KIRAN DEVI

v.

HIRA SAMI

[HIGH COURT, 1996 (Pathik J) 6 February]

Appellate Jurisdiction

Family law- variation of maintenance order- no change of circumstances since original order- Magistrate's power to vary where original order based on mistake of fact. Maintenance and Affiliation Act (Cap. 52) Section 8 (1).

A husband who did not appear when a maintenance order was made against him in favour of his wife successfully obtained a variation of the order. On appeal by the wife the High Court HELD: that although the husband had been unable to show changed circumstances the original order was plainly wrong and could therefore properly be varied.

Cases cited:

Brammer v Brammer [1954] 1 All E.R. 649
Kaye v Kaye [1965] P. 100
Smethurst v Smethurst [1977] 3 All E.R. 110

Appeal to the High Court from Labasa Magistrates' Court.

M. Sadiq for the Appellant
A. Kohli for the Respondent

Pathik J:

This is an Appeal by the Appellant (the complainant/wife in the original action) against the Order of the learned Magistrate, Labasa made on 20 April 1995 when he varied his Order for maintenance made on 8 July 1994 against the Respondent (Respondent/husband in the original action) from $20 per week to $12 with effect from 20 April 1995.

The facts are very simple. In the maintenance case against the husband, the learned Magistrate made the said order of 8 July 1994 after a hearing when the wife gave evidence but the Respondent failed to appear. Two and a half months later the Respondent swore an affidavit praying for variation of the order by way of reduction of the amount payable under the said order on the grounds set out in his said affidavit.

This application by way of Motion was not filed in Court until 1 February 1995 and the hearing was concluded on 20 April, 1995 which is some 9 1/2 months after the original Order.

The Appellant has now appealed from the said Order of 20 April 1995 upon the following grounds:

A

(a) That the findings are unreasonable and cannot be supported having regard to the evidence adduced.

(b) That the Learned Magistrate erred in law and in fact in reducing the said Order only after such a short time.

B

(c) That the Learned Magistrate erred in law and in fact in not giving due consideration to the fact that the Respondent was still working and failed to produce any supporting documents regarding his wages.

C The learned counsel for the appellant argued the three grounds together.

Mr. Sadiq submits that the learned Magistrate ought not to have varied the order on an application made so soon after the original Order. He says that the order was made on 8 July 1994 and the affidavit in support of application to vary was sworn 20 September 1994. He argues that there is no "change in circumstances" D as required by section 8(1) of the Maintenance and Affiliation Act (Cap. 52) under which an application for variation is made. He said that there was no proper evidence before the learned Magistrate on the variation application to entitle him to vary the Order.

Mr. Kohli for the Respondent says that to use the initial Order as the starting E point in the learned Magistrate considering this application is "fraught with mistakes" as, inter alia, the appellant has not given a true picture about the cane farm.

This application for variation was made under section 8 of the Maintenance and Affiliation Act Cap. 52 which provides, in so far as it is relevant, as follows:

F

> "8. - (1) A magistrate having jurisdiction in the place in which an order under the provisions of this Part has been made may, upon the application of either spouse and upon cause being shown upon evidence of a change in circumstances not occasioned by the default or neglect of the applicant, to the satisfaction of the magistrate, at
> G any time alter, vary or discharge any such order and may upon any such application from time to time increase or diminish the amount of any weekly payment order to be made." (underlining mine for emphasis)

The main ground on which the Respondent had sought to have the original order varied was that his financial circumstances do not permit him to be able to afford

the amount ordered to be paid.

Under the said section 8(1) evidence of "change in circumstances" is required. As stated in *Halsbury Laws of England 4th Ed.* Vol. 13 para 1323:

> "However as the court will approach an application for the exercise of such powers" (of alteration, variation and discharge) "on the basis that the original order was correctly made, it will in practice be necessary to demonstrate either that there has been a change in circumstances since the hearing or that evidence has come to the knowledge of the applicant since the hearing and could not by reasonable means have come to his knowledge before that time: to that extent fresh evidence must be adduced in support of the application." (underlining mine for emphasis).

None of this prevails here but the said paragraph continues:

> "Where, however, only the amount of a maintenance order is in issue, it has been said that the proper course for the husband who, by misadventure, has not appeared at the original hearing is to go back to the magistrates for a variation of the order and for discharge of the arrears, rather than to take the slower and more expensive course of appealing to the Divisional Court." (Kaye v Kaye [1965] P.100 at 108. (underlining mine for emphasis).

In the case before me the Respondent did not appear at the hearing and the learned Magistrate commenting on this said that the "defendant had evinced a could-not-care-less attitude towards his own case and has to blame his own self". Subject to what I state hereafter the Respondent would have to show a change in circumstances as required under s.8(1) (supra). There certainly could not have been a change as required in the 2 1/2 months after the order that he took to swear the affidavit showing his financial difficulties.

However, the issue here really is whether the learned Magistrate was justified in entertaining the application on the facts and circumstances of this case.

To determine the issue I shall now consider the approach adopted by the Courts in cases where situation such as the one prevailing here was discussed.

In Brammer v Brammer [1954] 1 All E.R. p.649 at 650 Lord Merriman, P said obiter as follows where there was a deliberate abstention as in this case on the part of this Respondent to testify:

> "I think it can be put in another way, which I merely indicate without attempting to decide. One of the elements of estoppel inter partes is

> that, if there is the opportunity to put forward a particular defence which is an answer on an occasion in the past, and there has been deliberate abstention from putting forward that defence, the defendant ought to be estopped from putting it forward on a later occasion. However, I do not think it is necessary to develop or examine that aspect of the matter." (emphasis added)

A

B

However, in Smethurst v Smethurst [1977] 3 All E.R. 110 the issue such as the one before me was considered.

C

There, as here, the husband had applied to vary the order by reducing the amount payable on the ground that he could not afford to pay it. In fact the situation there was on all fours with this case. The order was varied and the wife appealed contending that the justices had been wrong to consider the financial circumstances of the parties *de novo* and ought to have proceeded on the basis of the original Order and examined the extent to which the parties' position had changed since that order had been made.

D

The following passage from the judgment of Sir George Baker P in Smethurst (supra) at p.1113 is apt when it talks of "exceptions".

> "The difficulty, however, which faced the justices, and faces this court, is that according to a line of authorities, starting with Foster v Foster, applied in Wilkins v Wilkins, both of which were High Court cases, then applied to justices' decisions in Marpole v Marpole, and finally by Rees J and myself in McEwan v McEwan the starting point must be taken as the original order when proceedings for variation are brought. According to these authorities, it is not open to a court, including a magistrates' court, to fix the maintenance de novo. There are some exceptions to that proposition, as for example, when there has been a proved mistake in the original order, where some factor has not been put before the court, where there has been misrepresentation, and so on. I endeavoured to make a catalogue, but not necessarily an exhaustive catalogue, in Wilkins v Wilkins. But in B (GC) v B (GA), Ormrod J. referring to my decision in Wilkins v Wilkins, said:
>
> That case seems to me to fall into the same class as L v L and B(MAL) v B(NE), because, in reliance on the consent order in question, the wife abandoned what might have been a successful defence to her husband's petition on the ground of cruelty. There is only one point which I would respectfully question, and that is where the learned judge [myself] observed that neither he nor the registrar could hear an appeal from the judge who made the order. Where the court is asked to review an order made on what subsequently turns

E

F

G

> out to be a mistaken basis, I do not think it is accurate to say that it is purporting to act as an appellate tribunal. It is exercising its powers to vary, having regard to all the circumstances of the case: or its inherent power to vary interlocutory consent orders, referred to by Sir George Jessel MR in the case which I have already cited." (underlining mine for emphasis).

This case in my view falls into the category of an exception in the circumstances of the case. It is not that the Court condones the Respondent's behaviour by him not appearing at the hearing. There is ample power under section 8(1) to vary by increasing or decreasing the amount of the Order. It was brought to the learned Magistrate's attention that the Respondent could not pay and this situation has been brought about by just relying on the Appellant's evidence as to the Respondent's ability to pay which turned out to be wrong. That is where things went wrong and I gratefully adopt what Sir George Baker P has said (ibid) at p.1115

> "I do not for one moment suggest that the line of decisions to which I have referred is wrong, or should be lightly disregarded, indeed I think the decisions are perfectly right: I mentioned that two of them were my own, but there are these exceptional cases in which something has gone wrong.
>
> Let me look at the practical side of this. It is said that this was really in a sense an appeal to justices from a very recent order by the registrar, and the only way of dealing with an appeal was for somebody to give leave to appeal out of time and for the appeal to go to a judge. But what a complex procedure and what a waste of time in a situation in which it is abundantly clear that the husband cannot pay this order, and that somewhere along the line there has been a mistake, either by the husband or by somebody else, about his ability to get near paying it. That in effect is the conclusion the justices came to, and I am back to what I started with, common sense. What is to be done in this case?"

In this case the learned Magistrate after hearing evidence as to the Respondent's means was satisfied that he ought to reduce the previous Order for maintenance to $12.00 per week so that this man has enough to live on. This was the most sensible, realistic and practical approach to take.

The learned Magistrate was entitled to vary the order to the extent he did on the evidence before him. Hence the appeal based on what I have stated fails.

I conclude by referring to the following portion of the judgment of Arnold J in Smethurst (supra) at p.1116 on how to approach a situation such as the one that

has arisen in this case which has been admirably stated bearing in mind the views of Sir George Baker P (in Smethurst supra) at p.1116 that when he adopted the above course he is "not seeking in any respect to derogate from the authority of Foster v Foster and the other cases":

> "it may well be that in most cases, certainly in some cases, where the practical result is seen subsequently to be that the husband has by means of the order been depressed below a subsistence level, that a proper conclusion is, as was said in B (GC) v B (GA), to which Sir George Baker P has also referred, that there has been some mistaken basis on which the earlier order proceeded. It seems to me that that has happened here, and that the result which has been indicated is well justified." (emphasis added)

For above reasons the appeal is dismissed on each of the three grounds. In the circumstances of this case it is ordered that each party to bear his own costs.

(Appeal dismissed.)