IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Civil Appeal No. 5 of 1984

BETWEEN:

ARVIND SHARMA Appellant

and

SAIRA BIBI f/n Buturu Ali Respondent

Mr I Khan for the Appellant
Mr Jasbir Singh for the Respondent

JUDGMENT

This is an appeal from the decision dated the 20th January, 1984, of the Resident Magistrate Suva sitting in the Domestic Court in Maintenance Case No. 5 of 1983.

The appellant was the defendant in the Court below and in this appeal I shall refer to him as the appellant and his wife, the Complainant, as the Respondent.

The Magistrate made an order in favour of the respondent against the appellant that he pay her the sum of $30 a week for her maintenance and the maintenance of her 6 children and gave her custody of the children.

The appellant raises four grounds of appeal as under:-

(a) The Learned trial magistrate erred in law in hearing the petition in the absence of the petitioner;

(b) The Learned trial magistrate erred in law and in fact in not establishing the means of the petitioner before making the said order;

(c) The Learned trial magistrate erred in not adjourning the matter and/or standing it down when the counsel for the petitioner was engaged in another Court;

(d) That the Order for maintenance made is both harsh and excessive.

The Record indicates that the appellant first appeared in Court on 11th August 1983. He was not then represented. He advised the Court he was earning $54 a week and the magistrate made an interim order against him to pay his wife $20 a week for her maintenance and the maintenance of her 6 children.

The appellant next appeared on the 23rd September 1983 when he was then represented by Mr I Khan who sought a long adjournment because he had only been instructed. There were two further adjournments when Mr Khan appeared and then on 7th October 1983 Mr Chauhan appeared on behalf of Mr Khan. It was agreed by consent that the interim

order of $20 a week be increased to $30 a week. The case was adjourned to 21st November 1983 when the appellant did not appear. Mr Dean however, appeared on his behalf and informed the magistrate that Mr Khan was at Nausori Court and asked for an adjournment. The case was adjourned to 20th January, 1984.

On that date the appellant was again not present but Mr Dean appearing again for Mr Khan asked for the case to be stood down as Mr Khan was in Government Buildings.

Mr. Marquardt-Gray who had objected on several prior occasions objected to any further adjournment.

The learned magistrate released Mr Dean when Mr Dean advised the Court that he had had no further instructions and then the magistrate proceeded to hear the case in the absence of the appellant.

In support of Ground (a) Mr Khan referred to the case of SOHRAB ALI v JAINUL NISHA Civil Appeal 27 of 1982 in which case Dyke J allowed an appeal by a husband where orders had been made against him although he had not appeared in Court in answer to the summons served on him.

Mr Singh argues that the case is distinguishable because the husband in that case at no time appeared before the Court whereas in the instant case he appeared and/or was represented at every adjourned hearing but the last when Mr Dean asked to be released and was released by the Magistrate.

Section 26 of the Maintenance and Affiliation Act provides as follows:-

"26. All applications under this Act, shall be made in accordance with the provisions of the Criminal Procedure Code, and in the case of a conviction of a husband by a magistrate's court for assault upon his wife, her application may, by leave of the court, be made by summons to be issued and made returnable immediately upon such conviction and such summons may be served upon the husband in court."

Dyke J referred to CHANAN SWAMY v PARWATI Civil Appeal No. 4 of 1977, where Stuart J accepted that the practice and procedure in maintenance and affiliation cases should be governed by the Criminal Procedure Code. That was a case where a complaint had been struck out because a complainant was not present. A magistrate later restored the action. Stuart J held, following the Code that the striking out of the complaint was in effect a dismissal and the wife had to start de novo.

I am unable, with respect, to entirely agree with the views expressed by either of the learned judges.

On my interpretation of section 26 of the Act it is the application and only the application which "shall be made in accordance with the provisions of the Criminal Procedure Code."

This section requires the application to be made by way of complaint and summons. This procedure follows sections 78 and 79 of the Code. The section does not provide that the hearing of the complaint shall be conducted in accordance with the Code nor does it purport to incorporate the other provisions of the Code. It is in this respect that I differ from the views expressed by the two learned judges in the two cases earlier referred to.

Section 26 is in Part IV of the Act and covers all applications made under the Act. Under Part III dealing with Affiliation a single woman may apply for a summons to be served on the alleged father of the child.

Section 26 operates to ensure that that application is made by complaint and issue of a summons. In section 18 in Part III of the Act procedural matters are specified e.g. the magistrate is directed to hear the evidence of the complainant and such other evidence as may be produced.

If section 26 required the Court to follow the Criminal Procedure Code, section 18 would be otiose because under the Code the complainant must be heard and evidence taken and the case conducted as if it were a criminal action.

There is no specific requirement in the Act that the defendant must appear. The summons served on him does not state the consequences of his failure to appear.

Nor is there in the Act, any provision regarding the arrest of a defendant other than the specific provisions in section 10 to aprehend the husband of a deserted wife or one who is about to depart from Fiji.

Section 26 is quite different from section 19 of the Bastardy Ordinance which was repealed by the Maintenance & Affiliation Act. That section provided:

> "19. Except as provided for or varied by this Ordinance all procedures (emphasis added) including the computation of and other matters with respect to costs shall be as near as may be according to the procedures under the Criminal Procedure Code."

Bastardy proceedings were civil proceedings (so held by Stuart J in FULORI RAQALO v HARI BHAGWAN 19 F.L.R.64).

Affiliation and maintenance proceedings are also civil proceedings and section 26 does not alter the nature of those proceedings. The section merely specifies the procedure to be followed in initiating the proceedings by means of complaint and summons. Section 29 of the Act specifically provides for the procedure to be followed on appeal. The provisions of the Code are to apply so far as may be applicable.

Section 30 provides that the Chief Justice may make rules regulating practice and procedure but to date he has not found it necessary to make any rules.

In my view except where the Act makes specific provision (Sections 26 and 29) the rules of the Magistrates' Courts must be followed.

The Act confers on a magistrate jurisdiction to hear applications. This jurisdiction is covered by section 16(1)(i) of the Magistrates' Courts Act. That section provides for jurisdiction of magistrates in civil causes.

Subsection (i) of Section 16(1) refers to "all other suits or actions in respect of which jurisdiction is given to a resident magistrate's court by this Act or any other such law."

By Section 46 of the Magistrates' Courts Act the jurisdiction vested in magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by the Act and the Criminal Procedure Code or by the rules and orders of the Courts. In

default of any other rules or orders magistrates exercise jurisdiction in substantial conformity with the law and practice for the time being observed in England in the County Courts and Courts of Summary Jurisdiction.

In the instant case the magistrate would not have been empowered to issue a bench warrant to bring the defendant before the Court. Sections 89 and 90 of the Code provide for a warrant to apprehend an accused person. Those sections are not merely procedural provisions but confer on a magistrate the power to issue warrants for the arrest of an accused person.

The defendant in those proceedings was accused of no offence. He was a defendant in civil proceedings. His arrest to bring him before the court on an adjourned hearing would clearly be in breach of the defendant's right to personal liberty guaranteed by the Fiji Constitution (Section 5 of the Fiji Constitution).

The magistrate was entitled to proceed to hear the case in the absence of the defendant who had notice of the hearing and was represented by a legal practitioner who failed to appear and to make proper arrangements for the defendant to be represented.

There is no merit in the first ground of appeal.

As regards the second ground of appeal there was on record a current order pursuant to the appellant's agreement to increase the interim order of $20 to $30 maintenance a week.

The final order made by the magistrate was $30 a week.

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No enquiry into the means of the appellant was necessary in view of that situation. The appellant by offering that sum indicated he was in a position to pay it. The second ground accordingly fails.

There is no merit in the third ground. If Mr Khan was engaged in another Court he should have made arrangements for his client to be represented. He did arrange for Mr Dean to appear for him and seek an adjournment and for the case to be stood down until Mr Khan could appear but gave Mr Dean no instructions in the event the application for adjournment was not approved.

After 11 appearances in Court between 10.2.83 and 20.1.84 when the application was finally heard, almost a year after application had been made it is not surprising that Mr Marquardt-Gray objected to any further adjournment and that the magistrate directed that the case should proceed.

There is no merit in the third ground nor as regards the fourth ground alleging the order for maintenance was both harsh and excessive. It was for the amount offered by the appellant.

The appeal is dismissed with costs to the Respondent.

R.G.Kermode

(R.G.KERMODE)
J U D G E

SUVA,

21 MARCH, 1984