A

JAYA BEN

v.

PARBHU DAS alias P. K. BHINDI

B

[COURT OF APPEAL, 1973 (Gould V.P., Marsack J.A., Henry J.A.)
8th, 16th November]

Civil Jurisdiction

C *Husband and wife—maintenance order—complaint for variation—whether evidence had established a material change of circumstances—Maintenance & Affiliation Act* 1971 *s.*8(1).

Appeal—practice and procedure—powers of Court of Appeal—appeal on question of law—Court of Appeal Ordinance (Cap. 8) *s.* 12(1)(*d*)*—whole matter at large once question of law is found to have arisen and to have been determined in favour of appellant.*

D The appellant issued a complaint to vary the existing maintenance order in favour of her and her child on the grounds that the respondent's circumstances had improved. The magistrate increased the order but an appeal to the Supreme Court was allowed and a new trial ordered. The judge held that on the evidence given before the magistrate it was not possible for him to reach a conclusion as to whether or not there had been a change in the circumstances.

E *Held:* 1. There was conclusive evidence before the Court that the respondent's means had changed.

2. Once a question of law had been found to have arisen and was determined in favour of the appellant, then the whole matter was at large, and the Court could make such order as would do justice between the parties.

F Cases referred to:

Foster v. Foster [1964] 3 All E.R.541; [1964] 1 W.L.R. 1155.

McEwan v. McEwan [1972] 2 All E.R.708; [1972] 1 W.L.R. 1217.

Appeal from the decision of the Supreme Court setting aside the order of the Magistrate's Court increasing a maintenance order.

G

K. C. Ramrakha for the appellant.

R. I. Kapadia for the respondent.

Judgment of the Court (read by MARSACK J.A.): [16th November 1973]

H This is an appeal which, under Section 12(*d*) of the Court of Appeal Ordinance Cap. 8 must involve a question of law only, from the judgment of the Supreme Court given on the 18th May 1973 setting aside a judgment of the Magistrate's Court and ordering a new trial before another Magistrate.

The parties are man and wife, though living apart. By Maintenance Order dated 8th July 1966, made in the Magistrate's Court at Suva, respondent was ordered to pay to his wife, the appellant, $9.00 a week by way of maintenance together with $3.00 a week for each of the two children living with the appellant. One of the children has since reached the age of 16 and respondent is accordingly no longer responsible for her maintenance. On 27th November 1972, on a complaint by the appellant that the circumstances of the respondent has so changed that the original maintenance order should be varied, the Magistrate made an order increasing the weekly maintenance payable to the wife under the order to $60.00 per week and that payable in respect of the child to $15.00 a week. Respondent appealed to the Supreme Court against this order. His appeal was allowed, the decision of the Court below set aside and a new trial before another Magistrate ordered. It is against the judgment of the Supreme Court that this appeal is brought.

The basis of the judgment in the Court below was that on the evidence given before the learned trial Magistrate, it was not possible for him to reach a proper conclusion as to whether or not there had been such a change in the circumstances of the parties as to warrant a variation being made to the original maintenance order or to determine satisfactorily the extent of any such variation. With respect to the learned Judge, we find ourselves unable to accept this reasoning. Sworn evidence was given by both parties at the original hearing and an additional witness was called by the respondent. The evidence given was detailed on the subject of the financial situation of the parties and the change of circumstances which had taken place since the date of the original order. That evidence established conclusively that there had been a material change of circumstances. Without examining the evidence in detail, we need only refer to the admitted facts that, subsequently to the date of the original order, the respondent received $50,000 from the sale of some land, and was appointed an Assistant Minister under the Government, receiving by way of remuneration therefor salary and allowances totalling $6,450 anually. These circumstances fell directly within the scope of Section 8(1) of the Maintenance and Affiliation Act, 1971, and gave the Magistrate jurisdiction to vary the order in such a way as he thought proper. The extent of that jurisdiction, under a somewhat similar statutory provision, was considered by the Court of Appeal in England in *Foster v. Foster* [1964] 3 All E.R. 541, and the following extract from the judgment of Willmer, L.J. at p.545 was cited with approval in *McEwan v. McEwan* [1972] 2 All E.R. 708:—

> "Two things seem to me to emerge from that. The first is that the jurisdiction is a jurisdiction to vary, and basically what the court has to do is to consider whether an order to vary should be made, and if so, by how much the order should be varied. Prima facie, it is not a jurisdiction to re-fix de novo the amount of maintenance. Secondly, the court is specifically directed to take into consideration any increase or decrease in the means of either of the parties. In those circumstances, it seems to me that the judge was right to take the order of Mr Registrar Forbes as his starting point. Moreover, I think that he was entitled to proceed on the basis that the order was properly made at the time when it was made."

Accordingly, we are of the opinion that the learned Judge erred in law in holding that the trial Magistrate had not correctly exercised his jurisdiction to make a variation of the original order.

It was contended by counsel for the respondent that the learned Judge had been right in finding that the evidence in the Court below was unsatisfactory and that on that ground the learned Judge was right in ordering a new trial. But

it is no good ground for a new trial that the party applying for it did not produce at the original hearing all the evidence which was available to him at that time. In this case, the present respondent gave evidence on oath himself and called a witness; and thus had every opportunity to put before the Court all the evidence he wished to tender.

For these reasons we find that the judgment of the trial Judge cannot stand and the appeal must be allowed.

The question then arises as to what consequences are to follow the allowing of the appeal. Although under Section 12(*d*) of the Court of Appeal Ordinance it is provided that in a case such as this an appeal lies only on any ground which involves a question of law, we are of the opinion that once a question of law is found to have arisen and is determined in favour of the appellant, then the whole matter is at large and this Court may make such order as in the view of the Court will do justice between the parties. Counsel for the appellant submitted that the order for re-trial should be set aside and that this Court should fix the amount of maintenance which should be payable. Counsel for the respondent at first submitted that this Court should not take upon itself the task of making an assessment; but later he agreed that it would be in the interests of everyone if this court should fix the amount to be paid by respondent by way of maintenance, it being conceded that there had been a change of circumstances within the meaning of Section 8(1) of the Maintenance and Affiliation Act. We agree with Mr Ramrakha that *interest reipublicae ut sit finis litium.* It is certainly in the interests of the parties that there should be an end of this present litigation; consequently, we propose to fix the maintenance payable in respect of the appellant and the one child under 16.

In his judgment the learned Magistrate paraphrases the evidence of respondent as to his gross income, and concludes that this amounts to $17,342; though respondent himself, when recalled, deposed that his gross income for 1972 would be about $11,000 which would be subject to a tax deduction of $2,000 to $2,500. The learned Magistrate states in his judgment:—

> "It is not for this Court to direct him how to lay out his financial affairs but the Court can take note of the patent fact that the Defendant can discharge all his capital commitments leaving himself with an income of approximately $16,500 gross."

The evidence of appellant was that her income amounted to $1,605 per annum; and the trial Magistrate found that this was derived from a house property transferred to her from the respondent some years ago. It is clear that respondent has to meet many outgoings in addition to income tax. His entertainment and constituency allowances, for example, totalling $950 per annum, are obviously paid to enable him to meet expenses arising from his position as a Member of Parliament. Then, whatever may be his obligations in respect of his *de facto* wife, he is certainly liable for maintenance of the three children he has had by her. There is no finding by the learned trial Magistrate as to what will be the net income of respondent after deduction of the proper outgoings. On the figures given in evidence however, we conclude that the amount of $60 per week granted to appellant is too high. We agree that the maintenance payable to a wife should enable her to enjoy a standard of living which is reasonable having regard to the income of her husband. Keeping this in mind, and upon full consideration of the evidence and the finding of the learned trial Magistrate, we hold that a proper order would be for a sum of $40 per week in her favour. We would not disturb the order for $15 per week in respect of the child while she is under 16.

This appeal is accordingly allowed, and the judgment of the Supreme Court set aside. The order of the learned Magistrate will be confirmed, except that the sum of $40.00 will be substituted for the $60.00 per week fixed by the Magistrate in respect of the wife. The respondent will pay the appellant's costs in this Court, the Supreme Court and the Magistrate's Court, to be taxed in each case, if not agreed upon between the parties.

Appeal allowed.