SARIFAN BI

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v

SAIBAJ KHAN

[HIGH COURT, 1995 (Fatiaki J), 17 July]

Appellate Jurisdiction

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Family-maintenance of illegitimate children-principles governing awards-Maintenance & Affiliation Act (Cap 52) Section 18(2).

On appeal a refusal to award maintenance in favour of 2 children was set aside and the matter remitted to the Magistrates Court.

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Cases cited:

Bennett v. Bennett [1952] 1 KB 249
Birkett v. James [1978] AC 297
Debenham v. Mellon (1880) 6 A.C. 24
D *Follit v Koetzow* (1860) 119 R.R. 935
Hadmor Productions v. Hamilton [1982]) 2 WLR 322
Hyman v. Hyman [1929] AC 601
Preston v. Preston (1982) Fam 17
Roberts v. Roberts (1970) P 1
Ruttinger v. Temple (1863) 4 B & S 491

E Appeal from the Magistrates Court.

A. Sen for Appellant
A. Kohli for Respondent

Fatiaki J:

F This is an appeal against the dismissal by the Labasa Magistrate Court, of the appellant's complaint under the Maintenance and Affiliation Act (Cap.52) seeking a maintenance order for her two children born out of wedlock to the respondent in February 84 and November 85 respectively.

The complaint was issued pursuant to Section 16(c) of Part III of the
G Maintenance and Affiliation Act (Cap. 52) under which a magistrate is empowered in terms of Section 18(2) "(to) adjudge the defendant to be the putative father of the child, and may also, if he sees fit in all the circumstances of the case, proceed to make against the putative father an order for the payment by him.

(a) of a sum of money not exceeding $520 annually for the maintenance and education of the child ;"

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It will be seen at once that a magistrate dealing with a complaint under Part III of the Maintenance and Affiliation Act has a wide, unfettered discretion to order maintenance against a putative father "... if he sees fit in all the circumstances of the case."

In this latter regard Rees J. in Roberts v. Roberts [1970] P 1 in considering the ambit of the phrase "... the circumstances of the case", and in rejecting a submission that the court should confine itself to a husband's legal obligations enforceable at law said at p.8 :

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> "Therefore no hard and fast line can be drawn between `legal' and `moral' obligations. Such obligations frequently involve the support and maintenance of children, and in this context (i.e. the husband's moral obligations to support his illegitimate children) nice distinctions between whether or not they are enforceable at law ... are often impracticable of application and in any event undesirable. Merely by way of example we cite the following : (relevant instances of enforceable moral obligations) an obligation to support an illegitimate child under an affiliation order ; and obligation to support an illegitimate child in respect of whom an affiliation order might be obtained, but is obviated by actual support of the child ..."

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In the present case the learned trial magistrate wrote in the last paragraph of his 7 page judgment:

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> "On the evidence adduced in this case, I hold that the defendant (respondent) has provided more than adequately for the two children, he have brought into this world through the complainant and consequently dismiss her application for maintenance. Application for maintenance dismissed. Parties to bear their own costs."

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The appellant now appeals against the dismissal on the following grounds :

> "1. The Learned Magistrate erred in law in holding that the Applicant had to begin first when the paternity of the children was accepted by the Respondent.
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> 2. That the Learned Magistrate erred in law by making findings of facts on issues that was not before the court.

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3. The Learned Magistrate erred in law and in fact in holding that the Applicant was more than adequately provided when the evidence before the court was to the contrary.

4. That the Learned Magistrate erred in Law and in fact in holding that illegitimate children are not entitled to the same standard of living as legitimate children.

5. That the Learned Magistrate erred in Law in making findings of facts on matters which was not put to the Applicant in cross-examination.

6. That the Learned Magistrate erred in failing to hold that maintenance arrangement if any could be varied by the court."

I can deal quite briefly with ground (1) which refers to an entry in the court record at the beginning of the trial on 27.10.94 where the trial magistrate said:

> "This hearing is for determination of the maintenance. I rule that the complainant should give evidence first."

earlier on 11.8.94 the learned trial magistrate had recorded :

> "The defendant admits paternity of both the children. In the circumstances I adjudge Saibaj Khan to be the putative father of the child Zia Rukshana Khan born on 17.2.84 and Mohammed Zulfikhar Khan born on 9.11.85 of Sharifan Bi."

In view of the above earlier entry, counsel for the appellant submits the respondent as the putative father had a positive duty to provide for his children and therefore he ought to have been required to give evidence first. I cannot agree.

In the first place an order for maintenance is a matter within the discretion of a magistrate to order " ... as he sees fit ..." ; secondly, in the absence of admissions, Section 18(1) of the Maintenance and Affiliation Act requires the complainant to give evidence in support of her complaint and Section 18(2) specifically directs the magistrate's attention to the corroborated evidence of the complainant in making an affiliation order and an order for maintenance. In this regard I note that besides the respondent's recorded admissions, the birth certificates tendered in evidence (E-1 and E-2) both bear the respondent's

name in the Father's Name column ; and finally, as observed by the Court at the hearing of the appeal, this ground of appeal is based upon a non-existent common law duty on a putative father to pay maintenance for his illegitimate children. Certainly none was drawn to the Court's attention. (See : Ruttinger v. Temple (1863) 4 B & S 491.)

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I turn next to consider the remaining grounds of appeal which complain about various errors in the learned trial magistrate's judgment and in doing so I remind myself that the Order of the learned trial magistrate concerned the exercise of a statutory discretion granted in the widest possible terms.

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In such an event it is well established that an appellate tribunal will not lightly interfere with the exercise of a judicial discretion. As was said by Lord Diplock in Birkett v. James [1978] A.C. 297 at p.317 :

> "... an appellate court ought not to substitute its own discretion for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he had taken into account ; or (2) ... in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations."
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> (and in Hadmor Productions v. Hamilton [1982] 2 W.L.R. 322 at 325)

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In this case the learned trial magistrate identified the issue for decision when he said in his judgment :

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> "The question this Court has to decide in this case is whether the defendant has provided adequately for the children and (whether) the property he had given to the complainant had been given to her, for her personal use or for the benefit of the children."

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Then after dealing with the evidence adduced and various issues arising therefrom, and after considering the credibility of the complainant, the learned trial magistrate held "... that the defendant (respondent) has provided more than adequately for the two children he have brought into this world through the complainant."

This was a case in which the learned trial magistrate accepted that the appellant had received substantial income-producing assets from the respondent during the course of her de-facto relationship with him and after the birth of their children, and the fact that the appellant has herself disposed of or significantly encumbered the properties since their estrangement is no reason for the respondent to have to continue to provide for the appellant's profligate behaviour or bank-roll her inability to manage her own affairs.

As long ago as 1880, Lord Selbourne L.C. in rejecting the authority of a wife to pledge her husband's credit for necessaries, where adequate provisions had been made and where such authority had been withdrawn, said in Debenham v. Mellon [1880] 6 A.C. 24 at p.34 :

> "It is argued that, because these articles were found to be in some sense necessaries in their nature, the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife and duly paid it : much less can he be bound in a case like this where they were not living apart, and when he had made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing."

Whilst one can have some sympathy with the sentiments expressed in the learned trial magistrate's Order and in the above passage, counsel for the appellant forcefully argues that this is not an application for maintenance of the appellant but one solely for the benefit of the respondent's children, who should not be made to suffer, nor should the paramountcy of the children's interests be made subject to any agreement between their parents as to their future maintenance. In other words even accepting that the various assets were given to the appellant for the future maintenance and benefit of the children nevertheless that cannot preclude the appellant from seeking an order for the maintenance of the children in the event that the income produced by the assets is insufficient and their father is quite able to pay maintenance.

This common law principle was settled by the House of Lords in Hyman v. Hyman [1929] A.C. 601 where it was held that a wife who covenants by a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for her by the deed, is not precluded by her covenant from petitioning the Court for permanent maintenance.

Lord Shaw of Dunfermline elegantly expressed it when he said at p.622 :

> "The true principle is that whenever the aid of a Court is invoked to grant a judicial allowance and there is presented to it an

> agreement as in bar of the exercise of the right or the discharge of the duty under statute then the Court is bound to look at such an agreement and to decline to be turned from the performance of its judicial duty or the exercise of its judicial rights when the agreement so tabled is of a nature repugnant to and defiant of the obligations which are inherent in the sanctity of marriage itself. To hold otherwise would bring the law into confusion and Courts into contempt, for as already indicated, it would be using Courts of Law for purposes essentially subversive of society. It will be seen, my Lords, that the principle, so put, applies all around, that is to say not only to applications for alimony in cases of divorce but in those also of judicial separation."
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> (See : also the judgment of Denning L.J. in Bennett v. Bennett [1952] 1 K.B. 249 at 262.)

Furthermore whilst something can be said for the modern approach that seeks to foster a clean break between estranged spouses this approach has not been extended or applied in relation to child maintenance where the on-going responsibility of the parents has always remained a basic factor.

In other words whilst the parents may be free to achieve a clean break as between themselves, it is in my view, outside their powers to do so in respect of their child(ren). Like the power given to a Court to award maintenance in a matrimonial cause, the power to order a putative father to pay maintenance under an affiliation order is not given for the benefit of the mother alone and consequently she cannot by agreement deprive herself (much less her children) of the right to apply for it. (Settled since Follit v Koetzow (1860) 119 R.R. 935.)

In Preston v. Preston [1982] Fam 17 Brandon L.J. in disagreeing that a lump sum award of maintenance to the wife should include an amount for the future maintenance of the son said at p.36 :

> "There are 3 reasons why I disagree with the judge on this point.
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> The first reason is that it leaves the basic amount available to be spent on the boy entirely in the wife's hands, whereas I think that amount should be decided by the court making an appropriate order for periodical payments which can be varied from time to time as necessary.
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> The second reason is that, if (the son's) future needs for maintenance are included in the lump sum paid to the wife, the income tax allowance which would be available in respect of periodical payment ... will be entirely wasted ... which can and should be

avoided.

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The third reason is that, while it is both possible and desirable to bring about a clean break as between husband and wife, it is neither possible nor desirable to bring about a clean break between father and son."

Having carefully considered the evidence, and the submissions of learned counsel
B on appeal, I am constrained to hold that the learned trial magistrate erred in the exercise of his statutory discretion by giving undue weight to the provisions that had been made or given to the appellant and also in failing to give sufficient weight to the various principles set out in the above cases.

In the circumstances the order dismissing the application for maintenance for
C the children is set aside and the case is remitted to the learned trial magistrate to assess the nature, method of payment and quantum of maintenance which the respondent is to pay for the children in accordance with the terms of this judgment and the provisions of Section 18 of the Maintenance and Affiliation Act (Cap. 52).

In the result, the appellant having succeeded in this appeal is awarded her
D costs of the appeal to be taxed if not agreed.

(Appeal allowed.)

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