IN THE FIJI COURT OF APPEAL

Civil Appeal No. 62 of 1986

Between:

KISHORE LAL s/o Sohan Lal — Appellant

- and -

MAYA WATI d/o Pragi — Respondent

Mr. M.A. Khan for the Appellant
Mr. V.P. Mishra for the Respondent

Date of Hearing: 4th March, 1987
Delivery of Judgment: 13th March 1987

JUDGMENT OF THE COURT

O'Regan, J.A.

This appeal has entailed a review of the litigation since December, 1980 between the parties concerning a maintenance order. And that review reveals a sorry saga which does little credit to many of the members of the legal profession who were from time to time engaged in it. We hasten to add that we exclude learned Counsel who appeared before us from those observations. They have come lately into the picture and have played a more diligent part that many of their predecessors in helping to unravel the tangled skein.

At the outset of the hearing Mr. Mishra submitted that the appeal should not be entertained because first no notice of appeal - secondly no leave to appeal had been obtained and thirdly the appeal was brought out of time.

As Mr. Mishra rightly pointed out an appeal against an order or the refusal of an order made by a Magistrate under the Maintenance and Affiliation Act (Cap. 52) must be "in accordance with the provisions of the Criminal Procedure Code so far as the same may be applicable". Section 26 of that Act so provides. However there is no provision that an appeal from the decision of the Supreme Court in such a case, on a point of law, such as is the case here - should be in accordance with the provisions of that Code.

In our view, the right of appeal lies in subsection 1(c) of S. 12 of the Court of Appeal Act (Cap. 12) that provision, so far as it is relevant reads:-

> "(1) - - - - - an appeal shall lie under this part in any cause or matter, not being a criminal proceedings to the Court of Appeal:
>
> (a) - - - - -
>
> (b) - - - - -
>
> (c) on any ground of appeal which involves a question of law, only, from any decision of the Supreme Court in exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal."

Regulation 15 of the Court of Appeal Subsidiary Legislation prescribes that such appeals shall be brought by Notice of Motion and Section 16 prescribes that such be filed and served, in instances such as the present, within 6 weeks of the date on which the judgment or order of the Court was signed or otherwise perfected.

Mr. Mishra informed as from the car that the appellant's notice was served 39 days after the date on which the order of the Supreme Court was perfected. It accordingly seems to us that it was filed in due time. The appellant's notice also seems to us to comply with the provisions of Section 15. Accordingly the objections cannot be sustained.

In December 1980, Mr. J. Tomlinson, Resident Magistrate at Lautoka embarked upon the hearing of an application by the respondent for an increase in the maintenance payable under a court order for $15 per week, then in force. The hearing was adjourned from time to time until 21st July 1981 when the learned Magistrate, by consent, made an interim order fixing the maintenance at $40 per week. His minute reads as follows:-

> "By consent:
>
> Interim order of $40 per week with effect from today. Agreed costs $100 to be paid by defendant. Complainant will initiate divorce proceedings forthwith; separation. It will be in Magistrate's Court, containing a prayer for permanent maintenance. Complainant $20,000 and costs. (These will not be opposed. A petition in Supreme Court will be immediately discontinued by order. Adjournment to 17.9.81. Arrears will be brought up to date."

That order was made after a long hearing. It is clear from the copious notes kept by the learned Magistrate that he had dealt with everything necessary to be dealt before a final order could be made. Nonetheless, he made an interim order and adjourned the proceedings.

In the Supreme Court and now in this court, the appellant, in his first ground of appeal, sought to impugn the order on the grounds that the learned Magistrate had no power to make an interim order in proceedings for variation of a maintenance order. In this court, Mr. Mishra contended that despite the terms of the minute in the records of the court, the order was in fact a final order. He submitted that the record showed that the Magistrate had advanced the hearing to a stage where he could well have made a final order and that the likelihood was that the insertion of the word "interim" was a slip. We accept that it is not clear from the record why an interim order was made in preference to a final order. However the fact that the proceedings were adjourned - and for a period less than two months - in our view goes to confirm that an interim order was intended. We say that because the proviso to S. 14 of the Maintenance and Affiliation Act (Cap. 52) which authorises the making of such orders provides:-

> "Provided that no order directing such payments shall remain in operation for more than two months from the date on which it was made and every such order may be renewed from time to time until the final determination of the case."

We do not think there is any warrant for our going behind the terms of the minute entered by the Magistrate and we decline to do so.

The appellant's contention that the court had no power to make an interim order on variation proceedings in our view cannot be sustained. The relevant words of S.14(1) of the Act read:-

> "(1) Where, on the hearing of an application for an order for maintenance, such application is adjourned for any period exceeding seven days the Court may order that the husband pay to the wife - a weekly sum, not exceeding such an amount as might be ordered to be paid under a final order for the maintenance of the wife - - - - - - - - - - - - - - - - - - - until the final determination of the case; - - - - - - - - - - - - - - - - - -."

The appellant contended that the words we have emphasised applied only to the hearing of an application for a final maintenance order only and not to an application for an interim order. We do not think they can be so restricted. In our view, an application for a variation of maintenance is "an application for an order of maintenance" within the terms of the provision and we rule accordingly. It follows that the first ground of appeal must be dismissed.

On 17th September, 1981 (the first date to which the proceedings were adjourned) the proceedings were further adjourned to 8th October 1981 and an order made - "Interim order renewed".

On 8th October 1981, the proceedings were adjourned to 10th December, 1981 but no order for renewal was made.

The order of renewal made on 17th September, 1981 did not specify the duration of the renewal. If it was until the next adjournment date, the 8th October 1981, it lapsed on that date; if it was for the maximum period of two months, it lapsed on 17th November 1981.

Need we say that in the case where an interim order, made during the hearing of an application for an original order, lapses, there is no order remaining current; but where, as here, the interim order was made during proceedings to vary an existing order and that interim order lapses the existing order is automatically revived.

On 21st October, 1982 an order increasing the maintenance to $40 per week was made. The Magistrate's minute is as follows:-

" 21.10.82.
Mr. Punja for complainant
I. Khan for respondent

This is a variation application
Court order by consent
Interim order $40 per week
with effect from today
Hearing 5.1.83
Mention 16.12.82. "

The application for variation had been made by the respondent sometime in either August or September 1982. It purported to be an application to vary the consent order made on 21st July, 1981 which, as we have seen, lapsed either on 8th October or 17th November 1981. The respondent was obviously oblivious of this fact when she filed her application and both parties at the hearing proceeded under the misapprehension at the hearing.

The new interim order was duly renewed at interval of less than two months up until 17th March, 1983 when the case was adjourned until 14th April, 1983 and an order made "Interim Order renewed". That order enured either until 14th April, 1983 or for two months, that is up to 17th May, 1983. No further orders of renewal were made before

the latter date. It follows that the interim order made on 20th October, 1982 lapsed on one or other of those dates. For present purposes it matters not which. And, as before, with its lapsing the original order was revived.

On an undisclosed date in May, 1983 the appellant filed an application for variation not of the order made on 21st October, 1982 - but of the order of 21st July, 1981. That application was heard by Mr. Z.K. Dean, Resident Magistrate, on 18th May, 1984 who entered the following minute as to the proceedings:-

"18.5.84

Complainant	:	A.K. Narayan
Defendant	:	represented by N. Prasad
Prasad	:	Offer $20 per week by way of interim maintenance.
A.K. Narayan	:	Not interim order, but permanent order $40 per week.
Later	:	Counsel by agreement agree order varied to $40.00 per week. "

On this occasion, it was the appellant who initiated the proceedings oblivious of the fact that the order of 21st July, 1981 had lapsed and, again, both parties conducted their cases as if it was current.

The second ground of appeal relates to this order. It reads:-

> "The learned Judge also erred in holding that the permanent maintenance order by way of variation made by his Worship Mr. Z.K. Dean on 18th May 1984 was not erroneous."

The appellant's argument proceeded on the basis that it was impossible to vary an order that did not exist and that accordingly the purported variation of it was a nullity. However, whilst it is uncontrovertible that the order referred to in the appellant's application did not exist, the original order was at date of hearing, current and susceptible to a variation order. In those circumstances we do not think it can be said that the order made was a nullity. The reality is that the court was called upon to decide what was the then appropriate quantum of maintenance. It so happened that the parties agreed on a figure and the court made the order by consent increasing the existing order to the agreed figure. The result would have been no different had the order of 21st July, 1981 been current. The appellant is seeking to take advantage of his own mistake, made in his application for variation, and we see no warrant why, in the circumstances why he should be permitted to do so.

The appeal is dismissed with costs to the respondent to be taxed if not agreed upon.

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Vice-President

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Judge of Appeal

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Judge of Appeal