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## GORDON JOSEPH LEONG

v.

## ULAMILA WONG

B

[SUPREME COURT, 1967 (Hammett J.), 16th December 1966,  
7th February 1967]

## Appellate Jurisdiction

C

*Bastardy—order for maintenance—invalid after child attains thirteen years—power to direct continuation of payments until child attains sixteen years exercisable only when original order made—Bastardy Ordinance (Cap 33) ss.6, 7(1), 8.*

By section 8 of the Bastardy Ordinance an order made under section 6 for the maintenance of a child has no effect after the child attains thirteen years. Under the proviso to section 8 the magistrate may in the order for maintenance direct that the payments shall continue until the child attains sixteen years.

D

*Held:* The power given by the proviso can be exercised only when the original order is made; there is no provision in the Ordinance authorising the amendment of an order by extending its duration until the child attains sixteen years.

E

Appeal against variation of order for maintenance under the Bastardy Ordinance.

G. M. G. Johnson for the appellant.

M. V. Bhai for the respondent.

HAMMETT J. : [7th February 1967]—

F

On the 1st March, 1963, the Respondent, Ulamila Wong, was granted by the Magistrate's Court at Suva an Affiliation Order against the Appellant, Gordon Joseph Leong, in respect of her two illegitimate children, namely, Lily, born on the 8th January, 1953, and Joseph, born on the 2nd January, 1956. The Defendant was ordered to pay maintenance in respect of these two children at the rate of £2 per week with effect from the 1st March, 1963. From the brief note of the Order it is clear that an order in respect of each child was intended at the rate of £1 each per week. The Court did not state in its Order up to what age this maintenance should be paid in respect of either child.

G

The Defendant fell in arrears with his payments from time to time. At one stage, on his application, the amount of the payments was reduced to 17/6 per week per child. On the 28th February, 1964, the Order was again varied by increasing the payments to £1 per week for each child.

H

On the 23rd September, 1964, the mother, Ulamila Wong, applied for a further variation of the Order in the following terms:—

"I, Ulamila Wong of Lami, Suva hereby apply under section 7(1) of the Bastardy Ordinance Cap. 33 for Variation of Maintenance Order dated the 28th day of February, 1964 on the following grounds by increasing the said Order. A

- (1) That the children have grown up since the date of last Order.
- (2) That the cost of living has increased.
- (3) That both the children are attending School and their fees is £6 per term. B
- (4) That the present Maintenance is insufficient to meet their daily requirement. C

The Summons to Vary was duly served on the Defendant-Appellant but he did not appear at the hearing. He first sent a telegram and then a letter seeking an adjournment. This was not granted and the application was heard in his absence. After hearing the mother the learned trial Magistrate granted her application and made the following order on the 11th December, 1964 :—

"Order varied. Defendant to pay £1 per week for each child forthwith until the child reaches the age of 16 years."

The Defendant-Appellant fell in arrears under this Order and a warrant was issued to enforce payment. Later, Counsel on his behalf applied for, and obtained, leave to appeal out of time against the Order dated the 11th December, 1964. D

The grounds of appeal upon which the Appellant relies are as follows :—

- "(a) That on a proper construction of Section 8 of the Bastardy Ordinance, Cap. 33 the learned Magistrate had no jurisdiction to make such an Order. E
- (b) That the Defendant/Appellant had no notice that an application would be made to the Court seeking an Order whereunder he would become liable to pay maintenance in respect of the said child after the said child had attained the age of 13 years and that the said Order was made in his absence." F

The provisions of Section 8 of the Bastardy Ordinance read as follows :—

"No order for the maintenance and education or for contribution towards the relief of any such child made in pursuance of this Ordinance shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made has attained the age of thirteen years or after the death of such child: Provided that the magistrate may in the order direct that the payments to be made under it in respect of the child shall continue until the child attains the age of sixteen years, in which case such order shall be in force until that period." G

It is clear that in the absence of any express directions by the learned trial Magistrate when he made the original Order on the 1st March, 1963, that payments should continue to be made until each child attained the age of sixteen years, the Order in respect of each child ceased to have any force or validity after that particular child attained the age of H

A thirteen years. It is the contention of the Defendant-Appellant that on an Application to Vary under Section 7(1) of the Ordinance the Court had no power to increase the age up to which the payments ordered should be made. The material part of Section 7(1) reads as follows:—

B “Where an order under section 6 of this Ordinance for the payment of a weekly sum is in force at the date of this Ordinance or is subsequently in force, either the court that made the order or any other magistrate’s court for the district where the person who is entitled under the order to receive the payment resides, may from time to time, on the application of the person so entitled or of the putative father, by order vary the existing order by increasing the amount payable thereunder to such a sum not exceeding thirty shillings a week or by reducing the said amount as the court having regard to all the circumstances of the case thinks proper.”

C It would appear that it is only when the original Affiliation Order for the maintenance of illegitimate children is made that a Magistrate may direct that the payments shall continue until the child attains the age of sixteen years, instead of merely until the child attains the age of thirteen years as is otherwise the case under the express provisions of Section 8. There appear to be no other provisions in the Ordinance whereby the Order may be amended by extending its duration until the child has attained the age of sixteen years.

D Quite apart from this, however, it is clear from the wording of the Application for Variation of this maintenance Order dated 23rd September, 1964, that all that was sought by the complainant was an increase in the amount payable in respect of each child. No application was made to the Court to extend the duration of the original Maintenance Order. Whilst it was perfectly proper for the learned trial Magistrate to hear E the Application to Vary in the absence of the Defendant, because he had been served with a copy of the application, matters of which the Defendant-Appellant had been given no notice should not have been dealt with in his absence. The Defendant-Appellant had not been given any notice that the duration of the Order of Maintenance might be extended from F the time when the children would attain the age of thirteen years until they reached the age of sixteen years. It was not, therefore, appropriate that any Order in this respect should have been made against the Defendant in his absence.

G For these reasons the appeal must be allowed. The Order made by the Magistrate on the 11th December, 1964, that the Defendant-Appellant pay the sum of £1 per week for each child until the child reaches the age of sixteen years is amended by deleting the words therefrom — “until the child reaches the age of 16 years”.

H I observe that the child Lily, attained the age of thirteen years on the 8th January, 1966. In accordance with the provisions of Section 8 of the Bastardy Ordinance the Order in respect of the child Lily ceased to be of any force or validity after the 8th January, 1966, except for the purpose of recovering money then due under such Order. The Order in respect of the child Joseph amounting to £1 per week with effect from 11th December, 1964, will continue in force until he attains the age of 13 years, namely 2nd January, 1969, unless otherwise varied in the meantime.

*Appeal allowed — Order of Magistrate varied.*

**NEW INDIA ASSURANCE CO. LTD.**

v.

**MORRIS HEDSTROM LTD.**

[SUPREME COURT, 1967 (Knox-Mawer J.), 27th January, 8th February]

Appellate Jurisdiction

*Practice and procedure—non-suit in Magistrate's Court—power to enter—County Court Rules 1936 0.5 r.18—0.23 r.3(1)—Magistrates' Courts Ordinance (Cap. 5) s.47.*

By virtue of section 47 of the Magistrates' Courts Ordinance, which provides (*inter alia*) that in default of rules made under that Ordinance the jurisdiction of magistrates shall be exercised in substantial conformity with the practice for the time being observed in the County Courts in England, a magistrate is empowered to enter a non-suit against a plaintiff in a civil action.

Appeal against order for entry of non-suit in the Magistrate's Court.

S. M. Koya and K. Govind for the appellant company.

G. M. G. Johnson for the respondent company.

KNOX-MAWER J.: [8th February, 1967]—

This is an appeal against a decision of the Magistrate's Court of the First Class Lautoka in its Civil Jurisdiction.

The appellant Company is the insurer of a quantity of rice consigned in bags to Messrs. Punja & Sons Ltd., Lautoka. The respondent Company is the shipper of this rice. The consignees accepted delivery of the whole of the consignment including nine damaged bags from which rice had been spilt. The appellant Company, as insurer, paid Messrs. Punja & Sons Ltd. the sum of £52.3.7 in respect of the spilt rice. By subrogation the appellant Company then began this action against the respondent to recover the loss.

Unfortunately, in the lower Court, the learned counsel for the appellant company closed his case without proving what rice had been lost or its value. The learned trial Magistrate therefore non-suited the appellant and awarded costs in favour of the respondent.

It is against the above decision that the appellant company has now appealed, but this Court can see no grounds for disturbing it. The Magistrates' Courts rules contain no express provision relating to a non-suit. However, Section 4 of the Magistrates' Courts Ordinance (Cap. 5) provides as follows:—

"The jurisdiction vested in magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Ordinance and the Criminal Procedure Code, or by such rules and

orders of court as may be made pursuant to this Ordinance and the Criminal Procedure Code, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction.”

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*Halsburys Laws of England Third Edition* Vol. 9 page 258 paragraph 601 states (citing the English County Court Rules Ord. 5, R.18)\* that where the plaintiff does not prove his claim to the satisfaction of the Court it may either non-suit him or give judgment for the defendant.

B

In non-suiting the appellant rather than giving judgment for the respondent the learned Magistrate did the best that could be done for the appellant in the circumstances, for after being non-suited a plaintiff may bring another action for the same, or substantially the same, cause of action.

There being no merit in this appeal, it must be dismissed with costs in favour of the respondent.

C

*Appeal dismissed.*

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\* It would seem that the reference here intended is to Order 23 rule 3(1) — Ed.