

ST. VINCENT:

CIVIL APPEAL NO 1 of 1976

BETWEEN: ENID JOYCE NICHOLS APPELLANT/RESPONDENT  
AND  
CONRAD ALPHONSA NICHOLS RESPONDENT/PETITIONER

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice  
The Hon. Mr. Justice E L. St. Bernard  
The Hon. Mr. Justice R.A. Nedd (Acting)

Appearances: H Samuels for Appellant  
C. Dougan for Respondent

1977, Sept. 29,  
1978, Feb 6

J U D G M E N T

DAVIS, C.J.:

The parties to this appeal are husband and wife and there is one child of the marriage, named Thirleen.

It appears that unhappy differences arose between them culminating in a break-up of the marriage and that maintenance proceedings were started by the wife against the husband in or about September, 1974. It is not clear from the appeal record, what the issues were before the learned Magistrate, but on the 2nd day of September, 1974, the learned Magistrate of the Third District "held that the defendant is the father of the child Thirleen, and ordered the said defendant to pay \$4.00 per week towards the maintenance of the said child."

The husband has not appealed against the said Order nor has he obeyed it. On the 16th April, 1975, the husband petitioned for divorce citing the wife as the respondent and one John Straker as co-respondent, and on the 4th day of September, 1975, he took out an ex parte summons

/asking...

asking the Court to stay the execution of the said Maintenance Order. The summons was heard ex parte and on the 9th day of September, 1975, the learned judge made the following Order:

"It is ordered that the Order of the Magistrate dated the 22nd day of October, 1974, that the Petitioner pay the sum of \$4.00 per week for the maintenance and education of the child Thirleen born on the 14th February, 1974, be suspended on the grounds that the Petitioner in his petition had disputed that the child Thirleen is one of the family."

The wife now appeals against this Order on the following grounds:-

- (a) That the appellant being a party to the suit in which the learned trial judge made the Order was not served with any document or thing so that she may be a party to the proceedings.
- (b) That the appellant was unaware that any Order was made at the time it was made and she discovered by chance that her legal rights were infringed weeks after the Order of the learned trial judge.
- (c) That because of the nature of the application in Suit No 124 of 1975 in Chambers, elementary justice demands that, being a party to the suit, the appellant should be treated as a party.
- (d) That there is no legal basis on which His Lordship in Chambers can base his Order to suspend the decision of any Magistrate made one year ago when the respondent i.e. the Petitioner in Suit No. 124 of 1975 waived his right of appeal from that decision of the learned Magistrate acting in his judicial capacity.
- (e) That the Petition for Divorce filed by the Respondent i.e. the Petitioner, is totally distinct from and unconnected with the decision of the learned Magistrate pronounced on the 2nd day of October, 1975;

/and... ..

and the relief sought is that the Order of the learned judge in Chambers in Suit No. 124 of 1975 dated the 9th day of September, 1975, and entered on the 22nd day of September, 1975 be set aside.

As to ground (a), there is no contest as counsel for the Respondent has admitted that the proceedings before the learned judge were ex parte proceedings and this observation covers grounds (b) and (c) as well. In regard to grounds (d) and (e), counsel submitted that as there was no appeal from the Magistrate's Order the matter could not be reopened. The learned judge was wrong to entertain the application.

Counsel for the Respondent, in support of the judge's Order, referred the Court to Rayden on Divorce, 11th Edition, Page 1195, Para. 91, with particular reference to the following words:-

"Where after the making by a Magistrate's Court of a Matrimonial Order consisting of, or including a provision for maintenance of the complainant or a child or an Interim Order proceedings between and relating to the marriage of the parties to the proceedings in which that Order was made have been commenced in the High Court, the High Court may, if it thinks fit, direct that the said provision or as the case may be the Interim Order shall cease to have effect on such date as the High Court may specify"

These words are to be found in Section 7 (3) of the Matrimonial Proceedings Magistrate's Courts Act, 1960 of England and both counsel agree that this Act is applicable to St. Vincent.

Counsel for the Respondent then submitted that these words show clearly that the learned judge had the jurisdiction to make the Order which he made. I am doubtful. My interpretation of this provision is that in the circumstances envisaged by the Section, the High Court having decided on an application before it to make an Order for alimony pendente lite or to make a final Order for maintenance or upon the conclusion of the case before it to make no order at all, then in these cases the Court in the first case may suspend the Order of the Magistrate until the matter is determined and in the other two cases may order that the

Magistrate's...

Magistrate's Order should cease to have effect. If my interpretation is correct, then I would hold that this was not a proper case in which the judge should have exercised the jurisdiction in the way he did because to do so would deprive the appellant of a benefit under the said Order without some other benefit being granted to her

Counsel for the Respondent then went on to submit that not only had the judge jurisdiction to make the Order but that he could make it in an ex parte application, and again, he referred the Court to Rayden on Divorce Page 442, Para 97 This paragraph contains the words:-

"The matters set out in the schedule following may be the subject of ex parte applications. In some cases, depending on the particular circumstances, the authority should be referred to for details."

When one looks at the Schedule and the authority one cannot find an application which is even analogous to the application which the judge had before him in this matter. It is my view that even if the learned judge had jurisdiction to make such an Order he ought not to have done so without giving the appellant the opportunity to be heard. The application was to deprive her of a benefit under the Magistrate's Order and the elementary principles of natural justice suggest that she ought to have been given an opportunity to be heard. In the result, I would allow the appeal and set aside the Judge's Order. The appellant should have the cost of this appeal.

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(Maurice Davis)  
CHIEF JUSTICE

I agree

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(E.L. St. Bernard)  
JUSTICE OF APPEAL

I also agree

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(B.A. Nedd)  
JUSTICE OF APPEAL(Acting)