KALLON *v.* KALLON

SUPREME COURT (Betts, J.): May 23rd, 1967
(Divorce Case No. 20/65)

[1] **Family Law—divorce—appeals—appeals against maintenance orders—appeal proceedings not necessarily bar to variation by trial court:** The fact that an order of the Supreme Court for maintenance in a divorce suit has been referred to the Court of Appeal is not necessarily a bar to an application to vary the order in the Supreme Court, unless the application involves the consideration of some specific matter subject to reappraisal in the Court of Appeal (page 164, lines 7–19).

[2] **Family Law—maintenance—variation—permanent maintenance on divorce—appeal proceedings not necessarily bar to variation by trial court:** See [1] above.

[3] **Family Law—maintenance—variation—permanent maintenance on divorce—conduct of parties—husband's remarriage no ground for reducing wife's maintenance where new wife pregnant before decree:** An order for the payment of maintenance to a wife upon divorce should not be varied in the husband's favour on the ground of his remarriage where that is followed by the birth of a child to the new wife within a few weeks of the decree nisi (page 165, line 37—page 166, line 5).

[4] **Family Law—maintenance—variation—permanent maintenance on divorce—consent order variable by court though not made with liberty to apply or until further order:** A consent order for permanent maintenance which could have been made by the court within its statutory powers may be varied by the court whether or not it is expressed to be made until further order or with liberty to apply (page 164, lines 20–24).

[5] **Family Law—maintenance—variation—permanent maintenance on divorce—grounds for variation—remarriage or anything relevant on original application unless then known to party and not raised:** An order for the payment of maintenance upon divorce may be varied either on the ground of remarriage or having regard to all such matters as would be considered on the original application for maintenance or which have arisen since, except that a party cannot raise matters which were known to him and could have been raised on the original application (page 164, line 27—page 165, line 11).

[6] **Family Law—maintenance—variation—permanent maintenance on divorce—reduction where wife has become better off or husband worse off:** A reduction in the amount of maintenance payable upon divorce may be ordered where the wife's financial position has improved or the husband's has worsened (page 165, lines 24–29).

The applicant applied to the Supreme Court to vary its order for maintenance payable to the respondent, his divorced wife.

The applicant obtained a decree nisi against the respondent and was ordered to pay her a monthly sum as maintenance, and there was an appeal against this decision. On the applicant's application, the decree nisi was made absolute after 14 days. He remarried within six weeks and the new wife gave birth to a child three weeks later. He brought this application to vary the maintenance order on the ground of his remarriage and of certain financial commitments which he did not refer to at the original hearing though he had entered into them before then.

The applicant asked the court to reduce the maintenance on the ground of the worsening of his financial position by his remarriage. The respondent contended that the court could not vary the maintenance order, because it had been referred to the Court of Appeal and because it was not expressed as being made until further order or with liberty to apply.

Cases referred to:

(1) *Bennett* v. *Bennett* (1934), 150 L.T. 460; 103 L.J.P. 38.

(2) *Hall* v. *Hall,* [1914] W.N. 235; (1914), 111 L.T. 403, applied.

(3) *Perkins* v. *Perkins,* [1938] P. 210; [1938] 3 All E.R. 116.

(4) *Smith* v. *Smith* (1931), 145 L.T. 23; 47 T.L.R. 368.

(5) *Turk* v. *Turk, Dufty* v. *Dufty,* [1931] P. 116; (1931), 145 L.T. 331.

Statute construed:

Matrimonial Causes Act (Laws of Sierra Leone, 1960, *cap.* 102), s.26, as amended:

> "(1) Where the court has made an order under this Act for the making or securing of periodical payments, the court shall have power to discharge or vary the order or to suspend any provisions thereof temporarily and to revive the operation of any provisions so suspended.
>
> (2) The powers exercisable by the court under the preceding subsection in relation to any order shall be exercisable also in relation to any deed or other instrument executed in pursuance of the order.
>
> (3) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage."

Miss Wright for the applicant;
R.E.A. Harding for the respondent.

BETTS, J.:

This is an application made under the Matrimonial Causes Act (*cap.* 102), s.26, as amended by the Matrimonial Causes (Amendment) Act, 1961, seeking a variation of an order of the Supreme Court dated December 11th, 1965 for the payment of Le100 monthly as maintenance by the applicant to the respondent.

Some doubts were expressed as to whether this court has jurisdiction to entertain this application, as the matter had already been referred to the Court of Appeal. I think this court has jurisdiction, in spite of the doubts expressed. There is a significant difference between the two processes. In an appeal, there is a reappraisal of those factors which led to the original decision, in order to discover whether that decision was justified. In an application for variation, the court examines matters which have arisen since the original decision, although it may also consider matters which would be considered at the original hearing. Applying to the Court of Appeal does not necessarily in my view bar an application before this court except where there is an order or decision on a specific matter under consideration.

In *Smith* v. *Smith* (4) it was held that orders by consent for permanent alimony, permanent maintenance and periodical payments can always be made, and, if within the court's statutory powers, are variable whether or not they contain the formulae "until further order" or "liberty to apply." We therefore have such authority.

Both counsel appeared to me to have the impression that an application of this kind can be made on an omnibus package basis. With respect to both counsel, I have to differ. This application in my view can be made under two separate and distinct heads each capable of grounding an order for variation. In the case of *Bennett* v. *Bennett* (1) an order was reduced from £500 to £300 on remarriage; so also in the case of *Perkins* v. *Perkins* (3) where on remarriage the order was reduced from £500 a year to £300. The application in this case discloses remarriage as one of its grounds. Unfortunately, however, the argument pursued the line that that ground had to be buttressed by other facts, not directly incidental to the marriage, being included in the affidavit of the applicant, and which I would prefer to treat as a separate head. Under this second head the court in exercising its powers to modify orders would have regard to all the circumstances of the case. Tolstoy, *Law & Practice of Divorce*, 4th ed., at 156 (1958) outlines what "all the circumstances of the case" would convey. It reads:

"The words 'all the circumstances of the case' are very wide, and their effect is to give the court discretion to consider the same matters as would be considered on the original application for alimony or maintenance, as the case may be, or which have arisen since the original order, such as where the wife through lack of candour or perjury obtains an unjust prolongation of the order."

To confirm this line of thought, the passage continues: "It is, however, no longer open for a party to raise matters which were known to him and could have been raised by him at the original application." In *Hall* v. *Hall* (2) a husband was not allowed to raise allegations of misconduct which he might have raised on the original application. The present applicant outlined several commitments which he said he entered into with the consent and knowledge of the respondent, and I do not for a moment doubt that this is so, but these facts were in existence and known to him at the original hearing, and though I deeply sympathise with him for whatever misadventure occurred then, I hold that it was the duty of himself or his counsel to have made such facts known to the court. An omission of this kind is fatal. The law as outlined in *Hall* v. *Hall* is clear on the point.

Turk v. *Turk*, *Dufty* v. *Dufty* (5), reinforced by *Bennett* v. *Bennett* (1), confirm that there can be a reduction of a maintenance order by the fact of remarriage. However, rationalising the principle under which reductions were made, it is not difficult to conclude that they were made in those cases where the divorced wife's financial position had actually improved either by remarriage or inheritance or otherwise, or where the husband had suffered a financial reverse; the question of potential increase does not seem to bear any relevance.

Modification or otherwise of a maintenance order is a matter within the discretion of the court. A study of the authorities discloses that in those cases in which reductions were granted, the subsequent marriage arose as a result of the normal order of things —boy meeting girl. I am afraid that the facts disclosed in paras. 2 and 3 of the affidavit of the applicant do not suggest this normalcy. It was revealed that the applicant obtained a decree nisi on December 11th, 1965 and 14 days later applied for and obtained the decree absolute. He was remarried on February 2nd, 1966 and the new wife gave birth to a child on February 21st, 1966. This sequence of events, to say the least, is astonishing and carries with it

the implication of a devious contempt which ought to be frowned upon when considered in relation to the application. I am rendered completely powerless by the facts in the affidavit and I do not see how I can legally justify myself in using my discretion in favour of the applicant. I therefore dismiss the application with costs.

Application dismissed.

JOHNSON *v.* SINGER SEWING MACHINE COMPANY LIMITED

SUPREME COURT (Betts, J.): May 23rd, 1967
(Civil Case No. 67/66)

[1] **Tort—damages—measure of damages—torts affecting chattels—loss of chattel used in trade—hire of replacement and loss of business where replacement less profitable:** Damages for loss or deprivation of a chattel which is used in a profitable trade include the hire of a replacement and, where the replacement is such that it cannot be used as profitably as the missing chattel, the consequent loss of business (page 168, lines 4–8).

[2] **Tort—detinue—damages—measure of damages—chattel used in trade—damages include hire of replacement and loss of business where replacement less profitable:** See [1] above.

The plaintiff brought an action against the defendants for the return of a sewing machine or its value, and special damages.

The plaintiff was a seamstress. The defendants took her electric sewing machine for repairs and kept it. She commenced the present proceedings in which she claimed as special damages (a) the cost of hiring a hand sewing machine and (b) loss of business by using a hand machine instead of an electric machine.

Marcus-Jones for the plaintiff;
D.E.F. Luke for the respondent.

BETTS, J.:

In this case the plaintiff claims the value or the return of her Singer sewing machine, which was wrongfully detained by the defendants, and special damages.

The facts are simple and need not be recounted in full. Suffice