

BOUCHER v. BOUCHER

[COURT OF APPEAL. CIVIL APPEAL NO. 20 OF 1992

Williams, P., Husbands and Moe, J.J.A.) September 7, October 6, 1994]

(1994) 30 Barb. L.R. 376

Family law - Maintenance order - Trial judge ordered garnishment of husband's - Whether trial judge adhered to the Family Law Rules with regard to [376] maintenance for children over 18 years of age - Whether the application for enforcement of maintenance was filed in accordance with the Family Law Rules - Whether the order was unlawful and contrary to the Protection of Wages Act, Cap 351, s. 9(3)(c).

Facts: The appellant and respondent were married on September 23, 1972 a decree nisi was issued on May 26, 1986 when proceedings were instituted by the wife. On October 27, 1989 the wife applied for an order of maintenance for A.B. and D.B., the two children of the marriage. On February 26, 1990 the trial judge ordered the husband to pay to the wife \$125.00 per week with effect from February 1990 until further order. On April 2, 1992 the wife applied for maintenance of the two children on the ground that the husband failed to maintain as ordered on February 6, 1990 and was in arrears of \$8,240.00. The wife pointed out that one of the children concerned was then 20 years 16 years old. The matter was adjourned until April 14, 1992 when the wife applied for further orders including an order for garnishment of the husband's earnings as a Barbados Transport Board employee. The trial judge granted the order.

The appellant alleged that the trial judge erred in making the order as the application for enforcement of the order for maintenance filed by the respondent was not filed in accordance with the Family Law Rules, 1982, rule 14(1)(b)(i), and further, that the trial judge did not adhere to these rules in determining the matter. In addition, the appellant submitted that the order was unlawful as it was contrary to the Protection of Wages Act, Cap. 351, s. 9(3)(c).

Held: (i) With regard to maintenance of the two children, on April 14, 1992 one child had already passed the age of 18 years and it was necessary to consider the provisions of section 54 of the Family Law Act which provided that an order for maintenance should not be made for a child who had attained the age of 18 except in special circumstances;

(ii) No adequate evidence of the appellant's wages had been put before the learned judge and no protected earnings rate was fixed in accordance with (a) Rule 103(9)(b) of the Family Law Rules which stipulates that where the court makes a garnishment order attaching the earnings of the respondent it shall fix an amount below which the respondent's earnings shall not be reduced by compliance with the order, or (b) the Protection of Wages Act, Cap. 351, section 9(3)(c) that the total amount which may be attached under any law from the wages payable to a worker under any contract of employment shall not in any one period exceed one-third of the wages of the worker in that pay period;

Appeal allowed and order of the trial judge set aside. Applications remitted to be reheard and determined.

Statutes and statutory instrument referred to:

Family Law Act, Cap. 214, ss. 42 and 54.

Family Law Rules, Rules 14(1)(b)(i) and 103(9)(b). [377]

Protection of Wages Act, Cap. 351, s. 9(3)(c).

Mr. D.K. Rawlins for the appellant.

Mr. L. Greenidge for the respondent.

JUDGMENT OF THE COURT: The appellant and respondent were married September 23, 1972 and in proceedings instituted by the wife/respondent for dissolution of the marriage a decree nisi was issued on May 26, 1986.

On October 27, 1989 the wife/respondent applied for:-

(a) an order that maintenance be provided for the two children of the marriage, namely - Andrea Alicia Boucher, born January 25, 1973 and Duane Kevin Boucher, born May 10, 1978;

(b) an order under section 42 of the Family Law Act, 1981; and

(c) such further or other orders and/or declaration as the court may deem fit.

The application came on for hearing on February 6, 1990 before Mr. Justice Chase who ordered inter alia:-

(a) the husband/appellant pay to the wife/respondent the sum of \$125.00 per week with effect from February 9, 1990 until further order and each succeeding Friday;

(b) made an Order under section 42 of the Family Law Act;

and adjourned the matter.

On April 2, 1992, the application for an order for maintenance of the two children, supported by affidavits dated January 18, 1991, October 14, 1991 and February 4, 1992 came on before Mr. Justice Elliot Belgrave, CHB. The record that on that date counsel for the appellant was absent. Counsel for the respondent indicated to the learned judge that the appellant had failed to maintain as ordered on February 6, 1990 and was in arrears in the sum of \$8,240.00. The matter was adjourned until later in the day to give counsel for the appellant an opportunity to attend. On resumption, counsel for the appellant pointed out that one child concerned was then 20 years old and the other 16 years old. The matter was adjourned to the April 10, 1992 on which date it was further adjourned April 14, 1992.

On April 14, 1992 when hearing of the application for an order for maintenance there was also put before the court an application filed on April 3, 1992 with notice thereon that it had been set down for hearing on April 3, 1992 and in [378] which the following orders were applied for:-

"I. (a) That the personal property belonging to the husband who has failed and/or refused to comply with an interim order of this court made on the February 6, 1990 in respect of the children of the marriage Andrea Alicia Boucher and Duane Kevin Boucher be seized and sold to satisfy the sum of \$8,240.00 owed to the applicant as well as the costs of this application and execution execution.

(b) In addition or in the alternative an order for garnishment from the husband's earnings as an employee of the Barbados Transport Board.

(c) That the husband pay the applicant's costs in these proceedings

(d) Such further or other relief as to the court may seem just."

It was also stated in the application that -

"In respect of the order sought at (a) above the husband has regularly failed to pay the weekly sum of \$125.00 under the Order for the times set out in the affidavits of the applicant filed on the 18th January, 1991 and 15th February, 1992 in addition to which the sum of \$985.00 is outstanding for the period 9th February, 1992 to 1st April, 1992 inclusive.

Counsel for the appellant contended that the application for an order that the appellant's wages be garnished did not comply with the Family Law Rules, 1982 in that the husband was not given 14 days' notice of the wife's application and the Court could not hear the matter.

The learned judge after hearing, proceeded to order that the sum of \$200.00 per week (being \$125.00 per week maintenance and \$75.00 per week of the arrears of \$8,240.00) be deducted from the respondent's wages by the Transport Board and paid to the applicant.

The appellant has challenged the order on two grounds. He complains firstly that the learned judge erred in making the order as the application for enforcement of the Order for maintenance filed by the respondent was not filed in accordance with section 14(1)(b)(i) of the Family Law Rules, 1982 and the learned judge erred in not adhering to and applying the Family Law Rules, 1982 in the matter. Secondly, he says that the order made is unlawful as it was made contrary to the provisions of section 9(3)(c) of the Protection of 351. [379]

Application for Enforcement of Arrears

Rule 14. (1) of the Family Law Rules, 1982 provides as follows -

"14. (1) Subject to these rules, the date for the hearing of an application shall be fixed by the appropriate officer of the court in which the application is filed and shall be

(a) where the application is under rule 9 or 10, not earlier than 14 days after the time allowed under rule 17 for the filing of an answer; and

b) in all other cases

(i) where the respondent is in Barbados at least 14 days from the date of filing the application; or

(ii) where the respondent is not in Barbados at least 28 days from the date of filing the application."

Rule 14 is, as it says, subject to the Rules. Counsel for the respondent referred Rule 137 which states -

"1. Non-compliance with these Rules, or with a rule of practice or procedure in a court exercising jurisdiction under this Act, does not render proceedings in that court void unless the court so directs.

2. In exercising its discretion under this Rule, the court shall have regard to the real merits of the case, the minimising of expense, and whether any party to the proceedings has suffered injustice or has been prejudicially affected by non-compliance with these rules."

Of greater significance is Rule 103 of the said Rules, which makes special provisions with regard to garnishment. These were not addressed by counsel in argument before us. Rule 103(3) provides that an application for a garnishment may be made ex-parte. Rule 14 by its terms would be subject to Rule 103. In the circumstances, we do not think that Rule 14(1) is the governing rule on the application for garnishment and the learned judge was not precluded from hearing application of April 3 for the enforcement of arrears.

Amount of Arrears

It appears from the record that the amount of arrears in respect of which the trial judge made an order for enforcement was calculated as due up to February 9, 1992. Mr. Rawlins submits that the appellant is thus being made to pay maintenance [380] which he is not obligated to pay.

He refers to the age of Andrea Alicia born on 25th January, 1973. Section 54 of the Family Law Act, 1981-29 states -

"(2) Subject to subsection (3), an order for maintenance

(a) shall not be made where the child has attained the age of 18 years; and

(b) ceases to be in force when the child attains that age of 18 years.

(3) The court may

(a) provide in an order for the maintenance of a child who has not attained the age of 18 years that the order shall continue in force until a day that is later than, or for a period that extends the day on which the child will attain that age: or

(b) make an order for the maintenance of a child who has attained the age of 18 years, being an order that is expressed to continue in force until a day, or for a period, specified in the order,

if the court is satisfied that the provision of the maintenance is necessary to enable the child to complete his education (including vocational training or apprenticeship) or because he is mentally or physically handicapped, and, in that case, the order continues in force until that day or the expiration of that period, as the case may be."

It does not appear that attention was paid to the above provisions of section 54 of the Family Law Act.

Deduction from Wages

Another provision not addressed by counsel in argument before us but which appears relevant is Rule 103(9)(b) which provides -

"(9) where the court makes a garnishment order attaching the earnings of the respondent, it shall

(b) subject to the Protection of Wages Act, fix an amount below which the respondent's earnings shall not be reduced by compliance with the order and the amount so fixed may be referred to as the unprotected earnings rate" [381]

It is clear that a protected earnings rate was not fixed in this case. The Protection of Wages Act, Cap. 351 also makes provisions for the protection of wages of workers and in section 9 enacts as follows -

"9. (3) (c) provides that the total amount which may be attached under law from the wages payable to a worker under any contract of employment shall not in any one period exceed one-third of the wages of the worker in that pay period."

The record does not show that there was put before the learned judge adequate evidence as to the wages of the appellant/husband at the hearing of the applications.

In an affidavit filed in support of an application related to this appeal, it is indicated that the learned judge enquired of the appellant what was his take-home pay to which the appellant replied "Right now I receive \$134.10 in my hand."

It is also evident that the provisions of section 9(3)(c) of the Protection of Wages Act, Cap. 351 was not addressed.

Application for Order For Maintenance

Some observations should be made concerning the application for the order for maintenance of the two children. The learned judge, in making the order evidently confirmed the interim order of February 6, 1990. The Family Law Act, 1981-29 in 4 provides -

"(1) In determining

(a) whether to make an order for the maintenance of a child of a marriage or of a union; or

(b) the period for which such an order should continue in force or the amount of any payment to be made under such an order,

the court shall take into account, in addition to the matters set out in section 53(2), the following:

(i) the income, earning capacity, property and other financial resources of the child;

(ii) the financial needs of the child;

(iii) the manner in which the child is being, and in which the parties to the marriage or union expected the child to be educated or trained." [382]

There is no indication whatsoever that the learned judge adverted to the provisions just cited. As already stated, he appears to have simply confirmed the interim order. On April 14, 1992, one child Andrea Alicia had already passed the age of 18 years and it was necessary to consider how the provisions of section 54 applied to her. This and other matters may very well have been put before the judge had there been less haste in disposing of the matter. A reading of section 54 reveals that the kind of order to be made for maintenance requires careful consideration.

The record does not disclose sufficient material put before the learned judge which provides adequate basis for due consideration of the matter to

be determined.

We are of the opinion that the matters which ought to be considered in determining the appropriate orders for maintenance and the enforcement of arrears under the interim order were not adequately addressed. In the circumstances, we would allow the appeal, set aside the order of the learned judge and remit the applications to be reheard and determined.

The trial judge may wish to consider whether any order he decides upon should have retrospective effect. No order as to costs of this appeal.