JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 19 of 1969

BEFORE: The Hon. Mr. Justice Luckhoo (P. Ag.).
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Robinson J.A. (Ag.).

B E T W E E N AVORY HEWART McCARDIE HENRIQUES - PETITIONER/APPELLANT

A N D ORTRUD HENRIQUES - RESPONDENT/RESPONDENT

Hugh Small for Petitioner/Appellant.

Ronald Williams Q.C. for Respondent/Respondent.

25th February, 1972
24th March, 1972

ROBINSON J.A.:

On February 25, 1972, we dismissed this appeal and promised to put our reasons therefor in writing.

The appeal arose out of an Order made by the Hon. Mr. Justice Lopez on April 29, 1969. The entire order is not in question but only a part of it, as is set out in the notice of appeal namely:-

> "That the Petitioner do pay the travelling expenses of both Respondent and infant son Dean to Canada and return, and also medical, Hospital and Specialist's expenses and other reasonable incidental expenses incurred in connection therewith and costs of both summonses to be taxed or agreed."

At the time when this Order was made there were two summonses before the Court:

(1) Summons dated 21/4/69 taken out by the appellant for an order that he be granted leave to take the said child Dean (a child of the marriage) out of the jurisdiction of the Court to the Montreal Neurological Hospital in Canada for medical attention.

In support of this summons the usual affidavit was filed by the appellant.

(2) Summons dated 24/4/69 taken out by the respondent for leave to take the same child Dean out of the jurisdiction to the same place and for the same purpose as stated by the appellant and that the appellant be ordered to pay the necessary expenses in connection therewith.

An affidavit in support of this summons was filed by the respondent.

It was in the context of this competition between the appellant and the respondent as to which of them should go with the child to Canada, that the order complained of was made by Lopez J.; be it noted that the appellant was apparently willing to pay all expenses if he was allowed to go to Canada with the child himself. This child suffered from certain physical handicaps and arrangements were made for him to see medical specialists in Canada; his mother, the respondent, was granted custody on February 25, 1966.

Lopez J. dismissed the summons of the appellant and granted leave to the respondent, Mrs. Henriques, to take the child out of the jurisdiction. (In this regard, Mr. Small said at the hearing before us that he thought the judge was right; the child was in her custody and she would know more about his health).

The question for determination is, did the Court have jurisdiction to make the order complained of i.e. that the appellant pay the expenses consequent on the respondent taking this child to Canada for medical attention. Mr. Small, Counsel for the appellant argued that the Court did not have jurisdiction, in as much as there is an existing order for maintenance of the respondent and children. He submitted inter alia that the power of the Supreme Court to make maintenance orders is derived from s.36(1) of the Divorce Law, Cap. 102 and that that section is not wide enough to include the jurisdiction which Lopez, J. purported to exercise; (s.36(2), he pointed out, dealt with the Court's jurisdiction to make a secured order for the benefit of children in the nature of a lump sum). In course of his arguments, the Court brought to Mr. Small's attention the case of Eyre v. Eyre (1930) 46 T.L.R. 268. The headnote reads "Where a wife petitioner after decree absolute dissolving the marriage was granted an award of maintenance for herself and her young children, and she was involved in considerable expense by the severe illness of the children, the respondent was ordered to make a special payment, by way of contribution to medical and nursing expenses, under Rule 73(A) of the Matrimonial Causes Rules".

In that case, the application was made under the Supreme Court of Judicature (Consolidation) Act, 1925 s.193; counsel for the respondent submitted that the Court had no power to make such an order. Mr. Justice Bateson, in his judgment, held that under the provisions of s.193(1) of the Act above referred to, the Court had jurisdiction to entertain the application

for a special payment by way of maintenance for the children.

Section 193 (1) provides as follows:-

> "In any proceedings for divorce or nullity of marriage, or judicial separation, the Court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

I do not deem it necessary to set out the provisions of s.36(1) of the Divorce Law, Cap.102; it is sufficient to say that counsel for the appellant agreed that, in substance, those provisions are similar to s.193(1) above quoted.

This Court is of the view that Lopez, J. had jurisdiction to make the order under review. The appeal was therefore dismissed and the order affirmed, costs being awarded the respondent to be taxed.

Counsel for the appellant in course of his submissions pointed out that the judge dealt with the summons on the basis that the appellant was liable to pay all expenses because of his "delict." This indeed is not only faulty reasoning in the circumstances of this case but an altogether wrong approach and has no relevance as to whether or not the order should be made.

Before leaving this matter, this Court would like to observe that as to the terms of the Order, it may have been better for the learned judge to have qualified the order by stating specifically in the order itself, the quantum of expenses under each head. This aspect of the matter was considered by the Court on a summons to approve account of expenses which was heard on December 16, 1969 by Monteith, J.(Ag.) when an order was made approving the total balance of $2421.70.