30/78

COURT OF APPEAL (UK)

ANSAH v ANSAH

Stamp and Ormrod L JJ and Sir John Pennycuick

26 November, 13 December 1976

(1977) 2 WLR 760; [1977] Fam 138; [1977] 2 All ER 638

FAMILY LAW – HUSBAND AND WIFE – INJUNCTION AGAINST MOLESTATION – *EX PARTE* APPLICATION – INJUNCTION GRANTED ON HUSBAND'S *EX PARTE* MOTION WITH NO EXPIRY DATE – MINOR BREACH BY WIFE – GRANT OF SUSPENDED COMMITTAL ORDER TO BE ACTIVATED BY FILING AFFIDAVIT – WHETHER PROPER – ENFORCEMENT OF INJUNCTION – GENERAL PRINCIPLES APPLICABLE IN GRANTING *EX PARTE* INJUNCTIONS.

The husband and wife married in 1973 and had two children. From the outset the marriage was stormy and the wife left home on several occasions allegedly due to the husband's violence towards her. She finally left on April 7, 1976 and the children were placed with foster parents. On April 13, on the wife's motion, the husband consented to an injunction against molestation. On April 23 the wife filed her petition for divorce which contained serious allegations of violence which the husband denied. The case was then transferred to the High Court. Two months later the wife applied for a committal order against the husband for breach of the injunction; the parties came to terms which included the husband agreeing to the wife having custody of the children.

On September 13, the husband made an *ex parte* application in person in the County Court. Judge Lemon granted an injunction to restrain the wife from returning to the matrimonial home and molesting the husband "until the further hearing of the application at the time and place to be notified." Neither the wife nor her solicitors had notice of the application. On several occasions the wife returned to the matrimonial home to take care of her father who was staying there and, on the last occasion, when she went to collect the children who had been taken there by the husband, a row broke out between the parties, during which the husband suffered minor injuries.

On October 20, Judge McNair, granting the husband's application in the High Court made a committal order against the wife suspended on terms that she did not return to the matrimonial home or molest the husband but providing that it should be executed without further notice, upon the filing of affidavit evidence that the wife had ben served with the order and was in breach of its terms. On the wife's appeals against the grant of the injunction and the committal order—

HELD: Appeals allowed; the injunction had been improperly granted because the judge in the County Court had no jurisdiction in the matter as the cause was then proceeding in the High Court; that the husband's evidence in support of his *ex parte* application did not disclose the urgent need for making an injunction restraining the wife from molesting him and returning to the matrimonial home during the short period which would elapse before a hearing *inter partes* could be arranged; that, therefore, the injunction would be discharged *ab initio* and, since the injunction had been discharged, the committal order would also be discharged.

HELD, further that the form of the injunction was erroneous in that it was not strictly limited to the shortest period before there could be a hearing *inter partes*.

PER CURIAM: The wife's breach or breaches of the injunction did not justify the making of a committal order, suspended or otherwise. Although the conventional remedy for a breach is a summons for committal, the real purpose of bringing the matter back to the court, in most cases, is not so much to punish disobedience, as to secure compliance with the injunction in the future. It will often be wiser to bring the matter before the court again for further direction, before applying for a committal order. Committal orders are remedies of last resort; in family cases they should be the very last resort.

The practice of making suspended committal orders may be effective in some cases, but it can be very dangerous. Careful consideration must be given to the question of in what circumstances and how the suspension is to be removed and the committal order activated. It would have been much safer to have adjourned the summons to commit, with liberty to restore, in the event of a further breach of the injunction.

***Craig v Kanssen* (1943) KB 256; (1943) 1 All ER 108, CA, referred to.**

***Bassett v Bassett* (1975) Fam 76; (1975) 2 WLR 270; (1975) 1 All ER 513, CA, argued.**

ORMROD LJ read the following judgment of the court. At the conclusion of the argument in this case we allowed both appeals by the wife but, because the case raised some important issues relating to the granting and enforcement of injunctions in matrimonial proceedings, we thought it right to put our reasons into writing.

There are two separate appeals before the court; the first, from an order made *ex parte* on September 13, 1976, by Judge Lemon, sitting in the Guildford County Court, restraining the wife who is the petitioner in the divorce suit from returning to or entering upon the matrimonial home, and from molesting the husband; the second, from an order made by Judge McNair, sitting as a deputy High Court judge, on October 20, 1976, committing the wife to prison for contempt for molesting the husband and returning to the matrimonial home in breach of the order of September 13, 1976.

Fortunately, the judge suspended the committal order on the terms that the wife did not return to or enter upon the matrimonial home or molest the husband.

On September 13, 1976, the first of the two orders appealed from was made in unusual circumstances. On that day the husband appeared in person before Judge Lemon in the Guildford County Court to make an application *ex parte* for an injunction against the wife restraining her from returning to the matrimonial home and from molesting him. He produced a home-made affidavit sworn the same day at the County Court in which, after referring to various quarrels and grievances, he alleged that the wife:

> "... threatened to burn all my clothing. On occasions she threatened to break our front entrance door glass which she did. She always abused me pointing her finger on my nose, I cannot bear such abuses and treatment any longer. I would therefore ask this Honourable (court) to grant an injunction not to come to the matrimonial home, or any of her friends to phone and abuse me until the house is sold."

The proceedings were, in fact, wholly irregular because the cause was still proceeding in the High Court, so that the application should have been made to the vacation judge. No attempt seems to have been made to notify the wife or her solicitors of this proposed application, although it would have been easy to do so. Nevertheless the judge, presumably unaware of all these facts, granted an injunction in the following terms:

> "It is ordered that the petitioner by herself her agents servants or otherwise be enjoined and restrained from returning to or entering upon the matrimonial home at 32, Sheridan Road, Frimley in the County of Surrey and/or assaulting or molesting the respondent until the further hearing of this application which will take place at the Royal Courts of Justice, Strand, London W02, at the time and place to be notified."

Apart from the want of jurisdiction, which, in itself, would have been fatal to the validity of the order, there are a number of other reasons why this order should not have been made. Orders made *ex parte* are anomalies in our system of justice which generally demands service or notice of the proposed proceedings on the opposite party; see *Craig v Kanssen* (1943) KB 256, 262. Nonetheless, the power of the court to intervene immediately and without notice in proper cases is essential to the administration of justice. But this power must be used with great caution and only in circumstances in which it is really necessary to act immediately. Such circumstances do undoubtedly tend to occur more frequently in family disputes than in other types of litigation because the parties are often still in close contact with one another and, particularly when a marriage is breaking up, in a state of high emotional tension; but even in such cases the court should only act *ex parte* in an emergency when the interests of justice or the protection of the applicant or a child clearly demands immediate intervention by the court. Such cases should be extremely rare, since any urgent application can be heard *inter partes* on two days' notice to the other side: see *Hayden on Divorce*, 12th ed (1974) p909, para 47, and the notice in the Daily Cause List headed "Matrimonial Causes and Matters – Urgent Applications". Circumstances, of course, may arise when prior notice cannot be given to the other side; for example, cases where one parent has disappeared with the children, or a spouse, usually the wife, is so frightened of the other spouse that some protection must be provided against a violent response to service of proceedings, but the court must be fully satisfied that such protection is necessary.

The evidence produced by the husband in the present case obviously falls far short of justifying the making of an *ex parte* injunction. Had the judge known anything of the background of this

case it seems most unlikely that he would have acceded to the husband's application. This is all the more reason for proceeding with extreme caution.

The order that was made in this case is quite unacceptable for another reason. If an order is to be made *ex parte*, it must be strictly limited in time if the risk of causing serious injustice is to be avoided. The time is to be measured in days, i.e, the shortest period which must elapse before a preliminary hearing *inter partes* can be arranged and the order must specify the date on which it expires. (If difficulty in serving the other party is anticipated it may, exceptionally, be permissible to fix a longer period and to provide in the order that the other party may apply on 24 hours' notice to discharge the injunction.) The formula used in this case, namely, "until the further hearing of this application which will take place in the Royal Courts of Justice, Strand, London W02, at the time and place to be notified," is quite unjustifiable and improper. It has resulted in this *ex parte* injunction remaining in force from September 13, 1976 until the hearing of this appeal, namely, December 13, for the simple reason that no time or place for the hearing in London has ever been "notified" to the wife. Such a result cannot be tolerated. For all these reasons, the order of September 13, 1976, cannot stand and must be discharged *ab initio*.

It follows that the committal order made by Judge McNair on October 20, 1976, must also be discharged. The matter, however, cannot be left there. Assuming the order of September 13, 1976, to have been validly made, the wife was, admittedly, in breach of it, in that she had gone to the matrimonial home on a few occasions to look after her father who staying there on a visit from Ghana, and on October 5, 1976, had gone to the house to collect the children who were in her custody and had been taken there from the foster parents by the husband, without her consent. On this occasion there was another furious row between husband and wife, possibly involving some minor injuries to the husband. Such a breach or breaches, of an injunction in, the circumstances of such a case as this do not justify the making of a committal order, suspended or otherwise. Breach of such an injunction is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal.

But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience, as to secure compliance with the injunction in the future. It will often be wiser to bring the matter before the court again for further directions before applying for a committal order. Committal orders are remedies of last resort; in family cases they should be the very last resort. They are likely to damage complainant spouses almost as much as offending spouses, for example, by alienating the children. Such orders should be made very reluctantly and only when every other effort to bring the situation under control has failed or is almost certain to fail.

In most cases stern warnings, combined with investigation and an attempt to alleviate the offending spouse's underlying grievances or an adjournment to allow tempers to cool will resolve the problem. In some cases, the assistance of the court welfare officer may help to remove some of the tension. The new power created by section 2 of the *Domestic Violence and Matrimonial Proceedings Act* 1976 to attach a "power to arrest" to an injunction may, when this Act comes into force, provide another useful alternative way of dealing with some of these cases.

The practice of making suspended committal orders may be effective in some cases, but it can be very dangerous. Careful consideration must be given to the question of in what circumstances and how the suspension is to be removed and the committal order activated.

In the present case the terms of the suspension were that the warrant for arrest was not to be issued if the wife "complies with the following terms namely: that she does not by herself her servants or agents or otherwise, (1) return to or enter upon the said matrimonial home, and/or (2) assault or molest the respondent."

The order goes on to provide that upon filing affidavit evidence that the order has been served on the wife and that she has failed to comply with the above terms the committal order is to be executed without further notice to her. All that is required, therefore, to bring this committal order into effect is the filing of an affidavit at the County Court which may or may not be true. In other words, control has passed out of the judge's hands altogether, and the party subject to the order has no means of disputing the alleged failure to comply with the terms of the suspension. It would have been much safer to have adjourned the summons to commit, with liberty to restore, in the

event of a further breach of the injunction or of a term imposed by the court at the first hearing of the summons. For these reasons, we do not think that this was an appropriate case for making any kind of committal order and we, therefore, also allowed the second appeal. Appeals allowed. No order as to costs.
