

BALASINGHAM
v.
KALAIVANAY

COURT OF APPEAL.

G. P. S. DE SILVA, J. AND BANDARANAYAKE, J.

C. A. 62/80 – M. C. KALMUNAI 58228.

MARCH 22, 1985.

Maintenance Ordinance s. 2 and s.5 – "Living in adultery."

Under section 5 of the Maintenance Ordinance the Magistrate is obliged to cancel the order for maintenance made in favour of a wife under section 2, on proof that she is living in adultery. The relevant point of time at which the wife should be proved to be living in adultery is the time of the application under section 5 of the Maintenance Ordinance.

Cases referred to :

- (1) *Abeysekera v. Biso Menika* (1961) 64 NLR 260.
- (2) *Thanikchalam Pillai v. Dhakshavani Ammal* (1966) Cr. Law Journal 221.
- (3) *Rammalthamy v. Appuhamy* (1916) 3 CWR 326.
- (4) *De Silva v. Fernando* (1930) 32 NLR 71.
- (5) *Wijeyesinghe v. Josi Nona* (1936) 38 NLR 375.
- (6) *Pushpawathy v. Santhirasegarampillai* (1971) 75 NLR 353.

APPEAL from the Magistrate's Court of Kalmunai.

S. Sinnathamby for defendant-appellant.

Applicant-respondent absent and unrepresented.

Cur. adv. vult.

June 10, 1985.

G. P. S. DE SILVA, J.

The short point which arises for decision in this appeal relates to section 5 of the Maintenance Ordinance (Chap. 91). The material part of the section reads thus –

“On proof that any wife in whose favour an order has been made under section 2 is living in adultery the Magistrate shall cancel the order”.

The question before us is whether it is sufficient if the wife was “living in adultery” at any point of time after an order in her favour was made under section 2 or whether it is necessary that she should be living in adultery at the time the application for cancellation of the order for maintenance is made under section 5. The Magistrate in a well considered order held that there must be proof that the wife “is living in adultery” at the time the application for cancellation of the order is made. The defendant (husband) has now appealed against that order.

The facts of the case are not in dispute. An order for maintenance in favour of the applicant (wife) was made by the Magistrate on 27.2.75. There was an appeal against the order which was affirmed by the Supreme Court on 24.3.77. On 9.9.77 the defendant made an application under section 5 to have the order for maintenance cancelled on the ground that his wife had on 29th May 1975 purported to contract a “marriage” (bigamous) with one Sathanandarajah and had lived with him (Sathanandarajah) for a period of about one month from 29th May 1975. Mr. Sinnathamby,

Counsel for the defendant-appellant submitted that the evidence clearly showed that the applicant-respondent had lived "in adultery" within the meaning of section 5 for at least a continuous period of one month after an order for maintenance in her favour was made. I agree with Mr. Sinnathamby that there is evidence to establish that the applicant was living "in adultery" for a continuous period of at least one month from 29th May 1975. However, it is equally clear that there is no evidence to indicate that she was "living in adultery" at the time the application for cancellation of the order for maintenance was made in September, 1977.

Mr. Sinnathamby contended that proof of "living in adultery" at the time of the application for cancellation under section 5 is not necessary as long as there is evidence of "living in adultery" at any point of time after an order for maintenance in favour of the applicant had been made. In support of this proposition, Counsel cited the case of *Abeysekera v. Biso Menika* (1). In that case L. B. de Silva, J. held that "a Magistrate is entitled under section 5 or 10 of the Maintenance Ordinance to cancel the maintenance order in favour of the applicant-respondent with retrospective effect to cover the period during which she was admittedly living in adultery". The question that arises in the instant appeal was not considered by de Silva, J.

Mr. Sinnathamby next cited the case of *Thanikchalam Pillai v. Dhakshavani Ammal* (2). Here the Court considered the meaning of the expression "living in adultery" and did not address its mind to the matter in issue before us. Mr. Sinnathamby also referred us to the section 488 (5) of the Indian Criminal Procedure Code which is identical with section 5 of our Maintenance Ordinance. There appears the following statement in Sohani's Commentary on the Code of Criminal Procedure of India (1967 Edn., Vol. IV, page 3076): "A Magistrate rejected the application of the husband for cancellation of the order of maintenance on the ground that it was not proved that the petitioner's wife was at the time living in adultery although she might have committed adultery seven months before. It was held that adultery committed by a wife subsequent to an order obtained by her for maintenance disentitles her to claim continuous maintenance and entitles the husband to apply for cancellation of the order if it amounts to living in adultery". The authorities cited in support of the above view (*Queen-Empress v. Basappa*, Ratnial 3533 - *Sohani v. Manohar*, 1882 A. W. N. 168) are not available to me for perusal.

On the other hand, there are several decisions under our law which have a bearing on this point. Shaw, J. in *Rammalhamy v. Appuhamy* (3) expressed the view –

“An order made under this section can be cancelled under section 6 as from a subsequent date if it is then shown that the wife is then living in adultery, *and even the fact that at sometime subsequent to the order she was living in adultery does not entitle the husband to a cancellation of the order if she has ceased to do so and is living an honourable life at the time of the application*”. (The emphasis is mine)

This case was cited with approval by Jayawardena, A. J. in *De Silva v. Fernando* (4). Thereafter in 1936 this question directly arose for consideration by Abrahams, C. J. in *Wijeysinghe v. Josi Nona* (5), wherein the learned Judge expressed himself thus—

“..... the issue was whether in terms of section 6 of the Maintenance Ordinance the wife was living in adultery. The words of the section are plain. ‘On proof that any wife in whose favour an order has been made is living in adultery the Magistrate shall cancel the order’. The meaning is equally plain : the wife at the time that the application for cancellation of the order was made must be cohabiting with some other man or living a life of promiscuous immorality. Manifestly all that the appellant in this case would have proved if the case had been heard out, was that the child was not his, and inferentially that his wife had about a year previous to his application committed adultery with some man. He could not have proved thereby more than a single act of adultery, and if he could have done, *he could not have proved that the adultery was going on at the date of his application* This case does not seem to me really to need any authority, for the words are too plain to require interpretation”. (The emphasis is mine)

It is right to add that the above dicta of Abrahams, C. J. were cited with approval in 1971 by De Kretser, J. in *Pushpawathy v. Santhirasegarampillai* (6).

No decision of our courts which takes the view contended for by Mr. Sinnathamby was cited before us. On a consideration of the plain meaning of the words in the section and the trend of the authorities, I am of the opinion that when the section speaks of the wife “living in

adultery" the relevant point of time is the time of the application under section 5 of the Maintenance Ordinance (Chap. 91). As stated earlier, there is no evidence of continuous adulterous conduct on the part of the applicant at the time of the application. In the result, the order of the Magistrate is affirmed and the appeal is dismissed. In all the circumstances, I make no order as to costs.

BANDARANAYAKE, J. – I agree.

Appeal dismissed.
