

BEATRICE VENETIA PERERA

v.

ARTHUR SIMON PERERA

COURT OF APPEAL

G. P. S. DE SILVA, J. (President, C/A) AND P. R. P. PERERA, J.

C.A. No. 13/83.

M.C. MT. LAVINIA No. 2085/FCM.

DECEMBER 16, 1986.

Maintenance—Maintenance Ordinance ss. 2, 3 and 4—Invitation by husband to wife to live with him—Persistent refusal of offer by wife.

Under s. 2 of the Maintenance Ordinance if the husband had sufficient means and there is proof that he neglects, or refuses to maintain his wife the magistrate may order him to make a monthly allowance for her maintenance.

Under s. 3 if the husband offers to maintain his wife on the condition of her living with him the Magistrate may consider the grounds of any refusal by her of his offer and make an order for maintenance. If the husband is living in adultery or has habitually treated his wife with cruelty the maintenance can be ordered notwithstanding such offer.

Section 4 provides that the wife will not be entitled to such maintenance if she is living in adultery or without sufficient reason refuses to live with her husband or if they are living separately by mutual consent.

Where the wife persistently refused the invitation of her husband to her to live with him alleging misconduct on his part with her daughters and frequent assaults which misconduct and assaults were not proved to the satisfaction of the magistrate, the wife was not entitled to maintenance.

Cases referred to:

(1) *Sathasivam v. Manikkaratnam* – (1962) 66 NLR 355.

(2) *Richard v. Anulawathie* – (1971) 74 NLR 383.

APPEAL from order of the Magistrate of Mt. Lavinia.

E. Gunaratna for appellant.

N. R. M. Daluwatte, P.C. with *Miss Gabadage* and *Miss Nandadasa* for respondent.

March 2, 1987.

PERERA, J.

This is an appeal from an order made by the Magistrate of Mt. Lavinia dismissing the application of the appellant for maintenance for herself in a sum of Rs. 2,500 per month.

It would appear from the proceedings in this case that at the commencement of the inquiry, the respondent had invited the appellant to live with him and had offered to maintain her on the condition of her living with him. This offer has been made on 1.2.1982. In the course of the inquiry on 25.6.1982, the respondent has extended an invitation to the appellant for the second time. Thereafter on 9.11.1982 and 16.11.1982, the respondent has persisted in this offer—but the appellant has consistently refused to accept the offer made by the respondent.

The learned Magistrate having considered the evidence adduced in this case and the provisions of sections 3 and 4 of the Maintenance Ordinance (Chapter 91) has held that the appellant has refused to accept the offer made by the respondent to maintain her on condition of her living with him and that she has done so without sufficient reason. He has accordingly dismissed the application of the appellant for maintenance.

It was the principal submission of counsel for the appellant that on the evidence available in this case, the offer made by the respondent to the appellant to maintain her on condition of her living with him was not a genuine offer. He contended that an offer made under section 3 of the Maintenance Ordinance must be an offer which the other party could accept at the time it is made. Relying on *Sathasivam v. Manikkaratnam* (1) counsel argued that where a husband on being sued by his wife for maintenance offers to maintain her on condition of her living with him the Court must consider whether the offer is made *bona fide*. If the offer is not genuine, the defendant is liable to pay maintenance. He contended that the object of section 3 is to attempt a reconciliation between the parties by compelling the husband to fulfil his marital obligations by providing a matrimonial home. The offer therefore must be reasonable and should be capable of acceptance. It is the reasonableness of the offer which establishes good faith.

According to the evidence of the appellant in this case, she was compelled to leave the respondent in 1973, due to frequent assaults by the respondent. In the course of her evidence she has given reasons as to why she refused the offer made by the respondent to live with him. According to her, she did not accept this offer because the respondent has misconducted himself with her daughters and further has indulged in frequent assaults on her. The respondent has denied these allegations.

The argument of counsel for the appellant in this case was based on the provisions of sections 3 and 4 of the Maintenance Ordinance. Section 2 provides that if any person having sufficient means, neglects or refuses to maintain his wife.....the Magistrate may upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife.....

According to section 3—

“If such person offers to maintain his wife on condition of her living with him, the magistrate may consider any grounds of refusal stated by her and may make order under section 2, notwithstanding such offer if the magistrate is satisfied that such person is living in adultery or that he has habitually treated his wife with cruelty.”

● Further, section 4 (four) provides thus—

“No wife shall be entitled to receive an allowance from her husband under section 2, if she is living in adultery, or, if without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent.”

In our view, the learned Magistrate has given careful consideration to the provisions of section 3 and section 4 of the Maintenance Ordinance and the evidence adduced in this case and has held that there is no evidence to support either that the respondent was living in adultery or that he has habitually treated the appellant with cruelty.

The Magistrate has also held that the appellant has failed to place sufficient material to justify the refusal of the offer made by the respondent. We see no reason to interfere with these findings of fact made by the learned Magistrate.

On the question whether the offer that was made by the respondent in this case was made *bona fide*, the learned Magistrate appears to have preferred to follow the decision in *Richard v. Anulawathie* (2) where it has been held that an order for maintenance for the wife cannot be made merely because in the opinion of the Court the offer of the husband to maintain his wife is not made *bona fide*. In any event having regard to the evidence in this case there is no material in our view to support the proposition that the offer made by the respondent to maintain the appellant on the condition of her living with him was not made *bona fide*. The appeal is therefore dismissed. There will be no costs.

G. P. S. DE SILVA, J. (President, C/A)—I agree.

Appeal dismissed.
