1965 *Present :* **Alles, J.**

H. EDIRIWEERA, Appellant, *and* K. A. D. DHARMAPALA, Respondent

S. C. 198/1965—M. C. Tangalla, 31343

Maintenance Ordinance (Cap. 91)—Section 2—Maintenance of a child—Liability of the father—Means of the mother has no relevancy.

In determining the quantum of maintenance payable by the father in respect of his child under section 2 of the Maintenance Ordinance, the fact that the mother is possessed of means is not a factor that should be taken into consideration.

APPEAL from a judgment of the Magistrate's Court, Tangalla.

Ananda Karunatilleke, for the applicant-appellant.

R. L. N. de Zoysa, with *Miss C. M. M. Karunaratne*, for the defendant-respondent.

Cur. adv. vult.

November 29, 1965. ALLES, J.—

The only question that arises for consideration in this appeal is whether in law, the means of the mother is a factor that should be taken into consideration in determining the quantum of maintenance payable by the father in respect of his child.

The applicant who is the mother of the child Rohitha, aged 2 years, claimed a sum of Rs. 100 as maintenance in respect of the child. At the termination of the inquiry, the Magistrate came to the conclusion that " a fair estimate of the amount necessary per month for the maintenance of the child would be about Rs. 40 or Rs. 45 ". The mother was a First Class trained teacher and she stated in evidence that the amount she received into her hands monthly was Rs. 260. The defendant, the father, was a clerk employed at the Kalutara Kachcheri and he stated that his salary and other emoluments amounted to about Rs. 350 per month. In his order, the Magistrate said that " taking into consideration the respective circumstances of the two parties, the defendant should pay a sum of Rs. 30 per month by way of maintenance in respect of the child and that any balance necessary should be contributed by the applicant." Counsel for the applicant states that his client does not grudge making any payment for the maintenance of her child, and that she is quite willing to maintain the child; he contends however that the Magistrate in making the order of maintenance against the defendant has misdirected himself in law in taking into account the means of the mother and thereby reducing the maintenance payable by the defendant to Rs. 30 per month.

In arriving at the conclusion that there was an obligation on a mother who had sufficient means to maintain her child to provide a share of the maintenance, the Magistrate has proceeded on the acceptance of two propositions of law: firstly, that the Roman-Dutch law recognised a duty on the *parents* to legally provide for the maintenance of their children and secondly, that the Roman-Dutch law on the subject has not been modified by the provisions of the Maintenance Ordinance. According to the learned Magistrate, in an order for maintenance, it is open to him to consider the means of both parents before deciding on the quantum of maintenance payable by the father of the child.

In support of the first proposition, the learned Magistrate cites a dictum of Wood Renton, J.(as he then was) in *Luciya v. Ukku Kira* [1], the dissenting judgment of Schneider, A.J. in the Divisional Bench case of *Lamahamy Karunaratne* [2], and some passages from the Commentaries of Van Leeuwen quoted by Pereira, A.J. in *Jane Ranasinghe v. Pieris* [3] and Macdonnel, C.J. in *Gunesekere v. Ahamath* [4]. It would appear from these citations that under the Roman-Dutch law both parents had a duty to maintain their children and consequently, if the mother had means of her own, she was not exempt from providing a share of the maintenance. A critical examination of the Roman-Dutch law on the subject is however unnecessary because the more important question for decision is whether the Roman-Dutch law in regard to the maintenance of children has been superseded by the Maintenance Ordinance of 1889. Although the early decisions of the Supreme Court (*Subaliya v. Kannangara* [5], *Anna Perera v. Emaliano Nonis* [6], *Jane Ranasinghe v. Pieris* (supra)), appear to have taken the view that the Roman-Dutch law of maintenance has not been abrogated by the introduction of the Maintenance Ordinance, it is now settled law after the Full Bench decision in *Lamahamy v. Karunaratne* (supra) that all applications for maintenance must be made under the provisions of the Ordinance. Ennis, A.C.J. in that case, after reviewing the earlier authorities came to the conclusion that " the Maintenance Ordinance with its special procedure and the creation of a statutory liability must be held to have superseded the remedies of the Roman-Dutch civil law. " Shaw, J. agreed with this view and held that " since the enactment of the Maintenance Ordinance all applications against a husband or father for maintenance of his wife or children, legitimate or illegitimate, must be made under the provisions of the Ordinance. " Schneider, A.J. however, in his dissenting judgment was " not convinced that the Ordinance No. 19 of 1889 was intended to, or did in fact, abrogate the right of action in an ordinary Court of civil jurisdiction to enforce payment of maintenance for a child. " Macdonell, C.J. in *Gunesekere v. Ahamath* (supra) in construing the words " unable to maintain itself " in section 3 (presently section 2) said that " whether these words agree with the Common law or not, they are now the law on the matter, and a child which is dependent on charity cannot be said to be " able to maintain itself ". Therefore the question whether the Roman-Dutch law recognised a duty on both parents to maintain their child is now only of academic interest since by virtue of the decision in *Lamahamy v. Karunaratne*, the Roman-Dutch law of maintenance has been swept away and the law as it stands today is governed by the provisions of the Maintenance Ordinance.

Therefore the only matter that now arises for determination is whether under the provisions of section 2 of the Maintenance Ordinance, the liability of the father to maintain his child is in any way affected by the fact that the mother has means to support it. Although this question has not been authoritatively considered up to date, there are some useful dicta

[1] *(1907) 10 N. L. R. 225 at 226.*
[2] *(1921) 22 N. L. R. 289 at 293.*
[3] *(1909) 13 N. L. R. 21 at 25.*
[4] *(1931) 33 N. L. R. 241 at 244.*
[5] *(1899) 4 N. L. L. 121.*
[6] *(1905) 18 N. L. R. 263.*

in the Divisional Bench case of *Sivasamy v. Rasiah* [1] which seem to take the view that the means of the mother has no relevancy to the question of the father's liability to maintain his child. In *Sivasamy v. Rasiah* the question that arose for decision was whether the ability of the wife to maintain herself was a factor which affected the quantum of maintenance payable by the husband. Soertsz, S.P.J. who delivered the order of the Court analysed the provisions of section 2 in so far as it affected the wife and stated as follows :—

> " These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own. That conclusion emerges all the clearer when we read further down in the section the words of contrast providing for an order of maintenance for ' *his* wife ' and for ' *such* child ' : The word ' such ' is used as an adjunct to the word ' child ', and not to the word ' wife ' in order to emphasize the fact that in the case of the child, inability to maintain itself is one of the conditions upon which the father's liability rests. "

In this passage, the learned Judge recognised that the liability of the father to maintain his child was conditioned by two factors : firstly, the possession of sufficient means by the father, and secondly, the inability of the child to maintain itself. The means of the mother has no bearing whatsoever on these two distinct and separate factors. I would respectfully agree with the interpretation of section 2 as understood by Soertsz, S.P.J. and hold that the fact that the mother was possessed of means to maintain the child is a totally irrelevant consideration in so far as the legal liability of the father is concerned to maintain his child. If the law requires that the means of the mother is not a matter that should be taken into account in determining the quantum of maintenance payable by the husband in respect of his wife, there seems to be no valid reason why such a legal burden should be cast on an affluent mother in the case of her child for whose welfare and maintenance the father alone is responsible.

I am therefore of the view that the Magistrate has come to an erroneous conclusion on the law. Since the Magistrate has held that a fair estimate of the amount necessary for the maintenance of the child, Rohitha, would amount to Rs. 40 or Rs. 45, I alter the quantum of maintenance payable by the defendant from Rs. 30 to Rs. 42·50 per mensem and allow the appeal with costs.

Appeal allowed.

[1] *(1943) 44 N. L. R. 241.*