

1964

Present : Manicavasagar, J.

S. SHANMUGAM, Appellant, and ANNAMUTTU,
Respondent

S. C. 499/64—M. C. Jaffna, 15127

Maintenance—Order made in favour of children—Mother living in adultery—Her right to receive the children's allowance—Maintenance Ordinance, ss. 2, 4, 5.

Where, on an application made by a wife under section 2 of the Maintenance Ordinance, the husband is ordered to pay a monthly allowance to the children of the marriage, the wife, if she has the custody of the children, is entitled to receive into her hands the allowance of the children, even if she is living in adultery.

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

C. Thiagalingam, Q.C., with R. R. Nalliah, for the Defendant-Appellant.

R. Manikkavasagar, for the Applicant-Respondent.

December 4, 1964. MANICAVASAGAR, J.—

The applicant is the lawful wife of the defendant; in 1961 she was granted a decree nisi dissolving her marriage which has not yet been made absolute.

In October 1958 on an application made by her, the Magistrate ordered the defendant to pay a monthly allowance to each of the three children of the marriage; the defendant fell into arrears and a Distress Warrant was issued to recover the amount due. In January 1962, counsel for the defendant submitted to the Magistrate that the applicant is living in adultery, and also living in separation by mutual consent, and therefore his client is justified in not paying her the allowance due to his children.

After inquiry the Magistrate disallowed the objection of the defendant.

The question that was submitted for determination by me is whether the wife is entitled to receive the allowance of the children as she is living in adultery.

The Magistrate has not made a definite finding on the issue of adultery, nor has he found whether the document D1 which is relevant to this issue was given by the applicant voluntarily or under duress. Having regard to the decision I have reached on the submissions made by Mr. Thiagalingam, I do not think it necessary to send the case back for a re-hearing on these matters.

I shall however assume that the applicant is in fact living in adultery, and has been so living since July 1958. Mr. Thiagalingam's argument is that Section 4 of the Maintenance Ordinance disentitles the wife who is living in adultery from receiving from her husband the allowance granted under

Section 2 of the Ordinance. Section 2 empowers the Magistrate to order a person to pay a monthly allowance for the maintenance (1) of his wife and (2) of his children, whether legitimate or illegitimate. Counsel submits that Section 4 is applicable not only to the wife's allowance, but also to the allowance made in favour of the child ; in other words he says an adulterous wife is not entitled to receive into her hands the child's allowance ; he pointed to Section 5 which enables a Magistrate in certain circumstance to cancel an order made in favour of the wife, and contended that if the object of Section 4 is to apply only to the wife's maintenance, the section would have been couched in the same terms as Section 5 ; in the absence of such phraseology he submitted that all orders for allowance under Section 2 were affected by Section 4.

I am of the view that this submission is untenable : Section 4 applies to a stage prior to the making of an order under Section 2 : the matters set out in Section 4, if raised by the defendant, are those which the Court should consider in deciding whether the wife is entitled to receive an allowance or not : such matters have no relevance to the issue of maintenance for the child of the marriage, or in the case of an illegitimate child whose paternity is admitted by a defendant, because a parent is bound in law to maintain his child ; the adultery of the wife or that the spouses are living apart by mutual consent has nothing whatsoever to do with the legal duty of a father to maintain his child. The several matters set out in Section 4 have no application after an order for maintenance is made in favour of the wife. The husband cannot be heard to resist an order made in favour of the wife under Section 2 by recourse to Section 4 : his remedy is to have the order cancelled under Section 5 : otherwise it remains operative.

Mr. Thiagalingam's argument was on the basis that Section 4 applies to a case where an order under Section 2 has been already made, and if any one of the circumstances set out in Section 4 had been established the Magistrate could order that the wife is not entitled to receive the allowance ordered under Section 2 ; I do not agree with this submission ; but assuming that Mr. Thiagalingam is right, that is to say that Section 4 applies to an order under Section 2, my opinion is that even in such a case Section 4 applies only to the wife's allowance, and not to the child's allowance. It is the duty of a father to maintain his child, and, as in this case, if he has not the custody of his child, he is bound to pay the allowance ordered under Section 2 to the persons in whose custody the child is : if such person be the mother of the child she is not disentitled from receiving the allowance ordered for the child, even if any one of the circumstances set out in Section 4 is established : the allowance ordered is personal to the child, and the latter should not suffer even temporarily for the folly of the mother : this appears to me to be the reason underlying the sections of the Ordinance which were cited in the course of the argument.

The appeal of the defendant is dismissed with costs.

Appeal dismissed.