

1952

Present : Swan J.

H. VELENIS, Appellant, and L. EMMIE, Respondent

S. C. 825—M. C. Kalutara, 14,060

Maintenance—Application by wife and child—Denial of paternity of child—Burden of proof.

Where a wife sued her husband for maintenance for herself and a child and the husband admitted that the applicant was his wife but denied the paternity of the child—

Held, that the burden was on the defendant to establish his defence first.

APPPEAL from a judgment of the Magistrate's Court, Kalutara.

Titus Goonetilleke, for the defendant-appellant.

No appearance for the applicant-respondent.

Cur. adv. vult.

¹ (1947) 48 N. L. R. 433.

² (1949) 51 N. L. R. 8.

October 13, 1952. SWAN J.—

In this case the applicant-respondent sued the defendant-appellant for maintenance for herself and a child called Premawathie, aged three. In her application she stated that she was the lawful wife of the defendant and that Premawathie was their child and that the defendant, having sufficient means, had failed to maintain them in breach of section 2 of the Maintenance Ordinance. After recording the evidence of the applicant the learned Magistrate issued summons on the defendant. The defendant appeared on summons and admitted that the applicant was his wife but denied the paternity of the child. Inquiry was fixed for 19.4.52. It was postponed from time to time and ultimately taken up and concluded on 18.7.52. At the inquiry both parties were represented. Mr. Francis Silva appeared for the defendant and led evidence to prove that Premawathie was not his child. When the defendant's case was closed Mr. Weeraratne who appeared for the applicant called his client and a witness in support of his case and the learned Magistrate delivered judgment holding that Premawathie was the defendant's child. He ordered the defendant to pay the applicant Rs. 10 per mensem as maintenance for herself and Rs. 5 per mensem as maintenance for Premawathie.

Mr. Goonetilleke for the defendant-appellant contends that the procedure at the trial was entirely irregular and wants me to set aside the order and remit the case for re-trial before another Magistrate. For the alleged irregularity he relies on the judgment of Nagalingam A.J. in *Vidane v. Ukkumenika*¹. In that case it was held that where the defendant admitted the marriage but denied the paternity of the child and alleged that the applicant was living in adultery the applicant had to prove at the trial certain necessary matters before the defendant could be called upon to "establish his defence"; *firstly* that the defendant had sufficient means, and *secondly* that he had neglected or refused to maintain his wife, and *thirdly* that the child for whom maintenance was claimed was the child of the defendant.

Mr. Goonetilleke very properly brought it to my notice that Dias J., in the case of *Selliah v. Sinnammah*², doubted the correctness of the judgment of Nagalingam A.J. in *Vidane v. Ukkumenika* (supra).

I am in complete agreement with the dictum of Dias J. in *Selliah v. Sinnammah* (supra) that maintenance proceedings are civil in their nature and that the rules as regards burden of proof apply.

The record does not show that the learned Magistrate ruled that the defendant should begin. But presuming that he held that the burden was on the defendant I would unhesitatingly say that he was right.

On the facts the appeal was not pressed. I have no doubt at all that the learned Magistrate was correct in holding that the defendant had failed to prove that the applicant was living in adultery and had failed to rebut the presumption of legitimacy as regards Premawathie.

The appeal is dismissed.

Appeal dismissed.

¹ (1946) 48 N. L. R. 256.

² (1947) 48 N. L. R. 261.