

PERERA ALIAS CHARLES  
v.  
RODRIGO

SUPREME COURT.  
BANDARANAYAKE, J.,  
AMERASINGHE, J. AND  
GOONEWARDENE, J.  
S.C. APPEAL NO. 39/93.

*Maintenance - Right of divorced wife to claim maintenance until the date of divorce in maintenance proceedings instituted before the divorce - Jurisdiction - Maintenance Ordinance, sections 2, 10.*

On 06 May, 1986 the respondent - appellant instituted a divorce suit in the District Court against the applicant - respondent.

On 02 September, 1986 the applicant - respondent instituted maintenance proceedings against the respondent - appellant claiming monthly maintenance for herself.

On 19 January, 1989 maintenance proceedings commenced and was put off.

On 06 February, 1989 evidence in the divorce proceedings was begun and decree *nisi* was entered. The respondent-appellant agreed to pay Rs. 50,000/- before 31 May, 1989 and return 3 items referred in a list annexed to the plaint before 19 February, 1989 whereupon the applicant - respondent agreed to withdraw the maintenance case. On 06 June, 1989 the respondent-appellant paid the sum of Rs. 50,000/- but there was no evidence of the return of the three items. In the absence of proof of return of the three items the question of the applicant - respondent's obligation to withdraw the maintenance case did not arise.

On 31 May, 1990 the maintenance case was called and the Magistrate overruled the objection in regard to maintainability and ordered Rs. 27,000/- to be paid as maintenance for the period ending with the decree absolute which was entered on 20 October, 1989.

In appeal the High Court upheld the Magistrate's order in regard to maintainability but set aside the order in regard to maintenance and sent back the case for the Magistrate to determine the quantum of maintenance for the period in question.

In appeal against the order of the High Court,

**Held:**

(1) There is a legal duty cast upon a husband (1) to maintain his wife during the subsistence of the marriage independent of an order from a Magistrate to do so. In a case where a Magistrate orders a husband to pay maintenance to a wife on her application under the Maintenance Ordinance, he does no more than compel the husband to fulfil that duty. A subsequent decree for divorce, operates to relieve the husband of that duty and therefore the Magistrates' refusal to enforce payment for any period thereafter would be based not so much on a loss of jurisdiction but rather on his unwillingness to lend his authority to recover something which is not due.

(2) There is no bar to a divorced woman being eligible to receive maintenance for a period anterior to her divorce, and thus being entitled to resort to the provisions of the Maintenance Ordinance especially where, as here, an application had been made to a Magistrate prior to a decree for divorce being granted.

(3) The liability of the appellant to support the respondent was coterminous with the duration of their marriage ending with the divorce; at the time the applicant - respondent made her application to the Magistrate's Court for maintenance she was the wife of the respondent-appellant and had an enforceable right to receive maintenance and the subsequent decree for divorce did not take away the jurisdiction (which in any event must be considered to relate back to a point of time when it was properly invoked) to thereafter make an order for maintenance for a period prior to the divorce.

**Cases referred to :**

1. *Menike v. Siyathuwa* 42 NLR 53
2. *Ariyanayagam v. Thangamma* 41 NLR 169.

3. *Peiris v. Peiris* 45 NLR 18.
4. *Fernando v. Amerasena* 45 NLR 25, 27.
5. *Kent v. Kent* AIR 1926 Mad 59.
6. *Sarana v. Heenukku* 45 NLR 196.
7. *Francis Fernando v. Vincentine Fernando* 59 NLR 522.
8. *Premawansa v. Somalatha* 63 NLR 561.
9. *Mihingamage v. Bulathsinhala* 65 NLR 134.

*Menike v. Siyathuwa* 42 NLR 53 not followed.

**APPEAL** from judgment of High Court of Negombo.

*R.K.S. Sureschandra* for Respondent – Appellant-Petitioner

*M.D.K. Kulatunga* with *Leon Fernando* for Applicant-Respondent-Respondent.

*Cur. adv. vult.*

October 04, 1993.

**S.B. GOONEWARDENE, J.**

A brief narrative of the circumstances germane to this appeal is as set out below.

On 2nd September, 1986 the respondent made an application to the Magistrate's Court of Negombo for an order directing the appellant who at the time was her husband, to pay her a monthly allowance as maintenance.

On 6th May, 1986 the respondent also instituted in the District Court of Negombo a divorce action seeking a decree for divorce *a vinculo matrimonii* against the appellant.

On 19th January, 1989 inquiry into the maintenance application commenced with the respondent giving her evidence, but at the end

of her examination-in-chief the inquiry was postponed on the motion of Counsel for the appellant for a date to cross-examine her.

On 6 February, 1989 the evidence of the respondent was led in the divorce action in the presence of both parties and on that uncontradicted evidence a decree *nisi* was entered granting her a divorce on the ground of malicious desertion. The evidence of the respondent led before the District Judge on that date, namely the 6th February 1989, contains a statement that the appellant had agreed to return to her a sum of Rs. 50,000/- of her money with him, as well as three other items referred to in a list annexed to the plaint, particulars relating to which however are not available in the material presented to this Court. According to such evidence the agreement had been that the appellant would return the money on or before 31 May, 1989 and the other three items during the evening of 19 February, 1989. It is found further stated in her evidence that after such items and cash had been returned in full, she was agreeable to withdrawing the maintenance application. According to the proceedings of 6 June, 1989 in the divorce action, the appellant had paid to the respondent on that date in open Court the sum of Rs. 50,000/-, but there is no record of his having returned the other items he undertook to return, nor was Counsel for the appellant able, at the hearing before us, to point to any material to establish that that was in fact done. In the absence of proof as to that, the question whether the respondent was under any legal obligation to withdraw her application for maintenance does not arise for consideration.

The decree *nisi* entered in the divorce case was made absolute on the 20 October, 1989.

On 31 May, 1990 the maintenance application was called in the Magistrate's Court and in the face of a challenge relating to

jurisdiction mounted by the appellant, oral submissions were made regarding its maintainability. The Magistrate by his order dated 22 October, 1990 upheld the respondent's contention that the application was maintainable and then went on to order the appellant to pay a sum of Rs. 27,000/- as maintenance for a period ending with the date on which the decree *nisi* for divorce was made absolute in the District Court.

The appellant then appealed against such order to the Provincial High Court of Negombo and the learned High Court Judge in the exercise of his appellate powers upheld the submission regarding the maintainability of the application for maintenance, but correctly set aside so much of the Magistrate's order as purported to determine the quantum of maintenance payable, as the only question which was then before the Magistrate was as to the maintainability of such application. The High Court Judge also directed that a fresh inquiry be held by the Magistrate to determine the quantum of maintenance payable for the period in question.

This appeal is taken against the judgment of the High Court and the only argument placed before us was based on the fact that no order for maintenance had been made by the Magistrate in the maintenance application up to the time of the entering of the decree absolute on 20 October, 1989 in the divorce action.

There is in my view no doubt either in point of principle or on authority, that if a wife is not faced with a legal disqualification in that regard, her husband is under a duty to maintain her during the subsistence of their marriage, such duty terminating only with the termination of the marriage, nor did Counsel for the appellant seek to argue differently.

Indeed I would say that an essential concomitant of the marital relationship is the husband's duty to support his wife which lasts as long as the marriage lasts. The point however sought to be made for the appellant was that, although the Magistrate's Court had jurisdiction as at the time it entertained the application, since no order for maintenance had been made up to the time the decree *nisi* was made absolute in the divorce proceedings on 20th October 1989, the jurisdiction of the Magistrate's Court came to an end and no order could have been made after that date to pay maintenance even for the period prior to the entering of the decree absolute, although the appellant undisputedly had not maintained the respondent during that period.

Total reliance for this contention was placed upon the judgment in the case of *Menike v. Siyathuwa* <sup>(1)</sup> which had been decided by de Kretser, J. sitting alone. In that case the wife (the appellant) had obtained an order for maintenance against her husband (the respondent) from the Magistrate's Court. Thereafter the parties were divorced under the provisions of the Kandyan Marriages Ordinance No. 3 of 1870 in which proceedings no order for maintenance was obtained by the wife although the Registrar was empowered to so order. Subsequently the divorced wife applied to the Magistrate's Court to recover arrears of maintenance and this was successfully resisted by the husband on the basis that she had ceased to be his wife and could not maintain her claim. On appeal it was contended for her that the only mode of getting rid of the order for maintenance was to have it cancelled under section 5 of the Maintenance Ordinance and as none of the conditions prescribed in the section had application, the order had to remain in force and had to be enforced. De Kretser J. in response to that contention said (at page 54) as follows:—

"The answer to that is that the Ordinance only applied while the conjugal relationship exists, and that the very terms of that section and of other sections in the Ordinance indicate that the Ordinance applies only while the relationship of husband and wife continues. It is clear that the Ordinance was intended to apply only while marital relations continued.

The Ordinance is on the same lines as the corresponding provisions in the Indian Criminal Procedure Code. Sohini, in his commentary on that Code, at page 1035, deals with this very position and says "where the cessation of conjugal relations has been proved the responsibility attached thereto must cease, and a Magistrate is competent to stay an order for maintenance already made and to refuse to issue his warrant and to try all questions raised before him which affect the rights of a woman to receive maintenance."

In dismissing the appeal the learned Judge said (also at page 54) thus:

"It is sufficient to say that the order for maintenance is now ineffective, that the Magistrate is *functus officio* and that it was therefore his duty to refuse to continue the proceedings."

If I understand his language the way I think he intended it to be understood, which indeed is the way Counsel for the appellant himself contended it should be understood, it is convenient to state at once, with much respect to the learned Judge, that I cannot possibly agree that the Magistrate became *functus officio* and could not continue proceedings. Whilst so saying, I would add that to my mind it is doubtful upon a close examination of it whether the quotation from Sohini has this sweeping effect that de Kretser, J. contended for it.

As respects the jurisdiction of a Magistrate's Court to order maintenance in proceedings under the Maintenance Ordinance in a somewhat analogous situation, in the case of *Ariyanayagam v. Thangamma* <sup>(2)</sup> de Kretser, J. once again had occasion to hold that an order made by the District Court in proceedings in the exercise of its matrimonial jurisdiction making provision for the maintenance of the children of the marriage, operate as a bar to proceedings for their maintenance under the Maintenance Ordinance. He relied here too on a passage from Sohini (*ibid*) which is stated by him to have the effect that a woman is not entitled to an order for maintenance from a Magistrate, when a decree for maintenance obtained by her in a civil Court is in force.

The importance of that case here lies partly in that de Kretser, J.'s general line of thinking was not followed by Soertsz, J. in *Peiris v. Peiris* <sup>(3)</sup> or by Keuneman, J. (with Jayatillake, J. agreeing) in *Fernando v. Amarasena* <sup>(4)</sup>, and partly in comments, reproduced from an Indian case, found in the latter.

In the former case Soertsz, J. (at page 20) said:

"It seems to me that the Maintenance Ordinance provides special machinery for securing maintenance for parties entitled to it, and when resort is made for relief under this Ordinance, in a case like the present one the only question that arises in regard to the jurisdiction of the Magistrate to grant it, is the question of fact does the husband refuse or neglect to maintain wife or child".

Were I to attempt to express the legal effect of what Soertsz, J. there said, with reference to the circumstances of the instant case, while being mindful at the same time of the fact that the application for maintenance here was made before the decree absolute in the divorce action was entered, I do not think I would be wrong in stating it thus: "The only question that arises in regard to the jurisdiction of the Magistrate to grant it (maintenance) is the question of fact – 'did the husband refuse or neglect to maintain his wife', for the period for which in the event the Magistrate ordered payment?"

In the latter case I referred to i.e. *Fernando v. Amarasena* <sup>(4)</sup> there is reproduced (at page 27) the following passage from the judgment of Devadoss, J. in the Indian case of *Kent v. Kent* <sup>(5)</sup> thus:

"... what had to be proved to the satisfaction of the Magistrate was 'that the husband had neglected to maintain his wife' and where that was proved the Magistrate had jurisdiction".

And again (at page 27):

"A mere order for maintenance (made in a civil suit) is non-equivalent to maintaining the wife, and the order whatever may be its force or nature cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife."

The case of *Sarana v. Heenukku*<sup>(6)</sup> was one where the marriage in question was dissolved by the Provincial Registrar under the provisions of Section 20 of the Kandyan Marriage Ordinance and under section 20(2) (b), the appellant was ordered by the Registrar to pay monthly a sum of Rs. 2/- to the respondent for her maintenance. Subsequently the respondent applied successfully to the Magistrate's Court for enforcement of the maintenance ordered upon an invocation of the provisions of section 20(5) and (6) of the Kandyan Marriages Ordinance. These provisions state that an order made, *inter alia* under section 20(2) has the effect of an order of the Magistrate's Court made in the exercise of a jurisdiction under Section 2 of the Maintenance Ordinance and could be enforced by that Court as it was an order made by it. It was argued for the appellant husband that after the dissolution of the marriage, a Magistrate's Court had no power under section 2 of the Maintenance Ordinance to direct the payment of any sum of money. Howard, C.J., rejected this argument and in dismissing the appeal held that in considering the limitations on the powers exercisable by a Magistrate under section 2 of the Maintenance Ordinance, the proper interpretation to be given to section 20 of the Kandyan Marriage Ordinance is that the Magistrate can exercise his power with regard to maintenance in the case of a marriage dissolved under the Ordinance as if the parties were husband and wife.

In the case of *Francis Fernando v. Vincentine Fernando*<sup>(7)</sup> the wife had obtained a maintenance order in her favour from the Magistrate's Court subsequent to which there was a decree for divorce granted by the District Court in which an order for the payment of alimony in favour of the wife was also made. Thereafter, there was an application made by the wife under section 10 of the Maintenance Ordinance for enhancement of the quantum of maintenance earlier ordered, which the Magistrate granted. An appeal taken was pressed (as indicated by the report of the judgment) only on the ground that as by the decree of the Divorce Court the applicant-respondent ceased to be the wife of the appellant, she was not entitled to invoke the provisions of the Maintenance Ordinance. Sinnathamby, J. said that he did not consider it necessary 'to decide whether a wife who had obtained a decree for divorce can thereafter apply for

maintenance' under section 2 of the Maintenance Ordinance (a position different from the instant case where at the time the application was made the decree for divorce had not been granted) but went on to hold that since section 10 of the Ordinance does not use the word 'wife' (being the word used elsewhere in the Ordinance) but instead uses the word "person", it is open to a divorced "wife" to apply for enhancement under section 10 of the Ordinance. Although this case affords no direct resolution to the question I am concerned with on this appeal, at the least it suggests a disagreement by Sinnathamby, J. with the statements of de Kretser, J. in *Menike v. Siyathuwa* <sup>(1)</sup> that I have already referred to that the Maintenance Ordinance was intended to apply only while marital relations continued and that the Magistrate became *functus officio* consequent upon the decree for divorce.

In the case of *Premawansa v. Somalatha* <sup>(2)</sup> the Respondent obtained an order from the Magistrate directing the appellant to pay her maintenance. Thereafter the parties were divorced under the provisions of the Kandyan Marriages and Divorce Act. On a subsequent application being made to the Magistrate by the Respondent claiming arrears of maintenance and a distress warrant to recover the same, it was proved to the Magistrate that the marriage had already been dissolved and it was contended that the earlier order to pay maintenance could not therefore be enforced, a contention which the Magistrate rejected. On appeal, Thambiah, J. held that a distress warrant could be issued to recover arrears of maintenance payable up to the time of the dissolution of the marriage.

In *Mihirigamage v. Bulathsinhala* <sup>(3)</sup> the appellant wife made an application under section 2 of the Maintenance Ordinance describing herself in such application as the wife, when in fact the marriage had ended by a decree for divorce entered earlier. The Magistrate after inquiry refused the application on the ground that the appellant had at the date of the application ceased to be wife of the Respondent and was therefore not entitled to an order under section 2 of the Ordinance, a position upheld in appeal by Weerasuriya, S.P.J. Whatever view one may take as to the correctness of this decision, by

contrast, in the instant case as I have already pointed out, the Respondent was the wife of the appellant at the time of her application to the Magistrate and was entitled to describe herself as such and the claim upheld by the Magistrate did not require the payment of maintenance for any period after the marriage was dissolved. What must be emphasised is that this decision certainly does not purport to say that a jurisdiction which the Magistrate possessed when it was properly invoked during the subsistence of the marriage could be subsequently lost with the termination of marital relations by divorce as respects payment of maintenance for any period prior to such termination.

The point, I think, that must not be lost sight of is that there is generally a legal duty cast upon a husband to maintain his wife during the subsistence of the marriage independent of an order from a Magistrate to do so as the words in section 2 of the Maintenance Ordinance themselves suggest. In a case where a Magistrate orders a husband to pay maintenance to a wife on her application under the Maintenance Ordinance, he does no more than compel the husband to fulfil that duty. A subsequent decree for divorce, operates to relieve the husband of that duty and therefore the Magistrate's refusal to enforce payment for any period thereafter to my mind, would be based, not so much on a loss of jurisdiction, but rather on his unwillingness to lend his authority to recover something which is not due. In that view of the matter, I see no bar to a divorced woman being eligible to receive maintenance for a period anterior to her divorce, and thus being entitled to resort to the provisions of the Maintenance Ordinance especially where, as here, an application had been made to a Magistrate prior to a decree for divorce being granted. Therefore I must with great respect disagree with the thinking of de Kretser, J. as expressed in his judgment in the case of *Menike v. Siyathuwa* I started with.

The effect of what is contended for the appellant is to say that by reason of the decree absolute being entered in the divorce action, the respondent for all practical purposes lost a right which inhered in her to be maintained by the appellant during a period when they were husband and wife. I have not been able to find anything in the

Maintenance Ordinance to justify a reading of its provisions so narrowly and restrictively as to secure such a result. It is, to my mind, in the highest degree doubtful that the framers of the Maintenance Ordinance who introduced it into the Statute book with the obvious intention of expeditiously enforcing the matrimonial duty cast upon a man, also intended that its very terms should be permitted to be made use of as an instrument wherewith the man could rid himself of that duty. Indeed for myself I would be slow to read the statute in that way. It does not require much imagination to see that if the appellant's argument is upheld, it could well act as an encouragement to any scheming husband to attempt to delay maintenance proceedings pending in a Magistrate's Court with the object of evading compliance with his duty to maintain his wife, in the expectation that the decree in a parallel divorce proceeding would wipe out the right to enforcement of that duty.

For the purpose of the present appeal it is sufficient to say that the liability of the appellant to support the respondent was coterminous with the duration of their marriage ending with the divorce, that at the time the respondent made the application to the Magistrate's Court for maintenance she was the wife of the appellant and had an enforceable right to receive maintenance and that the subsequent decree for divorce did not take away the jurisdiction of the Magistrate (which must I think in any event be considered to relate back to a point of time when it was properly invoked) to thereafter make an order for maintenance for a period prior to the divorce.

The judgment in appeal of the High Court is accordingly affirmed and this present appeal is dismissed with costs.

**BANDARANAYAKE, J.** – I agree.

**AMERASINGHE, J.** – I agree.

*Appeal dismissed.*