

1938

Present : Hearne J.

ROSLIN NONA v. ABEYWEERA.

385—P. C. Tangalla, 5,619.

Maintenance—Separation of husband and wife by mutual consent—Custody of children in the wife—Liability of husband to pay maintenance for children.

Where husband and wife agree to separate and the wife is given the custody of the children, the husband is liable to maintain the children.

Dingiri Menika v. Mudianse (3 Bal. 253) referred to ; *Fernando v. Fernando* (9 Cey. Law Weekly 97) distinguished.

A PPEAL from an order of the Police Magistrate of Tangalla.

L. A. Rajapakse (with him Kumarakulasingham), for defendant, appellant.

E. B. Wikramanayake, for applicant, respondent.

Cur. adv. vult.

October 11, 1938. HEARNE J.—

The defendant and the applicant in the Magistrate's Court are husband and wife. The latter acting, as she says, "on the advice of a doctor to abstain from marital relations" with her husband left him. She went to her mother's house with her three children of whom the eldest is ten years of age. After a lapse of eight months she applied to the Court for maintenance of herself and the children. The defendant offered in Court

to provide a home for his wife and family and the applicant then alleged that he was living in adultery. The defendant denied the charge and a date was fixed for inquiry. On this date the applicant withdrew her application for maintenance of herself and limited it to maintenance of her children.

The Magistrate found that the defendant was in a position to pay Rs. 20 per month for the eldest child and Rs. 10 per month for each of the younger children and made an order accordingly. It is from this order that the defendant appeals. It was not argued in this Court that the Magistrate was wrong in holding that the defendant could afford to pay Rs. 40 per month.

In view of the fact that the applicant had withdrawn her application for maintenance of herself, the Magistrate did not record a finding on the question of whether the defendant was living in adultery or whether the applicant's refusal to live with her husband was with sufficient cause.

He considered the question of the defendant's means and addressed himself to the one argument concerning the defendant's liability to maintain his children that appears to have been advanced. It was to the effect that the applicant was liable to maintain the children under the Married Women's Property Ordinance. As this contention, although contained in the defendant's petition, was not pursued on appeal it is unnecessary to deal with it.

The crucial question which the Magistrate had to decide was whether the children were in the lawful custody of their mother (*Dingiri Menika v. U. Mudianse*¹). But everybody appears to have agreed that they were and the inquiry proceeded on this footing. Even the defendant's evidence that when his wife left with the children the parting was "on almost friendly terms" suggests a mutual understanding and an agreement that his wife should have the custody of the children two of whom at least are of very tender years.

In the circumstances Mr. Poulier who appeared for the defendant assumed that the children were in the lawful custody of their mother—he certainly did not ask the Court to take a contrary view—but on appeal it has been urged that the defendant is not liable to support his children while they are in their mother's custody on the authority of *Fernando v. Fernando*².

That case decided that the grandfather of a child who is maintaining the child cannot compel the father to pay maintenance when the father is willing to maintain the child in his own home. These facts are not comparable with the facts of the present case where a man whatever the merits of the dispute between himself and his wife, agrees to separate from her and to give her the custody of their children.

Another point was raised on appeal which was not raised in the Court below or even in the petition of appeal. It was said that there was no proof of neglect or refusal. The applicant gave evidence that "the defendant had not maintain" her or her children "for several months". This was not challenged by the defendant's proctor, it was not contradicted by the defendant when he gave evidence, and it was properly accepted by the Magistrate as the truth.

¹ 3 Bal. Rep. 253.

² 9 Cey. Law Weekly 97.

There remains the question of the offer of the defendant to provide a home for his wife and family. His wife cannot be compelled to return to him. While she lives apart from him and the children are in her lawful custody she is entitled to an allowance for their maintenance. Should a Court give the defendant the custody of the minor children no allowance would of course be payable, but in the present state of affairs his liability in law is in my opinion beyond doubt.

I dismiss the appeal with costs.

Appeal dismissed.

