

1971

Present : de Kretser, J.

PUSHPAWATHY, Appellant, and R. SANTHIRASEGARAMPILLAI,
Respondent

S. C. 1048/69 — M. C. Mallakam, 13760

Maintenance Ordinance (Cap. 91)—Section 4 —“ Living in adultery ”.

Where a husband against whom an order of maintenance had been made in favour of his wife sought the cancellation of the order on the ground that, about four years after the order was made, the wife gave birth to a child which was not his—

Held, that the birth of the child did not, by itself, establish that the wife was living in adultery with someone. It only established that the wife had committed adultery with someone, which act might well be a single lapse from virtue.

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

C. Chellappah, for the applicant-appellant.

No appearance for the defendant-respondent.

Cur. adv. vult.

May 20, 1971. DE KRETZER, J.—

The appellant in this case is the wife of the respondent. She had sued her husband for maintenance on the ground that from September 1964 he had deserted her and was living in adultery with his brother's wife. Her husband's defence was a denial of this and an allegation that it was she who was living in adultery with her brother-in-law Subramaniam.

The Magistrate accepted her version and her husband was ordered to pay her Rs. 35 per month as maintenance as from July 1965 and he continued to do so upto April 1969, when according to him in consequence of a letter he received that she was pregnant, he moved on 11.5.69 for a cancellation of the order on the ground that she was living in adultery with Subramaniam. His wife gave birth to a female child on 28.6.69. According to the birth certificate he was the father of the child and at the ensuing inquiry into the application made by him, it was her case that he was the father of this child.

The Magistrate rejected the evidence given by her and cancelled the order for maintenance. This appeal is from that order.

The evidence of the husband at the inquiry was that he did not know who the father of the child was and that it was only suspicion on his part that the brother-in-law was the father of the child.

It appears to me that the Magistrate has misdirected himself when he says, "whether the applicant was *living in adultery or not* can only be established if the defendant can prove the child is not his", for assuming the defendant satisfied the Magistrate, as it turned out he did, that the child was not his—a finding of fact, the correctness of which I have misgivings on—that does not establish that the applicant is living in adultery with someone. It only establishes that she has committed adultery with someone which may well be a single lapse from virtue.

In the case of *Wijesingha v. Josi Nona*¹ Abrahams C.J. said, "... The issue was whether in terms of section 6 of the Maintenance Ordinance the wife was living in adultery. The words of the section are plain, 'On proof that any wife in whose favour an order has been made ... is living in adultery ... the Magistrate shall cancel the order.' The meaning is equally plain: the wife at the time that the application for cancellation of the order was made must be cohabiting with some other

¹ (1936) 38 N. L. R. 375.

man or living a life of promiscuous immorality. Manifestly all that the appellant in this case could have proved, if the case had been heard out, was that the child was not his, and inferentially that his wife had about a year previous to his application committed adultery with some man. He could not have proved thereby more than a single act of adultery, and if he could have done, he could not have proved that the adultery was going on at the date of his application. This is not the first case of its kind. The cases of *Isabelahamy v. Perera* and *Rammalhamy v. Appuhamy* have been cited on behalf of the respondent. This case does not seem to me really to need any authority, for the words are too plain to require interpretation."

That it is continued adulterous conduct that is meant by living in adultery is the conclusion that Basnayake J. in *Arumugam v. Athai*¹ arrived at when he was considering the meaning of the phrase "living in adultery" and he quoted with approval from the case of *Ma Thein v. Maung Mya Khir*², "Now what does the phrase living in adultery mean? The word live conveys the idea of continuance and consequently the phrase living in adultery in my opinion refers to a course of guilty conduct and not a single lapse of virtue." He also quotes the words of Pandrang Row J. in 1938 A. I. R. Madras, at p. 834, where he says, "The words 'living in adultery' are, in my opinion, merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by 'living in adultery'."

The appeal is allowed with costs.

Appeal allowed.
