

Present: Shaw J.

1921.

PATHUMMA v. SEENI MOHAMMADU.

411—P. C. Batticaloa, 8,599.

Maintenance Ordinance, 1889, s. 4—Application for maintenance by Muhammadan wife—Offer by husband to take her back—Refusal of wife to live with husband as he was living with another wife.

A Muhammadan wife, who refuses to live with her husband on the ground that he is living with another wife, is not entitled to claim maintenance, as he is not guilty of adultery by so doing.

THE facts appear from the judgment.

J. Joseph, for the appellant.

Arulanandan, for the respondent.

May 12, 1921. SHAW J.—

This is an appeal from an order of the Magistrate directing the husband to pay maintenance for his wife and child under section 3 of the Maintenance Ordinance, 1889. The parties are Muhammadans, and were married about five years ago. About four years ago the respondent married a second wife, as he was entitled to do under the provisions of the Muhammadan law. Disputes would then appear to have arisen between the parties, which ended in the husband deserting the applicant. Some time after her husband returned and lived with her for some period, the length of which is not very clear from the evidence in the case. After some time differences again arose, which caused the respondent to leave the applicant, and the applicant took these proceedings for maintenance under section 3 of the Ordinance. At the hearing of the application the respondent appeared and said that he was willing to take back and support the applicant if she would come and live with him. To this the applicant replied alleging habitual cruelty, and saying that the husband was living with his second wife, and that she refused to share her husband with another woman. The Magistrate after hearing the evidence found, as a fact, that the applicant had failed to show the necessary cruelty on the part of her husband, but he held that she was entitled to refuse to return to him, as he had a second wife. He, therefore, made the order for maintenance, notwithstanding the respondent's willingness to take back the applicant and the child. The Maintenance Ordinance provides that in the case of proceedings of this character, if the respondent offers to maintain his wife and children on condition of her living with him,

1921.

SHAW J.

*Pathumma
v. Seeni
Mohammadu*

the Magistrate may consider any ground of refusal stated by her, and may make an order under section 3, that is to say, an order for maintenance, notwithstanding such offer if the Magistrate is satisfied that the respondent is living in adultery, or that he is habitually treating his wife with cruelty. There are, therefore, two grounds only from which the Magistrate may make an order, notwithstanding the offer of the respondent to take back his wife: one is adultery, and the other is habitual cruelty. I do not think that I can interfere with the finding of the Magistrate with regard to habitual cruelty. The only other ground, therefore, which can justify the order is that the respondent is living in adultery. The applicant has failed to show that in this case. A Muhammadan is entitled under the provisions of the Muhammadan law, which has been incorporated with the law of this Colony in reference to persons of that community to have more than one wife, and he is not guilty of adultery if he marries more wives than one. It appears to me, therefore, that neither of the two essentials, which would justify an order under section 3 of the Ordinance, are shown to exist in the present case. I am asked on behalf of the wife to extend the law as set out in the Maintenance Ordinance and as provided for under the Muhammadan Code. I am asked to say that, at the present time, these matters should be looked at in a somewhat different manner from that in olden days, and that Courts ought to give effect to the laudable desires of a woman, who is married to a Muhammadan man, to refuse to live with him if he takes a second wife. I am afraid it is beyond my duty to do anything of the sort.

If an alteration of the law of maintenance is necessary with regard to Muhammadans under modern conditions, the law must be altered by the Legislature, and not stretched by myself. A somewhat similar case came before Wendt J. in the case of *Mammadu Nachchi v. Mammatu Kassim*.¹ In that case it was held that the mere fact of a married Muhammadan man keeping an unmarried woman as his mistress was not good reason in law for his wife refusing to live with him and claiming separate maintenance. It was held, further, that the husband had no right to ask the wife to come and live in the concubine's house. That, of course, is a different state of things to that which is shown in the present case. It is true that under the Muhammadan law it is not adultery on the part of a Muhammadan to keep a concubine. But the position of a concubine is quite different under the Muhammadan law from that of the wife. She is of a lower class, and to ask a wife to go and live, as the husband did in that case, in a house belonging to his concubine, and to associate with her on equal or even inferior terms, is not offering to take her back and support her in the way that is contemplated by the Maintenance Ordinance. The position is,

¹ (1912) 15 N. L. R. 297.

however, different in the case of a man keeping two lawful wives, and one knows that in certain cases where a wealthy man has a number of Muhammadan wives, they do live together in the same harem. To hold that a wife is entitled to leave her husband's house and to recover by law maintenance for living elsewhere would be, I think, to make a very great change in the Muhammadan law and custom, and that would be the effect of the decision in this case if I should maintain the Magistrate's judgment. In my opinion the order cannot be supported, and the appeal must be allowed.

1921.

SHAW J.

*Pathumma
v. Seeni
Mohammadu*

Appeal allowed.
