

1948

Present : Basnayake J.

ARUMUGAM, Appellant, and ATHAI, Respondent

*S. C. 986—M. C. Batticaloa, 3,413**Maintenance—Refusal by husband to pay—Wife living in adultery—What must be established—Maintenance Ordinance, s. 4.*

A person who asserts that his wife is disentitled by section 4 of the Maintenance Ordinance to receive an allowance by reason of the fact that she is living in adultery must establish that she is leading a life of continuous adulterous conduct.

APPPEAL from an order of the Magistrate, Batticaloa.

G. Thomas, for the appellant.

No appearance for the respondent.

April 5, 1948. BASNAYAKE J.—

The appellant, who has been ordered to pay a sum of Rs. 10 per mensem as maintenance under section 2 of the Maintenance Ordinance, appeals from that order on the ground that the proof of marriage adduced by the

respondent in support of her claim is unsatisfactory. Learned Counsel for the appellant submits that the respondent is not in any event entitled to receive an allowance under section 2 as she is living in adultery.

On the first point there is a considerable body of evidence to show that a marriage ceremony according to Hindu rites was performed. The details of the ceremony are related by the respondent, an elder of the village claiming the title of "Mullaikaran", and the dhoby who attended the wedding. The appellant denies that there was any customary marriage ceremony whatsoever. The learned Magistrate who has seen and heard the witnesses finds as a fact that the appellant and the respondent went through the marriage ceremonies detailed by the respondent and her witnesses. I see no reason to disturb that finding. Once a marriage in fact is established, a marriage in law is presumed. There are numerous decisions which support this view. It will be sufficient if I quote the words of Lord Justice Giffard in the case of *Inderun Valungaypooly Taver v. Ramasamy Pandia Talaver*¹ wherein he says "When once you get to this, viz., that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law". It has been held in the case of *The King v. Perumal*², a decision of three Judges of this Court, that when the fact of the celebration of the marriage is established it will be presumed, in the absence of evidence to the contrary, that all the necessary ceremonies have been complied with.

There is no evidence to support the submission of learned Counsel that the respondent is living in adultery. The appellant's bare statement that the respondent did not live in his house at any time, coupled with the denial that he is the father of the respondent's child, is in my view not sufficient to entitle the appellant to claim the benefit of section 4 of the Maintenance Ordinance. That section reads: "No wife shall be entitled to receive an allowance from her husband under section 2 if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

A person who asserts that his wife is disentitled by this section to receive an allowance must establish that she is living in adultery or in other words that she is leading a life of continuous adulterous conduct.

The appellant has failed to establish any such proof. His allegation that the child of the respondent is illegitimate, even if it is true, is not by itself sufficient to establish that the respondent is living in adultery. The cases of *Kiree v. Naida*³, *Reginahamy v. Johna*⁴, and *Mariai v. Avorai*⁵ support this view.

Learned Counsel for the appellant has referred me to the case of *Ma Thein v. Maung Mya Khin*⁶. I have examined it, but find therein nothing that helps him. On the contrary, the following passage at page 68 is against him. "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

¹ 13 *Moore's Indian Appeals* p. 141 at p. 158.

² (1911) 14 N. L. R. 496 at p. 507.

³ (1910) 5 *Supreme Court Decisions* p. 28.

⁴ 1914) 17 N. L. R. 376.

⁵ S. C. No. 649, P. C. *Kayts* 6,768; S. C. M. 22. 9. 30.

⁶ (1937) A. I. R. Rang. 67.

conduct and not to a single lapse from virtue". The phrase "living in adultery" has been construed in the same sense by the High Courts in India as well¹. It is hardly necessary for the purpose of the present case to make specific reference to the views of the different Indian High Courts, but I shall quote the words of Pandrang Row J. in the latest of these Indian decisions² wherein 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 dismissed.

Appeal dismissed.

¹ { (1904) 26 *Allahabad* 326.
 (1907) 30 *Madras* 332.
 (1925) *A. I. R. Calcutta* 794.
 (1928) *A. I. R. Bombay* 59.
² (1938) *A. I. R. Madras* 833 at 834.