

1971

Present : de Kretser, J.

A. A. RICHARD, Appellant, and G. D. ANULAWATHIE, Respondent

S. C. 53/70—M. C. Colombo South, 97365/A

*Maintenance Ordinance (Cap. 91)—Section 3—Order for maintenance of wife—
Conditions necessary—Lack of bona fides in husband's offer to maintain wife—
Whether it is a ground per se to order maintenance.*

Where a husband offers to maintain his wife, the only grounds on which he may nevertheless be ordered to pay maintenance under section 3 of the Maintenance Ordinance are that he is living in adultery, or that he has habitually treated his wife with cruelty. An order for maintenance of the wife cannot be made merely because, in the opinion of the Court, the offer of the husband to maintain his wife is not made *bona fide*.

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

Elmo Vannitamby, with Mangala Moonasinghe and K. Balachandran,
for the defendant-appellant.

Applicant-respondent absent and unrepresented.

Cur. adv. vult.

August 10, 1971. DE KRETZER, J.—

The Magistrate of Colombo South, Mr. C. E. Mendis, allowed the application made that the Defendant should be ordered to pay Maintenance for his wife, the Applicant and his three children. The Defendant has appealed. At the hearing of the Appeal the correctness of the Order that the Defendant should pay Rs. 25/- a month for each of the children was not canvassed, but Counsel for the Appellant relying on Section 3 of the Maintenance Ordinance has urged that the Order that the Defendant should pay Rs. 25/- for his wife a month cannot stand in view of the fact that she had refused the offer he had made to maintain her on condition that she lived with him for there was no evidence of his living in adultery or that he had habitually treated his wife with cruelty which alone would justify the Magistrate making an order in her favour despite the offer made.

As far back as 1899 Withers, J. in the Case reported in the Supreme Court decisions of 1899 (Koch's Reports) at Page 9 pointed out that the grounds set out in the Ordinance which are sufficient to entitle an applicant to an allowance notwithstanding the husband's offer to maintain his wife if she would live with him are adultery and habitual cruelty. Wendt, J. in 1905 in the Case of *Ano v. Anthony Annavirale*¹ 3 Appeal Court Reports 19 pointed out that where such an offer is made the Magistrate has to be satisfied that the wife's refusal to live with her husband is justified by the fact of his living in adultery or by the fact of his having habitually treated his wife with cruelty.

In the instant case the Magistrate has not made a finding on either of these alternatives. He is of the view that the offer was not made bona fide. He comes to that conclusion after the Inquiry was over and in view of what had come out in evidence in regard to things that had happened after the couple had parted. He says "no reasonable man however well meaning or generous he might be would make such an offer to a woman who he has said in evidence was not a fit and proper person to have custody of his children and in regard to whose character he had made certain allegations at the Trial. Suffice to say in regard to bona fides that the Applicant wife who is the person most concerned and in the best position to judge did not refuse the offer alleging it was not bona fide but because she felt "humiliated" over events that had happened after they had separated. The true cause of that separation appears to be quarrels over property. There was no allegation at any time that the Defendant was living in adultery and the evidence does not establish that the Defendant treated applicant with habitual cruelty during the time they lived together. In the result I set aside that portion of the Order directing the husband to pay the wife maintenance at Rs. 25/- a month. There will be no costs for the Appeal.

Appeal partly allowed.

¹ (1908) 3 A. C. R. 19.