

1961

*Present : Tambiah, J.*

MRS. S. V. FERNANDO, Appellant, and J. R. I. FERNANDO,  
Respondent

*S. C. 1031—M. C. Kandy, 9575*

*Maintenance Ordinance—Section 2—Application made by wife for maintenance—  
Assessment of sum payable by husband—Means of wife should not be considered—  
Married Women's Property Ordinance, s. 26.*

The Court should not take into account the means of the wife when fixing the quantum of maintenance payable by the husband under section 2 of the Maintenance Ordinance.

**A** PPEAL from a judgment of the Magistrate's Court, Kandy.

*D. R. P. Goonetilleke*, for the Applicant-Appellant.

*G. Candappa*, for the Defendant-Respondent.

*Cur. adv. vult.*

February 28, 1961. TAMBIAH, J.—

The only question that arises in this case is whether the Court should consider the wife's means in fixing the quantum of maintenance payable by the husband. The Magistrate states in his order dated, 14.10.59, as follows: "The defendant is prepared to pay without prejudice to his rights, a sum of Rs. 30 per month, as maintenance to his wife. He gets an income of about Rs. 330 per month as a stenographer in the Bank of Ceylon, Kandy. This is admitted and it is also admitted that the applicant gets an income of a similar amount as Secretary of the Girls' Farm School, Kundasale. In these circumstances the question of maintenance becomes merely a question of the enforcement of a legal right by the wife. I would fix the maintenance at Rs. 30 per month, as from today. . . . The amount is fixed at Rs. 30 after I have given consideration to the fact that she herself is earning an income".

It was contended by the Counsel for the applicant-appellant that the learned Judge has misdirected himself in taking into account the income of the wife in fixing the quantum of maintenance payable to her by the husband.

Section 2 of the Maintenance Ordinance reads as follows: "If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Magistrate may upon the proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or

such child at such monthly rate not exceeding one hundred rupees, as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Such allowance shall be payable from the date of the order ”.

The provisions of section 2 of the Maintenance Ordinance have been authoritatively interpreted by a Divisional Bench of the Supreme Court in *Sivasamy v. Rasiah*<sup>1</sup>. It was held in that case that a wife who is possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself. Soertsz, S.P.J., after citing section 2 stated as follows, at p. 243 :

“ These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own. That conclusion emerges all the clearer when we read further down in the section the words of contrast providing for an order of maintenance for “ his wife ” and for “ such child ”. The word “ such ” is used as an adjunct to the word “ child ”, and not to the word “ wife ” in order to emphasize the fact that in the case of the child, inability to maintain itself is one of the conditions upon which the father's liability rests . . . the words of the section are clear and they must govern the question. While the word “ child ”, in its equivocation as to sex, makes the word “ itself ” the appropriate pronoun, to use that pronoun to refer to the antecedent “ wife ” would be to cast a thoroughly unwarranted aspersion on a perfectly unambiguous sex . . . I read section 2 of the Ordinance as entitling a wife to maintenance in virtue of her wifeness alone and to obtain it by proof that her husband has sufficient means ”.

That case was remitted to the Magistrate so that he might fix such monthly allowance as he thought fit, *having regard to the means of the husband*.

I am bound by the above ruling of the Divisional Bench that the means of the wife should not be taken into account in ordering maintenance. It follows that a Judge cannot take the wife's means into account in fixing the *quantum* of maintenance which the husband has to pay. If, however, he is in indigent circumstances he would not be liable to pay maintenance. But if he is possessed of sufficient means and it is proved that he has neglected or refused to maintain his wife, then in fixing the quantum only the means of the husband should be taken into account.

Counsel for the defendant argued that since section 26 of Married Women's Property Ordinance casts a liability on a wife, who has means, to support a husband in indigent circumstances, the Legislature intended that the wife's means should be a factor in determining the

<sup>1</sup> (1943) 44 N. L. R. 241.

amount of maintenance she is entitled to in the circumstances specified in section 2 of the Maintenance Ordinance. But these two sections contemplate two entirely different situations, and the interpretation placed on section 2 of the Maintenance Ordinance in *Sivasamy v. Rasiyah* (*supra*) in no way conflicts with section 26 of the Married Women's Property Ordinance.

The learned Magistrate in this case has erred in taking the applicant-appellant's income into account in assessing the amount of maintenance payable to her at Rs. 30.

Having regard to the income of the defendant-respondent, I order him to pay as maintenance to his wife a monthly sum of Rs. 60 from the date of the Magistrate's order. Accordingly I allow the appeal with costs.

*Appeal allowed.*

