

1958

Present: Sinnetamby, J.

FRANCIS FERNANDO, Appellant, and VINCENTINA FERNANDO,
Respondent

S. C. 873—M. C. Gampaha, 23,238

Maintenance Ordinance (Cap. 76)—Order of maintenance obtained by wife under Section 2—Subsequent decree for divorce—Right of the divorced wife to apply thereafter for enhancement of maintenance under Section 10.

A divorced wife is entitled to make an application under section 10 of the Maintenance Ordinance to enhance an order of maintenance obtained by her under section 2 prior to divorce.

¹ (1916) 19 N. L. R. 235.

APPPEAL from an order of the Magistrate's Court, Gampaha.

S. W. Jayasuriya, with *Norman Abeysinghe*, for the defendant-appellant.

Carl Jayasinghe, with *A. C. Krishnarajah*, for the applicant-respondent.

Cur. adv. vult.

March 7, 1958. SINNETAMBY, J.—

This is an appeal by a husband against an order of the Magistrate made under section 10 of the Maintenance Ordinance enhancing the amount of maintenance payable by him to his wife. It would appear that after the order for maintenance was made there was entered in the District Court of Gampaha a decree for divorce in which an order for the payment of alimony amounting to Rs. 50 was made in favour of the wife. The application for enhancement under section 10 was made subsequent to the decree in the divorce case. The appeal was pressed only on the ground that as by the decree of the District Court the applicant ceased to be a wife she was not entitled to invoke the provisions of the Maintenance Ordinance.

I should at this stage mention that a preliminary objection was taken to the appeal on the ground that the order of the Magistrate was under section 10 of the Ordinance and in view of the express provisions of section 17 the appellant was not entitled to prefer this appeal. In my opinion the preliminary objection is entitled to succeed but in view of the importance of the questions raised I propose to deal with the case in revision.

Two cases were referred to by the learned Magistrate in the course of his order, viz. *Peiris v. Peiris*¹ and *Fernando v. Amarasena*². In *Pieris v. Pieris* a decree for separation had been entered and it was held that the wife was entitled to bring a maintenance case claiming maintenance for herself and her child. In *Fernando v. Amarasena* the claim was by a divorced wife in respect of her legitimate child for which an order for maintenance had been made in the divorce proceedings: no claim was made on behalf of the "wife". The difficulty the learned Magistrate had was that in the present case the application is made by a wife who had been divorced and was no longer a "wife" in the eyes of the law.

Even if one confines oneself to a strict interpretation of the words used in the Ordinance it becomes clear that an application under section 10 for enhancement can be made by a "wife" who has, in the period intervening between the order for maintenance in her favour and the application for enhancement, been divorced.

It is section 2 of the Ordinance which enables a wife to obtain an order in her favour. At that stage she has to be a *wife* in order to succeed. It is not necessary, however, for the purposes of this case to decide

¹ (1940) 45 N. L. R. 18.

² (1943) 45 N. L. R. 25.

whether a "wife" who has obtained a decree for divorce can thereafter apply for maintenance under this section. An order once made in favour of a wife continues to be in force, at least so far as the provisions of the Maintenance Ordinance are concerned, until it is cancelled under section 5 or under section 10. It would appear on a first reading of these sections that an order under section 5 can only be made against a *wife* on the application of a *husband* as the section expressly uses the words "wife" and "husband". Indeed, having regard to the provisions of section 5 intrinsically there is much to be said in favour of this interpretation.

Section 10, may be advisedly, avoids using the words "wife" and "husband" and provides that any "*person* receiving or ordered to pay a monthly allowance" may apply for cancellation or alteration. It would thus be reasonable to hold that once an order for maintenance under section 2 has been made in favour of the wife it continues in force until it is cancelled or varied under section 10 irrespective of all other considerations and irrespective of whether there has since come into existence a decree for divorce. In my opinion it is open to a divorced "wife" to apply for enhancement under section 10 just as much as it is open to a divorced husband to apply under it for a cancellation.

Section 10 of the Ordinance permits an order to be made "on proof of a change in the circumstances". A decree for divorce would certainly be a change in the circumstances and if in the divorce case the husband is found to be the guilty spouse surely that should not place him in a position of advantage and enable him to claim that the decree for divorce *ipso facto* wipes out the order for maintenance. Similar though somewhat different provisions of the Summary Provisions (Married Women) Act of 1895 were interpreted in the case of *Bragg v. Bragg*¹. Section 5 of this Act provides "that the husband shall pay the applicant . . . a weekly sum" etc. Section 4 provides that only a "married woman" can make the application. Section 7 which corresponds to our section 10 provides that a Court of Summary Jurisdiction may upon fresh evidence vary or cancel the order. This is subject to this proviso:

"If any married woman upon whose application an order shall have been made under this Act" and so on, "shall voluntarily resume cohabitation with her husband or shall commit an act of adultery such order shall, upon proof thereof, be discharged."

In appeal the Court held that the decree for divorce does not *ipso facto* discharge the order for maintenance and that an order of discharge in an appropriate case can only be obtained by an application under section 7 of the Act. This case favours the construction I have placed on section 10 of our Ordinance.

I am accordingly of the view that a divorced wife is entitled to make an application under section 10 of the Ordinance to enhance an order of maintenance obtained by her prior to divorce under section 2. The order of the learned Magistrate is affirmed. The appellant "husband" will pay the respondent the costs of this application.

Appeal dismissed.

¹ 41 *Times L. R. S.*