

1946

Present : Wijewardene J.

KANDASWAMY, Appellant, and PUVANESWARI, Respondent.

676—*M. C. Jaffna, 19,00£.*

Maintenance—Order in wife's favour—Decree of separation—Return of wife to husband's house and temporary stay—Does not cancel order for maintenance—Enforcement of order of maintenance—Imprisonment possible only in respect of allowance remaining unpaid after execution of warrant—Maintenance Ordinance (Cap. 76), ss. 5, 8, 9.

An order for maintenance can be cancelled only in the circumstances set out in sections 5 and 10 of the Maintenance Ordinance. The mere fact that the wife who had obtained an order for maintenance and a decree of separation *a mensa et thoro* returned subsequently to her husband's house and lived with him for some time will not have the effect of cancelling the order though it may suspend the operation of the order.

A sentence of imprisonment under section 8 of the Maintenance Ordinance can be passed only in respect of the part of the allowance remaining unpaid after the execution of a warrant.

A PPEAL against an order of the Magistrate's Court, Jaffna.

C. Thiagalilingam, for the appellant.

S. N. Rajaratnam (with him *S. P. M. Rajendram*), for the respondent.

Cur. adv. vult.

September 23, 1946. WIJEWWARDENE J.—

The respondent obtained in 1937 an order for maintenance against her husband the appellant. She obtained later a decree of separation *a mensa et thoro*. As the appellant failed to pay maintenance, due from March, 1945, she applied for a distress warrant. The appellant did not dispute the fact that he did not pay maintenance from March, 1945, but opposed the respondent's application on the ground that the respondent came to his house and stayed there from September, 1944, till May, 1945 "when he was dying". The respondent's Proctor agreed to waive the claim for maintenance for the period during which the appellant stated that the respondent stayed in his house.

An order for maintenance could be cancelled only in the circumstances set out in sections 5 and 10 of the Maintenance Ordinance. The evidence led in the case does not disclose any grounds for a cancellation. The mere fact that the wife returned to her husband's house and lived with him for some time will not have the effect of cancelling the order though it may suspend the operation of the order (*Kanagammal v. Pandary Nadar*¹, and *Kadiravail Wadivel v. Sandanen*²).

After finding that the respondent is entitled to maintenance except from October 1, 1944, to April 30, 1945, the Magistrate provided in his order that if the appellant did not pay that amount on or before April 30, 1946, "he would be committed to jail". That part of the order is wrong and should be deleted in view of section 8 of the Ordinance which states

¹ *All India Reporter* (1927) *Madras* 376.

² (1929) 30 *N. L. R.* 351.

that a sentence of imprisonment could be passed only in respect of the part of the allowance remaining unpaid after the execution of a warrant (vide *Cornelia v. Sawodis* '). I affirm the order of the Magistrate subject to that modification.

I may add that, though the matter came up before me by way of an appeal, I have dealt with it in revision.

Order modified.
