THE

NEW LAW REPORTS OF CEYLON

VOLUME XL.

1938

Present : **de Kretser J.**

ANNAPILLAI *v.* SARAVANAMUTTU.

118—P. C. Jaffna, 20,836.

*Maintenance—Neglect to maintain children—Application by grandmother—children by first marriage—*Tesawalaṃai*—Ordinance No. 1 of 1911, ss. 39 and 40.*

In an application for maintenance under section 3 of the Maintenance Ordinance, neglect to maintain means such inadequate maintenance as to be in reality no maintenance at all.

Under the *Tesawalamai* a maternal grandmother has no absolute right to the custody of her grandchildren when the father contracts a second marriage, where the children are not of tender years and the father is willing to maintain them.

Where the father is not fit to be entrusted with the custody of the children he would be liable for their maintenance.

Quaere, whether section 11 of the *Tesawalamai* Code is not impliedly repealed by sections 39 and 40 of Ordinance No. 1 of 1911 ?

THIS was an application for maintenance under section 3 of the Maintenance Ordinance, against the defendant in respect of his children by the first bed. The defendant's first wife died in 1928. At that time he was employed abroad and his children stayed with their grandmother, the applicant, who maintained them. He married again in 1930 and returned to the Island in 1935. The children then went to live with the defendant. In 1937 the children left the defendant and the grandmother made the present application alleging that the defendant failed and neglected to maintain them. The Police Magistrate ordered the defendant to pay maintenance at the rate of Rs. 30 per mensem.

N. Nadarajah (with him *H. W. Tambiah*), for defendant, appellant.—The appellant has not refused or neglected to maintain the children. The children left of their own accord. The appellant maintained them and is still willing to maintain them. Section 3 of Ordinance No. 19 of 1889 only condemns a father who neglects to maintain his child. A father cannot be asked to pay maintenance when he is prepared to maintain the children (*Fernando v. Fernando* [1]). No cruelty has been proved.

Section 11 of the old *Tesawalamai* Code says that on remarriage a husband may hand over the custody of the child and also the property to the maternal grandmother. Sections 39 and 40 of Ordinance No. 1 of 1911 state that on the death of a spouse the surviving spouse has life interest and hence he is under no obligation to hand over the property. Sections 39 and 40 of Ordinance No. 1 of 1911 are contradictory to the provision of section 11 of the old *Tesawalamai* Code and hence section 11

[1] 19 *C. L. W.* 97.

of the old Code is impliedly repealed (see section 2 of Ordinance No. 1 of 1911). The case relied on by the Magistrate (*Thevanapillai v. Ponniah*[1]) followed *Kanapathipillai v. Sivakolunthu*[2] which interpreted section 11 of the old *Tesawalamai* Code. Since this section is impliedly repealed the decisions based on it are not binding. Even if the grandmother is entitled to the custody under the *Tesawalamai* she cannot claim maintenance. The Maintenance Ordinance only has to be looked into. Only if there is a refusal or neglect to maintain, the father can be condemned.

L. A. Rajapakse, for applicant, respondent.—There is sufficient evidence to justify a finding that the defendant has neglected to maintain his children within the meaning of section 3 of the Maintenance Ordinance. They are compelled to run away owing to their cruel treatment.

Ordinance No. 1 of 1911 deals with matters of property and inheritance. It has nothing to do with matters regarding the custody of children.

Sections 39 and 40 of that Ordinance refer to the rights of a surviving spouse with regard to his minor child's property as long as a second marriage is not contemplated. That is consistent with paragraph 1 of section 11 of the *Tesawalamai*.

What is to happen with regard to the custody of the children and their property in case the surviving spouse remarries is not dealt with there. The old law under section 11 of the *Tesawalamai* still holds good. (*Kanapathipillai v. Sivakolunthu* (*supra*).)

Here, the father who has remarried has treated his children so cruelly that he is unfit to be entrusted with them. The grandmother who is a recognized guardian is entitled to claim maintenance for them from the father. The father is still in possession of their property. (*Thevanapillai v. Ponniah* (*supra*).)

Cur. adv. vult.

May 18, 1938. DE KRETSER J.—

The appellant has been condemned to pay Rs. 15 a month for each of two of his daughters who are with their grandmother, the applicant.

The appellant's first wife died in 1928. At that time he was employed in the Federated Malay States.

His daughters stayed with their grandmother and the petitioner maintained them.

He married a second time in 1930 and returned to the Island in 1935. The children then went to live with their father. The appellant adopted one Saravanamuttu Muttucumaru, who gave evidence in this case and gave his age as 21 years. He is a vernacular pupil teacher. He left the appellant's house in August, 1937. In his evidence he did not state his reason for leaving and made no allegation against the appellant. The Magistrate, however, finds that he left "because he could not bear the treatment he received".

Shortly after the adopted son left the two girls went away on different dates.

The grandmother then sued for maintenance alleging that the appellant earned Rs. 100 a month. She made her claim under section 3 of the Ordinance No. 19 of 1889. It is this Ordinance that must decide her claim. Section 3 only condemns a father to pay maintenance if he

[1] *17 N. L. R. 437.* [2] *14 N. L. R. 484.*

neglects or refuses to maintain his child and it is upon proof of such neglect or refusal that a Police Magistrate may order maintenance. The applicant alleged a failure and neglect on the appellant's part to maintain his daughters but she gave no evidence at the trial.

It is clear from the elder girl's evidence that it is her uncle and her adopted brother who are at the back of the claim for maintenance.

The applicant herself is an old woman having no income of her own and living with her daughter.

On October 21, 1937, it was stated that the applicant was the grandmother of the children and that the respondent was married again. The reference probably was to section 11 of the *Tesawalamai*. The defendant's Counsel cited the case of *Thevanapillai v. Ponniah*[1].

The appellant undertook "to file a list of acquired property and jewellery received."

The case now began to go off the rails.

On the appointed day the list of property was filed. The appellant had previously offered to give "the property" to the children.

At this stage, that is over a month after the application was first made and after four appearances in Court, all the applicant stated was that the appellant was "not a fit person to take the children"; also "the children are not treated properly". This was not stated on oath: no allegation of cruelty was made, although *Thevanapillai v. Ponniah* (*supra*) had been cited on an earlier date. After still another postponement the applicant appeared by Counsel and the Magistrate makes the significant note "Mr. Kanaganayagam *now* states that the children are treated with cruelty by the respondent and his present wife".

The trial was then held in instalments and eventually the Magistrate ordered the appellant to pay Rs. 30 as maintenance, the Magistrate holding that the appellant had treated the children cruelly.

There are indications in the judgment that the Magistrate was influenced by considerations which should not have influenced him and that he allowed his sympathy to outrun his judgment. He starts by making the point that the appellant had not made over certain property to the applicant. But there is nothing to indicate that he was called upon to do so: he had already expressed his willingness to do so. On the contrary there is evidence as regards the most valuable asset that the children were unwilling to take it over. The elder girl when giving evidence professed her willingness to live in the house built on her mother's property but was careful to add that she could not live there alone and that her grandmother was unwilling to live in that house. Her adopted brother was even more emphatic and gave as a reason for their inability to occupy the house the hostility of the neighbours.

The Magistrate goes on to say that the elder girl spoke to "various acts of ill-treatment" by the appellant and his second wife, but the girl only spoke to being punished on two occasions and to the fact that she was not given by her stepmother dresses to wear and soap to wash her body. She did not say she had complained on these points to the appellant or any one else. She said she used to be given the previous night's rice to eat while her parents ate "pittu": she had to cook,

[1] *17 N. L. R. 437.*

she was scolded, she was not allowed to go to school in time. The Magistrate does not indicate which of these acts he considered to be cruel and, in my opinion, the acts complained of did not amount to cruelty. I shall deal with some of these later.

The Magistrate relies on the evidence of a teacher as corroborating the girl's story. Now, what did this witness say? That the girl left school in June, 1937: that he reported during the first half of the year that she was untidy: that her dress and hair were not clean: that her attendance was irregular and she used to get late. He adds that in consequence of his report there was some improvement from January, 1937. But if this later statement be correct his report could not have referred to the first half of 1937 but to some earlier period. And there is nothing in his evidence to corroborate the girl's allegations against her step mother. The defects may have been due to the girl herself. Many children of that class are irregular in attendance, late in coming to school, and untidy.

I have already referred to the want of evidence to support the Magistrate's finding regarding the adopted son, a young man quite able to look after himself.

The Magistrate disbelieved the appellant because he denied that he was absent from home and infers, without any evidence, that it was during these periods of absence that the stepmother ill-treated the girls. It follows then that they were not ill-treated when he was not absent. The Magistrate invokes the aid of the evidence of a Police Vidane but does not refer to the fact that this same witness said that appellant was wellbehaved and treated the children fairly well. He stated that the appellant *had been* a market renter and then used to stay away from home for a week or two. The girl said nothing about her father staying away. The adopted son said the appellant *had* been doing business at Chavakachcheri but was later doing nothing.

The Magistrate ended by holding that the appellant had a pension of Rs. 70 a month and, presumably because he believed that it would be a long time before the children got their property, he condemned him to pay very nearly half his income as maintenance to his two daughters, which left very little for himself, his wife and three children by the second marriage.

At the hearing of the appeal respondent's counsel indicated a willingness to have the maintenance reduced.

Now, the Magistrate did not once address himself directly to the question whether the appellant had failed or neglected to maintain his children, and this was all he had to decide. Assuming that he intended to say that the appellant ill-treated his children and in that way forced them to leave him and therefore failed to maintain them, his finding is not correct either in fact or in law.

I have already alluded to the fact that the charge of cruelty came rather late. If the Magistrate had examined this charge he would have seen how little there was in it, at the best.

There is nothing to show that "pittu" is more nourishing than stale rice, and it is common knowledge that many people eat stale rice, and eat it with relish. The girl says she had to cook. What was wrong

with that? She had to admit the presence of one Rajaratnam who helped in the house and the presence of a servant at the time of the trial. If she ate stale rice in the morning then no rice was cooked at that time. Presumably she was at school and did not cook the mid-day meal. If there were no servants her stepmother must have cooked that meal. Wherein lay the cruelty if the girl cooked the rice in the evening?

The adopted brother did not say the elder girl did household work but said "the smaller girl" did it. He made no specific statement about cooking or about stale rice.

The girl said that appellant drank. The adopted brother said nothing on this point and the headman said he did not know that appellant drank.

With regard to the beating, the girl says she was beaten in August, 1936, a year before she left, because she went with her uncle to a prize-giving during her father's absence. She alleged that her hands were tied to a palmyra tree and she was beaten. The appellant challenged this as a physical impossibility. The Magistrate expresses no opinion on this point. The alleged witness to the assault is not called. Assuming that the appellant did chastise her it was for going our without permission, that she should do so does not suggest much repression at home. But I think the gravity of the offence lay in her going with her uncle. There was a suggestion that the uncle was trying to arrange a marriage between his son and the elder girl and between his daughter and the appellant's adopted son. The adopted son admits that the appellant had such an idea, so that it was not invented for the purposes of this case, and here I believe probably lies the key to the whole difficulty.

On the facts therefore I am not satisfied that applicant has made out a case and I allow the appeal and dismiss her application.

I should like to add a few remarks about the law. Unfortunately the Magistrate has not discussed it but it is quite possible that he guided himself by the case of *Thevanapillai v. Ponniah* (*supra*). In that case Pereira J. rather deplored the revival of the provision that a grandmother was often entitled to the custody of the children when their father married a second time and went on to say that as the grandmother was considered a suitable guardian she may be allowed to keep the children in case the father happened to be a person not fit to be entrusted with the children, and then he would be liable to make provision for their maintenance. The reasoning was probably somewhat as follows:—

> The children are in proper custody. The father must maintain them in that custody. If he refuses or neglects to do so he may be compelled to pay.

Pereira J. thought himself bound by the decision in *Kanapathipillai v. Sivakolunthu*[1] which was not an action for maintenance but for the guardianship of certain minors.

Even in that case Lascelles C.J. did not think that the grandmother had an absolute right to the custody of the children but only that the section of the *Tesawalamai* gave an useful working rule.

[1] *14 N. L. R. 484.*

That decision was given on July 17, 1911. On that very day Ordinance No. 1 of 1911 came into operation, and it made certain changes in the law. Section 3 enacted that the existing statement of the *Tesawalamai* was to be followed unless found to be inconsistent with the provisions of the new Ordinance.

Section 39 gave the father a life-interest in the property left by his wife, and section 40 stated that the father was liable to maintain the children until they attained majority.

Now paragraph 11 of the *Tesawalamai* stated:—

> "If the mother dies first, leaving a child or children, the father remains in full possession of the estate so long as he does not marry again, and does with his child or children and with his estate in like manner as is shown stated with respect to the mother."
>
> "If a father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they be still young) in order to bring them up; and in such case the father is obliged to give at the same time with his child or children the whole of the property brought in by marriage by his deceased wife and the half of the property acquired during his first marriage."

Note that it happens "generally" and is not of universal application nor in any way made obligatory. It happens only when the children be still young, and it is only when that arrangement is made that the father is obliged to surrender the property mentioned. No further obligation is cast on him to maintain them. Note also that section 11 stated that the father remains in possession until he marries again whereas section 39 seems to extend that right.

Now, in this case the children are not of tender years and when the father returned to the Island the grandmother presumably thought the time to give them up to him had come. The arrangement contemplated by paragraph 11 had not in fact been made, for the father did not surrender the property and he did maintain the children. The grandmother was in no better position than an outsider with whom the father left his children.

It is open to the grandmother now to claim the alleged right? I doubt it. Of course she may take the children but in that case she cannot cast any obligation on the father. In this connection the observations of my Lord the Chief Justice in *Fernando v. Fernando*[1] are in point.

But a further question arises. Paragraph 11 combined the question of custody of the children with surrender of the property. But Ordinance No. 1 of 1911 gave the father a life-interest in his wife's property until the children attained majority and the children had no right to possession of their mother's property on their father's second marriage. Is the situation not changed? And when section 40 made express provision for the maintenance of the children during their minority and said nothing about the case of the father marrying a second time is it unreasonable to infer that the Legislature thought, as Pereira J. did, that paragraph 11 was obsolete and impliedly repealed it? The two provisions are really

[1] *9 C. L. W. 97.*

inconsistent. The obligation to maintain during minority is not consistent with the provisions of the Maintenance Ordinance, which fixes a different period.

Pereira J. went on the decided case. It was not brought to his notice that the new Ordinance made a change. As a matter of fact his decision may be supported as being of general application, for if a father so cruelly treats his child that the child is driven to leave him, as happened in the case Pereira J. was dealing with, might not a relative or friend shelter the child and could the father escape liability to make provision to maintain his child, whether under the *Tesawalamai* or the Maintenance Ordinance? Questions relating to the custody of a child are appropriate in guardianship cases or in applications for writs of *habeas corpus,* but in cases under the Maintenance Ordinance the only question is whether the father neglected or refused to maintain the child, and it is only when a father offers to take back the child that it becomes necessary to decide whether that offer of his should be accepted?

In the present case the grandmother had at no time an absolute right to the custody of the children, and she certainly had no such right at the time she made the present claim, but if the father had driven his daughters out and the Court thought his offer to take them back should not be accepted, then possibly the Court might hold him liable to pay for their maintenance. But the Court would require very strong evidence before it would deprive a father of the custody of his children. Here, not only has the respondent failed to prove cruelty on the part of the father, but there is evidence of his having been mindful of the welfare of his daughters and one cannot force one's views as to how the girls should be brought up on him.

Neglect to maintain must mean something more than a difference of opinion regarding the manner or the adequacy of the maintenance: is must mean such inadequate maintenance as to be in reality no maintenance at all.

Appeal allowed.