

1940

Present: Soertsz J.

PEIRIS, Appellant, and PEIRIS, Respondent.

249—*M. C. Colombo, 16,453.**Maintenance—Application for maintenance under the Ordinance—Order for alimony in the District Court—Application not barred.*

An application for maintenance under the Maintenance Ordinance is not barred by an order for alimony made in favour of the applicant and her child in the District Court in which the applicant had sued the defendant for judicial separation and obtained it.

A PPEAL from an order of the Magistrate of Colombo.

N. Nadarajah (with him *J. A. T. Perera*) for applicant, appellant.

E. B. Wikremanayake for defendant, respondent.

Cur. adv. vult.

December 20, 1940. SOERTSZ J.—

This was an application by the wife of the defendant for a maintenance allowance for herself and for her child by the defendant.

This application was opposed on the ground that it was barred by an order for alimony made in favour of the applicant and of the child in case No. 86 D. C., Colombo, in which the applicant had sued the defendant for a decree of judicial separation and obtained it. She was given the custody of the child. That decree was affirmed in appeal.

After the decree for judicial separation had been entered, the defendant went into the Insolvency Court, and was adjudicated an insolvent on March 3, 1938. On December 20, 1938, the District Judge refused a

certificate of conformity and said that he had "every reason to believe that the insolvent filed this action in order to avoid having to pay his wife the alimony she claims and the amount for which she obtained a decree against the insolvent". The adjudication is still in force. In this state of things, the law must surely stand compromised if it were helpless against the unscrupulous ingenuity of the defendant. The learned Magistrate thought that he was bound by the judgment in the case of *Aranayagam v. Thangamma*¹, and that he had no alternative but to dismiss the application.

In the case referred to, my brother de Kretser following what was said in a note in Sohoni's commentary at page 1034 on the authority of a case cited as reported in 2 *Weir* 615—the report itself not being available—held that a woman was not entitled to an order from a Magistrate when a decree for maintenance obtained by her in a civil Court is in force.

The question, then, is whether the decree for alimony obtained in the suit for judicial separation can be said to be in force in the circumstances of this case. The facts upon which de Kretser J. based his judgment are not to be found in the judgment. They, probably, were entirely different from the facts in this case. In this case, there is the fact that the defendant himself, soon after the decree for alimony was made, got himself adjudicated an insolvent. In the Bombay case to which de Kretser J. makes anonymous reference, Patkar J. with whom Wild J. concurred said: "In the present case, though there was a decree for maintenance in favour of the wife, the decree in fact could not be executed on account of the insolvency proceedings initiated by the husband . . . though there is a decree of the civil Court in existence, it is merely a paper decree . . . a mere decree of a civil Court awarding maintenance is not equivalent to maintaining the wife. Under these circumstances we think that the Magistrate has jurisdiction . . . to pass an order for maintenance"—*In re Mohamed Ali Mithabhai*². Reference is made in the course of the judgment to the case in 2 *Weir* noticed by de Kretser J.

There is another Indian case which deals with the same point, namely, *Kent v. Kent*³. In the course of his order Devadoos J. said: "The third contention is that there is an order of the Probate Division and Admiralty Division of the High Court in England whereby the petitioner is directed to pay his wife so much alimony per month, and it is seriously urged before me that this order is a bar to an application under section 489 of the Criminal Procedure Code. It is admitted that the wife finds it impossible to execute the order for alimony against the petitioner who is a planter in the Mysore State. Whether the order is executable or not is immaterial for the present purpose. The section gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person had neglected or refused to maintain his wife or child . . . A mere order for maintenance is not equivalent to maintaining the wife: And the order whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife".

¹ 41 N. L. R. 169.

² A.I.R. (1930) Bom. p. 144.

³ A.I.R. (1926) Mad. 59.

Section 488 of the Criminal Procedure Code of India which is the section considered and interpreted in these judgments, is substantially the same as section 2 of our Maintenance Ordinance, so that these decisions are apposite. It seems to me that the Maintenance Ordinance provides special machinery for securing maintenance for parties entitled to it, and when resort is made for relief under this Ordinance, in a case like the present one the only question that arises in regard to the jurisdiction of the Magistrate to grant it, is the question of fact 'does the husband refuse or neglect to maintain wife or child'? The question whether maintenance has been allowed in other proceedings of a different nature will be relevant to show that the maintenance so decreed is being given. If the mere fact that there is a 'paper decree' for alimony is sufficient to repel a claim for maintenance, then it must be a sufficient performance of what is asked for, to offer a stone to one who comes for bread.

I set aside the order of the Magistrate and send the case back for the amount of maintenance to be determined. I see that in section 6 of her affidavit the applicant says that the order in the separation case is conclusive in regard to the amount of maintenance she is entitled to for herself and the child. I do not propose to say anything in regard to that. The Magistrate will, no doubt, consider that submission if it is made to him. The appellant will have the costs of this appeal.

Set aside.
