1943 *Present:* **Keuneman and Jayetileke JJ.**

FERNANDO, Appellant, *and* AMARASENA, Respondent.

685—M. C., Colombo, 17,227.

Maintenance—Application for order under the Maintenance Ordinance—Decree for alimony in the District Court—No bar to order for maintenance—Maintenance Ordinance (Cap. 76) s. 2.

The jurisdiction of a Magistrate to grant an order for maintenance of a child under section 2 of the Maintenance Ordinance is not ousted by a decree for alimony passed by the District Court in favour of the applicant and the child in an action for divorce brought by the applicant against the respondent.

***Peiris v. Peiris* (45 N. L. R. 18) followed.**

THIS case was referred to a Bench of two Judges under section 38 of the Courts Ordinance in view of two divergent decisions of the Supreme Court.

L. A. Rajapakse (with him *H. Deheragoda*), for the applicant, appellant.—The question for consideration is whether an order made by the District Court, in the exercise of its matrimonial jurisdiction, for the maintenance of the children of a marriage operates as a bar to an application for their maintenance under the Maintenance Ordinance (Cap. 76). The petitioner in this case is asking for maintenance in respect of her child, aged 2 years. In the earlier divorce case it was ordered by the District Court that the respondent should pay Rs. 15 as alimony and maintenance for the wife and child. Of this sum not even a cent has been paid.

There are two conflicting decisions—*Aryanayagam v. Thangamma*[1] and *Peiris v Peiris*[2]. In *Aryanayagam v. Thangamma* certain important Indian decisions were not considered. It is submitted that the jurisdiction of the Magistrate under section 2 of the Maintenance Ordinance is not ousted by a decree of a civil Court so long as the respondent neglects or refuses to maintain the child. The important point is not that there is a paper decree for maintenance but whether there is a neglect or refusal to maintain. Nor can it be contended that the decree in the matrimonial suit operates as *resjudicata*. It is only by accident that the mother of the child is the petitioner in the present case; any other person could have made himself the petitioner on behalf of the child. Moreover the cause of action in the divorce suit was the malicious desertion of the spouse, and the maintenance awarded to the child was only an incidental relief. The real question in the present case is one of jurisdiction. See *Peiris v. Peiris (supra); In re Mohamed Ali Mithabhai*[3]*; Kent v. Kent*[4]*; In re Taralakshmi Manuprasad*[5]*; Saraswathi Debi v. Narayan Das Chatterjee*[6].

Nihal Gunesekera, for the respondent.—The question of *res judicata* does arise in this case. The order of the District Court awarding maintenance is the order of a Court of competent jurisdiction and is a bar to

[1] *(1939) 41 N. L. R. 169.*
[2] *(1940) 45 N. L. R. 18.*
[3] *A. I. R. (1930) Bom. 144.*
[4] *A. I. R. (1926) Mad. 59.*
[5] *A. I. R. (1938) Bom. 499.*
[6] *A. I. R. (1932) Cal. 698.*

separate proceedings on the same subject-matter. *Aryanayagam v. Thangamma* (*supra*) is applicable to the facts of this case. The more recent of the Indian decisions purport to follow *Kent v. Kent* (*supra*), but in the latter case the earlier order regarding maintenance had been made in England and not in India, and it is difficult to understand the *ratio decidendi*. *Saraswathi Debi v. Narayan Das Chatterjee* (*supra*) can be cited in respondent's favour. See also *In re Chandulal Ranchhod*[1].

Even if the Magistrate's Court has concurrent jurisdiction with the District Court the principle of election would apply, and, once one of two concurrent Courts is selected by a party he must exhaust the possibilities of the remedy obtained there.

L. A. Rajapakse.—The argument that there cannot be two concurrent enforceable orders for maintenance was put forward in *Birmingham Union v. Timmins*[2] but was not accepted.

Cur. adv. vult.

November 25, 1943. KEUNEMAN J.—

This case has been referred to us under section 38 of the Courts Ordinance for the determination of a question of law, in view of two divergent decisions of this Court. The facts are as follows: The applicant was the wife of the respondent, and applies here for maintenance on behalf of her legitimate child. In the earlier divorce action, the respondent was ordered to pay Rs. 15 as alimony and maintenance for the applicant and the child. It is clear that nothing has been paid by the respondent under that order. The respondent claims that the jurisdiction of the Magistrate has been ousted by the previous order of the District Court relating to the maintenance of the child.

In the argument before us, respondent's Counsel urged that the principle of *res judicata* applied. I do not think this argument is maintainable. The issue involved in the civil case is not the same as that in the maintenance case, and, further, in view of the fact that the applicant in the maintenance case need not necessarily have been the mother, it is doubtful whether the parties can be regarded as identical. I think the real question is whether the jurisdiction of the Magistrate has been ousted by the order in the divorce case.

Under section 2 of the Maintenance Ordinance (Cap. 76), "If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child", the Magistrate may order him to make a monthly allowance for that purpose. In the Ordinance several grounds are set out on which this order will be refused, but the existence of a prior order in a civil case is not one of the grounds.

Counsel for respondent desires us to follow the ruling of de Kretser J. in *Aryanayagam v. Thangamma*[3], namely:

> "So long as the order of the District Court remains, it is the order of a Court of competent jurisdiction and, on general principles, it ought to be a bar to separate proceedings on the same subject-matter."

In arriving at this decision de Kretser J. depended mainly on the case of *Subbaramakkamma, Petitioner* (*2 Weir p. 615*). The case itself is not

[1] *A. I. R. (1919) Bom. 140.* [2] *L. R. (1918) 2 K.B. 189.*
[3] *(1939) 41 N. L. R. 169.*

available here, and we have only the reference to it in later cases and in *Sohoni's Code of Criminal Procedure.* In the 1931 edition of Sohoni the decisior is set out as follows:—

> "A woman is not entitled to an order under this section from a Magistrate, when a decree for maintenance obtained by her in a civil Court is in force."

The section referred to is section 488 of the Criminal Procedure Code of India, which is very closely akin to section 2 of our Maintenance Ordinance.

The attention of de Kretser J. was not drawn to the fact that there are later Indian cases dealing with this point. He only refers to a Bombay case, which I shall have occasion to refer to later. In that case the civil decree could not be executed by the wife owing to the insolvency of the husband, and in the circumstances it was held that the Magistrate could act under section 488.

The same point came up for decision later in Ceylon before Soertsz J. (see *Peiris v. Peiris* (*supra*).) In this case also after the wife had obtained a decree for judicial separation and alimony, the husband was adjudicated insolvent. Soertsz J. referred to the Bombay case I have mentioned, namely, *In re Mohamed Ali Mithabhai*[1] where it was held that in the circumstances I have mentioned the decree of the civil Court was merely "a paper decree", which could not be executed on account of the pendency of insolvency proceedings. Patkar J. added "A mere decree of a civil Court awarding maintenance is not equivalent to maintaining the wife".

Reference was made in this case and also by Soertsz J. to the case of *Kent v. Kent*[2]. There Devadoss J. emphasised the language of section 488 and pointed out that what had to be proved to the satisfaction of the Magistrate was "that the husband had neglected to maintain his wife", and where that was proved, the Magistrate had jurisdiction. The decree in the civil case was for certain reasons not executable but Devadoss J. added, "Even if held to be executable, I am of opinion that so long as the husband does not maintain the wife either by payment of alimony or otherwise, the Magistrate's jurisdiction to order him to pay is not taken away". The case in Weir's Reports was differentiated. In another part of his judgment Devadoss J. said "A mere order for maintenance is non-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"

Soertsz J. in the case before him came to the conclusion that the existence of the civil decree for alimony was no bar to the exercise of the Magistrate's jurisdiction to grant an order for maintenance.

In the case of *Saraswathi Debi v. Narayan Das Chatterjee*[3] Mitter J. approved of the decision in *Kent v. Kent* (*supra*). The case, however, related to an agreement outside Court by the husband to maintain the wife. This was held not to be sufficient to oust the jurisdiction of the Magistrate.

[1] *A. I. R. (1930) Bom. 144.* [2] *A. I. R. (1926) Mad. 59.*
[3] *A. I. R. (1932) Cal. 698.*

Further, in the case of *In re Taralakshmi Manuprasad*[1] the facts were as follows:—A compromise decree was passed in a civil suit brought by the husband for restitution of conjugal rights, whereby it was provided that a certain sum was to be paid for arrears of maintenance, and that the husband should pay Rs. 15 a month for maintenance of the wife, and Rs. 5 a month for the maintenance of the daughter, and that a previous order made under section 488 should be cancelled. The order already made under section 488 was accordingly cancelled. The husband paid the arrears of maintenance under the civil decree, but failed to pay the subsequent maintenance. In the circumstances, the wife applied for a fresh order under section 488. It was held by Beaumont C.J. that the jurisdiction of the Magistrate was not ousted. In his judgment Beaumont C.J. said:

> " Section 488 contains no direction that an order under that section cannot be made if there is a decree for maintenance of a civil Court, although under sub-section (4) conditions are specified under which an order cannot be made. Of course the existence of a decree of a civil Court is relevant when the Magistrate is considering what form or order he should make under section 488, but in our opinion the mere existence of a decree of a civil Court does not oust the jurisdiction of a Magistrate in a proper case to make an order under section 488. It seems to us wrong in principle to allow the husband in this case to take advantage of the decree which, he has made no attempt to carry out. We think therefore that the case must be sent back to the learned City Magistrate to be dealt with on the merits. It is for him to consider whether there is any evidence which would bring the case under sub-section (4) and if he comes to the conclusion that an order for maintenance should be made, he ought to make it clear in his order that anything paid under the decree of the civil Court will be taken into account against anything which he may order to be paid. That is a mere question of the form of the order. In our view the existence of the decree of the civil Court does not oust the jurisdiction of the Magistrate ".

In my opinion, the later Indian decisions set out the true principle which we should follow. Where all that is shown is the existence of a decree of a civil Court, that is no bar to the exercise of jurisdiction by the Magistrate. Of course it is open to the husband to show that he is making payments under the civil decree and therefore has not failed or neglected to maintain the wife and children. In the present case the husband (respondent) has made no attempt to comply with the civil decree against him. I therefore set aside the order of the Magistrate and send the case back to him to make an appropriate order under the Maintenance Ordinance. The Magistrate will bear in mind the warning given by Beaumont C.J. as to the form of the order. and will not lose sight of the fact that the order of the District Court relates both to the wife and to the child.

The appellant is entitled to the costs of the appeal.

JAYETILEKE J.—I agree.

Appeal allowed.

[1] *A. I. R. (1938) Bom. 499.*