

1927.

Present: Lyall Grant J.

MALIAPPA CHETTY v. MALIAPPA.

759—P. C. Colombo, 13,368.

Maintenance—Separation by mutual consent—Binding effect—Ordinance
No. 19 of 1889, s. 5.

Where an application for maintenance by a wife was resisted by the husband on the ground that they were living separate,—

Held, that the separation by mutual consent contemplated by section 5 of the Maintenance Ordinance must be one entered into under circumstances which would justify a judicial separation.

A PPEAL from an order of the Police Magistrate of Colombo.

H. H. Bartholomeusz (with *Canakarathne*), for appellant.

Weerasooriya, for respondent.

July 1, 1927. LYALL GRANT J.—

This is an appeal from an order of the Police Magistrate of Colombo allowing a wife maintenance from her husband. The first hearing of the case was on September 28, 1926, when the defendant pleaded (1) that the applicant had deserted the respondent of her own accord and without sufficient reason and (2) that the parties were living apart by mutual consent.

Counsel for the applicant stated that the applicant was prepared to return to the defendant and offered to do so. Defendant's counsel then said that he was not now prepared to take the applicant back.

The question was then argued whether the respondent's allegations constituted a relevant defence.

The learned Police Magistrate held that they did not do so. He found on the authority of *Goonewardene v. Abeyewickreme*¹ that the continuance of an agreement to live apart depended on the continued consent of the parties and that it was put an end to by the applicant's offer to return to her husband.

Accordingly he restricted the question of proof to the amount of maintenance to be paid. Evidence on that point was led on October 20, 1926, and the amount of maintenance was then fixed of consent at Rs. 75 a month.

On October 21 the defendant presented a petition of appeal from the order of September 28. A preliminary objection was taken at the hearing that the appeal was out of time. It is obvious,

however, that the order of September 30 was an interlocutory order and not appealable, and that the appellant could appeal against the final order only. This appeal was entered at the earliest possible opportunity. Accordingly I over-rule the objection.

The principal point argued on appeal was as to the binding character of an extra judicial arrangement for a separation by consent.

That such an agreement is not illegal under our law was authoritatively decided by the Privy Council in *Soysa v. Soysa*.¹ A dictum of de Sampayo J., quoted with approval by the Board in this case, runs as follows:—

“ The result of all the authorities is that an agreement for voluntary separation and a provision as to property are not only not illegal, but valid as between the parties themselves, and only ineffectual for certain purposes ”

Maasdorp, *Institutes of Cape Law*, vol. 1, p. 76, says:—

“ An extra judicial agreement for separation will be effectual as between the spouses themselves Such an agreement also will not be binding even upon the spouses themselves, unless circumstances existed at the date of the separation which would have justified the Court in granting a decree of separation, the reason of this being that such an agreement, being without legal consideration, would amount to a donation between husband and wife. ”

The grounds which would satisfy such a decree are set forth as follows by Maasdorp at page 75:—

“ Where owing to habitual cruelty or the illtreatment of one spouse by the other, or continuous quarrels or dissensions between the spouses, or some other equally valid reason, the continued living together of the spouses has become insupportable or dangerous to the life of one or other of them. ”

It must be noted that in the present case no formal agreement for separation has been entered into. All that is alleged by the husband is that the parties are living apart by mutual consent. It appears to me that such an averment is not an averment of such an extra-judicial separation as is contemplated by the law as having the binding character attachable to a judicial separation.

The passage quoted from *Voet's Pandects*, Bk. 24, tit. 2, s. 19, is too vague to be of much assistance in this matter.

Mr. Justice Wood Renton in *Micho Hamy v. Girigoris Appu*² expressed the opinion that where the applicant parted from the respondent a number of years before on her own initiative and had since been living separate by mutual consent, the wife could not compel her husband to take her back or to pay her maintenance,

¹ 19 N. L. R. 146.

² 15 N. L. R. 191.

1927.

LYALL
GRANT J.

*Maliappa
Chetty v.
Maliappa.*

1927.

LYALL
GRANT J.*Maliappa
Chetty v.
Maliappa*

In that judgment Wood Renton J. refers to section 5 of the Maintenance Ordinance of 1889, which provides that no wife shall be entitled to receive a maintenance allowance from her husband if they are living separate by mutual consent. He adds: "The last words in the section mean," I think, "if they have separated by mutual consent."

I find myself unable to reconcile the judgment in this case with that of *Goonewardene v. Abeywickreme* (*supra*).

The question which this Court has really to decide at present is whether the words in the Maintenance Ordinance bear the interpretation placed upon them by Wood Renton J.

I am very doubtful whether the section can be so construed, unless its application is restricted to cases where the mutual consent has been entered into under circumstances which would justify a judicial separation.

Whether those circumstances exist in the present case or not is a matter of which the Court has no knowledge at present.

Another point, however, appears to me to be of some importance, and that is whether the offer by the wife to return to her husband is *bona fide*. It is open to any wife suing for maintenance to offer to live with her husband without any intention to do so but knowing that the offer will be refused. I do not think it is possible to arrive at a satisfactory decision in this case without investigating the facts.

The order for maintenance is accordingly set aside, and the case remitted to the Police Magistrate for the purpose of inquiring into the truth of the parties' averments.

Set aside.