Present : Bertram C.J.

1924.

PODIHAMY *v.* WICKREMESINGHE.

579—P. C. Matara, 31,546.

Maintenance—Application by mother—Illegitimate children—Decisory oath.

A case in which a mother applied for maintenance on behalf of her illegitimate children may be put to the test of a decisory oath, provided the Magistrate is satisfied that it is in the interests of the children that it should be done.

Sayalee v. Setuwa [1] explained.

APPEAL from an order of the Police Magistrate of Matara, dismissing an application for maintenance.

Soertsz, for applicant, appellant.

H. V. Perera (with him *Jayasooriya*), for respondent.

November 18, 1924. BERTRAM C.J.—

This is an appeal in a maintenance case which raises some points of difficulty. The allegation of the applicant, Podyhamy, was to the effect that the respondent, Don Carolis Wickremesinghe, had maintained her as his mistress for a period of seven years, and that she had two children by him, one six years old and the other six months old. She further alleges that the respondent continued to maintain her up to about three months before action. He now, so she says, repudiates his responsibilities, having been lately married. The applicant lives with her mother, and according to her story, the

[1] *(1923) 25 N. L. R. 216.*

1924.

BERTRAM C.J.

Podihamy v. Wickremesinghe

respondent regularly visited her, and kept his clothes at her mother's house. The respondent would appear to be a person of some importance. He is the brother of the local headman, and also a brother of the late headman. He is a cousin of a headman of a neighbouring village. The applicant filed a list of five witnesses. The respondent, on the other hand, filed a counter list of witnesses, including a Vidane Arachchi and two headmen. The Vidane Arachchi was to prove the loose character of the applicant. The respondent alleged that the case was instigated by his brother-in-law, yet another headman, the peace officer of a neighbouring village.

When the case came up for hearing none of the witnesses cited by the applicant appear to have been available. She had nobody to support her except her mother and an uncle, who was not on her list of witnesses. Discouraged, no doubt, by this circumstance, she challenged the respondent to take a decisory oath at the temple at Tissamaharama. On this point the case underwent a series of vicissitudes. First, the Magistrate ruled against the applicant on the ground that section 9 of Ordinance No. 9 of 1895 only applied to judicial proceedings of a civil nature, and that he was not satisfied that a maintenance case was a proceeding of a civil nature. The applicant was thereupon called, and after a few introductory circumstances, she broke down and refused to proceed with the case. The Magistrate, quite rightly, refused to allow her to withdraw from the case as the interests of the children were involved. After some further examination, applicant's advocate discovered an authority which decides that maintenance proceedings are proceedings of a civil nature, see *Eliza v. Jokino*.[1] The applicant thereupon repeated her challenge to the respondent to take an oath at Tissamaharama Dagoba, and the respondent declared that he was willing to do so. The Magistrate was in the course of making his order for this purpose, when another counsel, as *amicus curiæ*, drew his attention to the recent decision of my brother Jayewardene (*Sayalee v. Setuwa* (*supra*)), and this case was taken as deciding that in no case where the interests of minor children were involved is the mother in a maintenance case entitled to put the case to the test of a decisory oath. This, however, is not the proper interpretation of the decision. Acting on this misinterpretation, the learned Magistrate ordered the case to proceed.

When applicant first appeared before the Court, it was alleged (no doubt with a view to impugning her character) that a certain sore which she was suffering from was due to a fight. When she next appeared she denied this, and said it was due to an abscess, and this she subsequently established by medical testimony. When the Court went into the merits of the case, the defence took what I cannot help thinking was a singular form of a suggestion that the

[1] *(1917) 20 N. L. R. 157.*

two children were due to an intimacy between the applicant and Juwanis, who was said to be living in a house in the same compound with her. Juwanis, however, from the evidence appears at the time when the first child was born to be a mere schoolboy of ten or eleven years of age. Both mother and daughter definitely swear to the juvenile age of this boy, though there was naturally a certain want of precision in their particulars. The girl said she was ten or twelve years older than Juwanis, and she was now twenty-five. It is by no means clear that Juwanis had ever paid poll tax. No facts were stated or put to the witnesses which, in any way, suggested any familiarity between this boy and the mother of the two children. The learned Magistrate dismissed the girl's application saying, " there are numerous contradictions between the applicant and her mother. I gravely doubt whether applicant is not trying to shift to respondent the responsibility for children, of whom Juwanis is actually the father."

The case is one which is somewhat difficult to deal with. The learned Magistrate has clearly misinterpreted the judgment of my brother Jayewardene. The effect of that judgment is that before allowing a mother in a maintenance case to put the case to the test of a decisory oath, the Magistrate must be satisfied that it is in the interests of the children that she should be allowed to do so. It is often difficult for a woman in a maintenance case to procure the necessary corroboration, but her case may, nevertheless, be true. There may well be instances in which her position is desperate, and a decisory oath is her only hope. In Muhammadan law it is always the privilege of a party, who has failed to prove his case, to challenge the other party to take an oath. In the present instance, the position of the applicant was in fact desperate. She had not been able to procure the attendance of any of the witnesses on her list, though this circumstance was not known to the learned Magistrate when she first made her application. The absence of these witnesses may, of course, be due to the fact that they could not support a false story, but their absence may also have been due to the fact that, owing to the social and official connections of the respondent, they were afraid or reluctant to support a true one.

It would appear, therefore, that the learned Magistrate was mistaken in his final determination that the mother ought not to be allowed to put the rights of herself and her children to the test of an oath. Some time has, however, now elapsed. The test of an oath is deprived of a good part of its value, unless it is promptly taken upon a challenge made in Court. The respondent has now so far committed himself that it is very unlikely that he will refuse to take the oath in any circumstances.

With regard to the merits of the case, I cannot, of course, say that the learned Magistrate was necessarily wrong in refusing to decide the case in the applicant's favour simply upon the evidence of

1924.

BERTRAM C.J.

Podihamy v. Wickremesinghe

mother and herself alone. But, nevertheless, this seems to me to be a case in which the facts should be more fully investigated. The learned Magistrate, having already expressed an opinion, would no doubt desire to be relieved of the necessity of embarking on a further inquiry.

I think, therefore, the best course will be to remit the case for further inquiry before another Magistrate. The witnesses on the applicant's list should also be summoned, and any other witnesses whom either party desires. Further the boy, Juwanis, should be before the Court, and some definite evidence of his age should be obtained, if it is procurable. Should the applicant renew her application for a decisory oath, the learned Magistrate, to whom the case is remitted, will then have to consider her application in view of the principles above explained.

I make order accordingly.

Case remitted.