

1952

Present : Rose C.J.

N. SUBRAMANIAM, Petitioner, and PAKKIYALEDCHUMY,  
Respondent

S. C. 92—Application in revision in *M. C. Jaffna (Addt.) 21,446*

*Divorce—Decree nisi entered in favour of wife—Re-marriage before decree is made absolute—Right to claim maintenance as wife—Marriage by habit and repute—Maintenance Ordinance (Cap. 76), s. 2.*

The applicant, who had obtained a decree *nisi* in divorce proceedings against her husband K., alleged that she contracted a second marriage with S. and claimed maintenance for herself from S. before the decree *nisi* in the divorce proceedings had been made absolute.

*Held*, that the applicant was not entitled to claim maintenance as wife of S. under section 2 of the Maintenance Ordinance. In such a case, the presumption of marriage by habit and repute is not applicable.

<sup>1</sup> (1948) 50 N. L. R. 214.

**A**PPPLICATION to revise an order of the Magistrate's Court, Jaffna.

*T. B. Dissanayake*, for the defendant petitioner.

*C. Chellappah*, for the applicant respondent.

*Cur. adv. vult.*

June 19, 1952. ROSE C.J.—

This is an application in revision by the defendant-petitioner, the respondent in a maintenance action, to have the order for maintenance made in favour of the applicant-respondent (the applicant) set aside on the ground of its illegality in that the applicant-respondent was, at the time of the order, still the lawful wife of one Appapillai Kumarasingham.

In her application for maintenance the applicant-respondent called herself the "wife" of the defendant-petitioner who, on appearing in court on the summons returnable date, admitted marriage and paternity, as shown in the relevant journal entry. On this admission the magistrate inquired into the quantum of maintenance and made order in her favour in a total sum of Rs. 50 viz. Rs. 30 for the applicant-respondent and Rs. 20 for the child. The defendant-petitioner's appeal from this order was dismissed by this court on August 31st, 1951. Thereafter on 2nd September, 1951, the defendant-petitioner on discovering that the applicant-respondent was still in law the wife of Appapillai Kumarasingham filed an affidavit with a copy of the marriage certificate and invited the learned magistrate to set aside the order for maintenance in favour of the applicant-respondent, who rightly declined to interfere because he had no jurisdiction to entertain such an application.

From this order the defendant-petitioner appealed but at the hearing of the appeal it was conceded on his behalf that his remedy, if any, would be to seek relief from this court by way of revision. Hence this application.

Section 2 of the Maintenance Ordinance No. 19 of 1889 permits a "wife" to make an application against her husband in the event of his failing or neglecting to maintain her. The duty is cast on the husband to provide only for his "wife", and if the alleged marriage of an applicant for maintenance is invalid by reason of some legal impediment, which makes her stand in some lesser relationship to the alleged husband than his "wife", it would seem to be plain from the wording of the section that she is not entitled to claim maintenance for herself under the Ordinance.

The applicant-respondent was married to Appapillai Kumarasingham and in divorce proceedings against him she obtained a decree nisi on November 4th, 1941. This decree was not made absolute until April 8th, 1952, which is considerably later than the decision of the application which has given rise to the present proceedings.

That being so, there cannot, in my opinion, arise even a presumption of a marriage by habit and repute between the defendant-petitioner and the applicant-respondent at the relevant times—*Sathiyathan v. Sathiyathan*<sup>1</sup>; *Weerapperuma v. Weerapperuma*<sup>2</sup>.

The defendant-petitioner is, therefore, entitled in my view to succeed in the present application. The previous proceedings in so far as they make the defendant-petitioner liable to pay maintenance to the applicant-respondent are set aside. The applicant-respondent will pay the costs of the present application.

*Application allowed.*

