

1972

Present : Rajaratnam J.

D. G. PERERA, Appellant, and K. A. D. SHAMA PERERA,
Respondent

S. C. 601/71—M. C. Colombo, 33347/AMC

Maintenance—Order for maintenance of children—Children looked after by a third party subsequently—Liability of the defendant nevertheless to pay all arrears due—Maintenance Ordinance, s. 10.

Where a person has been ordered under the Maintenance Ordinance to pay maintenance in favour of his children, his liability to pay arrears of maintenance is not extinguished by the fact that a third party looked after the children when they were destitute.

APPEAL from a judgment of the Magistrate's Court, Colombo.

N. R. M. Daluwatte, for the defendant-appellant.

W. Justin Perera, for the applicant-respondent.

Cur. adv. vult.

October 19, 1972. RAJARATNAM, J.—

The appellant in this case admitted the paternity with regard to three children on behalf of whom the mother claimed maintenance. The defendant-appellant agreed to pay a sum of Rs. 140 in respect of these three children on the 22nd of March 1968. An order was made accordingly for the payment of this sum. On the 31st May 1968 the applicant came to Court complaining that the defendant failed to pay a sum of Rs. 280 for two months ending on 22.5.68 and a distress warrant was issued. On 19.7.68 the said warrant was returned unexecuted and the Fiscal reported that there were no movables. On 9.8.68 and 7.9.68 the defendant again failed to be present in Court. By this time the defendant had only paid Rs. 100 in respect of the arrears of Rs. 280 due up to the 22nd May 1968. There were a number of dates following in Court when the defendant absented himself and the warrants were returned unexecuted. The defendant, it is abundantly clear, evaded and avoided liability and the applicant had to come to Court on several occasions to recover the arrears due to her for the first two months. Ultimately she came to Court and claimed a sum of Rs. 2,420 arrears due up to the 22nd of September 1969, and prayed for a distress warrant on the 19th of October 1969. On the 19th December 1969 the defendant failed to be present and the distress warrant was returned unexecuted. There was the same sequel on two following dates and finally on the 15th of June 1970 the defendant presented himself and denied that the sum of Rs. 2,420 was due from him. The dispute was fixed for inquiry and after a few more dates the respondent paid Rs. 500 on the 6th of

December 1970. After several more dates the matter was finally inquired into on the 3rd January 1971. Thereafter there were a few more dates and the inquiry proceeded on the 31st January 1971 and at last an order was made on the 1st of March 1971 from which order the present appeal was lodged.

The main and the only point of dispute was that the defendant was not liable to pay any maintenance to the children in view of the fact that these 3 children were maintained in various orphanages during the period for which arrears of maintenance were claimed. It is not at all surprising that the mother was compelled by circumstances due to the defendant's neglecting to maintain his children to put the children into orphanages. It was unreasonable for the defendant to expect these children under such circumstances to have been maintained in comfort by the applicant while he was neglecting and avoiding payment of maintenance. The order for maintenance was made against the father for neglecting or refusing to maintain his children and once this order is made after an inquiry or after an agreement this will stand till an application is made under s. 10 of the Maintenance Ordinance to cancel or vary the order.

The learned Magistrate has held that it cannot be said that the children were not maintained by the applicant. There is evidence at least in respect of one child that the mother spent on books and provided clothes. It cannot be forgotten that the period in which the children were in orphanages was the period that the defendant evaded payment of any maintenance. The journal entries eloquently reveal the conduct of the defendant and he cannot be heard to avail himself of the benefit of his own evasion. The liability of the defendant to pay maintenance during this period to his children is not extinguished by the fact that a third party looked after the children when they were destitute. An order to the effect that the defendant is not liable to pay his arrears will be an invitation for defaulting fathers to create situations where the poor mother has to depend on charity of others and for that reason for them to claim non-liability to pay the arrears.

I hold that the learned Magistrate made the correct order in this case when he held that the defendant was liable to pay Rs. 2,420 less Rs. 500 to the applicant.

I dismiss the appeal with costs.

Appeal dismissed.