1962 *Present* : Weerasooriya, J.

J. MIHIRIGAMAGE, Appellant, and S. BULATHSINHALA, Respondent

S. C. 162—M. C. Gampaha, 64,757

Maintenance Ordinance (Cap. 91)—Section 2—Incapacity of an ex-wife to apply thereunder for maintenance.

A married woman who has obtained a decree for divorce is not entitled thereafter to apply for maintenance for herself under section 2 of the Maintenance Ordinance. In construing the expression "wife" in that section it is not permissible to give it an extended meaning so as to include an ex-wife who, as a result of a decree of a competent court, has ceased to be the wife of the respondent.

APPEAL from an order of the Magistrate's Court, Gampaha.

Frederick W. Obeyesekere, for the applicant-appellant.

J. C. Thurairatnam, with *M. T. M. Sivardeen*, for the defendant-respondent.

September 3, 1962. WEERASOORIYA, S.P.J.—

This is an appeal from an order of the Magistrate refusing an application by the applicant-appellant against the respondent for maintenance of herself and her child. In the application, which was made on the 13th May, 1961, under the provisions of section 2 of the Maintenance Ordinance (Cap. 91), the applicant described herself as the lawful wife of the respondent. The application in so far as it concerned the maintenance of the child was not proceeded with as the child died on the 23rd September, 1961, during the pendency of the proceedings.

It appears from the document A1 that on the 30th August, 1960, a decree nisi had been entered in the District Court of Gampaha for the dissolution of the marriage between the applicant and the respondent on the grounds that the respondent was guilty of malicious desertion. By the same decree the respondent was ordered to pay to the applicant Rs. 50 per month as alimony and Rs. 20 per month as maintenance for the child. This decree was made absolute on the 20th December, 1960, so that at the time when the applicant made the application for maintenance in the present proceedings she was no longer the wife of the respondent. The description of the applicant as the lawful wife of the respondent in the application made by her is therefore not correct. The Magistrate after inquiry refused the application on the ground that as the applicant had at the date of the application ceased to be the wife of the respondent, she was not entitled to an order of maintenance under section 2 of the Ordinance.

Section 2 confers power on a Magistrate to make an order for maintenance against any person who "having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself". The expression "wife" is not defined in the Ordinance and in the absence of a definition it would have to be construed as meaning a lawfully married wife unless there are any grounds for giving to the expression an extended meaning. Mr. Obeyesekere who appeared for the appellant relied on certain decisions of this Court on the strength of which he submitted that the expression "wife" in section 2 should be construed so as to include an ex-wife who prior to the making of the application for maintenance had ceased to be a wife as a result of a decree of a competent Court dissolving her marriage with the person against whom the order for maintenance is sought to be obtained. The first of these cases is *Peiris v. Peiris* [1]. The facts of this case are as follows: The applicant had sued the respondent for a decree of judicial separation and was successful in obtaining it along with the custody of the child of the marriage. It would appear that an order for alimony in her favour had also been made, but in order to avoid payment of the alimony the respondent had subsequently got himself adjudicated an insolvent. The wife thereafter made an application against the defendant under the Maintenance Ordinance for maintenance for herself and her child. The Magistrate following a decision of de Kretser, J., in *Aryanayagam v. Thangammah* [2] by which he considered himself bound, dismissed the application of the wife on the ground that there was already a decree of a civil court in favour of the wife for the payment to her of alimony. In appeal Soertsz, J., held that the decree for alimony, as long as it was not complied with, was not a bar to an application under section 2 of the Maintenance Ordinance and that in such an application it was open to the Magistrate to make an order for maintenance if there is proof that the husband having sufficient means had neglected or refused to maintain his wife or child. It is to be noted that the applicant in that case was still the wife of the respondent.

The conflicting views expressed by Soertsz, J., and de Kretser, J., led to the subsequent case of *Fernando v. Amarasena* [3] being referred to a Bench of two Judges of this Court, It would appear that in that case the applicant for maintenance had previously obtained a divorce from her husband, the respondent, who had in the same action been ordered to pay Rs. 50 as alimony and maintenance for the applicant and the child of the marriage. No payment had however been made by the respondent in terms of that order, and the applicant thereafter applied to the Magistrate's Court for an order of maintenance in favour of the child only. She refrained from making an application for maintenance in her favour presumably because she had ceased to be the wife of the respondent. It was held that where all that is shown is the existence of a decree of a civil court for payment of alimony, such decree is no bar to the exercise of jurisdiction by the Magistrate under the

[1] *(1940) 45 N. L. R. 18.* [2] *(1939) 41 N. L. R. 169.*
[3] *(1943) 45 N. L. R. 25.*

provisions of the Maintenance Ordinance. No occasion arose in that case for the Court, to consider the question whether it was competent for the " wife " once she had ceased to be the wife of the respondent, to make an application under the Maintenance Ordinance for maintenance of herself.

The third case relied on by Mr. Obeyesekere is the case of *Francis Fernando v. Vincentina Fernando* [1]. In that case the applicant had obtained an order for maintenance of herself under the provisions of the Maintenance Ordinance. Subsequently she obtained a decree in the District Court dissolving her marriage with the respondent and also an order for payment of alimony in a sum of Rs. 80. Apparently the order for payment of alimony was not complied with and the applicant then applied under section 10 of the Maintenance Ordinance for enhancement of the maintenance that had been ordered in her favour prior to the divorce proceedings. Sinnetamby, J., held on a consideration of the language of section 10 that it was open to the applicant, even after she had ceased to be the wife of the respondent, to apply under section 10 for enhancement of the maintenance ordered prior to her change of status. Sinnetamby, J., while expressing that view, contrasted the language of section 10 with that of section 2, and he observed that for the purposes of section 2 an applicant " has to be a *wife* in order to succeed ", but he did not think it necessary for the purposes of that case to decide whether a " wife " who had obtained a decree for divorce can thereafter apply for maintenance under section 2.

The view taken by Sinnetamby, J., that it is open to an ex-wife to apply under section 10 for enhancement of maintenance order under section 2 at a time prior to her change of status, seems to run counter to the decision in the earlier case of *Meniki v. Sivathuwa* [2], which was not considered by him, and in which it was held that where a wife had obtained an order for maintenance against her husband under the provisions of the Maintenance Ordinance, it would not be open to her to recover maintenance in terms of the order as from a date subsequent to that on which her marriage with the respondent was dissolved under the provisions of the Kandyan Marriage Ordinance, No. 3 of 1870.

It seems to me that the question decided in *Francis Fernando v. Vincentina Fernando* (*supra*) and in the other two cases relied on by Mr. Obeyesekere was different from that arising in the present appeal. A case which is more in point, and to which Mr. Sivardeen appearing for the respondent drew my attention, is *Subramaniam v. Pakkiyaladchumy* [3] where Rose, C.J., in considering the language of section 2 observed that the section permits a " wife " to make an application against her husband in the event of his failure to maintain her. He stated further " 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

[1] *(1958) 59 N. L. R. 522.* [2] *(1940) 42 N. L. R. 53.*
[3] *(1952) 55 N. L. R. 87.*

in a somewhat lesser relationship to the alleged husband than as 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."

Section 2 of our Maintenance Ordinance is substantially the same as section 488 (1) of the Indian Code of Criminal Procedure (Act No. 5 of 1898). It would appear to be the view of the Indian Courts " that it is only on proof of the existence of conjugal relations between a man and a woman that the man can under section 488 be ordered to provide for the woman's support "—per Aikman, J., in *Shah Abu Ilyas v. Ulfat Bibi* [1]. See also *In re Mohamed Rahimullah and another* [2]; and *Janni Bibi v. Mohamed Abdul Rahaman* [3].

In the present case too I do not think that in construing the expression " wife " in section 2 of the Maintenance Ordinance it is permissible to give it an extended meaning so as to include an ex-wife who, as a result of a decree of a competent court, had ceased to be the wife of the respondent.

In my opinion, the order of the Magistrate refusing the application of the appellant is a correct order and I therefore dismiss the appeal.

Appeal dismissed.