

Present : Jayewardene A.J.

DE SILVA v. FERNANDO.

240—P. C. Negombo, 53,502.

Maintenance—Application for arrears—Resistance on ground of wife's adultery—Cancellation of order—Retrospective effect.

Where an application for an order for payment of arrears of maintenance due to a wife was resisted on the ground that she was living in adultery.—

Held, that the Court had no power to cancel the order for maintenance retrospectively so as to affect the arrears due under it.

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

M. T. de S. Amersekere, for defendant, appellant.

Peri Sunderam, for complainant, respondent.

June 18, 1930. JAYEWARDENE A.J.—

This is an appeal under the Maintenance Ordinance, No. 19 of 1889. The defendant has been ordered in 1916 to pay Rs. 10 a month by way of maintenance: Rs. 5 for his wife, the applicant, and Rs. 2.50 for each of his two children. The defendant had not made any payment for some years, and on December 18, 1929, the applicant applied that the defendant be ordered to pay the arrears then due. The defendant appeared to show cause. On February 27, 1930, counsel on his behalf submitted that the applicant was living in adultery since the order for maintenance was made and that the Court had the power to rescind the order for past maintenance. He cited an authority in support of his contention. The book was not available and the

Magistrate made order that the case be called the next day for the production of this authority. On the next day, February 28, the defendant filed a motion signed by himself and his proctor praying that the order for maintenance made against him may be cancelled under section 6 of the Ordinance on the ground that the applicant was living in adultery. Notice was ordered on the applicant for March 14. There is an entry on the record that this notice had not been issued as ordered because no stamps were supplied by the defendant.

The application for the cancellation of the order for maintenance has not been considered.

In the meantime on February 28, the counsel for the defendant appeared and wanted to lead evidence to show that for eight years the applicant had been living in adultery and that therefore the order must be cancelled as from the commencement of that period. The learned Magistrate held that he could not make an order of cancellation which could have any effect on arrears due under the original order. The applicant restricted her claim to Rs. 250. The learned Magistrate gave judgment for that sum, and ordered distress warrant to issue for its recovery. The defendant has appealed.

It was contended that the wife was not entitled to receive any allowance for maintenance under section 5 of the Ordinance for any period during which she was living in adultery even though the order under section 3 was in force. The aid of the law cannot be denied to those who seek to enforce their rights under a decree or order. The wife merely asks the Court to enforce its own order. All that an execution Court can do is to execute the decree as it stands. It cannot proceed to impeach its own decree. (*Caspersz on Res Judicata*, p. 306, 3rd ed.) The Magistrate has the power, however, to cancel its own order under section 6 on proof in proper proceedings, that the wife is living in adultery since the order

for maintenance was made, but till such cancellation the order is operative, and must be given effect to. If the husband chooses to let the order remain uncanceled in spite of the wife's adultery he is bound by it. An order for maintenance can only be cancelled under section 6 on a later date, and only if it is shown that the wife is then living in adultery and even the fact that at some time subsequent to the order she was living in adultery does not entitle the husband to a cancellation of the order, if she has ceased to do so (*Ramalhamy v. Appuhamy*¹). An order of cancellation cannot be made so that it may have a retrospective effect. Though upon a change of circumstances or on proof of adultery, the existing order may be modified or cancelled, still so long as that order remains in force

¹ (1916) 3 C.W.R. 326.

it must carry with it its proper consequences (*Sideswar Teor v. Dasi*¹). The same principle underlies the case of (*Nepoor Aurut v. Surai*²).

The application to cancel the original order was made after the first day's argument and notice of it had not been served on the wife, so that it could not properly be considered. I think, however, that the learned Magistrate was right. In any event the father is bound to maintain his children, even though his wife may be living in adultery, so long as they are in her lawful custody (*Dingiri Menike v. Mudiyanse*³). The sum ordered to be paid very nearly covers the amount due under the decree for the maintenance of the children alone.

I dismiss the appeal with costs.

Appeal dismissed.

¹ (1894) 22 Cal. 291. ² 19 W.R. Cr. 73.

³ (1906) 3 Bal. 253.