

*Present:* Jayewardene A.J.

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SANCHI *v.* ALLISA.

93—*P. C. Kogalla, 5,272.*

*Kandyan Marriages Ordinance, No. 3 of 1870, s. 23—Dissolution of marriage—Legitimacy of child—Subsequent application for maintenance—Ordinance No. 19 of 1889.*

Where in proceedings before an Assistant Provincial Registrar for the dissolution of a Kandyan marriage no order for the maintenance of a child of the marriage was made.

*Held,* that the proceedings before the Registrar was no bar to an application under the Maintenance Ordinance.

*Navaratnam,* for defendant, appellant.

February 22, 1926. JAYEWARDENE A.J.—

This appeal raises a question with regard to the construction of sub-sections (2), (3), (4), and (5) of section 23 of the Kandyan Marriage Ordinance, 1870, and the powers of Provincial or Assistant Provincial Registrars under them. These sub-sections were enacted by section 4 of Ordinance No. 1 of 1919 as amendments to the main Ordinance. The appellant, the husband, was sued by the respondent, his wife, under the Maintenance Ordinance for failure to maintain his child. The parties were married in

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December, 1921, and their marriage was dissolved by the Provincial Registrar on August 3, 1925, on the ground of their "inability to live happily together"; of which, under the Ordinance of 1870, section 23 (1) (4), actual separation from bed and board for a year is the test. The husband had made a previous application for divorce, which had been withdrawn. The second application, which resulted in a divorce, was also at his instance. The child, on whose behalf maintenance is claimed, was born two months before the dissolution of the marriage. The appellant has taken a preliminary objection to the application on the ground that as the Assistant Provincial Registrar had refused to make an order for maintenance in respect of this child at the dissolution of the marriage the present application cannot be maintained. The learned Police Magistrate has in a very lucid judgment repelled this objection and made an order for the payment of maintenance. He said: "All that sub-sections (4) and (5) enact is to give the same force to an order for maintenance made by the Assistant Provincial Registrar as an order made by a Magistrate under section 3 of the Maintenance Ordinance. Where the Assistant Provincial Registrar fails or declines to make any order for maintenance, it is open to any party to invoke the provisions of the Maintenance Ordinance. The case reported in 21 N. L. R. 477, though not on all fours with this, appears to support the view I have taken."

The objection is pressed before me.

Now, under sub-section (2) of section 23 a Provincial or Assistant Provincial Registrar when making an order for the dissolution of a marriage—

"(b) May, if he thinks fit, order, by an entry to that effect in the Register of Dissolutions, that the husband shall pay a certain sum of money periodically, or make other provision for the maintenance—

- (i) Of his wife, provided there is no entry under paragraph (a) hereof for compensation to be made to her;
- (ii) Of his children."

Sub-section 3 (a) gives a right of appeal to the Governor in Executive Council, and 3 (b) directs the order made on appeal to be entered in the Register of Dissolutions.

Sub-section (4) runs as follows:—

"(4) An entry or order made under sub-section (2) or (3) hereof shall have all the effect of an order or decree of a competent court in so far as it may be enforced, cancelled, or varied by such court, to all intents and purposes as if the entry or order were an order or decree of such court but subject to the limitations hereinafter mentioned."

And sub-section (5) declares that—

“ For the purposes of the immediately preceding sub-section ‘ competent court ’ shall mean—

(a) A Police Court in the exercise of its jurisdiction under ‘ The Maintenance Ordinance, 1889 ,’ in respect of an order made under section 3 thereof, where such entry or order directs the payment periodically of a sum of money in so far as such entry or order directs such payment; . . . . .

(b) . . . . .”

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The learned Magistrate’s reasoning appears to be correct. Sub-section (2) (b) when it speaks “ of his children ” refers, in my opinion, to children whom the father admits to be his. I do not think the sub-section gives the Provincial or Assistant Provincial Registrar power to inquire into disputed questions of legitimacy. This view is borne out by the terms of the entry required to be made in the Register of Dissolutions. The entry has to be substantially in the form F of the schedule to the Ordinance, and the Registrar after ordering the dissolution of the marriage, has to certify “ that, according to the representation of the parties, they have had during their marriage . . . . children as follows: (name and age) ”; then he has to state the order made by him under sub-section (2) (b). I would construe the words “ according to the representation of the parties ” as meaning a statement admitted by both parties. They exclude the idea of a statement made by one party and disputed by the other, but which has been established by evidence to the satisfaction of the Registrar. Sub-section (4) read with sub-section (5) makes this quite clear. By sub-section (4) an entry or order made under sub-section (2) and (3) is given the same effect as an order or decree of a competent Court, and such Court can enforce, cancel, or vary any entry or order in the Register of Dissolutions as if it were an order or decree passed by itself, but this provision is subject to certain limitations. The limitations are to be found in sub-section (5), which defines the term “ competent court ” as used in sub-section (4). It includes a Police Court exercising jurisdiction under the Maintenance Ordinance, 1889, when it acts under section 3 of the Ordinance, but only when the entry or order under sub-sections (2) or (3) directs the payment of a sum of money periodically as maintenance. Under section 3 of the Maintenance Ordinance a Police Magistrate can either make an order for maintenance or dismiss the application, that is, refuse to make an order. Sub-section (4) read with the limitation withholds from an order of the Provincial or Assistant Provincial Registrar refusing to make an entry for the payment of maintenance, the effect of an order of a competent Court given by

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the sub-section to an entry or order directing periodical payments. Therefore, there can be no entry having the effect of an order or decree of a competent Court which could be pleaded as a bar to the applicant's present claim. Further, there is in the present case no entry or order in the Register of Dissolutions showing that the Assistant Provincial Registrar refused to make an order in favour of the child in question. It is to such an entry or order alone that sub-section (4) gives the effect of an order of a competent Court. I do not think it is possible to refer to the Assistant Provincial Registrar's notes of inquiry to ascertain what conclusions he had arrived at. I do not think they are admissible, as all the effective entries or orders have to be entered in the Register of Dissolutions. If the husband, the appellant, denied paternity, the Assistant Provincial Registrar was justified in refusing to make an order for maintenance, as the child was not a child of the marriage "according to the representation of the parties." He could do no more. He had no authority under the Ordinance to proceed to inquire into the question of the child's legitimacy.

On the facts, the learned Police Magistrate has come to a right conclusion. The appellant has failed to rebut the strong presumption created by section 112 of the Evidence Ordinance that a child born during the continuance of a valid marriage must be considered to be legitimate, unless it can be shown that the husband had no access to the wife at any time when such person could have been begotten, or that he was impotent. The appeal is dismissed.

*Appeal dismissed.*