

1961

Present : L. B. de Silva, J.

D. M. ABEYSEKERA, Appellant, and K. M. BISSO MENIKA,
Respondent

S. C. 766—M. C. Gampola, 14233

Maintenance—Order in favour of wife—Cancellation on ground of adultery—Retrospective effect of order of cancellation—Maintenance Ordinance (Cap. 76), ss. 4, 5, 8, 10—Kandyan Marriage and Divorce Act, No. 44 of 1952—Effect of maintenance order made thereunder.

(i) When an order of maintenance entered in favour of a wife is cancelled under sections 5 or 10 of the Maintenance Ordinance on the ground that she is living in adultery, the order of cancellation may be made to take effect retrospectively so as to cover the period during which she has been living in adultery.

(ii) There is no provision under the Kandyan Marriage and Divorce Act No. 44 of 1952 enabling an order of maintenance entered by a District Registrar to be made an order of the Magistrate's Court.

A P P E A L from an order of the Magistrate's Court, Gampola.

D. R. P. Goonetilleke, for Defendant-Appellant.

No appearance for Applicant-Respondent.

Cur. adv. vult.

October 5, 1961. L. B. DE SILVA, J.—

The Defendant-Appellant moved Court to cancel the Order for Maintenance in favour of his wife, the respondent, on the ground that she was living in adultery. Admittedly the Respondent was living in adultery from July, 1959. The marriage between these parties, who

are Kandyan, was dissolved with effect from 14th September, 1960, being the date on which the dissolution of their marriage was registered under the Kandyan Marriage and Divorce Act, No. 44 of 1952.

The parties agreed that the applicant-respondent was not entitled to maintenance for herself as from the 14th September, 1960. The Appellant contended that the applicant was not entitled to maintenance as from July, 1959 as she was living in adultery from that time.

The learned Magistrate held that section 10 of the Maintenance Ordinance (Chapter 76 of the Legislative Enactments of Ceylon) which empowered him to cancel the Order for Maintenance, made no provision for an Order to be cancelled with retrospective effect.

Learned Counsel for the Appellant argued that sections 4 and 5 of the Maintenance Ordinance empowered the Magistrate to cancel the Order for Maintenance with retrospective effect. Section 5 provides as follows:—

“ On proof that any wife in whose favour an Order has been made under section 2 is living in adultery the Magistrate shall cancel the Order. ”

It is not clear from sections 5 or 10 if the Order for cancellation of Maintenance, can be made with retrospective effect. I am informed by learned Counsel for the appellant that there are no local decisions governing this point. He, however, referred me to certain decisions under section 488 of the Indian Criminal Procedure Code, relevant to this point. The provisions of the Indian Code are more or less similar to the provisions of our Maintenance Ordinance.

Section 488 (5) of the Indian Criminal Procedure Code provides, “ On proof that any wife in whose favour an Order has been made under this section is living in adultery the Magistrate shall cancel the Order ”. This sub-section is identical with section 5 of our Maintenance Ordinance.

Section 488 (4) of the Indian Code provides, “ No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery ” This sub-section is identical with section 4 of our Maintenance Ordinance.

In *Tari Bala Suklabaidya v. Ribal Ram Suklabaidya*¹ Biswas, J. (a single Judge) held, “ An order of cancellation takes effect from the date of the order and has no retrospective operation ”.

In *Khandekar v. Khandekar*², Broomfield, J. (in a case before two Judges) referred to the earlier decisions including the case referred to above and stated, “ We find ourselves unable to accept these rulings as correct in so far as they appear to lay down that an order for maintenance is to be treated as a good and executable order until it is cancelled or set aside ”.

¹ A. I. R. 1938 Calcutta 144.

² A. I. R. 1942 Bombay 258.

After considering section 488 (4) which is the same as section 4 of our Maintenance Ordinance, he stated, "The general language here employed seems to make this applicable to any sum receivable by a wife by way of maintenance including arrears of maintenance. So that the effect of clauses (3) and (4) together is that on proof that the wife is living in adultery, the Magistrate will be justified in refusing and indeed bound to refuse to execute an order for maintenance, quite apart from the question whether the order has been cancelled or set aside".

Having considered clause 5 (same as our section 5), he drew a distinction between execution of an Order and its cancellation. He said, "It is by no means clear that the use of the word 'cancel' necessarily implies retrospective effect. Cancel may mean 'put an end to' or 'terminate' rather than 'set aside'. But this point is immaterial if the execution of the original order is barred under clauses (3) and (4).

The view we take that an order for payment of maintenance may be or become incapable of execution, quite apart from the question of cancellation, is supported by *10 Rangoon 194*¹.

Under section 488 (4) of the Indian Criminal Procedure Code, a Magistrate may issue a warrant for recovery of the amount due on a Maintenance Order, "if a person so ordered fails *without sufficient cause* to comply with the Order". In the Rangoon Case, the Court held, "The words 'without sufficient cause' are very wide and seemed to us to justify the raising of a plea that the order has become spent owing to the child for whom the maintenance was ordered, having attained the age of majority and being able to maintain itself. . . . We do not consider it can have been the intention of the Legislature that the order which obviously is spent can still be enforced until the person affected thereby shall have made a formal application under the provisions of section 489 (i.e. for an Order altering or cancelling the Order for maintenance similar to an Order under section 10 of our Maintenance Ordinance). The fact that an Order is so spent seems to us to be sufficient cause within the meaning of clause 3 of section 488".

In section 8 of our Ordinance which provides for the enforcement of Maintenance Orders, the words "without sufficient cause" do not occur. But under section 4 of our Ordinance, a wife who is living in adultery is not entitled to receive an allowance from her husband under section 2. The allowance to the wife under section 2 is the Order for Maintenance. If she is not entitled to the benefit of the Order for Maintenance, she has no right to enforce the Order for any period during which she was living in adultery. It is the duty of the Court not to enforce the Order with reference to the period during which the wife was not entitled to an allowance under the Order.

In view of these considerations, I hold that a Magistrate is entitled under sections 5 or 10 of the Maintenance Ordinance to cancel the Maintenance Order in favour of the Applicant-respondent with retrospective effect to cover the period during which she was admittedly

¹ (1932) 19 A. I. R. 94.

living in adultery. I accordingly cancel the order in favour of the Applicant-respondent for her own maintenance with effect from 1st July, 1959.

In this case the Defendant-Appellant was ordered to pay Rs. 20/- a month to the Applicant-respondent as maintenance for their child Arunda Kumari. Thereafter the marriage of these parties was dissolved by the District Registrar and he ordered the Appellant to pay the Respondent Rs. 45/- a month as maintenance for the child. The Applicant-respondent filed her affidavit dated 1/11/59 and moved that the Order of the District Registrar increasing the maintenance for the child be made an Order of the Magistrate's Court and to recover maintenance accordingly.

There is no provision under the Kandyan Marriage and Divorce Act No. 44 of 1952 or under the Maintenance Ordinance for such an Order (*Vide Abeysekera v. Abeysekera*¹). The learned Magistrate accepted this position but treated the application of the Applicant-respondent as an application for enhancement of Maintenance under section 10 of the Maintenance Ordinance. He said, "I have no right to whittle down the effect of that Order and there is no need for the Applicant to go through the same material upon which she obtained that Order of maintenance for her child in order to satisfy me that the child needs Rs. 45/- per month now and not Rs. 20 per month as maintenance earlier ordered by this Court".

As no application had been made to the Court to enhance the Order for Maintenance for the child under section 10 of the Maintenance Ordinance, the course adopted by the learned Magistrate has prejudiced the Defendant-appellant as he was not called upon at any time to meet an application for enhancement of maintenance under section 10 of the Maintenance Ordinance. There was also no material placed before the Magistrate to justify the order except the fact that the District Registrar has thought fit to order the payment of a larger sum as maintenance for the child. This fact, in my view, is not a sufficient reason to increase the Order for maintenance for the child to the same amount.

I, therefore, set aside the Order of the Magistrate increasing the maintenance ordered for the child from Rs. 20/- to Rs. 45/- per month. If the Applicant makes a proper application to the Magistrate to enhance the maintenance payable for the child, the Magistrate may make an appropriate Order thereon, after hearing the parties.

I direct the Magistrate to ascertain the arrears of maintenance payable by the Defendant-appellant on the basis of this Order and to take steps for the recovery thereof. The Defendant-Appellant is entitled to the costs of this Appeal which I fix at Rs. 31/50.

Appeal allowed.