1943 *Present :* **Soertsz S.P.J., Wijeyewardene J., and Jayetileke J.**

SIVASAMY, Appellant, *and* RASIAH, Respondent.

*998—M. C. Batticaloa, 5,973.*

*Maintenance—Application by wife—Wife possessed of means—Right to apply for maintenance from husband—Maintenance Ordinance (Cap. 76),s. 2.*

A wife, who is possessed of means, is entitled to claim maintenance from her husband provided he has sufficient means himself.

*Goonewardene v. Abeywickreme (17 N. L. R. 450)* followed.

*Silva v. Senaratne (33 N. L. R. 90)* overruled.

THIS was a case referred to a Bench of three judges.

*N. Nadarajah, K.C.* (with him *Kandesamy* and *M. D. H. Jayawardene*), for applicant, appellant.—The question of law in this appeal is whether a married woman having sufficient means of her own is entitled to claim maintenance from her husband under the provisions of the Maintenance Ordinance (Chap. 76 ; Legislative Enactments). Sections 2, 4, and 10 have a bearing on this question. It is submitted that a married woman having means of her own is entitled as of right to claim maintenance from her husband. Further, if a married woman earns and invests her earnings her right to claim maintenance is unaffected. Section 2 of our Ordinance corresponds to section 488 of the Indian Code of Criminal Procedure. In the Rangoon case *Maung Son v. Ma Thet Nu*[1] it was held that the wife's separate or independent means of support is not an element of consideration against her right of maintenance from her husband. Inability to support oneself is a condition attached by the section only to the child. The effect of our Ordinance on Common Law rights was considered in *Lamahamy v. Karunaratne*[2] in connection with the claim to maintenance of an illegitimate child. As regards the interpretation of the words " change in circumstances " occurring in section 10 of our Ordinance see *Chitaley on Criminal Procedure, p. 2479,* and the cases there cited with reference to the corresponding Indian section. The legal position was clarified by Wood Renton C.J. in *Gunewardene v. Abeywickreme*[3]. The contrary view of Macdonell C.J. in *Silva v. Senaratne*[4] purports to follow an old case *Cader Umma v. Calendran*[5] which, however, was based on the Vagrants' Ordinance. The correct view is expressed in *Ukku v. Thambya*[6]. It is finally submitted that on the evidence there is no proof that the wife is possessed of sufficient means.

*S. Nadesan* (with him *Curtis* and *Chellappah*), for defendant, respondent.—On the evidence the Magistrate was justified in holding that petitioner had ample means. Her petition of appeal reinforces that finding and in fact admits its correctness. On the question of law it is submitted that section 2 read together with Form 2 in the Schedule

[1] *(1904) 1 Cr. L. J. 883 at p. 886.*
[2] *(1921) 22 N. L. R. 289.*
[3] *(1914) 17 N. L. R. 450.*
[4] *(1931) 33 N. L. R. 90.*
[5] *(1863–1868) Ram 141.*
[6] *(1863–1868) Ram. 70.*

to the Ordinance indicates that only a wife without means can make a claim for maintenance. The ambiguity in the use of the word "itself" in section 2 is resolved in the Form. This view is reinforced by the implication of section 10 under which an order may be cancelled on proof of a "change in circumstances". What is contemplated is only a change in pecuniary circumstances—*Chitaley: Criminal Procedure, p. 2480*; *(1935) A. I. R. Lahore, p. 24*; *(1916) A. I. R. Madras, p. 567.* The object of the Maintenance Ordinance is stated by Macdonell C.J. in *Silva v. Senaratne* (*supra*), and by Pereira J. in *Ranasinghe v. Peries*[1]. The case of *Thankachiammah v. Sampanther*[2] dealt with an application for enhancing maintenance under section 10 of the Ordinance. See further *(1899) Koch's Reps. 54*; *(1899) Koch's Reps. 24*; *1 Maasdorp 232.* It is submitted that to ascertain the quantum of maintenance the Court must look to the income of the wife.

*N. Nadarajah, K.C.*, replied.

*Cur. adv. vult.*

March 23, 1943. SOERTSZ S.P.J.—

This is an application made by a wife, under the provisions of the Maintenance Ordinance, for an order against her husband who, she complains, having sufficient means to support her, refuses to fulfil that obligation.

The application is opposed by the husband on the ground that his wife has sufficient means of her own for her support and maintenance.

The learned Magistrate found, on the evidence before him, that the applicant had resources from which she could contrive to supply her needs, and in view of this finding, he said that the ruling given by Macdonell C.J. in the case of *Silva v. Senaratne* (*supra*) left him no alternative but to dismiss the application inasmuch as the contrary view taken by Wood Renton C.J. in the earlier case of *Goonewardene v. Abeywickreme* (*supra*) was taken *obiter* and had to yield to it.

In the former case, Macdonell C.J. held that a married woman who is possessed of sufficient means to support herself is, by that fact alone, debarred from claiming maintenance from her husband under the Maintenance Ordinance.

In the latter case Wood Renton C.J., while disposing of the appeal on the ground that the applicant was not possessed of sufficient means to support herself, expressed the opinion, after careful consideration of all the authorities cited in the course of a full argument, that a married woman living apart from her husband, not of choice, and through no fault of hers, is not precluded from claiming maintenance by the fact that she has sufficient means of her own. Unfortunately, this case does not appear to have been cited to Macdonell C.J., when he was dealing with the case of *Silva v. Senaratne*, and a conflict of views on an important question has thus resulted. Hence this reference to a Divisional Bench.

The first question that arises for consideration is whether, so far as wives are concerned, the Maintenance Ordinance provides a certain measure of relief to indigent wives *alone*, and it seems to me that there

[1] *(1909) 13 N. L. R. 21.*

[2] *(1922) 24 N. L. R. 250.*

need be no difficulty in answering that question if we guide ourselves by the plain words of the relevant sections of that Ordinance. Section 2 says :—

> "If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself . . . . the Magistrate may order such person to make a monthly allowance for the maintenance of his wife or such child . . . . ."

These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own. That conclusion emerges all the clearer when we read further down in the section the words of contrast providing for an order of maintenance for "*his* wife" and for "*such* child". The word "such" is used as an adjunct to the word "child", and not to the word "wife" in order to emphasize the fact that in the case of the child, inability to maintain itself is one of the conditions upon which the father's liability rests.

In the case of *Goonewardene v. Abeywickreme,* as well as in this case, Counsel for the husband sought to interpret the words "unable to maintain itself" as qualifying both the antecedent words "wife" and "child", and in support of that interpretation, they relied on Form 2 in the Schedule of the Ordinance. Wood Renton C.J., appears to have agreed that in that form "inability to maintain" was applicable to the wife also, but he disposed of the argument with the words of Lord Penzance in *Dean v. Green 8 P.D. 89,* that "it would be quite contrary to the recognized principle upon which Courts of Law have to construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for convenience sake in a schedule". But, for my part, I am unable to agree that in the Form, inability to maintain is made applicable to the wife. What, in my opinion, the Form does is to change the neuter "itself" in section 2 into the masculine "himself" and the feminine "herself" to be applied in that way to the case of a male or female child respectively. Be that as it may, the words of the section are clear and they must govern the question. While the word "child", in its equivocation as to sex, makes the word "itself" the appropriate pronoun to use that pronoun to refer to the antecedent "wife" would be to cast a thoroughly unwarranted aspersion on a perfectly unambiguous sex. The only instance that occurs to me on which such a disparagement was implied is that in which Virgil, regardless of obvious sex, spoke of "*varium et mutabile semper femine*". But that was poetic licence indulged in to depict a mood of intense disappointment, and we are interpreting the stolid prose of Legislators.

I read section 2 of the Ordinance as entitling a wife to claim maintenance in virtue of her wifehood alone and to obtain it by proof that her husband has sufficient means.

Sections 3 and 4 follow and state the only circumstances in which a husband, although possessed of sufficient means, may repel his wife's

claim to maintenance. Except in those circumstances, there are no words in the Ordinance that debar a wife from asking for maintenance, notwithstanding the fact that she is able to support herself.

But, it is contended that by the implication of section 10 of the Ordinance a wife must satisfy the Court that she has no means of her own in order to obtain an order against her husband. I have scrutinized that section, but I cannot find that there is, necessarily, such an implication. Section 10 is as follows:—

> "on the application of any person receiving or ordered to pay a monthly allowance . . . . and on proof of a change in the circumstances of any person for whose benefit or against whom an order . . . . has been made . . . . the Magistrate may either cancel such order or make such alteration in the allowance ordered as he deems fit."

The words relied on for the implication contended for are the words I have underlined and, upon them, it is argued that, conceivably, the only change of circumstances upon proof of which an order for maintenance *in favour* of a wife can be cancelled is that she has passed from a condition of incapacity to maintain herself to one of such capacity. But, that argument ignores the fact that an order made in favour of a wife may be cancelled upon proof of a change in the circumstances of the husband *against* whom an order has been made. Section 10, although compendiously framed, refers to all the relevant changes in circumstances upon proof of which an order for maintenance may be either cancelled or altered at the instance of either party. The section must, however, be construed not independently, but in the light of the other provisions of the Ordinance.

For these reasons, I am of opinion that, on a correct interpretation of the various provisions of the Ordinance itself, a wife possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself.

And that is as it should be for, as observed in the Judgment delivered by Creasy C.J. and Thomson J. in *Ukku v. Thambia* (*Ram. 1863–1868, p. 71*):

> "the husband, by the marriage contract, takes upon himself the duty of supporting and maintaining his wife so long as she remains faithful to the marriage vow."

That is the position as stated by such commentators on the Roman-Dutch Law as Wessels, Nathan, and Maasdorp, and I have not been able to find the source—if such exists—from which Middleton A.C.J. derived the proposition advanced by him *obiter* that "a claim for maintenance, of course, implies that the claimant has no means of her own"—*Ranasinghe v. Peries*[1]. As pointed out by Wood Renton C.J., in the case already referred to, the only limitation placed upon the right of a wife to maintenance is, as stated by Maasdorp, Vol. 1, pp. 30-31, that "maintenance may be withheld, as a matter of Judicial discretion, where a wife is provided with ample means, *and the husband is not in a position to contribute to her support*". That is the position under the Maintenance Ordinance too. The contrary view would lead to the appalling result that a fickle husband, having

[1] *13 N. L. R. 21.*

enjoyed the consortium of a wife possessed of means so long as it pleased him, may, on wearying of it, turn his wife adrift and free himself of all his obligations to her.

The Judgment of Macdonell C.J. in *Silva v. Senaratne* [1] proceeds upon the view that " the reason for allowing proceedings by a wife against a husband for maintenance is obviously lest the wife becomes a public charge ", and the learned Chief Justice says that that is the *ratio decidendi* in *Cadera Umma v. Calendren* (*Ram. 63-68, p. 141.*) But that was a case in which the husband was charged as a vagrant, the alleged vagrancy being based on the ground that he had failed to support his wife, and it was held that he was not liable to be punished as a vagrant when, in point of fact, the wife was, as in that case, supporting herself on money borrowed on the husband's credit. That case differs *toto caelo* from a case such as this which arises under the Maintenance Ordinance which is not concerned with questions of vagrants and vagrancy and has for its avowed purpose the provision of maintenance for wives and children.

For the reasons I have stated I respectfully agree with the view of Wood Renton C.J. and I am of opinion that the Order made by the Magistrate is wrong.

I would, therefore, remit the case to the Magistrate so that he may fix such monthly allowance as he thinks fit, having regard to the means of the husband. The applicant is entitled to her costs.

WIJEYEWARDENE J.—I agree.

JAYETILEKE J.—I agree.

*Appeal allowed.*