

1934

*Present : Maartensz J*SIVAPAKIAM *v.* SIVAPAKIAM599—*P. C. Colombo, 15,159*

Maintenance—Person having sufficient means—Meaning of expression—Maintenance Ordinance, No. 19 of 1889, s. 3.

The expression "having sufficient means" in section 3 of the Maintenance Ordinance denotes a person who has a source of income or who has wilfully abstained from earning an income.

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

H. V. Perera (with him *Nadesan*), for appellant.

L. A. Rajapakse (with him *A. Wijeyeratne*), for applicant, respondent.

Cur. adv. vult.

October 18, 1934. MAARTENSZ J.—

This is an appeal from an order made under section 3 of the Maintenance Ordinance, 1889, by which the appellant was ordered to make the respondent, his wife, a monthly allowance of Rs. 30 for her maintenance.

There is no evidence of the ages of the parties, but they are described as a young couple by the Magistrate in his judgment. There is some confusion in the evidence regarding the date of the marriage. According to the respondent she was married in October, 1932, and the Magistrate has adopted that date as the date of the marriage. According to her brother-in-law and the appellant the marriage took place in May, 1933.

The appellant at the time of the marriage was a student at the Ayurvedic College and had no means of his own, and the appellant and respondent after their marriage lived with his mother in Deans road. After some time they left the house in Deans road and lived in various

houses in various parts of Colombo till October, 1933, when the respondent left the appellant and went back to her mother. She alleged that her husband treated her cruelly and refused to accept his offer to maintain her on condition of her living with him. The learned Magistrate was of opinion that the offer was not a genuine one and that the respondent was entitled to refuse to live with the appellant as he had habitually treated her with cruelty. One of the grounds of appeal was that this finding was not justified by the evidence. I am unable to sustain this ground of appeal. There is evidence that the respondent was assaulted by the appellant and I see no reason to disagree with the view taken by the Magistrate of that evidence.

The other ground of appeal was that the appellant has no means and was therefore not a person against whom an order under section 3 of the Maintenance Ordinance, 1889, could be made.

It appears from the evidence of the applicant herself that the appellant has no means of his own and that his mother made them an allowance of Rs. 100 a month while they lived apart from her. This allowance was according to the evidence of the mother stopped when the appellant returned to her home after the respondent left him.

It is clear from the evidence that the appellant has no source of income from property or employment or otherwise. Nor is there evidence that he could earn and has wilfully abstained from doing so.

The appellant's contention was that he was not a person who "having sufficient means" neglects or refuses to maintain his wife.

The expression "having sufficient means" meant, it was urged, having a source of income; for the respondent it was contended that it meant not only a source of income, but also capacity to earn and that if a husband was capable of earning he was a person to whom section 3 of the Maintenance Ordinance applied. The expression has not been the subject of any local decision.

The law with regard to the maintenance of wives in India is contained in Chapter XXXVI. of the Indian Criminal Procedure Code. Section 488 in that Chapter is very similar in terms to section 3 of the Maintenance Ordinance. The expression "having sufficient means" has been considered in cases in India, but the reports in which the decisions have been reported are not available and the extracts cited in the *Commentaries on the Indian Criminal Procedure Code* by Roy and Sohoni are very brief and the Commentators do not appear to be in agreement as to the effect of the decisions. I am therefore unable to rely on the Indian decisions.

Section 3 of Ordinance No. 19 of 1889 took the place of sub-section (2) of section 3 of Ordinance No. 4 of 1841 enacted to amend the laws relating to vagrants. By the sub-section "every person being able wholly or in part to maintain his family" who left his wife without maintenance or support whereby she became chargeable to or required to be supported by others was guilty of an offence.

The case of *K. Michohamy v. A. Suddappu*¹ was a case under this sub-section.

¹ (1883) 5 S. C. C. 198.

The only evidence of the ability of the defendant to maintain his family was the statement of the prosecutrix that he was well able to do so.

Burnside C.J. in setting aside the order made against the defendant said "the ability of the defendant to maintain his family is, therefore, the first element to sustain a prosecution under the Ordinance, and it is necessary that some proof of the plaintiff's social and material condition should be given from which the Magistrate may be able to draw his own conclusions as to the ability of the defendant, not only to maintain his illegitimate child, but his family generally.

No doubt in the case of an able-bodied man very slight evidence would be sufficient upon which the Magistrate would be justified in finding against the defendant, but yet there must be some facts before the Court, not the mere expression of an opinion by a witness, more particularly when that witness is the most interested party".

The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vic. c. 39), grants relief to a wife where, *inter alia*, her husband wilfully neglects to maintain her. The Act of 1886 (49 & 50 Vic. c. 52), section 1, contained the words "being able wholly or in part to maintain his wife". Although these words were omitted in the Act of 1895 it was held in the case of *Earnshaw v. Earnshaw*¹, that "before they (the Justices) can find that there was wilful neglect they must be satisfied that there were actual earnings at the time in question or that there was capability of earning means" and that there would be wilful neglect if it was found that a man could earn money but that he wilfully abstained from doing so.

The principles laid down in the cases I have cited are, in my opinion, applicable to section 3 of the Maintenance Ordinance, and as there is no evidence that the appellant has any source of income or that he has wilfully abstained from earning an income, the appeal must be allowed and the order appealed from set aside. I am not prepared to dismiss the application as I think the minds of the parties were not directed to the question of whether the appellant was a person "having means" actual or potential, the evidence led as to his means being apparently intended to enable the Magistrate to determine the amount which he should order to be paid by way of maintenance.

I accordingly remit the case to the Magistrate to determine whether the appellant is a person having sufficient means to maintain his wife and make order according to his finding on the question.

It will be open to the Magistrate to reduce the amount which should be paid by way of maintenance in the light of the further evidence led as to the means of the appellant but not to increase it. The appellant will not be entitled to reopen the question of cruelty.

In determining whether the appellant has wilfully abstained from earning, the Magistrate should consider whether he is in health and strength and able to earn by work suitable to his past and present condition in life, and whether such work is readily attainable.

Sent back.