1953 *Present :* **Swan J.**

D. SIMON APPU, Appellant, *and* N. H. SOMAWATHIE, Respondent

*S. C. 889—M. C. Walasmulla, 12,676*

*Maintenance—Order of court in favour of wife—Subsequent covenant in a deed of separation—Effect thereof on maintenance suit—Maintenance Ordinance, ss. 2, 5.*

Where a married woman obtains an order for maintenance against her husband, a subsequent deed of separation between them puts an end, in effect, to the wife's rights and the husband's liability under the order. In such a case, the husband would be entitled to claim a cancellation of the order under section 5 of the Maintenance Ordinance.

*Parupathipillai v. Arumugam* (1944) 46 N. L. R. 35, not followed.

APPEAL from a judgment of the Magistrate's Court, Walasmulla.

*H. W. Jayewardene*, with *P. Ranasinghe*, for the defendant appellant.

*Ivor Misso*, with *B. E. de Silva*, for the applicant respondent.

*Cur. adv. vult.*

December 7, 1953. SWAN J.—

In this case the applicant-respondent obtained an order for maintenance against her husband the defendant-appellant. The application was made in October, 1940. The defendant appearing on summons said that he was willing to take the applicant to his house in Polhenagodera. The applicant was willing to go with the defendant there, but apparently they could not live happily together. On 6. 10. 41 the applicant complained that the defendant's mother assaulted her and drove her out. On the 5th of January, 1942, after inquiry, the learned Magistrate ordered the defendant to pay the applicant maintenance at Rs. 3·50 per month as from the 1st February, 1942. On the 27th May, 1942, the applicant moved for a distress warrant for Rs. 14 being maintenance for four months. There being no property available for seizure warrant was issued for the arrest of the defendant. On 20. 9. 42 an open warrant was issued, but no steps were taken thereon. On 25. 2. 52 the applicant moved for a notice on the defendant who, she said, was at the time residing at Kirinda in Matara. As the defendant could not be found the court issued a warrant on him. This too could not be executed and on 6. 12. 52 the court ordered an open warrant to issue. On 18. 12. 52 the defendant surrendered to court and was ordered to give bail to appear on 16. 1. 53. On that day he produced a deed of separation entered into between himself and the applicant bearing No. 28760 and dated 23rd November, 1945 (marked D1). It was contended at the inquiry that the deed of separation terminated the defendant's liability to pay maintenance as ordered by the court. After inquiry the learned Magistrate held on the authority of *Parupathipillai v. Kandiah Arumugam* [1] that the agreement was not binding on the applicant. Giving the defendant credit for the sum of Rs. 100 paid under D1 he ordered distress warrant to issue for the balance due, namely Rs. 362.

In the case referred to above Jayetileke J. held that an agreement whereby an applicant who had an order of maintenance in her favour and to whom a large amount was due as arrears accepted a lump sum and waived all future claims for maintenance was contrary to public policy and should be set aside. The order was made of consent on 18. 11. 1937 that the defendant should pay maintenance at Rs. 6 per mensem. This was subsequently increased to Rs. 8. On 15. 4. 1943 the applicant moved for and obtained a distress warrant for Rs. 40 being arrears for 5 months. On 14. 5. 43 the parties appeared in court and the learned Magistrate made the following entry in the record :—

> " Distress warrant twice returned by Fiscal unexecuted as respondent is not possessed of any movable property. Demand made of him was not complied with. The respondent pays Rs. 200 in court. The applicant receives same *waiving all future claims for maintenance against the respondent*. The applicant signs the record. "

It may appear to have been an unfair bargain but in my opinion it put an end, in effect, to the applicant's rights and the defendant's liability under the order. If the applicant filed a fresh application there can be no question that the compromise of 14. 5. 53 would have been no defence.

[1] *(1944) 46 N. L. R. 35.*

Let me now examine the authorities upon which the learned Judge based his conclusion in *Parupathipillai v. Kandiah Arumugam* [1]. The first case was that of *Madduma Hamy v. Kalu Appu* [2]. In that case Clarence J. observed that an agreement in writing by which a wife agreed to relieve her husband of the burden of maintaining her and their children was invalid. The charge was made under clause (3) sub-section (2) of Ordinance 4 of 1841 and was dismissed by the Police Magistrate. On appeal the order of dismissal was affirmed. In the course of his judgment Clarence J. said :—

"Such an agreement as this, between husband and wife, is invalid; but nevertheless, if the defendant has been induced to abstain from affording due support to the complainant and their children by a belief that this agreement exonerated him from liability so to do, he ought not to be criminally convicted on this charge."

*Nakamuthu v. Kanthan* [3] was a case under the Maintenance Ordinance, 19 of 1889. There the defendant sought to escape liability by relying on an agreement whereby the applicant had accepted a sum of Rs. 50 as maintenance for herself and her child during their lifetime. Grenier A. J. described the agreement as an unconscionable bargain. Undoubtedly it was. It certainly could not defeat the application for maintenance.

In *Hinnihamy v. Gunawardene* [4] the applicant had obtained an order of maintenance for herself and five children. Subsequently the defendant applied to the Magistrate and obtained his sanction to pay the applicant a sum of Rs. 250 in full discharge of the maintenance payable by him. Sometime later the applicant applied again for an order of maintenance. The Magistrate who entertained that application took the view that the compromise did not relieve the defendant of his obligation and ordered him to pay. De Sampayo J. in affirming that order said :—

"The Ordinance does not contemplate the settlement of a lump sum. It only provides for making a 'monthly allowance'. The payment of a lump sum may, of course, negative the basis of the application, namely, that the father neglects or refuses to maintain his children. But in such a case the money should be so settled as to ensure the continued maintenance of the children. But in this case the income to be derived from Rs. 250 is by no means sufficient to maintain five children. It was never invested or secured. The mother appears to have exhausted it and the children are presumably left once more without maintenance . . . . The appellant relies on the circumstances that the court had sanctioned the compromise in this, but I do not think it makes any material difference."

What I wish to emphasize is that (1) it was a fresh application and (2) the original application was for the maintenance of illegitimate children. Regarding the latter there can be no question that a woman cannot by

[1] *(1944) 46 N.L.R. 35.*
[2] *(1880) 3 S. C. C. 132.*
[3] *(1908) 1 S. C. D. 48.*
[4] *(1921) 3 C. L. Rec. 161.*

the acceptance of a lump sum compromise the claim for maintenance of her children legitimate or illegitimate. As regards the former I would say that in a fresh application entirely new matters arise for consideration and decision. I must, however, state that the point was taken that the applicant should not have filed another case but applied for relief in the first action. De Sampayo J. dealing with this submission said " that may be so ". With due deference to that most learned Judge I say that could not be so.

In *Hyman v. Hyman* [1] the House of Lords held that a wife who covenanted by a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for by the deed and thereafter obtained a decree for dissolution of the marriage on the ground of her husband's adultery was not precluded by her covenant from petitioning the court for permanent maintenance. It was entirely a question of the jurisdiction of the court, whether it could be ousted by the covenants in a deed of separation.

Referring to deeds of separation Lord Atkin said :—

" We have to deal with a separation deed, a class of document which has had a chequered career at law. Not recognized by the Ecclesiastical Courts, such contracts were enforced by the common law. Equity at first frowned. Lord Eldon doubted but enforced them. Finally they were fully recognized in equity . . . . Full effect has therefore to be given in all Courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial courts seems to suggest that at times they are still looked at askance and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved, and to be enforced on precisely the same principles as any respectable commercial agreement of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy. "

The Roman Dutch Law recognizes the validity of deeds of separation. There are two cases in which our courts have considered agreements by spouses to live in separation. In *Mitcho Hamine v. Girigoris Appu* [2] Wood Renton J. said :—

" I do not think that there is anything contrary to public policy under our law in a husband and wife agreeing to live separately where they find that it is impossible for them to live happily together and. in my opinion, such a case comes under Section 5 of the Maintenance Ordinance 1889 . . . . "

[1] *(1929) A. C. 601.* [2] *(1912) 15 N. L. R. 191.*

In *Silva v. Silva* [1] Pereira and Shaw JJ. held that an agreement between husband and wife for a separation *a mensa et thoro* and for payment by the husband to the wife of a monthly allowance was enforceable but that it was terminable at the will and option of either party.

The question to determine is the effect of such an agreement upon a suit for maintenance. If an order is made I would say that the defendant would be entitled to claim a cancellation of the order under Section 5 which provides :—

> " On proof that any wife in whose favour an order has been made under Section 2 is living in adultery, or that without sufficient reason she refuses to live with her husband, *or that they are living separately by mutual consent,* the Magistrate shall cancel the order. "

If no order has been made the fact that there exists a deed of separation which is being honoured by the husband would not oust the jurisdiction of the court to entertain the application and make an order. In deciding whether an order should be made the court would have to consider :—

(1) whether in fact the spouses are living apart by mutual consent. Authority for this proposition will be found in *Mitcho Hamine v. Girigoris Appu* [2] and *Maliappa Chetty v. Maliappa* [3].

(2) whether the provision made in the agreement is reasonable and adequate.

In *Hyman v. Hyman* [4] Lord Hailsham L.C. observed :—

> " It may very well be that when the facts come to be investigated, the Court will say that a sum of this magnitude, so secured, voluntarily accepted as a sufficient maintenance ten years ago, and faithfully paid ever since, is a sufficient provision, and that the Court will not deem it to be reasonable to order any further payment to be made."

As regards the point that arises for decision in this case I hold that the deed of separation extinguished the applicant's right and terminated the defendant's liability under the order made, and that the learned Magistrate should have given effect to it by refusing the applicant's application for a distress warrant. Acting on the principle that an order could be made *nunc pro tunc* he should have cancelled the order as from 3.11.1945 and directed the applicant to file a fresh application, if so advised.

Learned Counsel for the respondent contended that D1 was an unconscionable bargain. I do not think so. Assuming that on 3.11.1945 more money was due to the applicant under the order than she received under D1 it was perfectly legitimate for the defendant to pay and for her to accept a smaller sum in full settlement. As regards the waiver of future maintenance the fact that the parties decided to live in separation

[1] *(1914) 18 N. L. R. 26.*
[2] *(1912) 15 N.L.R. 191*
[3] *(1927) 29 N. L. R. 78.*
[4] *(1929) A. C. 601*

by mutual consent as from that date is a good *causa* or consideration for the agreement which, however, would as laid down in *Silva v. Silva* [1] be terminable at the option of either party. Until so terminated it would be enforceable. In my opinion to allow the applicant to obtain payment for a period when she was living in separation from the defendant by mutual consent is without question unconscionable.

The only other matter that calls for comment is the fact that there was no formal cancellation of the order. In *Kadiravail Wadivel v. Sandanem* [2] where after an order was made the parties lived again together (which fact the court recorded) Akbar J. said that inasmuch as there was no cancellation of the order the applicant could enforce it. The point to note is that the applicant did not seek to obtain payment for the period during which she was living apart from her husband.

In this present case there was no cancellation of the order, but I do not think that could stand in the way of giving effect to the deed D1. It would be artificial to contend that because the order was not formally cancelled a right that had been extinguished could be revived and a liability that had been terminated could be enforced.

The order made by the learned Magistrate is set aside. The appellant will be entitled to the costs of this appeal.

*Appeal allowed.*