

Present: Mr. Justice Wendt.

1908.  
September 19.

MAMMADU NACHCHI v. MAMMATU KASSIM.

P. C., Jaffna, 45,580.

Maintenance—Muhammadan parties—Keeping concubine in the house—  
"Living in adultery"—Ordinance No. 19 of 1889.

WENDT J.—The mere fact of a married Muhammadan man keeping an unmarried Muhammadan woman as his mistress is not good reason in law for his wife refusing to live with him and claiming separate maintenance. But the husband has no right to ask the wife to come and live in the concubine's house.

It is improper to address any communication to the Supreme Court about a pending case.

**A** PPEAL by the applicant (wife) from a judgment of the Police Magistrate of Jaffna refusing to order her husband to make an allowance to her by way of maintenance. The facts sufficiently appear in the judgment.

*Bawa* (with him *Akbar*), for the complainant, appellant.

No appearance for the respondent.

*Cur. adv. vult.*

September 19, 1908. WENDT J.—

This is an appeal by a Muhammadan wife against the refusal of the Magistrate to order her husband, who is also a Muhammadan, to make her an allowance by way of maintenance. The application was on behalf both of the wife and her child, and in respect of the latter an order of maintenance has been made, against which no appeal has been presented. At the hearing of the application the defendant offered to maintain his wife on condition of her living with him, which she refused to do on the ground that he was "living in adultery." The Magistrate based his refusal of maintenance in respect of the wife on his finding that the respondent was not living in adultery; and the question submitted to me upon this appeal is whether that finding was right, not that such finding necessarily concludes the matter, for the words of the Ordinance are that the Magistrate "may" make an order, not that he "shall."

The Magistrate finds that the defendant for the last four years is keeping in his house an unmarried Muhammadan woman named *Neina Umma*, to whom he says he is married. The Magistrate holds the marriage not proved; but, inasmuch as section 101 of the Muhammadan "Special Laws" of 1806 entitles the defendant to

1908.  
September 19.

WENBT J.

keep, besides his lawful wife, " as many concubines as he is able to maintain," he holds that the appellant is not justified in refusing to live with the defendant, and therefore declines to order her maintenance.

Appellant's counsel contended that in order to be a lawful " concubine " a woman must be the slave of a man (*Nell*, p. 45 ; *Hamilton's Hedaya*, 2nd edition, p. 182, definition of " Zinna ", *Ameer Ali*, vol. II., p. 269; *Sale's Koran*, chapter IV.), and that as slavery was no longer lawful in Ceylon, a Muhammadan could not lawfully have a concubine in addition to his lawful wife. What the writers quoted say is no doubt true of a Moslem country, but it is certainly not true of British India to-day; and in the absence of any vestige of judicial or other authority for so holding, since slavery was abolished here in 1844, I am not prepared to decide that it is true in Ceylon. Our Maintenance Ordinance (No. 19 of 1889) on this point is substantially a re-enactment of section 488 of the Indian Criminal Procedure Code of 1882. Owing to the circumstance that the Indian enactment as to maintenance occurred in that Code, the Madras High Court in 1893 held that the term " adultery " must be given the meaning defined in the Penal Code, and that consequently it could only be committed by a man, and then only with a married woman; but in 1896 this view was over-ruled by a bench of four Judges of the same Court, who held (*Gantapalli Appalamma v. Gantapalli Yellayya*<sup>1</sup>) that the term was used in the popular sense of a breach of the matrimonial tie by either party. " A difficulty must always arise," said Collin C.J., " in deciding in what cases the adultery of the husband is sufficient cause for the wife to claim maintenance. Amongst the Hindu community concubinage is recognized, and it is possible for concubines to have a certain status. If, therefore, a husband keeps a concubine in a house apart from his wife, it is doubtful whether such an act alone would entitle the wife to separate maintenance; but if he keeps such concubine in the same house as his wife lived in and against her wishes, or in such a manner as to offend the self-respect of his wife, in my opinion that would entitle the wife to separate maintenance under section 488." The other Judges expressed themselves in the same sense, Shepherd J. saying, " conduct of this sort, which according to Western notions would be condemned as a breach of the marital obligation, is not so condemned either by Hindus or by Muhammadans. . . . I cannot conceive that it was intended to apply the term ' adultery ' to conduct considered by the community to which the parties belong as innocent from a matrimonial point of view." (The Indian Criminal Procedure Code has since been amended in 1898 by the substitution of the words " if he is satisfied that there is just ground for so doing " for the words " if he is satisfied that such person is living in adultery," &c.)

<sup>1</sup> I. L. R. 20, Madras 470.

Sir Roland Wilson thus sums up the existing law of India (*Anglo-Muhammadan Law, 2nd edition, 158*): "The husband does not (in British India) incur any legal penalty, criminal or civil, by failing to observe conjugal fidelity, except that the keeping of an idol-worshipping concubine in the same house with the wife may (perhaps) be regarded as so serious an outrage on her religious feelings as to constitute 'cruelty' in the legal sense of the term, which would justify the wife in refusing to live with him and give her a claim to maintenance, notwithstanding such refusal." He adds in a note that the High Court of Calcutta took this view of the converse case of a Hindu husband forcing the company of a Muhammadan concubine on his wife, but that it would clearly not be open to a Muhammadan wife to set up this plea if the concubine were a Christian or a Jewess. Considering the analogy of the circumstances of Ceylon to those prevailing in British India, I see no objection to applying this law here. I hold that the mere fact of a married Muhammadan man keeping an unmarried Muhammadan woman as his mistress in the house is not good reason in law for his wife refusing to live with him and claiming separate maintenance.

1908.  
September 19.  
WENDT J.

It stands to reason, however, that the offer by a husband to maintain his wife if she will come and live with him must be an offer to maintain her with the dignity and consideration which befits a wife. I see no proof of such an offer here. In fact, the respondent's invitation to his wife appears to be to come and live in his mistress Neina Umma's house. He has no house of his own, and is living in a house which Neina Umma has taken on mortgage with her own money. I do not think that the appellant is bound to go and live there, and I therefore consider that respondent's offer is not such as is contemplated by section 4 of the Ordinance.

I set aside the order appealed against, and order the respondent to pay maintenance for his wife, as well as for his child. The amount in respect of the wife and the time of payment will be fixed by the Magistrate.

A large number of persons, describing themselves as Muhammadan inhabitants of Moor street, Jaffna, have thought fit to address a petition to this Court, in which they discuss the merits of this case, and even go so far as to suggest what judgment should be given upon the appeal. It is impossible to suppose that the signatories to this petition, some of whom are able to write English, were unaware that they were doing an improper thing. They have done more than that, and have been guilty of a contempt of this Court, although they have failed in their object of influencing our decision. The petitioners will be informed of the view taken by this Court of their conduct, and warned that any recurrence of this abuse of petitions will be visited with severe punishment.

*Appeal allowed.*