

1946

Present : Nagalingam A.J.

VIDANE, Appellant, and UKKUMENIKA, Respondent.

735—M. C. Nuwara Eliya, 217

*Maintenance—Application made by wife and child—Denial of paternity by defendant—Allegation that applicant was living in adultery—Burden of proof—Maintenance Ordinance (Cap. 76), ss. 2, 4.*

In an application made by a wife for maintenance for herself and child, the defendant denied the paternity of the child and further stated that he was not prepared to take his wife back on the ground that she was living in adultery. On the date of trial the Court called upon the defendant to establish his defence first.

*Held*, that the Court should not have called upon the defendant to establish his case before the applicant's case was placed in accordance with law; the facts that she was not living in adultery and was not living separately from her husband by mutual consent should have been first established by the applicant.

**A** PPEAL against an order of the Magistrate's Court, Nuwara Eliya.

S. P. Wijewickreme (with him Lucian Jayetileke), for the defendant, appellant.

C. S. Barr Kumarakulasinghe (with him K. C. de Silva), for the applicant, respondent.

<sup>1</sup> *Contra*, see Ch. 59, sec. 4 (i) and 4 (3) and Ch. 112, sections 2 and 4.

December 18, 1946. NAGALINGAM A.J.—

This is an appeal by the defendant in a maintenance case from an order of the learned Magistrate ordering him to pay a sum of Rs. 20 for the wife and Rs. 10 for a child.

Counsel for the appellant has confined himself to arguing a point of law as to whether the procedure adopted by the Magistrate was correct in this instance and if not whether the proceedings are not vitiated thereby.

It would appear that when the applicant tendered the plaint she was examined by the learned Magistrate, in the absence of the defendant. When the defendant appeared, apparently he was questioned and he admitted that the applicant was his wife but denied the paternity of the child in respect of which maintenance was claimed. He further stated that he was not prepared to take his wife back on the ground that she was living in adultery. On the date of trial the learned Magistrate appears to have treated the case more or less as a civil proceeding between the parties and in view of the fact that the defendant admitted marriage and denied paternity on the ground of adultery held that the burden was on him to prove that the wife was living in adultery and that he was not the father of the child. It is contended that the approach to the whole case thus made by the Magistrate has not only no sanction in law but has resulted in causing prejudice to the defendant. Under section 2 of the Maintenance Ordinance (Chapter 76) there are certain facts which must first be established by the applicant before an order for maintenance can be made against the defendant; firstly, that the defendant has sufficient means and secondly, that he either neglects or refuses to maintain his wife and thirdly, that the child in respect of whom maintenance is claimed is the child of the defendant. The mere neglect or refusal on the part of the defendant does not necessarily enable the Magistrate to make an order against the defendant. He must be satisfied that the refusal or neglect was not upon sufficient cause. Again no order can be made against a defendant as section 4 of the Ordinance states expressly that a wife who makes an application for an order against the husband must be one who is not living in adultery and must not be living separately from her husband by mutual consent. All these facts have to be first established by the wife and the learned Magistrate was therefore in error in calling upon the defendant to establish his case before the applicant's case was placed before Court in accordance with law. Learned Counsel for the respondent has sought to contend that no prejudice has been caused to the defendant as a result of his being called upon to establish his defence first, but I am not prepared to say that no prejudice in fact has been caused to the defendant. For these reasons I would allow the appeal, set aside the order of the Magistrate and remit the case for trial to be proceeded with before another Magistrate.

*Order set aside.*