1969 *Present :* Samerawickrame, J.

K. PERUMAL, Petitioner, *and* K. KARUMEGAM, Respondent

S. C. 211/68—Application in Revision in M. C. Matale, 24721

Maintenance—Application by wife against husband in respect of a child born about six months after marriage—Application granted in Magistrate's Court—Subsequent annulment of the marriage by decree of District Court on ground of unknown pregnancy before marriage—Whether the maintenance order can be cancelled—Evidence Ordinance, s. 41 (2).

A child was born to X a little over six months after the marriage between X and Y. X obtained in a Magistrate's Court an order of maintenance against Y in favour of the child. Y thereafter obtained in the District Court an *ex parte* decree annulling his marriage on the ground that at the time of the marriage X was pregnant and that Y was not aware of the pregnancy. In the present application to the Supreme Court Y sought to have the order for maintenance in respect of the child cancelled and set aside.

Held, that the finding against X in the matrimonial action for nullity was not binding on the child as the child was not a party to the action. In such a case section 41 (2) of the Evidence Ordinance is not applicable as against the child.

APPLICATION to revise an order of the Magistrate's Court, Matale.

P. Edussuriya, for the defendant-petitioner.

Sarath Mutteltuvegama, with *I. S. de Silva*, for the applicant-respondent.

Cur. adv. vult.

August 18, 1969. SAMERAWICKRAME, J.—

The applicant-respondent had obtained an order that the defendant-petitioner should pay maintenance for her child. The child was born on the 14th of June, 1964, a little over six months after the marriage between the applicant-respondent and the defendant-petitioner. The defendant-petitioner disputed paternity and after an inquiry, at which evidence was heard on behalf of both parties, the learned Magistrate made order for maintenance in respect of the child. The order was affirmed upon an appeal to this Court. The defendant-petitioner thereafter obtained a decree from the District Court, after an ex-parte trial at which he alone gave evidence, annulling his marriage with the applicant-respondent on the ground that at the time of the marriage his wife was pregnant and that he was not aware of the pregnancy. The defendant-petitioner has now made the present application to this Court to have the order for maintenance in respect of the child cancelled and set aside.

Counsel for the defendant-petitioner cited Indian cases in which orders for maintenance had been cancelled in view of subsequent decrees in civil cases granting declarations of non-paternity and of non-liability in consequence to pay maintenance—vide *U Arzeina v. Ma Kyin Shue & another* [1] and *Nga Po Thein v. Ma Me San & another* [2]. Section 488 of the Indian Criminal Procedure Code empowers a magistrate to make an order for maintenance and s. 489 (2) empowers a magistrate to cancel or vary the order. That provision is as follows :—

> " Where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

Apart from the fact that there is express provision empowering a magistrate to cancel or vary an order in consequence of a decision of a competent civil Court, under the Indian Specific Relief Act there is provision for declarations of non-paternity and consequent non-liability for payment of maintenance. In suits to obtain such declarations the child concerned would necessarily be a party. There is no provision under our law corresponding to s. 489 (2) of the Indian Criminal Procedure Code authorising a magistrate to cancel an order for maintenance following a decision of a competent civil Court. Some of the earlier cases in India however had been decided before the year 1923, when by an amendment the provision in s. 489 (2) was introduced into the Criminal Procedure Code of India. In the case of *Bo Gyi v. Ma Nyein* [3], it was held that the jurisdiction conferred by s. 488 is auxiliary to that possessed by a civil Court and before enforcing an order for maintenance made under that Section a magistrate is bound to take into consideration any subsequent order of a civil Court which would disentitle a wife to maintenance.

[1] *A. I. R. (1940) Rangoon 298.*

[3] *A. I. R. (1922) Upper Burma 20.*
A. I. R. (1919) Lower Burma 7 (2).

In that case, as well as in all the other cases which I have had the opportunity of examining, it appeared that the petitioner had obtained a declaration in a civil case that the child was not his and not merely an incidental finding in a matrimonial action for divorce or nullity to which the child was not a party. Nor is the jurisdiction under the Maintenance Ordinance auxiliary to that possessed by the civil Court as in the case of that under s. 488 of the Indian Criminal Procedure Code for since the enactment of the Maintenance Ordinance a civil action for maintenance is no longer available—vide *Tenne v. Ekanayake* [1].

Learned Counsel for the defendant-petitioner submitted that in view of s. 41 (2) of the Evidence Ordinance the order of the District Court declaring the marriage between the defendant-petitioner and the applicant-respondent null and void on the ground that the applicant had concealed her pregnancy from the petitioner at the time of marriage, was a judgment *in rem*. Section 41 (2) however, makes final and conclusive only that part of the order which confers or takes away any legal character. It would, therefore, be conclusive on the question as to whether or not a marriage existed between the defendant-petitioner and the applicant-respondent. It would not however be conclusive in respect of the ground upon which a finding on that question is made. In respect of a decree for divorce it was stated in the full Bench decision in the case of *Kanhya Lal v. Radha Churn* [2], " It is conclusive upon all persons that the parties have been divorced and that the parties are no longer husband and wife but it is not conclusive nor even prima facie evidence against strangers that the cause for which the decree was pronounced existed. " The finding of pregnancy of the applicant-respondent at the time of marriage unknown to the defendant-petitioner is therefore, not binding on persons who were not parties to the action and accordingly not binding on the child of the applicant-respondent. Though the applicant-respondent was the person who applied for maintenance, the application was made for the benefit of her child.

It appears to me that the defendant-petitioner has failed to put before this Court sufficient grounds for the cancellation of the order for maintenance made in respect of the applicant-respondent's child. The application is accordingly dismissed with costs.

Application dismissed.

[1] (1962) 63 N. L. R. 544 at 546.

[2] 7 W. R. 338.