1949 *Present :* **Gratiaen J.**

SEBASTIAN PILLAI, Appellant, *and* MAGDALENE, Respondent

S. C. 568—M. C. Kayts 10,641

Maintenance Ordinance—Issue of summons—Examination of applicant on oath or affirmation—Not condition precedent to issue of summons—Chapter 76—Section 14.

In regard to section 14 of the Maintenance Ordinance, the failure to examine the applicant on oath or affirmation before the issue of summons is at best an irregularity which does not necessarily vitiate all subsequent proceedings.

Namasivayam v. Saraswathy (1949) 50 N. L. R. 333 dissented from.

Podina v. Sada (1900) 4 N. L. R. 109 followed.

APPEAL from a judgment of the Magistrate, Kayts.

S. Nadesan, with *A. M. Ameen*, for the defendant appellant.

C. Thiagalingam, with *V. Arulambalam*, for the applicant respondent.

Cur. adv. vult.

[1] *Fernando v. Bandi Silva (1917) 4 C.W.R. 9.*

September 7, 1949. GRATIAEN J.—

In these proceedings the applicant, who is the wife, sued her husband for maintenance. After trial the learned Magistrate ordered the husband to pay to the applicant a sum of Rs. 25 per mensem.

The parties had been married for over ten years and since 1946 there had been unpleasantness from time to time between them, but in my opinion the facts disclosed in the evidence leave reasonable grounds for the belief that the union has not broken down irreparably. As so often happens in such cases, the husband and wife have so far had little opportunity of enjoying each other's company except in the presence of their respective relatives. Without attempting to generalise in matters of this sort, I am content to say that in the present case the arrangement has not worked well, and that the interference of the proverbial " in-laws " proved to be a source of constant irritation. It is common ground that the first year of the marriage was spent in the house of the bride's parents. It was then decided that they should live alone, but they unwisely selected a house situated in the same compound as that of his sister. These two women quarrelled incessantly, and the husband's attempts to associate himself with these petty squabbles aggravated the situation. In November, 1946, the wife left him after a quarrel and returned to her parents. In 1947, through the good offices of a mutual friend, a reconciliation was effected, and for some months the parties lived together again. In March, 1948, there was another incident, and the wife left her husband a second time.

The basis on which the wife initiated proceedings under the Maintenance Ordinance was that her husband " had deserted her on March 30, 1948, and failed to maintain her " since that date. The trial was fixed for December 10, but on that date a very sensible adjustment was arrived at whereby the wife agreed to return to her husband on condition that he provided a separate house in which they could live together relieved of the irksome and irritating presence of his sister. The evidence shows that the husband thereafter honoured the terms of this arrangement. On February 11, 1949, however, the wife's brother, acting no doubt with good intentions but nevertheless unwisely, offered to vacate his own house so as to provide a different residence in which the husband and wife should make a new start in their married life. This offer was in the first instance accepted by the husband but within a week he retracted, and he insisted that the house which he had himself selected in terms of the original agreement should be their home. Some discussion seems to have arisen in Court on February 18, 1949, as to the suitability of this house, and the wife, though she alleged for the first time that her husband had been cruel to her, agreed to resume married life with him " provided that the house that is taken is agreeable to her ". By the time the case was called a week later she had changed her mind and stated unequivocally that she was no longer prepared to live in any house with her husband.

As the negotiations had broken down the case went to trial. The genuineness of the husband's invitation to take his wife back was not in dispute, but the issue which arose for adjudication was whether the wife

was nevertheless entitled to refuse his offer of a resumption of *consortium* on the ground that he had " habitually treated her with cruelty " within the meaning of section 3 of the Maintenance Ordinance (Chapter 76). The finding of the learned Magistrate was that the husband had " subjected his wife to continuous neglect and sometimes cruel treatment ". No express finding of *habitual* cruelty has been recorded, but he held that the wife had good and sufficient grounds for refusing to return to her husband, and made an order for maintenance at the rate of Rs. 25 per mensem in her favour. The present appeal is from this order.

The case has caused me much anxiety. I am very conscious of the inestimable advantage which the learned Magistrate has enjoyed over me in having seen and heard the witnesses who testified before him in regard to this unhappy dispute. I am also conscious that, particularly in a matrimonial dispute, an appellate tribunal, with only " the cold written word " to guide it, should be slow to disturb the findings of fact of the original Court unless there is compelling reason to the contrary. *Watt (or Thomas) v. Thomas*[1]. Upon an analysis of the relevant evidence judged in the light of the surrounding circumstances, I have arrived at the conclusion that in the present case the learned Magistrate's findings must be disturbed. To begin with, the wife had made no complaint of cruelty to the mutual friend who had brought about the earlier reconciliation, but the circumstance which has particularly influenced me is one which the learned Magistrate does not seem to have considered at all. Can the wife's evidence be accepted as true when she complains that she has been the victim of such habitual cruelty at her husband's hands that she genuinely and reasonably fears, as she says she does, that a resumption of *consortium* would lead to a repetition of such treatment ? The alternative solution is that she has greatly exaggerated her version of past incidents, and that all that had really taken place might fairly be attributed to " the wear and tear of married life " for which some allowances should be made in this imperfect world—vide *Squire v. Squire*[2]. It seems to me that the wife has, perhaps unconsciously, exaggerated in her mind the events of her past unhappiness in so far as it is attributed by her to cruelty at her husband's hands. The truth is that he had displayed too much partisanship in the many quarrels between his wife and his sister, and that he now realises the folly of such interference. The safest guide to the problem, in my opinion, is the circumstance that on three occasions after these proceedings commenced the wife had consented to return to her husband upon the condition that their house should really be their own. This convinces me that she entertained no fears as to their future happiness as man and wife provided that they were protected from the interference of his relatives. The husband has been very foolish in the past, but I think that so long as there is still room for a happy ending it would be wrong to make a judicial order the effect of which would be to separate the spouses for ever. I accordingly make order setting aside the order of the learned Magistrate, but upon certain conditions which I regard as necessary in order to implement the terms of the original settlement which the parties had effected in Court on December 10, 1948. If within three weeks of the date on which

[1] *(1947) A. C. 484.* [2] *(1948) 2 A. E. R. at p. 56.*

the record is returned to the Magistrate's Court the husband provides a separate matrimonial home which is suitable to their station in life, the application of the wife will be dismissed. If any disagreement should arise as to the suitability of the house selected by the husband, that dispute should be referred by the learned Magistrate to the Probation Officer of the district whose decision in the matter shall be final. Should the husband fail to provide a suitable house within the time prescribed in this judgment, the order for maintenance made by the learned Magistrate in favour of the wife will stand. In all the circumstances of the case I think that it is in the interests of justice that the husband should pay his wife's costs of this appeal and in the Court below, and I make order accordingly.

It is evident that the future happiness of these parties will depend on the spirit in which they will attempt to honour their solemn obligations to each other. The hope that there will be a genuine reconciliation between them underlies my judgment in this case. As Lord Macmillan pointed out in *Watt (or Thomas) v. Thomas (supra)* " a Court of law provides at the best but an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however impartial, can enter fully into its subtle intricacies of feeling and conduct ". It is now left to the parties to make or mar their future happiness.

There is one other question which was raised in the argument before me. Section 14 of the Maintenance Ordinance (Chapter 76) requires a Magistrate before issuing summons in a Maintenance action to examine the applicant on oath or affirmation, and it is only after such examination that he is justified in issuing process. The purpose of this section is to protect a party from the vexation of having to defend himself in proceedings of this nature until there is sworn evidence on the record making out a *prima facie* case against him. In the present action the learned Magistrate failed to comply with section 14, and there can be no doubt that the issue of summons against the husband was premature. The husband would accordingly have been entitled, if he so chose, to have the order for summons vacated. This however he did not do. On the contrary he submitted to the jurisdiction of the Court and an order was made against him after witnesses were called by both sides. The question is whether the irregularity in failing to comply with section 14 necessarily vitiates all the subsequent proceedings. In *Podina v. Sada*[1] Bonser C.J. held that failure to comply with section 14 did not vitiate the proceedings but was at best an irregularity against which the husband could object if he could satisfy the Court that he had been prejudiced by the irregularity. In *Namasivayam v. Saraswathy*[2] however, my brother Basnayake took a contrary view. He held that the issue of a summons in strict accordance with the requirements of the section was a condition precedent to the assumption by a Magistrate of jurisdiction under the Maintenance Ordinance, and that although there was an *inter partes* trial without objection to the irregularity all the proceedings must be quashed. With great respect I feel that I must follow the judgment of Bonser C.J. with which I am in agreement.

[1] *(1900) 4 N. L. R. 109.* [2] *(1949) 50 N. L. R. 333; 39 C. L. W. 71.*

It seems to me that whether or not the proceedings were regularly commenced under section 14, it is section 2 of the Ordinance and not section 14 which vests a Magistrate with jurisdiction after trial to make or refuse an order for maintenance in favour of an applicant. The condition precedent to an order for maintenance is in my opinion *the proof* furnished at the trial that the respondent had neglected or refused without just cause to maintain his wife or his children as the case may be. I accordingly overrule Mr. Nadesan's objection on this point. To order a fresh trial at this stage would benefit neither party.

Order set aside on conditions.