1940 *Present :* **Hearne J.**

BAKER *v.* FABURA.

854—A. M. C. Colombo, 16,388.

Maintenance—Application by woman as wife for maintenance on behalf of herself and child—Marriage not proved—Order for maintenance of child —Maintenance Ordinance, s. 6 (Cap. 76).

Where a woman applied for maintenance as the lawful wife of the defendant on behalf of herself and her child and where the Magistrate found that evidence of the marriage was insufficient and refused maintenance for herself.

***Held*, that the Magistrate may order maintenance in respect of the child on the footing that it was illegitimate if, in fact, the evidence for the applicant satisfied him that the defendant was the father and that he maintained the child within twelve months of the birth, although her application was not supported by an affidavit to the effect.**

APPEAL from an order of the Additional Magistrate of Colombo.

H V. Perera, K.C. (with him *S. Sabapathipillai*), for defendant, appellant.

L. A. Rajapakse (with him *M. I. M. Haniffa*), for applicant, respondent.

Cur. adv. vult.

May 28, 1940. HEARNE J.—

The applicant claiming to be the wife of the defendant asked for maintenance for herself and her son. She said she was married to the defendant in 1930, about August, and that their son, Nazim, was born ten or eleven months later.

The Magistrate held that the evidence of marriage was not satisfactory and accordingly he made no order for maintenance in her favour.

In his evidence the defendant admitted that he started keeping the applicant as his mistress shortly after 1932 or 1933, and that when he went to India he arranged for the payment to the applicant of Rs. 50 per month. He did not deny that his association with her continued up to April, 1939.

The Magistrate, however, accepted the evidence of the applicant which was supported by one Saleem that she and the defendant had started living together in a tenement at Panchikawatta in 1930, that they remained in the tenement for about a year or eighteen months, and that it was during this period that Nazim was born.

The defendant admitted that Nazim was called Abdul Rahaman Nazim and it is significant that his first names are also Abdul Rahaman. He also admitted that in letters addressed to the applicant he referred to Nazim as "our Nazim". In these circumstances and in the evidence of Saleem the Magistrate found corroboration of the truth of the applicant's story and he ordered the defendant to pay for Nazim's maintenance at the rate of Rs. 50 per month. From this order the defendant appeals.

There is no doubt that, had the applicant come to Court on the footing of a former mistress and not a wife, on the Magistrate's findings of fact which have not been seriously assailed, the appeal would have had to be dismissed.

The question I have to consider is whether the appeal should be allowed for the reason that although the applicant asked for maintenance on behalf of Nazim as the child of a married union, maintenance has been allowed in the absence of proof that he was in fact the child of such a union.

In this connection my attention has been drawn to the Maintenance Ordinance, section 6 of Cap. 76, vol. II. of the Legislative Enactments of Ceylon. This section enacts that in the case of an application for an order in respect of an illegitimate child, such an application shall not be entertained unless made within twelve months from the birth of such child, or unless it be proved that the man alleged to be the father of such child has at any time within twelve months next after the birth of such child maintained it or paid money for its maintenance . . . .

If an applicant, on coming into Court twelve months after the birth of her child, altered her position from that of a married woman to that of a mistress, and had not averred in her affidavit that the defendant had supported her child during the twelve months next after its birth, the whole inquiry would, in my opinion, have been abortive. For she would then have initiated proceedings irregularly and have misstated the true facts in order to cure the irregularity.

But in a case in which the Magistrate did not hold the applicant had deliberately tried to mislead the Court—he did not reject the applicant's evidence, though he was not satisfied there was a sufficiency of proof of an actual marriage ceremony—and in which the applicant's position, which was accepted by the Magistrate, had always been that the defendant's support had continued from the days of their first association in 1930 till April, 1939, I do not think that the appeal should be allowed by reason of the provisions of section 6 of the Maintenance Ordinance, or on the ground that the defendant was prejudiced in his defence.

Apart from the applicant's claim to be the wife of the defendant, the issue of whether the defendant had lived with the applicant from 1930 or only from 1932 (or 33) was, as it appears, fully appreciated by the defendant and his Counsel.

The Magistrate answered the issue unequivocally in favour of the applicant and I dismiss the appeal with costs.

Affirmed.