

1969

Present : de Kretzer, J.

G. RAYAPPAN, Appellant, and R. MONICAMMA, Respondent

*S. C. 66/69—Chief M. C. Colombo, 33614/A.M.C.**Maintenance Ordinance—Application for maintenance thereunder—Whether it is affected by action for divorce instituted by one party against the other.*

An application for maintenance may be made by a wife under the Maintenance Ordinance during the pendency of an action for divorce instituted against her by the husband.

APPEAL from a judgment of the Chief Magistrate's Court, Colombo.

S. N. Rajadurai, for the respondent-appellant.

H. W. Jayewardene, Q.C., with *M. Amarasingham* and *G. M. N. Samaraweera*, for the applicant-respondent.

Cur. adv. vult.

October 20, 1969. DE KRETZER, J.—

The facts are as follows:—Gregory Rayappan filed Divorce Case No. 7952 D.C. Colombo on 28.6.1968 seeking a divorce from his wife Monicamma on the footing that she had maliciously deserted him.

On 28.8.1968 Monicamma filed the present Maintenance Case against him claiming maintenance for herself and her child.

In regard to the child by consent a Maintenance Order of Rs. 50 was made. In regard to Monicamma, who refused her husband's offer to come back and live with him because she alleged that he habitually ill-treated her, application was fixed for Inquiry. On the Inquiry date, Counsel for Gregory Rayappan moved the Court to lay by the Case until the Divorce Case which had been fixed for Trial was over. The Magistrate refused the Application to lay by and then Counsel informed him that Gregory Rayappan would not be taking part in the proceedings. The Magistrate having recorded the available evidence made his order that Gregory should pay Monicamma Rs. 75 a month as Maintenance and Gregory Rayappan has appealed.

Counsel has urged that the Magistrate has erred in not laying by the Case as in the Divorce Case that was pending the same issue, viz. whether the Applicant had deserted the Respondent had to be determined. Although the Maintenance Ordinance provides special machinery for securing maintenance for the parties entitled to it and when parties resort to its provisions they are entitled to obtain the relief as speedily as possible by the determination of the question of fact "does the husband refuse or neglect to maintain wife or child" Counsel relies on the case reported in 7 Law Recorder, page 58—*De Silva v. Seneciratne*¹—in which when a wife sued for Maintenance a husband who had already instituted a Divorce Case which was pending at the time of the Application for maintenance, Jayewardene J. held that as the issue was the same in both cases the maintenance proceedings should be stayed pending the decision of the Divorce Case conditionally on the husband prosecuting the Divorce Case with diligence.

In the Case reported in 39 C. L. W. 75—*Wimalawathie Kumarihamy v. Imbuldeniya*²—it was held that an application for maintenance is not affected by the institution of an action for divorce by one party against the other. In regard to the decision reported in 7 Law Recorder 58, Basnayake J. said "with great respect I find myself unable to agree with the view taken by Jayewardene J. in *De Silva v. Seneciratne* (1925) 7 Law Recorder 58. In the absence of a provision in the Maintenance Ordinance enabling a Magistrate to adopt the course suggested therein he has no power in law to deny to an applicant the relief provided by the Statute."

I am in respectful agreement with this observation of Basnayake J. In my opinion the Magistrate correctly decided to go on with this Case. The Appeal is dismissed with Costs.

Appeal dismissed.

¹ (1925) 7 C. L. Rec. 58.

² (1919) 39 C. L. W. 75.