

1925.

[IX REVISION.]

Present : De Sampayo J.

EBERT v. EBERT.

P. C. Kalutara. 57.114.

Maintenance—Husband living in adultery—Change of conduct—Application to revise order for maintenance—Ordinance No. 19 of 1885, s. 9.

Where a Court has once granted maintenance to a wife on the ground that her husband is living in adultery, it has no authority to revise such order under section 6 of the Maintenance Ordinance, on the ground that the husband has ceased to live in adultery.

APPPLICATION to revise proceedings before the Police Magistrate of Kalutara. The petitioner sued her husband, the respondent for maintenance for herself and her child on December 3, 1920; whereupon the respondent offered to maintain her, if she would live with him. She refused to do so, on the ground that the respondent was living in adultery. It was found by the Police Magistrate that the respondent was living in adultery with the person named, and the respondent was ordered to pay maintenance. After several attempts to reduce maintenance, the respondent moved before the Police Magistrate to vacate the order for maintenance by serving a notice on the petitioner to show cause why she should continue to refuse unreasonably to live with him. In an application to vacate the order for notice, the Police Magistrate held that if the respondent is not now living in adultery and is not guilty of other misconduct, the original order may be cancelled.

Drieberg, K.C., with him *Soertsz*, for petitioner.

H. V. Perera, for respondent.

March 27, 1925. DE SAMPAYO J.—

This is a maintenance case instituted by the petitioner against her husband, the respondent, applying for maintenance for herself and her child. At the trial on December 3, 1920, the respondent offered to maintain his wife if she would come and live with him. This the petitioner refused to do, on the ground that the respondent was living in adultery. It was after full investigation found by the Police Magistrate that the respondent had lived in adultery with the person named, and this finding was expressly upheld

by the Supreme Court in appeal. The respondent was then employed in the Government Railway, and was in the receipt of salary and allowances amounting to about Rs. 500 a month, and the Police Magistrate ordered him to pay Rs. 100 a month for the maintenance of the petitioner and the child. Subsequently, the respondent retired from Government service on pension, and he then applied that the amount of maintenance be reduced. On June 21, 1924, the amount was by agreement of parties reduced to Rs. 83 a month. Later the respondent applied that the amount be further reduced to Rs. 40 a month, but this was refused by the Court. This was on October 14, 1924. The respondent's next attempt to relieve himself of the entire liability to pay maintenance was to apply for and serve a notice on the petitioner to show cause "why she should continue to refuse unreasonably and without sufficient good cause or reason to live with her legally married husband who has his permanent residence now at Kalutara." The petitioner showed cause by submitting that, in view of the original finding of the Court in respect of adultery, the respondent could not be allowed to revise the question of the petitioner's refusal to live with the respondent, and moved that the order issuing the notice may be vacated. The Police Magistrate refused to vacate the order, and fixed the matter for inquiry. The petitioner now applies that the proceedings in this connection be revised.

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The Police Magistrate's view is that if the respondent is not now living in adultery and is not guilty of other misconduct, which should be the matter for inquiry, the petitioner would have no "sufficient reason" for refusing to live with her husband within the meaning of section 6 of the Maintenance Ordinance, 1889, and that the original order for maintenance would under that section be liable to be cancelled. The question is whether this view is right. The entire section 6 is as follows:—

"On proof that any wife in whose favour an order has been made under section 3 is living in adultery, or that *without sufficient reason she refuses to live with her husband*, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

There is no direct authority for the Police Magistrate's ruling, and the question has to be considered on principle. It will be noted that the sentence which is italicized, and which is said to be an alternative to the wife herself being guilty of adultery, is in very general terms, and does not refer to change of conduct on the husband's part, thus leaving the wife without any sufficient reason to refuse to return to him. If this was intended, I should have expected the Ordinance to provide for it more clearly. Further, the expression "without sufficient reason" may well refer to matters other than adultery. For instance, under section 4 a

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wife's refusal to live with the husband can be justified if the husband "has habitually treated his wife with cruelty." And if the husband has reformed in this respect, as he may well change his "habits," the wife would then have no "sufficient reason" for her refusal. But adultery is quite a different thing, and other considerations apply to it. I might say here that, as I understand the judgments of the Police Magistrate and of this Court in appeal, the respondent had committed not one act of adultery, but pursued a course of conduct amounting to "living in adultery." The stain of adultery cannot be obliterated by reform, nor can a wife be expected to overlook the fact in regulating her own life. Adultery strikes at the root of the marriage relation, and its consequences both legal and social continue. Of course, a wife may condone the misconduct, whether it be one act or a series of acts of adultery. But condonation must be voluntary. The present effort of the respondent is in effect to compel the petitioner to condone his offence, and in this connection I do not think the date of the offence makes any difference. In my opinion the words of section 6 do not enable the Court to force the unwilling wife to cohabit with a once guilty husband or lose her right to maintenance. I think, therefore, the notice issued on the petitioner at the instance of the respondent should have been discharged for lack of any legal justification, and the Police Magistrate should not enter into any inquiry on the subject of the present condition of life of the respondent.

Acting in revision I quash the order and proceedings in question.

Proceedings quashed.