

RUKHMANI

v.

BALRAJ

[SUPREME COURT, 1965 (Hammett P.J.), 8th October, 3rd
November]

Appellate Jurisdiction

Husband and wife—matrimonial proceedings—maintenance order—persistent cruelty—order not terminable by offer of co-habitation—Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 31).

The appellant obtained an order for maintenance and custody of children against her husband the respondent on the ground of persistent cruelty. On an application by the respondent to vary the order the magistrate discharge the order on the ground that the respondent was willing to resume cohabitation with the appellant and was no longer in desertion.

Held: The finding against the respondent was one of persistent cruelty and it was not open to him to frustrate the order for maintenance in favour of his wife and children by making an offer to resume co-habitation.

Cases referred to: *Pike v. Pike* [1954] P.81 n.; [1953] 1 All E.R.232; *Thomas v. Thomas* [1924] P.194; 130 L.T.716.

Appeal from discharge of maintenance order.

K. C. Ramrakha for the appellant.

R. I. Kapadia for the respondent.

HAMMETT P.J. : [3rd November, 1965]—

On 1st June, 1962, the Magistrate's Court at Labasa held, *inter alia*, that the husband respondent had been guilty of persistent cruelty to his wife, the appellant. An order was made under the provisions of the Separation and Maintenance (Summary Jurisdiction) Ordinance granting the custody of the two children of the marriage (Sant Kumari and Mahesh Chand) to the wife and that the husband do pay maintenance to the wife at the rate of £1 per week and 12/6d. for each child until attaining the age of 16 years.

On 17th October, 1963, the parties appeared before the Magistrate's Court at Labasa and agreed that shortly after the original order was made the wife had been delivered of a third child (Devi Prasad) of which the husband was the father. The order for maintenance was then varied by consent to the effect that the payment to the wife was reduced from £1 to 10/- a week and in lieu of 12/6d. per week maintenance in respect of each of two children, the husband would

pay 10/- per week in respect of each of three children. It was also ordered by consent that the husband should have access to the children for one hour every Saturday at the rear of the Court House.

A The husband did not comply with the order for maintenance either regularly or fully, and on one occasion a large amount of arrears of maintenance was remitted.

On 10th March, 1965, he applied to the Court below for the discharge or variation of the order of maintenance on two grounds:

Firstly : Because of poverty and lack of employment.

B Secondly : Because the wife had not regularly produced the children at the Court House every Saturday as agreed.

After hearing the evidence the learned trial Magistrate considered that the husband was now willing to resume cohabitation with her and that she was unwilling to do so. On this basis he discharged the order of maintenance on the ground that the husband was no longer in desertion.

C It is against this order of discharge that the wife has now appealed upon the several grounds set out in the petition of appeal which I do not consider necessary to set out in full.

In his judgment the learned trial Magistrate referred to and appeared to rely on the decisions of the Court of Appeal in *Pike v. Pike* [1953] 1 All E.R. 232 and *Thomas v. Thomas* [1924] P.194.

D In *Pike v. Pike* it was held that conduct falling short of persistent cruelty is not sufficient to support a charge of constructive desertion, and that a charge of cruelty must be distinctly pleaded and proved as such. In *Thomas v. Thomas*, another case on desertion, it was held that desertion is a continuing offence and that it could not be obliterated by subsequent offers to resume cohabitation as to the genuineness of which a wife might reasonably entertain doubts.

E Both these cases dealt with the question of desertion and neither of them concerned the issue of persistent cruelty. Again, in both these cases, the Court of Appeal was considering the evidence of the husband's conduct and the events which occurred prior to the hearing of the original case by the Justices. In the present case on appeal there has been an undisturbed finding that the husband has been guilty of persistent cruelty and the evidence was of the husband's intentions subsequent to that finding against him.

F I do not know of any authority for the proposition that after a Court has reached a finding of desertion which has not been challenged or set aside on appeal, the desertion can be terminated by the deserting spouse making an offer to return or to resume cohabitation. All the cases on this aspect of desertion concern offers to return made before an adjudication by the Court.

G In the present case the original finding in 1962 was that the husband had been guilty of persistent cruelty. It was not open to him to frustrate the order of maintenance in favour of his wife and children, on the grounds of his persistent cruelty, by making an offer to resume cohabitation even though his offer might then have been genuine. The wife is entitled to reject any such offer and to rely on her Court Order for maintenance. If she chooses to accept his offer and does

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resume cohabitation she is, of course, entitled to do so. The order for maintenance would then become unenforceable under the provisions of section 7 of the Separation and Maintenance (Summary Jurisdiction) Ordinance. She cannot, however, be compelled by either her husband or the Court to accept such an offer after a finding of persistent cruelty against her husband. A

Further, the husband did not base his application to vary or discharge the order against him on the ground that he had made a *bona fide* offer to resume cohabitation with his wife. His application was based on two grounds only, i.e. (1) of poverty and (2) of the wife's failure to comply with the order by consent that the husband could have access to his children once a week for an hour each Saturday behind the Court House. B

On the question of poverty, the husband admitted in his evidence that he had in fact obtained gainful employment before the hearing. It seems that there were no grounds why the order of maintenance of 10/- per week for his wife and each of his three children, i.e. £2 a week in all, should be reduced. It was a modest order which it is his responsibility and duty to comply with. C

On the question of access, it seems to have been an extraordinary arrangement for a man who says he loves his children to have sought or consented to. It is difficult to imagine a more incongruous place for a man to want to meet his children than at the "rear of the Court House". According to the husband on 7 or 8 occasions in the past three years his wife did not appear at the time and place agreed. Since he has in these three years failed to pay his maintenance for three separate periods, it is by no means improbable that when the maintenance was not paid the wife did not appear. Again on some at least of these 7 or 8 occasions either the wife, or one of the children, may well have been indisposed or the weather inclement. There is no evidence that the husband made any sort of enquiries at the time of why his wife and children did not appear when he expected them. On the evidence produced by the husband his complaint on this score would appear to be specious. It was certainly of insufficient weight for the Court to consider revoking the order of maintenance. It might have been otherwise had the Court been satisfied on clear evidence that the wife was acting in flagrant defiance of the Court Order concerning access. D E F

For these reasons the appeal is allowed. The order of the Court below revoking the order for maintenance is set aside and the wife is entitled to have the order in her favour enforced.

If the arrangements for access to the children are not working to the mutual convenience of the parties, it is a matter that could well be investigated by a Probation Officer. The Court could then, by consent, vary the order for access to the mutual convenience of the parties, bearing in mind the interests of the children. G

The husband must pay the costs in this Court and in the Court below which I assess at £21 plus any actual disbursements and Court fees paid, which I direct are to be assessed by the Court below in the event of the parties failing to agree upon them. H

Appeal allowed.