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CHINSAMI

v.

PUNAMMA

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[SUPREME COURT, 1967 (Mills-Owens C.J.), 3rd February, 7th, 28th, April]

Appellate Jurisdiction

Husband and wife—matrimonial proceedings—maintenance order—conduct of husband—same issues decided in earlier proceedings—res judicata—suspicion of adultery not proof—order for maintenance of child in custody of mother though mother in desertion—Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz. 2, c.48) (Imperial) ss.1, 1(1) (h), 2, 2(1), 2(3) (b), 4(1)—Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 31) ss.3, 4, 4(c), 8.

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Res judicata—separation and maintenance—same issues in previous proceedings between same parties—no new event bearing on issues.

Evidence and proof—separation and maintenance proceedings—finding of serious suspicion of adultery—insufficient basis for order.

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The respondent obtained in the Magistrate's Court an order against the appellant under the provisions of the Separation and Maintenance (Summary Jurisdiction) Ordinance for payment of maintenance for herself and for each of the two children of the marriage. The custody of both children (one of whom was in the care of the appellant) was given to the respondent. The grounds of the complaint by the respondent were habitual drunkenness, desertion, cruelty, wilful neglect to maintain and adultery; the magistrate found that the conduct of the appellant had been such as to entitle the respondent to withdraw from co-habitation and that his more recent behaviour gave rise to serious suspicions of adultery.

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In 1963 the respondent had brought maintenance proceedings against the appellant, relying upon all of the grounds above enumerated except that of adultery. Since those proceedings, in which the respondent failed, the parties had continued to live apart and no new event bearing directly upon the matters in question had occurred. The adultery relied upon in the present proceedings was alleged to have occurred in 1966.

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Held: 1. Suspicion of adultery cannot amount to proof to any standard and the decision of the magistrate based on that ground could not stand.

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2. Adultery not having been proved and therefore having no bearing upon the continued separation of the parties, all the other issues between the parties were *res judicata*.

Stokes v. Stokes [1911] P.195, applied.

3. Under sections 3 and 4 of the Separation and Maintenance (Summary Jurisdiction) Ordinance, an order may be made in respect of the maintenance of a child whose custody has been awarded to a wife, even though no order may be made in respect of the wife because of her desertion.

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4. The order for maintenance of the respondent and that for custody and maintenance of the child in the care of the appellant would be set aside; custody of the other child would be awarded to the respondent and an order for maintenance of that child made.

Cases referred to: *Molesworth v. Molesworth* [1947] 2 All E.R.842; 112 J.P.65: *Stokes v. Stokes* [1911] P. 195; 105 L.T.416: *Pickavance v. Pickavance* [1901] P.60; 84 L.T.62: *Herod v. Herod* [1939] P.11; [1938] 3 All E.R.722: *Day v. Day* [1957] P.202; [1957] 1 All E.R.848: *Northrop v. Northrop* [1966] 3 All E.R.797; [1966] 3 W.L.R.1193; affd. [1968] P.74: *Young v. Young* [1964] P.152; [1962] 3 All E.R.120: *Cooke v. Cooke* [1961] P.16; [1960] 3 All E.R.39.

Appeal from an order for maintenance by the Magistrate's Court made under the Separation and Maintenance (Summary Jurisdiction) Ordinance.

R. I. Kapadia for the appellant.

D. N. Sahay for the respondent.

MILLS-OWENS C.J. : [28th April 1967]—

This is an appeal against a maintenance order made in favour of the respondent wife. The complaint was made on the grounds of habitual drunkenness, desertion, cruelty, wilful neglect to maintain, and adultery. The learned Magistrate's decision in favour of the wife may be regarded as summed up in the following passage of his written judgment —

> "The occasion of the separation may well be res judicata, but if there are more recent acts of cruelty or misbehaviour, I can look at the whole circumstances of the case. The complainant is willing to live with Defendant at Vunivau, because she says she will have her relatives to look after her. The Defendant wants to take the complainant back, and live anywhere except at Vunivau, because he says the complainant's mother always causes trouble and, going by her appearance, this is probably true. In the result, I find that the conduct of Defendant has been such, if not owing to his drinking habits and assaults, both of which I hold proved, even though not sufficiently to be considered as matrimonial offences by themselves, then by his more recent behaviour giving rise to serious suspicions of adultery with Ballamma, as to entitle the complainant to withdraw from cohabitation except at Vunivau. In these circumstances the Defendant has to support the complainant: he has not paid maintenance when there was serious fault on his side: a more technical finding on the complaint would be that I find over the past three years, apart from the small amounts mentioned by Defendant, the Defendant has not maintained his daughter whom he is legally liable to maintain, with the result that the younger child, in the mother's care, has not been sent to school, because of lack of finance, while the elder child, with the Defendant's brother, is apparently quite well looked after. Since he has failed to maintain his daughter, I can make any of the proper orders in Cap. 31.
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> I make order for custody of both children to complainant, and that Defendant pay 10/- per week for wife, and 7/6 per week for each of the two children."

There had been earlier maintenance proceedings brought by the wife in 1963 (Case No. 33 of 1963) when she alleged the same grounds, except for the ground of adultery. In those proceedings the wife was unsuccessful, all the issues raised, namely habitual drunkenness, desertion, cruelty and wilful neglect to maintain, being held to be not proved. No new event bearing directly on those matters has occurred since 1963. The parties have continued to live apart. As for the adultery, that is alleged to have occurred in 1966.

The first ground of appeal is that all the issues arising in the case, except for that of adultery, are res judicata. This plea was raised in the Court below, and on the appeal the record of Case No. 33 of 1963 was referred to by consent. It is quite clearly the case that the issues of habitual drunkenness, desertion, cruelty and wilful neglect to maintain were all decided in the husband's favour in Case No. 33 of 1963, on the merits. Mr. Sahay for the wife, contends that the raising of the issue of adultery in the present proceedings means that the other issues may be re-opened. He cites *Molesworth v. Molesworth* [1947] 2 All E.R. 842. The headnote of that case reads —

> "In March, 1947, a summons issued by a wife charging her husband with wilful neglect to maintain her was before justices, but that charge was not proceeded with, being replaced by one of desertion, which was dismissed. In June, 1947, the wife issued two further summonses against her husband, alleging desertion and wilful neglect to maintain. The justices, in dismissing these summonses, proceeded on the basis that the history of the case as it stood before the hearing in March was irrelevant.
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> Held: (i) the withdrawal in March of the charge of wilful neglect to maintain did not estop the wife from making a similar allegation in June, because the withdrawal was made on the implied condition that the court was then and there prepared to deal with the major charge of desertion, and the charge of wilful neglect to maintain had never been adjudicated on, *Pickavance v. Pickavance,* ([1901] P.60) , distinguished.
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> (ii) the justices were wrong in excluding from their deliberations in June the facts preceding the hearing in March, as the charge of desertion should have been considered in the light of the matrimonial history which had not become res judicata by the March decision. *Stokes v. Stokes,* ([1911] P.195) distinguished."

It is desirable to add that in those proceedings the wife was also seeking, and was granted, leave to appeal out of time against the dismissal of the charge of desertion. Dealing with the plea of res judicata the learned President Lord Merriman said, at pp.844-5 —

> "I do not propose to take this opportunity of making such very small contribution as I could hope to make to the extremely difficult topic of res judicata, but we have been pressed with an observation of Sir Samuel Evans, P., in *Stokes v. Stokes.* That, like this, was a case in which a charge of desertion had been dismissed on a previous occasion, but that, unlike this, was a case in which the evidence which the wife sought to bring related solely to the original charge. There was no new issue at all. What she was seeking to adduce was

evidence which had not been obtained (I need not consider whether or not it could have been obtained) on the issue on which she had failed at the first hearing, and it was to these circumstances that Sir Samuel Evans, P., was addressing himself in the passage on which reliance has been placed by counsel for the husband. It reads ([1911] P.199):

> If a wife makes a complaint of desertion, places her case before the justices, adduces the evidence on which she relies, and asks for their decision, and they decide against her, she cannot afterwards, whatever further evidence she may obtain, issue another summons for the same cause of complaint.

"The same cause of complaint". I pause on those words. That, of course, cannot mean that the complaint is desertion in both cases as distinct from desertion in one case and (say) cruelty in another. It means the same cause of complaint in substance and in fact. Sir Samuel Evans, P., continues (ibid):

> The fact that desertion is a continuing offence makes no difference; because the desertion must be referable to some particular time when it began.

Applied to the facts with which the President was dealing, no exception whatever could be taken to those observations. If, however, it is sought to apply them to all possible cases of desertion, then they go much too far, I could not assent to the proposition that in no circumstances does the fact that desertion is a continuing offence make no difference. It makes all the difference in the world in certain circumstances for precisely the same reason that in a charge of persistent cruelty the conduct which is alleged, within the period of the summons which is being dealt with, to amount to persistent cruelty can only be judged in the light of the whole course of conduct, and the mere fact that at an earlier stage, when the conduct was only partly completed, a court has adjudged that at that point it does not amount to persistent cruelty, does not shut that evidence out for ever, any more than it does in certain cases of desertion. I am not laying down any general rule, but it is open to a court to say: "You have not quite driven it home on this occasion. We are not sure whether your offers to resume cohabitation have had a reasonable time to elapse and we are not prepared to hold that desertion is proved today." That does not mean that for all time nobody can refer in such a case as the present to the fact that there have been earlier attempts to bring about a reconciliation, when further time has elapsed and fresh overtures have been made by which, taken cumulatively, the issue of desertion falls to be decided."

As it appears to me the case now before me is governed by the decision of Sir Samuel Evans P. in *Stokes v. Stokes* unless, that is to say, the adultery alleged in the present case was in fact proved, and, moreover, had a bearing on the continued separation of the parties.

As to the adultery, it must I think be evident that the decision of the learned Magistrate cannot possibly stand. He expresses the case on that issue as one of 'serious suspicion'. Suspicion can hardly be proof,

to any standard. I do not think that any more need be said on that point. Further, even if adultery by the husband had been proved, assuming that initially the wife had been in desertion, the fact of adultery would not of itself put an end to the wife's desertion. It would be a matter of determining whether the adultery had any influence on her intentions (*Herod v. Herod* [1939] P.11; *Day v. Day* [1957] 1 All E.R. 848) as to which there was no evidence in the present case. However, as adultery has not been proved that does not arise. In these circumstances I hold that the issues other than adultery are res judicata and that the appeal succeeds on the issue of adultery.

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At the request of the Court, Counsel addressed themselves to the question, raised by the learned Magistrate in his judgment, whether the husband is liable nevertheless to pay maintenance on the basis of wilful neglect to maintain the child of whom the wife has the care or custody. It appears that there are two children of the marriage and that ever since the separation in 1963 one child has lived with the husband and his brother and the other with the wife, the former child is apparently well cared for, whilst it is clear that the husband has not been maintaining the child of whom the wife has the custody. In these circumstances the question is whether, the wife being in desertion and consequently not entitled to maintenance in her own right as it were, it is the obligation of the husband nevertheless to maintain the child, and possibly, incidentally, to maintain the wife as well on the basis that only thus may the child be properly maintained. The rule that where, on a consensual parting of husband and wife without any stipulation exonerating the husband from supporting a dependent child, there has been wilful neglect to maintain such child, the court may make a finding of wilful neglect to maintain the wife, has recently been explained by the Divisional Court as arising out of the close identification of interest between the mother and dependent child; the failure to maintain the child throwing the obligation on the mother and amounting to wilful neglect on the husband's part to maintain her notwithstanding that there is no stipulation to maintain her in the separation agreement (see *Northrop v. Northrop* [1966] 3 All E.R. 797). That however was a case of separation by agreement. The case where the wife is a deserter was dealt with by the Divisional Court in *Young v. Young* [1962] 3 All E.R. 120, in which the President, Sir Jocelyn Simon, said, at pp.124-6 —

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> "A father is prima facie liable to provide maintenance for his child; and the onus lies on him to prove that any separation agreement provided expressly or impliedly that he should not be responsible for the maintenance of the child. .....
> If the husband was guilty of wilful neglect to maintain the child then, whatever the conduct of the wife, the justices should make an order for the maintenance of the child: *Kinnane v. Kinnane; Starkie v. Starkie* (No. 2); *Cooke v. Cooke.*
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> Would failure to provide reasonable maintenance for the child give jurisdiction to make a maintenance order in favour of a wife who would not otherwise be entitled? Section 1(1) (h) of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, provides that a married woman (Magistrates' Courts) Act, 1960, provides that a married woman may apply to a magistrates' court for an order against her husband on the ground that he "has wilfully neglected to provide reasonable

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maintenance for the wife or for any child of the family . . . . " *Cooke v. Cooke* establishes that those are two quite separate grounds of complaint. Section 2 (1) says that on hearing a complaint under s.1 the court may make a matrimonial order containing among other provisions:

> "(b) a provision that the husband shall pay to the wife such weekly sum not exceeding £7 10s. as the court considers reasonable in all the circumstances of the case (and) (h) a provision for the making by the defendant or by the complainant or by each of them, for the maintenance of any child of the family, of payments by way of a weekly sum not exceeding in the case of payments by either one of the parties in respect of any one child the sum of 50s."

On the face of these provisions it would appear that once the offence of wilful neglect to provide reasonable maintenance for a child had been committed under s.1 (1) (h), any of the orders specified under s.2 (1) could be made including a maintenance provision for the wife. But the matter requires consideration in four different sets of circumstances: first, where the husband is alone to blame for the separation; second, where the parting is consensual; third, where the wife has committed adultery; and, fourth, where the wife has committed some other matrimonial offence, such as desertion.

Even where the husband's misconduct alone leads to the break-up of the marriage, the wife may nevertheless be disentitled to an order for her own maintenance on the ground of his wilful neglect to maintain her. She may, for example, have such income of her own that the husband was justified, whatever his misconduct, in refusing to maintain her. But if he were guilty of wilful neglect to maintain the child of the marriage, the wife would be entitled to an order for the maintenance of the child on that ground. Moreover, if subsequently she lost her own source of income, she would be able, in my view, to secure a variation of the original order based on her husband's wilful neglect to provide reasonable maintenance for the child, so as to provide for her own maintenance; and this would be so whether or not the original order provided nominally for her maintenance. The Act applies at its face value.

Secondly, where the parting was consensual, without any stipulation exonerating the husband from liability for the child's maintenance, *Kinnane v. Kinnane, and Starkie v. Starkie* (No. 2) as explained in *Cooke v. Cooke*, establish that "where the husband wilfully neglects to provide maintenance for the child it is open to the court to make a maintenance order in favour of the wife."

Here I would interpose a reference to the subsequently decided case of *Northrop v. Northrop* which I have referred to above, also a case in which the leading judgment was given by Sir Jocelyn Simon P. Continuing with the quotation from *Young v. Young*, —

> "Thirdly, where the wife has committed adultery, the Act itself provides in s.2 (3) (b) that a maintenance order shall not be made in her favour unless the adultery has been condoned, connived at or conduced to. The court may, nevertheless, in such circumstances, by s.4 (1) make an order in favour of the child.

It is against this background that the fourth case can be judged — namely, where the wife has been guilty of desertion or cruelty. The husband cannot be convicted of wilful neglect to provide reasonable maintenance for her in those circumstances. He could, however, be guilty of wilful neglect to provide reasonable maintenance for the child of the marriage. Is it open to the court to make an order also for the maintenance of the wife in such circumstances? In my view, the answer is No. In the first place, a wife's right to maintenance under the legislative code with which we are here concerned has been approximated to a wife's right to maintenance at common law: see, for example, the application of *Jones v. Newtown and Llanidloes Guardians*, in the judgment of Hodson, L.J., in *Price v. Price*. At common law a wife had no right to claim maintenance from her husband while she remained in desertion. Secondly, *Cooke v. Cooke* established that a wife who had been guilty of conduct which reasonably led her husband to believe that she had committed adultery was not entitled to a maintenance order on the ground of her husband's wilful neglect to maintain her. This supports the view that, a fortiori, a wife who has committed an actual matrimonial offence is disentitled to an order for maintenance in her favour. Counsel for the wife argued that, if any matrimonial offence precluded a wife from obtaining a maintenance order in her own favour, it was odd that the Act specifically singles out adultery as a bar. The explanation may be that specific provision had to be made for conduct conducing to the adultery, since this was not a concept of which the common law took cognisance."

There are differences between the wording of the Fiji Ordinance (Cap. 31) and the English statute. One difference is that no order, even apparently in favour of a child, can be made where the wife is guilty of adultery (vide sec. 8), but that does not arise here. Secondly, and this is of importance in the present case, the section of the Ordinance which provides for maintenance (sec. 4) of the wife and children does so in a single paragraph. Thus the section provides —

"4. A magistrate hearing any application under this Ordinance may make an order or orders containing all or any of the provisions following that is to say —

(a) .....

(b) .....

(c) a provision that the husband shall pay to any officer of the court for the use of the applicant such weekly sum or sums as the magistrate shall, having regard to the means both of the husband and wife, consider reasonable for the maintenance of herself and of each child the legal custody of whom has been committed to the applicant under paragraph (b) of this section but, in the case of such child, only until such child attains the age of sixteen years;

(d) ....."

On the other hand section 3 of the Ordinance (as was held to be the position under the English Act in the case of *Cooke v. Cooke*, cited above) treats neglect to maintain the wife and neglect to maintain a child as

two quite separate grounds of complaint. Notwithstanding the wording of paragraph (c) of section 4 of the Ordinance, therefore, I am of opinion
A that, as in the English law, an order may be made in respect of the maintenance of the child, although an order may not be made in respect of the wife because of her desertion, provided that custody of the child is awarded to the wife.

The award of custody of both children to the wife by the learned Magistrate appears to have been influenced by his findings on the facts
B of the case, which as I have indicated cannot stand. As it appears to me there is no evidence calling for the status quo to be disturbed.

Accordingly the appeal is allowed to the extent that the order for maintenance in favour of the wife, and the order for custody and award of maintenance in respect of the child Subhdra Wati, are hereby set aside; and it is hereby ordered that the custody of the other child, namely
C Kankamma, is awarded to the wife and that the husband pay the sum of 7/6. per week for the maintenance of that child, commencing on the date hereof; the parties to have reasonable access to the children respectively on such terms as may be agreed or as in default of agreement may be ordered by a magistrate's court. No order as to costs.

Appeal allowed in part.