

## IN THE SUPREME COURT OF FIJI

Criminal Appeal No. 60 of 1957

PERMAL NAIDU

Appellant

v.

YESWANT KUMARI

Respondent

Enforcement of Order for Maintenance—effect of wife's adultery subsequent to the date of the Order—meanings of the word "Order" in sections 8 and 9 Separation and Maintenance (Summary Jurisdiction) Ordinance, Cap. 17 (now Cap. 31)—similar provisions in sections 6, 7 and 9, Summary Jurisdiction (Married Women) Act 1895 compared.

*Held.*—A husband cannot prevent the enforcement of an order for maintenance on the ground of the wife's adultery unless and until he has applied for and obtained the discharge of the order on this ground.

Cases referred to:—

*Ruther v. Ruther* (1903) 2 K.B.D. 270.

*Ruterbridge v. Ruterbridge* (1927) 1 K.B.D. 368.

*R. D. Patel* for appellant.

Respondent in person.

HAMMETT, J. [15th November, 1957]—

This is an appeal by way of Case Stated dated 27th September, 1957, from the decision of the Magistrates' Court of the First Class sitting at Lautoka.

The facts are as follows:

On 22nd February, 1956, the appellant was ordered to pay a total of £4 (four pounds) per week maintenance for his wife and two children under the provisions of the Separation and Maintenance (Summary Jurisdiction) Ordinance, Cap. 17. On 24th September, 1957, the appellant was arrested and appeared to show cause why he should not be committed to prison for his failure to make any payments under this order.

His Counsel sought an adjournment to call evidence of the wife's adultery, relying on the provisions of section 8 of the Ordinance which reads:

"8. No order shall be made under this Ordinance on the application of a married woman if it is proved that such married woman has committed an act of adultery etc."

This application for an adjournment was refused by the learned Magistrate on the ground that section 8 referred only to the proof of adultery prior to the making of a maintenance order and section 9 to proof of adultery after the making of such an order.

The material part of section 9 of the Ordinance reads as follows:

"(3) If any married woman upon whose application an order has been made under this Ordinance commits an act of adultery such order shall on proof thereof be discharged.  
Provided etc."

The question on which the appellant seeks the opinion of this Court is whether in view of section 8 of the Separation and Maintenance (Summary Jurisdiction) Ordinance, Cap. 17, the learned Magistrate has power to make an order committing the appellant to prison if he (the husband) can prove that the wife has committed adultery since the making of the order for maintenance.

It is the contention of Learned Counsel for the appellant that the word "order" in section 8 includes not only a Maintenance Order but also an order to enforce a Maintenance Order made under section 11 of the Ordinance which reads as follows:

"The payment of any sum of money directed to be paid by any order under this Ordinance may be enforced in the same manner as the payment of money is enforced under an order of affiliation made under the Bastardy Ordinance."

Sections 8, 9 and 11 of the Separation and Maintenance (Summary Jurisdiction) Ordinance, Cap. 17, are virtually the same provisions as those contained in sections 6, 7, and 9 of the Summary Jurisdiction (Married Women) Act 1895.

In the case of *Ruther v. Ruther* (1903) 2 K.B.D. 270 where this matter was raised Wills, J. said:

"Orders for payment made under the Act of 1895 are by section 9 to be enforced in the same way as affiliation orders; and on looking at section 4 of the Bastardy Laws Amendment Act 1872 one sees what the procedure is. Therefore an order of committal for non-payment is not an order made under the Act of 1895."

This decision was followed in the subsequent case of *Ruterbridge v. Ruterbridge* (1927) 1 K.B.D. 368.

In my opinion precisely the same reasoning should be applied to the corresponding Ordinances in Fiji.

To construe the word "order" in section 8 of Cap. 17 to include "order for enforcement of a maintenance order" would lead to the conclusion that once adultery on the part of the wife were proved, no order for enforcement of payment of arrears of maintenance which had accrued prior to the date of the proof of the adultery could be made after the proof of such adultery. This would be an absurd conclusion.

Learned Counsel for the appellant at the hearing of this appeal admitted that the husband was liable in spite of the provisions of section 8 to pay all arrears of maintenance due prior to the date of the adultery, which admission presupposes that the word "order" in section 8 cannot refer to orders made to enforce payment of Maintenance Orders.

There is ample machinery provided in section 9 of the Ordinance for a husband to apply for the discharge of an order on the grounds of the wife's adultery. Unless and until the appellant avails himself of that remedy the wife is entitled to enforce payment of the sums due under the Maintenance Order.

In my opinion the word "order" in section 8 of the Separation and Maintenance Ordinance, Cap. 17, means "Order for Maintenance."

The section should therefore be construed as follows:

"No order for maintenance shall be made under this Ordinance on the application of a married woman if it is proved that such married woman has committed an act of adultery etc."

Once such an Order for Maintenance has been made the provisions of section 8 cannot be invoked by the husband to prevent the enforcement of the Order on the grounds of his wife's adultery. His remedy is to apply under section 9 for the discharge of the order. Until he has done so the order may be enforced.

In my opinion the learned trial Magistrate's interpretation of section 8 was perfectly correct.