

JAYANTILAL

v.

KALAWATI UKABHAI PARMAR

[SUPREME COURT, 1971 (Hammett C.J.), 15th January, 19th February]

Appellate Jurisdiction

C *Husband and wife—maintenance order—means of husband—potential earnings as well as actual earnings to be considered—Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 43) s.4(c).*

In making an order for the payment of maintenance by a husband to his wife under the provisions of section 4(c) of the Separation and Maintenance (Summary Jurisdiction) Ordinance, it is proper for the magistrate to take into account not only the husband's actual earnings but also his potential earning capacity.

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Cases referred to :

Stephens v. Stephens [1931] P. 197.

Klucinski v. Klucinski [1953] 1 W.L.R. 522; [1953] 1 All E.R. 683.

Rose v. Rose [1951] P.29; [1950] 2 All E.R. 311.

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Appeal from the quantum of maintenance awarded by the Magistrate's Court to a wife after a separation order.

V. Parmanandam for the appellant.

C. D. Singh for the respondent.

19th February 1971

HAMMETT C.J. :

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This is an appeal by the husband against the decision of the Magistrate's Court at Suva by which he was ordered to pay Maintenance to his wife under the Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 43).

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The parties were married on 29th August, 1969, when they were both 19 years of age and there are no children. On 9th April, 1970, the wife applied to the Court below for a Maintenance Order on the grounds that the husband had been guilty of desertion, cruelty and wilful neglect to provide reasonable maintenance for her.

On 19th June, 1970, when the case was before the Court below, both sides were legally represented. The Learned Trial Magistrate then said:

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"These young people have not had an opportunity to establish a proper marriage. I gain the impression both want to be reconciled but family difficulties stand in the way.

I intend to adjourn the case to enable the possibilities of reconciliation to be explored."

He adjourned the hearing and an interim order for Maintenance in favour of the wife of \$5.00 a week was made by consent.

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Attempts to effect a reconciliation were not successful and the case again came before the Court on 7th August, 1970.

Counsel for the husband then said that desertion was admitted and that the only matter requiring an order by the Court was the amount of the Maintenance that should be paid.

B

The husband gave evidence admitting desertion and of his means. He said he was engaged with a partner in a small way of business, as importers of goods for customers on commission. He lived with his parents, who fed and clothed him, and to whom he paid \$10.00 a month for his board. He also helped his father in his father's own business, which was also that of an importer at which his father was very successful. The husband said he was not making any money in his own business and that all he could offer his wife was \$2.00 a week by way of maintenance. He admitted that if he went out to work he could earn about \$50.00 to \$60.00 a month.

C

The Learned Trial Magistrate made a separation order on the grounds of desertion and failure to maintain and made a Maintenance Order in favour of the wife. In doing so he said —

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"It appears that complainant is not employed though perhaps employable as a teacher of language. Defendant has earning capacity which is not being exploited. He must be dealt with on the basis of his potential. On that basis I confirm the interim assessment of \$5.00 per week and make a maintenance order for that amount."

The husband now appeals against the quantum of Maintenance ordered on the following grounds —

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"(a) That the Learned Trial Judge erred in law in assessing the amount of maintenance when he ruled that the "Defendant has earning capacity which is not being exploited. He must be dealt with on the basis of his potential."

(b) The amount of the maintenance related to your Petitioner's earnings is harsh and excessive."

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Learned Counsel for the Appellant husband contends that it is wrong for a Maintenance Order to be based on the potential as opposed to the actual earnings of a husband. He relies on the case of *Stephens v. Stephens* [1931] P.197 and submits that only a normal order for Maintenance should have been made.

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The relevant provision of the Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 43) are contained in Section 4(c) of which the material parts read —

"4. A Magistrate hearing any application under this Ordinance may make an order or orders containing

(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"

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A In effect it is contended by the husband that his "means" under Section 4(c) refer to his actual cash income and does not permit the Court to take into account the potential earning capacity of a husband if he chooses not to work at gainful employment. His Counsel submits that the Court cannot take into account what the husband admits he is capable of earning or his potential earning capacity but only his actual cash income when assessing his "means".

B This matter has been considered on a number of occasions by the English Courts in similar cases. It is not necessary for me to refer to all these authorities but the principle that has always been applied was clearly expressed by Lord Merriman P. in *Klucinski v. Klucinski* [1953] 1 All E.R. 683 where he said, at p. 683 —

"It is elementary law that in assessing the amount of maintenance justices ought to take into account, just as we are bound to do here, not merely the husband's basic wage but his earning capacity."

C In *Rose v. Rose* [1950] 2 All E.R. 311, Lord Denning expressed similar views on the question of a wife's means where at p. 313 he said —

"If a wife does earn, then her earnings ought to be taken into account or if she is a young woman with no children and obviously ought to go out to work in her own interest but does not then her potential earning capacity ought to be taken into account, or if she has worked regularly during the married life and might reasonably be expected to work after the divorce her potential earnings ought to be taken into account. Except in cases such as those, however, it does not as a rule lie in the mouth of a wrong-doing husband to say that the wife ought to go out to work simply in order to relieve him from paying maintenance."

D The Learned Trial Magistrate was therefore correct in taking account not only of the husband's actual earnings but also his potential earning capacity.

In this case the husband consented to an Interim Order of \$5.00 per week. It is not suggested that this is an inappropriate sum for him to pay having regard to his potential earning capacity.

E The husband in this case is a young man of well-to-do parents who, not unreasonably, has attempted to establish his own business rather than take up more profitable employment as an employee. In doing so, a man may well forgo the chance of a higher income now with the ambition of retaining his own independence and achieving a greater income later in life if he is successful in his business. Any young wife living with her husband may well be expected to share his hardships now and assist him if need be and possibly by taking up employment herself in the expectation of sharing the fruits of his success later in their married life. I do not think a deserted wife can be called upon to accept a lower rate of maintenance, in these circumstances, than is otherwise justified by the husband's earning capacity.

F There is, moreover, no evidence of either the potential or the actual earning capacity of the wife in this case.

G I have after giving consideration to this aspect of the matter come to the conclusion that there are no grounds upon which this Court would be justified in varying the order made by the Court below.

The appeal is therefore dismissed.

Appeal dismissed.