

APPELLATE CRIMINAL.

*Before Mr. Justice Pandrang Row.*1938,
July 28.

KISTA PILLAI (ACCUSED), PETITIONER,

v.

AMIRTHAMMAL (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 488 (4) — “Living in adultery”—Meaning of—Claim for maintenance by wife—Husband putting forward the only defence of “living in adultery”—Procedure to be followed.

To constitute “living in adultery” within the meaning of section 488 (4), Criminal Procedure Code, it is not necessary that the wife should live in the house of the adulterer. The words “living in adultery” are merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by “living in adultery.”

Lakshmi Ambalam v. Andiammal(1) and *In re Fulchand Maganlal*(2) considered.

In the case of a claim for maintenance by a wife against her husband under section 488, Criminal Procedure Code, the husband, who puts forward a charge of “living in adultery” against the wife as his only defence to the claim, ought to begin his case, and the wife ought to have an opportunity of adducing rebutting evidence.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Ranipet, dated 12th October 1937 and made in Miscellaneous Case No. 18 of 1937.

* Criminal Revision Case No. 883 of 1937 (Criminal Revision Petition No. 827 of 1937).

(1) (1937) 2 M.L.J. 885.

(2) (1927) I.L.R. 52 Bom. 160.

The petitioner in the High Court (Kista Pillai), KISTA PILLAI
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AMIRTHAMMAL the husband, was married to the respondent (Amirthammal) about ten years back. She gave birth to two children, but they died. For about six months prior to the petition, she was in her parents' house and was not under the protection of her husband. A petition was filed by her against her husband for maintenance. She alleged that owing to ill-treatment by her husband and his sister, she had been living in her parents' house and the husband had not cared either to take her back or to give her any money to live upon. The evidence adduced on behalf of the respondent showed that about five months prior to the petition she and one Chinnappa left the village and were living at Wallajapet as husband and wife. The petitioner's witnesses 2 and 3 repeatedly requested her to return to her husband's house but she refused to do so and with great difficulty she was taken by force in a bandy and restored to her parents.

V. T. Rangaswami Ayyangar and K.A. Chakravarthi Ayyangar for petitioner.

N. Somasundaram for respondent.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

The petitioner in this case is the husband of the respondent who has obtained an order of maintenance in her favour from the Sub-divisional Magistrate of Ranipet under section 488, Criminal Procedure Code. The main defence to the application for maintenance was that the petitioner was living in adultery. The learned Sub-divisional Magistrate observes on this part of the case merely that there is ample evidence that the

KISTA PILLAI petitioner was having illicit sexual intercourse
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 certain observations of NEWSAM J. in *Lakshmi
 Ambalam v. Andiammal*(1) on the file of the High
 Court to the effect :

“Living in adultery is something quite different from leading an unchaste life. The principle, it seems to me, is that a husband is absolved from the obligation to maintain his wife when his wife has a *de facto* protector with whom she lives and by whom she is being maintained as if she were his wife.”

The learned Magistrate then comes to the conclusion that

“under this interpretation, the sometime immoral character of the petitioner would not constitute ‘living in adultery’.”

The facts elicited in evidence are not merely that there was only one individual lapse or even occasional lapses from virtue but that the petitioner actually eloped with Chinnappa and lived with him in another place, viz., Wallajah Road, for some days, that when discovered by her husband's relations and pressed to return, she refused to return, and that she had to be taken by force from her paramour to her parents' house. There is also certain evidence adduced, no doubt at a late stage of the case without giving an opportunity to the petitioner to rebut, to the effect that the petitioner, even when the case was pending before the Sub-divisional Magistrate, was continuing her intrigue with Chinnappa. The learned Sub-divisional Magistrate makes no reference to this evidence, and he appears to have thought that the only evidence against the petitioner was in respect of her immoral character in the past, that is to say,

(1) (1937) 2 M.L.J. 886.

before the application. I am unable to say that this is a satisfactory way of disposing of a claim for maintenance either from the point of view of the petitioner or of the counter-petitioner. I am not prepared to go to the length of saying that, unless a married woman lives with the adulterer in the latter's own house and is maintained by him as a wife, the husband will be liable to pay maintenance under section 488, Criminal Procedure Code. Emphasis is no doubt to be laid on the words "is living in adultery". In other words, as was pointed out by the Bombay High Court in *In re Pulchand Maganlal*(1), the clear implication from the words used by the Legislature in this section is that unless the wife is actually living in adultery at or about the time of the application, she is not disentitled to obtain maintenance. It is nowhere said in the section, and there is no need to introduce additional words therein, that living in adultery must be in the house of the adulterer. The words "living in adultery" are, in my opinion, merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by "living in adultery". The question, therefore, for the Magistrate to decide in this case was whether there had been such adulterous conduct on the part of the petitioner at or about the time of the application, that is to say, shortly before or shortly after the application was made, interpreting the word "shortly" in a reasonable manner. This case has not at all been approached from this

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standpoint. The learned Magistrate has decided the case in a way which appears hardly to do justice to the parties. In particular, the serious allegation of subsequent adultery made in the evidence given by the last witness examined for the respondent in the Magistrate's Court should have been allowed to be contradicted or rebutted on the petitioner's side by the petitioner giving evidence on the point if she was so inclined to do or by letting in other evidence. But it does not appear that any opportunity was given to her for giving evidence on the point. My opinion is that in a case of claim for maintenance like this the respondent, who puts forward a charge of "living in adultery" against the petitioner as his only defence to the claim for maintenance, ought to begin his case, and the petitioner against whom this charge is made ought to have an opportunity of adducing rebutting evidence. This procedure has not been followed in this case and in my opinion the enquiry must have done prejudice to the petitioning wife.

In these circumstances, I am of opinion that the interests of justice require that the order of the Magistrate should be set aside, and the Magistrate directed to rehear the petition after giving an opportunity to both parties to adduce additional evidence and, in particular, to let the petitioning wife have the last word and to dispose of the petition afresh in the light of the observations contained in this judgment.