I set aside the judgment of the Court of Appeal and of the District Court and enter judgment for plaintiff as prayed for. The plaintiff will however be entitled to the costs of this court only.

WANASUNDERA, J. – I agree.

ATUKORALE, J. – I agree.

Appeal allowed.

BALASINGHAM

v.

KALAIVANY

SUPREME COURT.
ATUKORALE, J., SENEVIRATNE, J. AND H. A. G. DE SILVA, J.
S.C. No. 50/85, C.A. No. 62/80.
M.C. KALMUNAI 58228.
JUNE 13, 1986.

Maintenance–Application for cancellation of order under section 5 of the Maintenance Ordinance.

So long as the marital tie subsists an order for maintenance made in favour of a wife will be cancelled only if–

(*a*) the wife is guilty of a more or less continuous course of adulterous conduct and not merely isolated acts of adultery – there being a clear distinction between 'committing' adultery and 'living in adultery' which is what s. 5 of the Maintenance Ordinance requires.

(*b*) the wife was living in adultery at or about the time of the application for cancellation of the order for maintenance.

Cases referred to:

(1) *Wijeysinghe v. Josi Nona – (1936) 38 NLR 375.*

(2) *Arumugam. v. Athai – (1948) 50 NLR 310.*

(3) *Pushpawathy v. Santhirasegarampillai – (1971) 75 NLR 353.*

(4) *Simo Nona v. Melias Singho – (1923) 26 NLR 61.*

(5) *Manickam v. Arputha Bhavani Rajam – (1980) Cr. L.J. 354.*

(6) *Kista Pillai's Case – (1938) Mad. WN 829.*

APPEAL from an Order of the Court of Appeal.

S. Sinnathamby for the appellant.

Respondent absent and unrepresented.

Cur. adv. vult.

August 1, 1986.

ATUKORALE, J.

The facts relevant for consideration of this appeal are as follows. The respondent, who is the wife of the appellant, made an application to the Magistrate's Court on 24.7.1973 for an order of maintenance in her favour. After inquiry the Magistrate on 27.2.1975 ordered the appellant to pay the respondent a monthly allowance of Rs. 50 as maintenance. The appellant appealed against this order to the then Supreme Court which on 24.3.1977 dismissed his appeal. On 9.9.1977, the day on which the parties were noticed to appear in the Magistrate's Court for the purpose of communicating the order of the Supreme Court, the appellant moved court for a cancellation of the order on the ground that the respondent had on 29.5.1975 contracted a second marriage with one Sathanantharajah with whom she was living in adultery. D1 establishes the fact of registration of such a marriage. It is conceded that this purported marriage is void as being bigamous. The oral evidence of Sathanantharajah, who testified on behalf of the appellant, proves that he and the respondent in consequence of this 'marriage' lived together only for about one month and that thereafter in June 1975 the respondent refused to live with him; that in July 1976 he filed a divorce case against the respondent on the ground of her malicious desertion and that on 26.1.1978 decree was entered ex parte dissolving the 'marriage' on such ground.

The appellant's application for a cancellation of the maintenance order was made under s. 5 of the Maintenance Ordinance (Chap. 91, Vol. IV, L.E.) as amended by Act No. 19 of 1972, the relevent portion of which reads as follows:

> "5. On proof that any wife in whose favour an order has been made under S. 2 is living in adultery .... the Magistrate shall cancel the order".

The learned Magistrate following mainly the decision of the Supreme Court in *Wijeysinghe v. Josi Nona* (1) held that the appellant had failed to establish that the respondent was living in adultery at the time the application for a cancellation of the order was made and accordingly refused to cancel the order. On an appeal by the appellant the Court of Appeal affirmed the order of the learned Magistrate and dismissed the appeal. The appellant has now appealed to this court therefrom.

Several decisions of our Supreme Court have considered and construed the meaning of s. 5 of the Maintenance Ordinance. The effect of these decisions is that where a husband seeks to cancel an order for maintenance in favour of his wife on the ground that she 'is living in adultery' he must, to obtain an order of cancellation, establish that–

(i) the wife is guilty of a more or less continuous course of adulterous conduct and not merely isolated acts of adultery – there being a clear distinction between 'living' in adultery and 'committing' adultery, vide *Arumugam v. Athai* (2) and *Pushpawathy v. Santhirasegarampillai* (3), and that

(ii) the wife was so living in adultery at the time the application for a cancellation of the order was made, vide *Simo Nona v. Melias Singho* (4), *Wijeysinghe v. Josi Nona (supra)* and *Pushpawathy v. Santhirasegarampillai (supra).*

Learned counsel for the appellant whilst not seeking to canvass the correctness of this legal position sought to distinguish these decisions on the ground that they dealt with cases of isolated acts of adultery and contended that where a wife in whose favour an order for maintenance has been made commences and continues, in pursuance of a second though bigamous marriage, to live in adultery, for however short a period of time (in the instant case for about a month) with her second 'husband', the order in her favour is liable to be cancelled for the reason that by her conduct she evinces an intention of finally repudiating all the rights and obligations flowing from her lawful marriage. Such a wife, learned counsel maintained, forfeits her claim to support from her lawful husband. He placed much reliance on the Indian decision in *Manickam v. Arputha Bhavani Rajam* (5) in support of his contention.

In that case the husband challenged the entitlement of his wife for maintenance on the ground that she had been and was, at the time of her application for an order of maintenance in her favour, living in adultery with his brother. The application for maintenance was filed by the wife on 3.12.1975. There was cogent evidence to show that she lived in adultery with the husband's brother till 28.5.1975. The Magistrate granted her maintenance on the basis that there was no evidence to show that the wife was, on the date of the application, living in adultery since her adulterous union continued only up to

28.5.1975. In revision the Madras High Court after a close scrutiny of the letters sent by the wife to her paramour considered it significant that all the letters written by her were between June and July 1975 showing that she had not put an end to her adulterous conduct even after 28.5.1975. Further there was the evidence of the husband's brother himself who expressed a sustained desire to take the wife with him and live with her. On a total consideration of the facts in that case the learned High Court Judge held that the husband had established that his wife was leading a continuous adulterous life with her paramour and also that she was living in such adultery even at or about the time of the filing of the application for maintenance. The order for maintenance in her favour was therefore set aside. In construing the provisions of s. 125(4) of the Indian Criminal Procedure Code (1974), which corresponds to s. 4 of our Maintenance Ordinance and reads as follows:

> "No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery..."

the court, whilst observing that the plain and ordinary meaning of the words would seem to imply that the wife must be living in adultery at the time she files the application, held after a consideration of previous decisions of several Indian High Courts that the correct construction is that the wife must have lived in adultery at or about the time of her filing the application and not necessarily on the date of the application itself. In the course of his judgment the learned High Court Judge stated:

> "The quintessence of all the judicial pronouncements is to the effect that when the husband challenges the claim for maintenance of his wife, alleging that his wife is living in adultery, the husband ought to begin his case and prove the allegation of such adulterous life on the part of the wife by letting in evidence of her continued adulterous conduct at or about the time of the application and then the wife against whom such a charge is made ought to be given an opportunity to rebut such allegation. Pandranga Rao, J., in *Kista Pillai's Case* (6) whose decision has been oft quoted with approval, held in that case that the continued adulterous conduct on the part of the woman at or about the time of the application would mean such conduct shortly before or shortly after the application was made, interpreting the word 'shortly' in a reasonable manner. What is reasonable would depend upon the facts and circumstances of

each case. In my opinion, it would be quite meaningless and even absurd to interpret the words 'is living in adultery' in the sense that the husband, in order to succeed in his defence against the maintenance claim, must prove that his wife was living in adultery on the date of the application itself."

In the circumstances of that case the period of interregnum between 28.5.1975 and 3.12.1975 (the date of the application for maintenance) during which the wife was not proved to have had sexual relationship with her paramour was not considered as having snapped the relationship between herself and her paramour so as to hold that she was not guilty of the act of 'living in audltery'. Nor could this temporary cessation of relationship between the two be attributed to the fact that the wife had returned to a life of purity or that she had turned to a new virtuous life. The basis therefore upon which the High Court set aside the order of the Magistrate granting maintenance to the wife is that there was proof to establish that the wife was living in adultery at or about the time of the filing of the application for maintenance.

This decision far from supporting the contention of learned counsel for the appellant in the instant case seems to me to militate against it. The refusal of the High Court to grant maintenance to the wife in that case was founded not upon the fact that she by her adulterous conduct with another man, (whether in consequence of an illegal union or not is immaterial) had manifested her intention of finally repudiating the rights and obligations attaching to the marriage but because she was proved to have lived an adulterous life at or about the time she filed the application for maintenance. By a parity of reasoning, both under s. 125 (5) of the Indian Code and s. 5 of our Ordinance which warrant a cancellation of an order already made in favour of a wife, if she 'is living in adultery', there must be proof not only of the wife's subsequent adulterous conduct but also of such adulterous conduct at or about the time the application is made for the cancellation of the order. It would no doubt appear to be contrary to all moral principles to grant or to refuse to cancel an order for maintenance in favour of a wife who is shown, at some stage prior to the making of the relevant application, to have lived in adultery whether in pursuance of a bigamous union or not. But as a proposition of law I am unable to accept the soundness of the learned counsel's contention. That a husband should be called upon to support his wife

knowing that she has been unfaithful to him, though even on one occasion only, appears to be repugnant to the moral standards of our society. Whether it be a single act of adultery or her living in adultery over a period of time would not make a difference for in either event she is guilty of a serious breach of her matrimonial obligations. In either event her conduct is tantamount to a violation of the sanctity of the matrimonial bond. But a perusal of the provisions of our Maintenance Ordinance, as amended, makes it quite clear that the subsistence of the marital tie is the foundation of the Magistrate's jurisdiction to make and enforce an order of maintenance against the husband. As long as the marital tie continues to subsist the husband's obligation to make payment upon the order continues. As long as the woman's status as a wife continues, the order in her favour operates. It is only on proof that the marital tie has been legally terminated upon a dissolution of the marriage that the order ceases to be operative unless the court makes order for its cancellation in terms of s. 5 or s. 10 of the Maintenance Ordinance. Proof of a repudiation or abandonment of matrimonial rights and obligations on the part of the wife by virtue of her conduct would not per se render the maintenance order invalid or unenforceable. To uphold such a contention would result in nullifying to a large measure the jurisdiction conferred on a Magistrate's Court by the Maintenance Ordinance. S. 5 mandates the cancellation of a maintenance order made in favour of a wife on proof of the circumstances stipulated therein. In the instant case the application of the appellant to cancel the order was made under this section. The learned Magistrate and the Court of Appeal quite rightly have refused to do so since the application was made about 2 years after the respondent had ceased to live in adultery with her paramour and as such there was no proof that she was living in adultery at or about the time of the application for cancellation. At the hearing before us learned counsel for the appellant drew our attention to s. 10 and suggested that the facts and circumstances of the instant case may warrant a cancellation of the order under that section. I am unable to agree. It empowers a Magistrate to cancel an order for maintenance 'on proof of a change in the circumstances of any person for whose benefit or against whom an order for maintenance has been made'. This section appears to me to deal with a situation where there is a change in the financial circumstances of a party. This seems to be the primary purpose of the section. But it may also empower a court to order cancellation of an order in favour of a wife on proof that she has lost her legal status as a wife, for instance, consequent upon a decree

of divorce. A change in the legal status of the husband or wife is certainly a change in the circumstances of either party. But I do not think this section empowers the court to cancel an order made in favour of the wife on the basis that she has been guilty of immoral conduct at some point of time in the past even though such conduct may have manifested a repudiation by her of the matrimonial obligations so long as her marital tie subsists in law.

For the above reasons the judgment of the Court of Appeal is affirmed and the appeal is dismissed but without costs.

SENEVIRATNE, J. – I agree.

H. A. G. DE SILVA, J. – I agree.

Appeal dismissed.

SRIYANI PEIRIS

v.

MOHAMED

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT) AND GOONEWARDENA, J.
D.C. MOUNT LAVINIA 579/ED.
CA 415/80 (F).
MARCH 11 AND 12, 1986.

Landlord and tenant–Rent Act, No. 7 of 1972, section 22(1)(bb)–Tenancy commencing prior to date of operation of section 22(1)(bb)–Notice–Does attornment to new landlord create a new contract?

(1) Where in a tenancy begun in 1965 the landlord informs the tenant to attorn to a new landlord in 1977 and the tenant in compliance attorns to the new landlord the resultant legal effect is:–

(*a*) There is a termination of the tenancy under the original landlord,

(*b*) A new tenancy is created from the date of attornment under the new landlord to whom the tenant attorns and pays rent.

(2) Section 22(1)(*bb*) necessarily refers to the "current" landlord who institutes the action for ejectment.