SARAS WATI

v.

MAHENDRA DEO SINGH

[HIGH COURT, 1989 (Byrne J) 21 August]

Appellate Jurisdiction

Family law- whether "cohabitation" and "residing with" are equivalent- when maintenance order becomes unenforceable or ceases to have effect- Maintenance and Affiliation Act (Cap. 52) Section 6.

The parties separated and a maintenance order was made in favour of the wife. Later the parties resumed cohabitation for some months before separating again. The Magistrates' Court dismissed the wife's proceedings for breach of the maintenance order on the ground that a resumption of cohabitation had occurred resulted in the maintenance order ceasing to have effect. On appeal the High Court, dismissing the appeal HELD: that merely residing together did not amount to cohabitation but that where cohabitation occurred the result was that a maintenance order by operation of law then ceased to have effect.

Cases cited:

Guardians of Parish of Brighton v. Guardians of Strand Union (1891) 2 Q.B. 156
Thomas v. Thomas [1948] 2 All E.R. 98

M. Sadiq for the Appellant
V.P. Ram for the Respondent

Appeal from the Magistrates' Court to the High Court.

Byrne J:

This is an appeal under the Maintenance and Affiliation Act (Cap. 52) against an Order of the Magistrates' Court at Labasa on the 2nd December, 1988 whereby the Court struck out a warrant for committal issued by it against the Respondent for failure to pay arrears of maintenance allegedly due to the Appellant under a Maintenance Order made by the Court in favour of the Appellant of the 8th May, 1987. I am informed by counsel that the appeal raises for the first time in the High Court or its predecessor the Supreme Court the interpretation of Section 6 of the Maintenance and Affiliation Act.

The brief facts which are not in dispute are that on the 8th May, 1987 the Magistrates' Court at Labasa made an Order against the Respondent for payment to his wife, the Appellant, of the sum of $25.00 per week from that date. The Respondent paid maintenance to the Appellant until the 25th day of March, 1988

but then appealed to the Magistrates' Court against the Maintenance Order. On the 3rd of June, 1988 some time before the date of hearing of his appeal, the Appellant and Respondent became reconciled and, according to paragraph 5 of the affidavit of the Respondent, sworn on the 22nd October, 1988, "began to live together". They continued to live together until the 6th September, 1988 when the Appellant left the matrimonial home. She claims in paragraph 7 of an affidavit sworn on 7th November, 1988 that the Respondent deserted her again but as to this I make no findings due to lack of evidence.

In her affidavit, the Appellant does not deny that she resumed co-habitation with the Respondent; for example the only comment she makes on paragraph 6 of the Respondent's affidavit is that the Respondent withdrew his appeal on the 1st July, 1988 and it was accordingly dismissed. She makes no mention of their co-habitation although this is the term used by the Respondent.

On the 23rd November, 1988, the Respondent applied to the Court for an Order striking out a warrant for committal on the Maintenance Order on the ground that the parties had resumed co-habitation (see paragraph 6 of the Respondent's affidavit). On the 2nd December, 1988 the Court upheld the Respondent's contention on the ground that under Section 6 of the Maintenance and Affiliation Act, once co-habitation resumed, the existing maintenance order ceased to have any effect.

In upholding the Respondent's appeal, the learned Magistrate said that from the affidavits of the Respondent and that of the Appellant sworn on the 7th November, 1988 he presumed from the fact that the parties began living together again from the 3rd June, 1988 until the 6th September, 1988 that co-habitation resumed and that this was sufficient under Section 6 for him to discharge the Maintenance Order. In their affidavits both the Appellant and the Respondent use the terms "living together" and "co-habitation" to describe their resumed relationship; for example in paragraph 5 of his affidavit, the Respondent says:

> "That on the 3rd day of June, 1988 some time before the date of hearing of my appeal, the Complainant and I reconciled and *began to live together.*" (my emphasis)

In paragraph 6 he says:

> "That because of the reconciliation and by agreement between the complainant and I our respective Counsel *informed the Court of the co-habitation* and in accordance with instructions given to Counsel for both sides my appeal was withdrawn and the same dismissed".

And in paragraph 7 he says that they continued to "live together" until the 6th September, 1988 when "in my absence, the complainant left the matrimonial home without cause". Section 6 of the Maintenance and Affiliation Act reads as

follows:-

> "No order made under time provisions of this Act shall be enforceable and no liability shall accrue under any such order whilst the spouse in favour of whom the order was made resides with the spouse against whom the order was made and any such order shall cease to have effect if for a period of 9 months after it was made the spouses continue to reside together. Any such order shall also cease to have effect when the spouses having lived apart after such order has been made resume co-habitation". A B

It will be seen from this that Parliament has set out three situations in which a Maintenance Order is either unenforceable or ceases to have effect. They are:

a) whilst the spouse in whose favour the order was made resides with the spouse against whom the order was made (in that case the order is unenforceable); C

b) if for a period of 9 months after it was made the spouses continue to reside together, in which case the Order ceases to have effect; and

c) when the spouses having lived apart after an Order has been made resume co-habitation. In that event the Order shall also cease to have effect. D

Mr Sadiq, who appeared for the appellant submitted that the expressions "co-habitation" and "resides with" were synonymous and that accordingly since the parties had resided together for less than nine months after the making of the Order, the appellant was entitled to whatever arrears of maintenance were now due under the Order. He conceded that as the Appellant and the Respondent lived together for a period of some three months, the Order did not operate during that time but thereafter from the 6th September, 1988 maintenance began to accumulate again in favour of the Appellant. E

For the Respondent, Mr. Ram argued that the two expressions "co-habitation" and "residing with" were not synonymous and he pointed out that the draftsman of Section 6 was careful to use two different expressions covering the liability to maintenance and that once the parties resumed co-habitation then by the last limb of Section 6 any maintenance order binding the parties ceased to have effect. He submitted that if it had been the intention of parliament that the Order was to cease to have effect only after a period of nine months co-habitation, it would have been simple for it to have stated this expressly in the last sentence of Section 6 and that this had not been done, He said whilst this might cause some hardship to a deserted spouse it was not the function of the court to legislate but simply to construe the Section according to the recognised principles of statutory interpretation. F G

One of the principles of statutory interpretation is that where in the same statute, and in relation to the same subject matter different words are used there is a presumption that the alteration has been made intentionally. In Guardians of Parish of Brighton v. Guardians of Strand Union (1891) 2 Q.B. 156 at page 167, Lord Esher, M.R. said this:

> ".....; and it is a rule of construction that where in the same Act of Parliament, and in relation to the same subject matter, different words are used, the Court must see whether the legislature has not made the alteration intentionally, and with some definite purpose; prima facie such an alteration would be considered intentional".

In the present case in my opinion the draftsman has deliberately used two different expressions in Section 6. In the first two sentences he uses the terms resides with and "reside together" whereas in the last sentence he uses the term "co-habitation". There is a well known difference in law in the meaning of these two expressions. A resumption of co-habitation implies more than the mere resumption of residence by one spouse with the other. Thus in Thomas v. Thomas [1948] 2 All E.R 98 at p. 99 Lord Goddard. C.J. said :-

> "As I endeavoured to point out in Evans vs Evans cohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should. Sexual intercourse usually takes place between parties of moderate age if they are cohabiting, and if there is sexual intercourse, it is very strong evidence that they are cohabiting, but it does not follow that because they do not have sexual intercourse they are not cohabiting."

It may well be that the draftsman of Section 6 had this in mind when using these two different expressions and that it was the intention of parliament once co-habitation had been established that any maintenance order should there and then cease to have effect. In my view this is the proper construction to be placed on Section 6 and I therefore dismiss this appeal and uphold the learned Magistrate's decision. Of course if the appellant is able to establish desertion by the respondent then she may issue further proceedings against him in the Magistrate's Court. The Order of the Court is that the appeal is dismissed and there will be no order for costs.

(Appeal dismissed.)