JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 62/91

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	RUEL SAMUELS	PETITIONER/APPELLANT
A N D	NORMA ELAINE SAMUELS	APPLICANT/RESPONDENT

Dennis Goffe, instructed by Myers, Fletcher and Gordon for the Appellant

Anthony Pearson and Mrs. C. Beecher-Bravo. instructed by Playfield, Junior, Pearson & Co. for the Respondent

February 17 and March 9, 1992

ROWE P.:

On July 21, 1991 W.A. James J. (ag.) ordered that the appellant (hereinafter "the husband") should pay to the respondent, (hereinafter "the wife") the sum of $3,000.00 per month by way of maintenance from August 1, 1991. Mr. Goffe challenged that order on the grounds that:

(a) the judge was wrong in law to rule that the allegation that the wife had committed adultery was irrelevant on an application for maintenance;

(b) there was no evidence to show that the husband had means to pay $3,000.00 per month and further that the judge ought to have found that the wife was able to maintain herself;

(c) the judge failed to take into account the catastrophic decrease in the husband's means since 1978 and wrongly increased a voluntary payment of $2,000.00 per month by 50% due to inflation.

We dismissed the appeal and set out herein our reasons.

The wife caused a notice of her intention to apply for maintenance to be served upon the husband on October 26, 1990. This drew a response from the husband in an affidavit sworn to on 1st November 1990 and served on November 8, 1990 in which he alleged that he had no means of his own and further that his wife was dis-entitled to maintenance as she had during the course of the marriage committed adultery. On March 5, 1991 decree nisi was granted on the husband's petition. Then on April 11, 1991 the wife issued a summons returnable on May 7, 1991 seeking alimony pending suit. On that day Reid J. (ag.) made an interim order. The summons was re-issued for May 27, 1991 when Clarke J. made several orders including an order granting leave to the husband to file further affidavits. This was done and on June 27, 1991, W.A. James (ag.) heard the application for alimony pending suit and delivered his reserved decision on July 31, 1991. Unfortunately his judgment did not form part of the Record.

At the outset of the hearing before W.A. James J. (ag.) the Court was asked to rule on the relevance of the husband's allegations that his wife had during the course of the marriage committed adultery. The allegation had been denied by the wife. Basing himself upon section 12 of the Maintenance Act, Mr. Goffe argued before the Court below and again before us, that a wife who has committed adultery is not entitled to maintenance. So far as is relevant section 12 of the Maintenance Act provides:

> "For the purposes of this Act, every man shall be liable and is hereby required to maintain his wife, irrespective of her being able to maintain herself:
>
> Provided always, that no order for the payment of any sum of money by the husband of any married woman shall be made against such husband, under the provisions of this Act, if it be proved before the Court to which application for such order is made that the wife has committed adultery (unless such adultery has been condoned), ..."

Applications under the Maintenance Act can only be made in the Resident Magistrate's Courts and in the Family Courts - see sections 5 and 7 of the Judicature (Resident Magistrates) Act and section 4 of the Judicature (Family Court) Act. This application for alimony pending suit was not triable in a Resident Magistrate's Court, was not made in such Court and was not governed by the Maintenance Act.

Although it has been amended from time to time up to the year 1987, the Maintenance Act is a very old statute first enacted in 1881. The social and philosophical basis for section 12 of that Act, may have long disappeared, nevertheless if one has recourse to the provisions of that Act one is bound by its spirit and its letter. Mr. Goffe's lament that a person's rights should not depend upon the forum in which he chooses to litigate has merit, but his plea for generality in the law relating to maintenance cannot be achieved without statutory basis.

The Matrimonial Causes Act which came into force in 1989 enables a wife to apply for maintenance for herself if the husband fails to provide reasonable maintenance for her. This she may do under section 25 whether or not there is in existence a petition for the dissolution of the marriage. Where, however, as in the instant case, there is a pending petition for dissolution of the marriage, the wife may apply under section 20 of the Act for maintenance pending suit. Section 20(1) of the Act enables the Court to make a secured provision for the wife's maintenance upon dissolution of the marriage and expressly provides for interim payments in this way:

> "... and upon any petition for dissolution of marriage the Court shall have power to make interim orders for such payments of money to the wife as the Court may think reasonable."

It is transparently clear that the Court's power to grant interim payments to the wife under section 20(1) above is neither dependent nor predicated upon an application for a secured provision. Once there is in existence a petition for dissolution, the Court therefore has the unfettered power to consider the grant of maintenance pending suit.

In Valentine v. Valentine C.A. 22/91 (unreported judgment delivered on 28/2/92) this Court held that conduct of a wife or a husband may be relevant to the grant of maintenance in certain exceptional cases. We said:

> "The decided cases show that where the statute empowers a Court to take into account the conduct of the parties when fixing the amount of maintenance, 'conduct' there does not mean conduct which has contributed to the breakdown of the marriage. Conduct can be taken into consideration as a factor which may modify the otherwise predictable result, e.g. financial recklessness in the husband or some wholly unacceptable social behaviour by the wife which suggests that in justice some modification of the order should be made - Wachtel v. Wachtel et al (1973, 1 All E.R. 113. In the instant case no provision is specifically made in section 20(1) of the Matrimonial Causes Act for the conduct of the parties to be taken into account but the phrase 'all the circumstances of the case' is wide enough to encompass the examples of conduct taken from Wachtel's case."

If there is evidence that a wife is living in open adultery at the time of the hearing of the application for maintenance pending suit that would be a circumstance which the Court could take into consideration to determine whether to grant interim maintenance or the quantum thereof. But the allegation or even the proof of adultery by a wife is not an absolute bar to the grant of maintenance pending suit under the provisions of section 20(1) of the Matrimonial Causes Act.

In the instant case there was no allegation that the wife was at the time of the hearing of the application committing adultery and there was evidence to suggest that the husband and wife had lived and cohabited together after the alleged adulterous incident which is said to have occurred at some time prior to 1984. Having seen the affidavits in the case, the learned trial judge was correct in holding that the wife's conduct was irrelevant to the proceedings. When, however, he found that 'all the circumstances of the case' in section 20(1) of the Matrimonial Causes Act, does not include the conduct of the wife, he was stating the rule too widely, but in any event such a finding was unnecessary for the resolution of the matters before him.

On the question of quantum, Mr. Goffe submitted that there was no evidence to contradict the appellant's statements that he was retired and had no income of his own, while the wife was able to work and could earn extra money from rent or boarders. The husband exhibited some static bank accounts, but significantly did not exhibit the account over which he said he had a power of attorney and from which he made withdrawals for his personal use. It was clear from his affidavits and his sworn evidence that the husband once controlled companies which operated in tens of millions of dollars and that although the companies are not now trading he still maintains an office and staff in Kingston and a house with a staff in Manchester. The husband has made it plain that he is not a bankrupt.

A judge sitting in Court in 1991 was bound to take into consideration the current cost of living so as to be able to determine the reasonable requirements of the wife. This husband was said by the wife to "continue to live in a very comfortable life-style and to enjoy a lot of foreign travel." His response was that the foreign travel which he enjoyed was paid for by his son and foster daughter whom he visited from time to time in the U.S.A. Significantly he did not comment upon the allegation as to the comfortable life-style that

he maintained. There was, therefore in our view, sufficient evidence to lead the judge to the conclusion that the husband had the ability to pay the sum of $3,000.00 monthly as maintenance pending suit. Accordingly, we dismissed the appeal.

WRIGHT J.A.:

I agree.

GORDON J.A.:

I agree.