

JAYAWARDANE
v
PRIYASHANIE

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 170/2006
DC ATTANAGALLA 234/D
FEBRUARY 14, 2007
JUNE 13, 2007

Civil Procedure Code – Section 605–Section 615 (2) – Matrimonial actions – Divorce in favour of the defendant – Alimony not awarded – Appeal – Could the decree nisi be made absolute – Could subsidiary order be made under Section 615(2)? – Who could make any application under Section 605?

The Court granted a divorce in favour of the defendant – She was awarded custody of the child, no alimony was awarded. The defendant appealed against the portion of the order concerning the non payment of alimony.

The plaintiff-respondent sought to have the *decree nisi* made absolute, after the three month period. The Court refused the application, on leave being sought.

Held:

- (1) The benefit of Section 605 is available to either party in a divorce case. No restrictions have been imposed that it is the party in favour of whom divorce is granted that could resort to Section 605.

Held further:

- (2) The appeal is with regard to the payment of alimony and not the dissolution of the marriage.
- (3) Chapter under matrimonial actions contemplated the making of subsidiary orders relating to permanent alimony, custody of children, and other settlements in terms of Section 615, these orders can be discharged, modified temporarily suspended and revised or enhanced. They are not part of the decree.

There is no residuary discretion in the Court to decline it, if any party moves to have the *decree nisi* made absolute.

APPLICATION for leave to appeal from an order of the District Court of Attanagalla.

Case referred to:

B.Kaluarathchi v Wijewickrama 1990 1 Sri LR 262.

Geeshan Rodrigo for plaintiff-petitioner.

S.N. Vijithsingh for defendant-respondent.

February 11, 2008

ERIC BASNAYAKE, J.

This is a leave to appeal application filed by the plaintiff-petitioner (plaintiff) to have the order of the learned District Judge of Attanagalla dated 26.04.2006 set aside.

The plaintiff filed action in the District Court of Attanagalla to have a decree of divorce on the ground of malicious desertion of the defendant. The defendant filed answer and sought a divorce on the ground of constructive malicious desertion on the part of the plaintiff. The defendant also prayed that she be given the custody of the minor child and Rs. 500,000 as alimony. The learned District Judge by his judgment granted a divorce in favour of the defendant-respondent (defendant). The defendant was also awarded custody of the child. However, no alimony was awarded since no evidence was adduced to prove the income of the plaintiff. The defendant appealed against that portion of the order concerning the non-payment of alimony.

On 01.09.2005 the plaintiff filed a motion to have the *decree nisi* made absolute. By that time three months period had lapsed. The Court after inquiry refused to make the *decree nisi* absolute. The plaintiff is seeking leave to appeal against this order.

Section 605 of the Code of Civil Procedure is as follows:-

Whenever a *decree nisi* has been made and no sufficient cause has been shown why the same should not have been

made absolute ... *such decree shall on the expiration of such time be made absolute*" (emphasis added).

The benefit of the above provision is available to either party in a divorce case. No restrictions have been imposed that it is the party in favour of whom divorce is granted that could resort to this provision. On an application made by either party whether it is the innocent or the guilty party, court should enter the decree absolute. (*B. Kaluarachchi v Nilmini Wijewickrama and another*⁽¹⁾).

The appeal is with regard to the payment of alimony and not the dissolution of the marriage. The question is as to whether or not the marriage should be dissolved is no longer in issue. The learned Counsel appearing for the defendant submitted that the divorce decree is inter-connected with the matters pending in appeal, namely, the claim in respect of alimony. He further submitted that the plaintiff could not have moved to have the *decree nisi* made absolute for the reason that the divorce was granted in favour of the defendant.

Senanayake, J. (with S.N. Silva, J. (as he then was) agreeing) in *B. Kaluarachchi v N. Wijewickrama* (*supra*) at page 267 stated thus that "the chapter under matrimonial actions contemplated the making of subsidiary orders relating to permanent alimony, custody of the children and other settlements in terms of the provisions of section 615 of the Civil Procedure Code. These orders as stated in section 615 (2) can be discharged, modified, temporarily suspended and revived or enhanced. These orders could be varied at any time and it was not a part of the *decree nisi*."

Permanent alimony order or any sum ordered for the maintenance of a child or an order for the custody of a child could be varied at any subsequent stage as the circumstances of the parties change. If a party who is given the custody of a child subsequently leads the life of a common prostitute the Courts could vary its own order ... These orders are not entered as a part of the *decree nisi* (emphasis added). Senanayake, J. held (at page 267) "That there is no residuary discretion vested in the Court to decline it if any party moves to have the *decree nisi* made absolute".

Therefore I am of the view that the learned District Judge erred in refusing to make the *decree nisi* absolute. I set aside the order

of the learned District Judge and direct the Court to enter decree absolute. This application is allowed. In the circumstances I make no order with regard to costs.

WIMALACHANDRA, J. - I agree.

Application allowed.

District Court directed to make the decree nisi absolute.