

1962 *Present* : Weerasooriya, S.P.J., and H. N. G. Fernando, J.

V. S. NADARASA, Appellant, *and* NAVAMANY, Respondent

S. C. 110, with Application 270—D. C. Colombo, 3747/D

Action for dissolution of marriage—Suit instituted by husband—Promise by husband to make an ex gratia payment to wife—Enforceability—Civil Procedure Code, ss. 217, 615 (1).

Where decree for dissolution of marriage is entered at the suit of a husband, a promise by the husband to make an ex gratia payment to the wife cannot be incorporated in the decree so as to compel him to pay the sum.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *R. L. Jayasuriya*, for plaintiff-appellant and for plaintiff-petitioner in Application No. 270.

N. Kumarasingham, for defendant-respondent in the appeal.

June 21, 1962. WEERASOORIYA, S.P.J.—

In this case as the decree for the dissolution of the marriage has been entered at the suit of the husband it is common ground that no permanent alimony could have been ordered under section 615 (1) of the Civil Procedure Code. It was because such an order could not be made that the plaintiff, while giving evidence, said that he agreed to make an ex gratia payment of a sum of Rs. 60 a month to the defendant which will continue as long as she remained unmarried. He also stated that he had no objection to this promise being incorporated in the decree. What has been incorporated in the decree is in the following terms :—

“ And it is further ordered that the plaintiff do pay to the defendant the sum of Rs. 60 per mensem as an ex gratia payment to be applied towards the maintenance of the defendant ”.

Whereas the plaintiff only agreed to his promise to make an ex gratia payment being incorporated in the decree, he is now faced with an order in the decree to pay Rs. 60 per mensem the performance of which would be compellable by process of execution of the decree. It seems to us that this part of the decree goes much beyond what the plaintiff agreed to. Mr. Kumarasingham asks that at least the promise to make an ex gratia payment be incorporated in the decree. We do not think, however, that even though the plaintiff stated that he had no objection to his promise being incorporated in the decree, the decree should refer to it. Section 217 of the Civil Procedure Code, which classifies the various types of decrees that may be entered, does not appear to provide for a promise of this nature being incorporated in the decree.

The appeal is allowed, but without costs, and the decree will be amended by deleting the following paragraph : —

“ And it is further ordered that the plaintiff do pay to the defendant the sum of Rs. 60 per mensem as an ex gratia payment to be applied towards the maintenance of the defendant ”.

Although in the result the decree will have no reference to the promise of the plaintiff to make the ex gratia payment, the defendant can, for what it is worth, rely on the proceedings to show that such a promise was in fact made and that the defendant's undertaking not to apply for enhancement of maintenance in M. C. Jaffna Case No. 7963 depends on this promise being kept.

In view of this order, we make no order in Application No. 270.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.