

1947

Present : Soertsz S.P.J. and Jayetileke J.

ROWLANDS, Appellant, and ROWLANDS Respondent.

93 Inty.—D. C. Colombo, 438 D.

Alimony—Decree of separation—Order for payment of alimony entered of consent—Possibility of subsequent modification of such order—Civil Procedure Code, s. 615.

An order for permanent alimony entered by the consent and agreement of both the parties concerned cannot be subsequently modified under section 615 of the Civil Procedure Code on the ground that the husband's income has suffered substantial reduction, unless such modification is provided for in the consent decree.

A PPEAL from an order of the District Court, Colombo.

H. V. Perera, K.C. (with him S. J. Kadirgamar), for the plaintiff, appellant.—In this case a decree for separation was entered, and an agreement as to alimony was embodied in the decree. That agreement was made subject to variation. Subsequently an amended decree by consent of parties was entered, omitting the words which empowered the variation.

The order as to alimony was made under section 615 of the Civil Procedure Code. The two sub-sections (1) and (2) of the section deal with two different sets of circumstances. Sub-section (1) empowers Court to cause an instrument to be executed for the purpose of securing to the wife a gross sum of money or an annual sum for a term not exceeding her own life and sub-section (2) enables Court to order the husband to pay a weekly or monthly sum to the wife.

The order in this case was clearly made under section 615 sub-section (2) though a mortgage of property was given as a further security for monthly payments. Such an order under sub-section (2) is variable at the instance of the husband, while in an order under sub-section (1), the husband has nothing further to do with payments to the wife once an instrument has been executed. The original decree contained the order for alimony subject to variation. Whether the words allowing the variation were there or not the order for alimony could have been discharged, modified, or suspended for a time at the instance of the husband. The Court does not seem to have power to make an order for alimony under sub-section (2) which cannot be varied under the circumstances mentioned in sub-section (2).

It is submitted that the amending decree is inoperative, but, even if it is operative, the order for alimony, being an order made under sub-section 2 of section 615, is subject to modification at the instance of the husband.

Section 615 (1) and (2) only contemplates the two sets of circumstances referred to above. But *Swaris v. Perera*¹ purporting to follow *Maidlow v. Maidlow*² seems to contemplate a third set of circumstances where parties may be acting outside the scope of section 615 by consent. In

¹ (1940) 41 N. L. R. 562.

² L. R. (1914) Prob. 245 at 248.

such a case where parties act outside section 615 and come to an agreement which is embodied in the decree such an agreement cannot be varied. That seems to be the meaning of the decision in *Swaris v. Perera* (*supra*).

In this case there is nothing to show that the parties were acting outside section 615. Mere agreement of parties as to the amount of alimony does not show that the Court has no power to modify or vary orders of this kind even if they are made with consent of parties. See *Tangye v. Tangye*¹; *Hall v. Hall*².

N. E. Weerasooria, K.C. (with him *D. W. Fernando*), for the defendant, respondent.—On the facts it is quite clear that the parties entered into a compromise and proceeded to act outside the scope of section 615 of the Civil Procedure Code. See *Maidlow v. Maidlow* (*supra*). *Swaris v. Perera* (*supra*) is exactly in point. It is on all fours with the present case and is binding on this Court.

H. V. Perera, K.C., in reply.—The mere fact that parties agree upon the amount of alimony does not show that parties were entering into a compromise outside the scope of section 615. Even where security is given the Court has power to vary the amount payable from time to time. See *Tangye v. Tangye* (*supra*).

Cur. adv. vult.

March 14, 1947. SOERTSZ S.P.J.—

This is an appeal from an order by the District Judge of Colombo refusing the application made by the husband in this case to have the order made in the case in respect of permanent alimony modified on the ground that since the order was entered his income has suffered substantial reduction. The application is made under section 615 of the Civil Procedure Code.

It is necessary to recapitulate briefly the facts that led to this application in order to understand and deal with the objection taken by the defendant to this application on the ground that it is bad in law. The plaintiff, that is the present petitioner appellant, sued the defendant for a divorce on the ground of malicious desertion. The defendant denied desertion on her part and counterclaimed a judicial separation on the ground of malicious desertion on the part of the plaintiff. When the case was called for trial, the plaintiff led no evidence. The defendant's testimony was taken in support of her allegation of malicious desertion and, in the course of her testimony, she declared that she was willing to accept Rs. 400 on account of alimony for herself and Rs. 135 for the maintenance of their minor daughter, and she also said "I am content that the payment of alimony be secured by the hypothecation (of certain named properties) to Mr. C. E. Jayewardene as my Trustee". Decree was to be entered for judicial separation and the terms in regard to alimony, maintenance and hypothecation of property by way of securing payment were agreed upon. But the matter and manner of the hypothecation caused much discussion and delay. In the end the Public Trustee was brought in and it was agreed to amend the decree in respect of alimony, maintenance and hypothecation. The court approved the amendment.

¹ *L. R. (1914) Prob. 201 at 209.*

² *L. R. (1915) Prob. 105.*

In view of the extent of the amendments they were not made in the existing decree itself but a new paper containing the amendments was filed to take effect as the amended decree. This amended decree had previously been submitted to the plaintiff's proctors for approval and they made certain alterations in it and sent it back with the endorsement "approved as amended in red ink". One of the amendments they made was to delete the words—

"and this allowance is to continue until further orders and be subject to variation as future circumstances may require."

which appeared in the decree as it was first entered. On these facts, the question for consideration is whether it is open to the plaintiff to seek to amend the terms in regard to alimony under section 615 of the Civil Procedure Code. That section provides for two kinds of orders for permanent alimony, namely (a) "orders that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding his own life and for that purpose may cause a proper instrument to be executed by all necessary parties, (b) orders on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable. In regard to the latter kind of orders, a proviso says "that if the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the Court to discharge or modify the order". It is clear that, whatever the position be in regard to the first kind of orders, the second kind of orders are, ordinarily, liable to modification. But, the point now taken is that no modification is possible if the order is one that has been entered by the consent and agreement of both the parties concerned. It is submitted that this decree, in so far as it was concerned with alimony, provided for security being given and, thereby, revealed the fact that it was an order made by agreement. The payments ordered were monthly payments and the Court *mero motu* had no power to order these payments to be secured by mortgage. That was something arranged by the parties themselves. A similar question arose in the case of *Swaris v. Perera*¹. Hearne J. who delivered the judgment of the Court observed as follows:—

"But the Court has no jurisdiction to make an order against the husband for monthly or weekly payments coupled with an order requiring him to give security for such payments I am clearly of the opinion that the form of the order to which the defendant agreed left him no statutory right to reopen the matter Such an order could not be made apart from consent and, in the circumstances of this case, the Court could not vary the order unless the plaintiff (in the present case it would be the defendant) also agreed to this being done. In the case of *Maidlow v. Maidlow*², it was held that having regard to section 1 (2) of the Matrimonial Court Act, 1907—this provides for the payment by the husband of monthly or weekly sums 'during their joint lives'—an order for the payment to the wife during her life could only be made by consent, and the order being so made could not be

¹ (1940) 41 N. L. R. 562.

² (1914) Prob. 246.

varied". There are not, in the present case, any allegations of fraud, mistake or misrepresentation leading to the entering of the consent order upon which a consent decree may be impeached.

In certain cases, this result may work hardships but that is a matter for the Legislature. So far as we are concerned, the law, as judicially interpreted, prevents us from acceding to the petitioner's application. I would dismiss it with costs.

JAYETILEKE J.—I agree.

Appeal dismissed.
