1942 *Present :* **Soertsz, Hearne and Wijeyewardene JJ.**

SENADIPATHY *v.* SENADIPATHY.

104—D. C. (Inty.) Colombo, 477.

Stamp duty—Matrimonial action—Action for divorce by wife—Counter-claim by husband—Damages against co-respondent—Class of case—Amount of damages—Stamp Ordinance (Cap. 189), Schedule F. (Miscellaneous), item (l).

In an action for dissolution of marriage brought by the wife against her husband, the latter himself claimed a divorce from the plaintiff on the ground of her adultery with the co-defendant from whom he claimed the sum of Rs. 10,000 as damages. The defendant further claimed a sum of Rs. 7,073 on three separate causes of action, viz.:—

(a) a sum of Rs. 2,640, which he alleged was the plaintiff's share of the expenditure incurred by him in improving a common land ;
(b) a sum of Rs. 1,933 on account of articles belonging to him which were damaged by her ;
(c) a sum of Rs. 2,500, the value of rubber coupons appropriated by her without his consent.

Held (by Soertsz and Hearne JJ., Wijeyewardene J. dissenting), that the last named causes of action cannot be introduced into a matrimonial action instituted under Chapter 42 of the Civil Procedure Code.

Section 36 of the Civil Procedure Code is excluded by necessary implication and does not apply to matrimonial actions.

Held, further, that the class of case for purposes of Stamp Duty on matrimonial actions must be determined by item (*l*) of Schedule F. according to which it is fixed by the amount of damages claimed by the defendant, viz., Rs. 10,000.

[*Per* WIJEYEWARDENE J.—That the separate causes of action could be properly joined in a matrimonial action and that item (*l*) in the Schedule does not override the general principle that the stamp duty should be assessed on the aggregate value of the various claims, even if such claims have been wrongly joined.]

L. A. Rajapakse (with him *P. A. Senaratne*), for the plaintiff, respondent, took preliminary objection.—Class 5, and not class 4, of Part 2 of Schedule A of the Stamp Ordinance (Cap. 189) governs this case. The appellant furnished stamps on the basis that the proceedings fell under class 4. The tendering of additional stamps subsequently would not cure the irregularity—*Balasubramaniam v. Valliappar Chettiar* [1].

Where, in an action, the defendant sets up a claim in reconvention, the stamp duty leviable is calculated upon the value of the claim in reconvention if it is larger than the claim made in the plaint—*Vellasamypulle v. The Uplands Tea Estates of Ceylon, Ltd.* [2]. And the value of the claim in reconvention would be the aggregate value of the various claims made in the answer—*Sinnappu v. Theivanai* [3]. The value, therefore, of the present action is Rs. 17,073.

[SOERTSZ J.—What is the class of a matrimonial action generally ?]

[1] *(1938) 39 N. L. R. 553.*
[2] *(1912) 1 C. A. C. 108.*
[3] *(1937) 39 N. L. R. 121.*

According to item (*l*) in Schedule F of the Stamp Ordinance, matrimonial suits shall be charged as of the value of Rs. 1,000, where the amount of damages claimed does not exceed such sum; where the damages claimed exceeds Rs. 1,000, the class shall be determined by the amount of the damages claimd according to the classification of suits in civil proceedings in the District Courts.

[SOERTSZ J.—The determining factor then seems to be the amount of damages claimed ?]

Proceeding on the basis that the class is determined by the amount of damages, the defendant claims Rs. 10,000 from the added-defendant and, under paragraphs 6 and 7 of the answer, Rs. 4,433 from the plaintiff. His action, therefore, is for the sum of Rs. 14,433 as damages. Thus, whether the value of this action is regarded as Rs. 17,073 or as Rs. 14,433 the governing class for stamping purposes is class 5.

[SOERTSZ J.—No damages can be claimed except against the co-defendant. Read section 598 of the Civil Procedure Code in conjunction with item (*l*) of Schedule F of the Stamp Ordinance.]

Section 40 (*d*) of the Civil Procedure Code provides for two or more causes of action to be set out in a plaint. But even supposing the defendant *wrongly* claims damages against the plaintiff and the answer is entertained, then the determining factor is the total damages claimed.

The class of a case is determined by the final state of the pleadings, whether the claim is lawful or not—*Samynathan v. Atukorale*[1]; *Little's Oriental Balam and Pharmaceutical, Ltd. v. P. P. Saibo*[2]; *Silva v. Fernando et al.*[3]

H. V. Perera, K.C. (with him *G. P. A. de Silva*), for the defendant, appellant.—A divorce action is an action *sui generis*. For the purpose of stamping, a formula applicable to an ordinary action cannot be applicable to a divorce action. The claims of the defendant are really two distinct legal proceedings, one against the wife and the other against the co-respondent. The two legal proceedings, although rolled into one action, are incapable of amalgamation and cannot be regarded as one single proceeding. The fact that one plaint is permitted does not make the two proceedings a single one.

An examination of the scheme of Chapter 42 of the Civil Procedure Code makes it clear that the claim for damages against the wife cannot be maintained in the present action and that section 36 of the Civil Procedure Code is not available. Item (*l*) in Schedule F of the Stamp Ordinance constitutes a further special provision with regard to a matrimonial suit. A suit does not cease to be matrimonial because a wrong claim is included in that suit. Whether item (*l*) of Schedule F existed or not, this is a matrimonial suit, and the claim against the wife is foreign to it.

At any rate, in an appeal from an order for alimony the damages claimed from the co-respondent should not be taken into account for the purpose of stamping.

[1] *(1940) 41 N. L. R. 409.*

[2] *(1938) 40 N. L. R. 441.*

[3] *(1908) 11 N. L. R. 375 at 378.*

L. A. Rajapakse, in reply.—Stamps should be affixed according to the class of the whole action and not according to the value of the interest of the appellant—*Sinnetamby v. Thangamma* [1].

Cur. adv. vult.

February 17, 1942. SOERTSZ J.—

This was an action in which the plaintiff who is the wife of the defendant sued him to have their marriage dissolved on the ground of malicious desertion, as well as on the ground of adultery. She also asked that the defendant be ordered to transfer to her his half share of some properties that had been settled on them three days before their marriage on a certain deed, or in the alternative to pay her Rs. 2,000.

In his answer the defendant himself claimed a divorce on the ground that the plaintiff was living in adultery with one B. A. Charles Silva, whom he made a co-defendant, and from whom he claimed Rs. 10,000 on account of damages. He also claimed Rs. 7,073 from the plaintiff on three causes of action set forth in paragraphs 5, 6, and 7 of his answer. On the first cause of action, he claimed Rs. 2,640, which he alleged was her share of the expenditure incurred by him in improving a common land; on the second cause of action, he claimed Rs. 1,933 on account of articles belonging to him which were damaged by her or taken by her from his possession; and on the third cause of action, he claimed Rs. 2,500 on account of his share of rubber coupons appropriated by her without his consent.

In this state of things, the plaintiff filed petition and affidavit as provided by section 614 of the Civil Procedure Code and asked that the defendant be ordered to pay Rs. 450 as alimony *pendente lite* for herself and for the children of the marriage and Rs. 400 towards the costs of this action. The trial Judge held an inquiry on this application and ordered the defendant to pay to the plaintiff Rs. 225 a month on account of alimony pending the action, and Rs. 250 on account of costs.

The defendant appealed from this order on the ground that the amount awarded in respect of each of the claims was excessive. He made the plaintiff the party respondent to his appeal.

Counsel for the respondent took a preliminary objection to this appeal on the ground that the amount tendered by the appellant, together with his petition of appeal to cover the stamp duty with which the decree of this Court and the certificate of appeal are chargeable, is less than the amount required by the Stamp Ordinance, and Counsel contended that the fact that subsequently the appellant supplied the deficiency is of no avail. This objection is based on the assumption that the class of this case for the purpose of the Stamp Ordinance is Rs. 17,073. If that is the correct class, then, the amount originally tendered is, admittedly, insufficient and Council's contention that it is not possible to make good the deficiency in stamp duty in the manner the appellant has sought to do is conceded as well-established.

Counsel for the appellant, however, maintained that the class of this case for the purpose of stamping is Rs. 10,000 and not Rs. 17,073. If that is correct the appeal is, of course, in order.

[1] *(1912) 1 C. A. C. 151.*

The short point for decision, then, is whether this action falls within class 4 or class 5 of Part 2 of Schedule A of the Stamp Ordinance.

In my opinion, item (*l*) in Schedule F (Miscellaneous) of the Stamp Ordinance read with Chapter 42 of the Civil Procedure Code gives the answer to that question. That item reads as follows:—

"Matrimonial suits shall be charged as of value of Rs. 1,000 where the amount of damages claimed does not exceed such sum. Where the damages claimed exceed Rs. 1,000, the class shall be determined by the amount of damages claimed according to the classification of suits in the District Courts."

Section 596 of the Civil Procedure Code enumerates matrimonial actions as actions for divorce a *vinculo matrimonii*, or for separation *a mensa et thoro*, or for declaration of nullity of marriage. The present action is one for divorce, and as such is within item (*l*) of the Stamp Ordinance, and its chargeability with duty depends on the amount of damages claimed, if any. The word "damages" in the context can only mean the "damages" referred to in section 598 of the Civil Procedure Code, and claimable, as they are claimed in this case, by a party defendant in virtue of section 603 of the Code. The amount claimed in this instance, is Rs. 10,000 and, ordinarily, that amount would fix the class of the action..

But Councel for the respondent argues that inasmuch as the defendant has claimed, whether rightly or wrongly, three other sums of money amounting to Rs. 7,073, this action cannot be regarded as a matrimonial action as contemplated in item (*l*), and that to ascertain its chargeability, it is necessary to add this sum of Rs. 7,073 to the sum of Rs. 10,000, which is the value set upon it by item (*l*) in so far as it is a matrimonial action.

This contention gives to the question whether such causes of action as the defendant has set up in paragrapths 5, 6, and 7 of his answer and the plaintiff, in paragraph 6 of her plaint, can be properly brought into a matrimonial action. For the reasons I shall presently state, my view is that they cannot be introduced into such an action in the way in which they have been in this case.

Incidentally, I would point out that the causes of action set forth in paragraphs 6 and 7 of the answer are based on tort, and cannot be sued upon, at all, in the circumstances of this case in view of section 18 of the Married Women's Property Ordinance (Cap. 46). The cause of action averred in paragraph 5 appears to be based on a *quasi*-contract, and is enforceable, but not in the course of a matrimonial action.

The scheme of Chapter 42 is such as to imply that matrimonial actions are put upon a footing or their own except that the rules and practice provided by the Civil Procedure Code in regard to plaints and answers in ordinary civil actions, and the procedure generally provided by the Code are adopted *in so far as the same can be made applicable*, subject to the provisions of Chapter 42.

Section 597 says that "any husband or wife may present a plaint to the District Court . . . . praying that his or her marriage may . . . . be dissolved". Section 607 says that "any husband or wife may

present a plaint to the District Court . . . . Praying that his or her marriage may be declared null and void". Section 608 provides for application to be made by a husband or a wife for separation a *mensa et thoro* by plaint to the District Court within whose jurisdiction he or she resides.

There is no provision for any other relief being asked or any other cause of action being included in such a plaint, whereas in section 40 it is stated that the plaint presented to Court in ordinary actions shall contain "a plaint and concise statement constituting *each* cause of action, and where and when it arose".

In this conflict between what is required by section 597 and what is provided for by section 40 of the Civil Procedure Code, section 597 must prevail by virtue of section 596, and it seems to me to follow from that that section 36 is excluded by necessary implication and does not apply to matrimonial actions.

Then there is section 598 which again emphasises the fact that a matrimonial action has been put upon a footing of its own, for that section enable a husband whether he be plaintiff or defendant, occupying in virtue of section 603 the position of a plaintiff, to combine with the cause of action he alleges against his wife, where he is suing for divorce on the ground of adultery, a totally different cause of action against a third party with whom he alleges the adultery took place. And damages on account of the adultery complained of is all he may ask against the co-defendant in that action, even though he may happen to have other causes of action against that party.

Alimony *pendente lite* is to be applied for collaterally and by summary procedure in terms of section 614. As for permanent alimony and ante-nuptial and post-nuptial settlements, the Court is required to take those matters up for consideration after decree for dissolution of marriage has been entered. All this seems to me to suggest a reasonable and proper anxiety on the part of the Legislature to see that the important and far-reaching issues that arise in matrimonial actions are not confused with other questions not strictly germane to them.

Again, section 601 says that where divorce is sought on the ground of adultery, if "the Court on the evidence, in relation to any such plaint, is not satisfied that the plaintiff's case has been proved" or finds that there has been connivance or condonation or collusion . . . . "*the Court shall dismiss the plaint*". There is no provision whatever for the Court going on to try any other causes of action which either party has set up. Nor is that all. When it comes to the stage of entering decree, section 604 provides for a *decree nisi* in the first instance when the Court has decided to dissolve the marriage. If, however, it is competent to a Court trying matrimonial action to *entertain* and decide other causes of action as well, as have been set up in this case, then there will have to be in the same action a *decree nisi* in regard to the dissolution of marriage and a *decree absolute* in regard to the other matter. There is also the fact that in matrimonial actions the ordinary rule in regard to territorial jurisdiction provided by section 9 of the Code is departed from, at least to the extent that a plaintiff is enabled, if not required, to institute his or her action in the Court within the local limits of which he or she

resides. This means that, if other causes of action may be sued upon in a matrimonial suit, a plaintiff is entitled to disregard the restrictions imposed by section 9 of the Code.

To me the conclusion seems irresistible that such claims as have been made in paragraphs 5, 6, and 7 of the answer cannot be included in an action under Chapter 42.

The next question is whether the contention of Counsel for the respondent that these claims, even if wrongly made, should be taken into account in fixing the class of the action is entitled to prevail. I do not think it is. In my opinion, we must deal with the action as it would have been if it had been properly constituted. It has been observed that as long as there is a necessity, *in any stage* of the proceedings in an action, for appeal to the authority of the Court, or any occasion to call upon it to exercise its jurisdiction, the Court has, even if there has been some express arrangement between the parties, *an undoubted right, and is, moreover, bound to interfere* if it perceives that its own process or jurisdiction is about to be used in a manner which the law does not warrant—*Wade v. Simeon*[1]. This observation, it is true, was made in regard to an entirely different question, but it is of wide application and is relevant to the question under consideration here.

I would, therefore, overrule the preliminary objection and direct that the appeal be listed for hearing in due course.

HEARNE J.—I agree.

WIJEYEWARDENE J.—

The plaintiff is the wife of the defendant. In the plaint filed by her she prayed for a decree—

(*a*) dissolving her marriage with the defendant on the grounds of malicious desertion and adultery ;
(*b*) ordering the defendant to pay a monthly sum as permanent alimony for herself and as maintenance for her children ;
(*c*) directing the defendant to transfer to her a half share of a certain land or in the alternative pay her a sum of Rs. 2,000.

In his answer the defendant denied the allegations of adultery and malicious desertion made against him and the plaintiff's right to ask for a transfer of the half share of the property mentioned in the plaint. He further pleaded that the plaintiff was living in adultery with one N. A. Charles Silva, from whom he claimed Rs. 10,000 as consequential damages. He prayed for a decree—

(*a*) dissolving his marriage with the plaintiff ;
(*b*) directing N. A. Charles Silva to pay him Rs. 10,000 as damages ;
(c) directing the plaintiff to pay him a sum of Rs. 7,073.

The claim of Rs. 7,073 was made on the grounds—

(*a*) that the plaintiff was liable to pay him a sum of Rs. 2,640 as a half share of the expenses incurred by him in improving a property owned jointly by him and the plaintiff ;

[1] *13 M & W, p. 647.*

(b) that the plaintiff wrongfully removed some movable property of the value of Rs. 1,933 belonging to him ;

(c) that the plaintiff wrongfully appropriated to herself certain rubber coupons valued at Rs. 2,500.

N. A. Charles Silva, who was made an added defendant, filed a statement denying the allegations made against him in the defendant's answer.

The District Judge held an inquiry for determining the amount payable by the defendant on account of alimony *pendente lite*, the maintenance of the children and the expenses that would have to be incurred by the petitioner in prosecuting her action.

The present appeal is by the defendant from the order made by the District Judge at that inquiry in favour of the plaintiff.

When the appeal first came up for hearing before my brother Soertsz and me, the Counsel for the plaintiff-respondent took the preliminary objection that the appellant has failed "to deliver to the Secretary of the District Court . . . . together with the petition of appeal the proper stamp for the decree or order of the Supreme Court and certificate in appeal" as required by the Stamp Ordinance. The question was thereupon referred by us to a Bench of three Judges under section 38 of the Courts Ordinance.

It is admitted that the defendant gave only stamps of the total value of Rs. 24 for the decree of this Court and the certificate in appeal and a few days thereafter he tendered additional stamps of the value of Rs. 6. It has been decided by this Court that the default arising from the failure to supply the "proper stamps" at the time of filing the petition of appeal is not cured by the appellant supplying additional stamps subsequently to cover the deficiency. (Vide *Balasubramanian v. Valliappar Chettiar* [1]).

The question that has to be decided, therefore, is whether a stamp of Rs. 12 is the proper stamp for a decree of this Court in this action or the certificate in appeal. Though generally the class of an action for purposes of stamp duty is determined by the claim in the plaint, yet where there is a claim in reconvention it has been held that the value of the stamp duty should be calculated upon the value of that claim if that claim happens to be larger—*Vellasamypulle v. The Uplands Tea Estates of Ceylon, Ltd.* [2] In this case, therefore, the stamp duty would have to be determined on the basis of the aggregate value of the claims made in the answer. (Vide *Sinnappu v. Theivanai* [3]). Now, as stated earlier by me, the defendant prays for (*a*) the dissolution of his marriage, (*b*) damages for Rs. 10,000 against the added defendant, and (*c*) a sum of Rs. 7,023 against the plaintiff. The value of the claim in the answer must be determined by reference to the Schedule A of the Stamp Ordinance. It is true that the Table in Schedule A does not state in express terms what the sum mentioned at the head of each class represents, but in *de Silva v. Lever* [4] Schneider J. expressed the view with which I respectfully agree, that the sum of money represented the value of "the cause of action, title to land or property" as mentioned in Schedule III. of the Civil Procedure Code. The value of the relief claimed in respect of the causes of action (*a*) and (*b*) has to be assessed according to item (*l*) in Part II. (F) of Schedule A of the

[1] *39 N. L. R. 553.*
[2] *1C. A. C. 108.*
[3] *9 N. L. R. 121 at 124.*
[4] *23 N. L. R. 435 at 436.*

Stamp Ordinance and that would be Rs. 10,000. The total value of the aggregate claim on the causes of action (*a*), (*b*), and (c) would be Rs. 17,073 and the proper stamp for the decree of the Supreme Court or the certificate in appeal would be Rs. 15. It is however argued on behalf of the appellant that this would not be a correct way of assessing the value of the claim made in the answer. It is said that as one of the reliefs claimed is a dissolution of marriage, the action is a "matrimonial action" and therefore in assessing the value of the aggregate claim in the answer we should not go outside the item (*l*) mentioned above. What would then be the value of an action when a wife claims a dissolution of marriage and sues for the recovery of movable property belonging to her and valued at Rs. 50,000 ?

Has the action to be valued as an action for Rs. 1,000, ignoring the claim in respect of the movable property? It was stated in the course of the argument that such a claim for movable property would not be made as there was said to be some bar operating against the joinder of such a claim in an action for dissolution of marriage. It was sought to support this argument by reference to section 598 of the Civil Procedure Code which enacts that it "shall be lawful" in a plaint in an action "to include a claim for pecuniary damages" against the co-respondent and this by necessary implication, it was argued, prohibited the inclusion of any other claim. This argument is based on the assumption that section 598 overrides the earlier provisions of the Code contained in section 36. I am unable to assent to this. Section 598 of the Civil Procedure Code provides for the inclusion of a claim for damages against the co-respondent as otherwise the inclusion of such a claim would have been obnoxious to the earlier provisions of the Civil Procedure Code. (Vide *Kanagasabapathy v. Kanagasabai* [1]). That section merely enlarges the right of a party with regard to joinder of causes of action and does not have the effect of preventing a plaintiff from joining several causes of action as contemplated by section 36 of the Civil Procedure Code. An analogous argument based on a similar assumption was unsuccessfully advanced in *Wright v. Wright* [2] when it was contended that in view of section 597 of the Code an action for divorce could not be filed in the Court within the jurisdiction of which the defendant resided as laid down in section 9 of the Code. I am, therefore, of opinion that in the case contemplated by me the wife could in accordance with law make a claim in respect of her movable property, subject of course to the right of the Court under section 36 to order separate trials. Could it then be said that, in such a case, the stamp duty should be as in the Rs. 1,000 class though the Court would have to adjudicate not only on the question of divorce but also on the right to the movable property valued at Rs. 50,000 ? It appears to me further that the question whether certain causes of action could be joined along with a claim for divorce has really no bearing on the assessment of the stamp duty. Now it is clear in law that a plaintiff cannot in one action claim a declaration of title to one land against one defendant and title to a second land against another defendant. But if he does so, he should surely affix stamps according to the aggregate value of the two lands. The defendants in such a case could take an objection to the

[1] *25 N. L. R. 173.*

[2] *8 N. L. R. 31.*

misjoinder at the earliest possible opportunity under section 22 of the Civil Procedure Code and thus obviate the necessity for stamping the documents in the higher class if they secure an order in their favour on the question of misjoinder. The position then is that there is nothing in Chapter 42 of the Civil Procedure Code which stands in the way of the adoption of the general rule that the value of an action for stamp duty is the total value of the various claims made even if one claim happens to be a claim for dissolution of marriage or separation *a mensa et thoro* or nullity of marriage. I do not see any difficulty created by item (*l*) when it states—

> "Matrimonial suits shall be charged as of the value of Rs. 1,000, where the amount of damages claimed does not exceed such sum. Where the damages claimed exceeds Rs. 1,000, the class shall be determined by the amount of damages claimed according to the classification of suits in Civil Proceedings in the District Courts."

That means that in an action the relief claimed by way of a dissolution of marriage and damages should be assessed in a particular manner. Such assessment would no doubt give the total value of the action for purposes of stamp duty if no other relief is claimed. But I fail to see how item (*l*) in the Schedule to the Stamp Ordinance could be regarded as precluding a Court from considering any other reliefs claimed whether rightly or wrongly in finding the total value of the claim in any action. The normal procedure in assessing the stamp duty would be to consider the plaint or the answer in cases where the claim in reconvention exceeds the claim of the plaintiff. The Court would then consider each of the causes of action and ascertain the stamp duty in respect of each cause of action by reference to the Schedule to the Stamp Ordinance. A litigant cannot file a plaint asking for a divorce and for some other relief, say recovery of property, and evade the payment of stamp duty on the aggregate value of the claim by calling his action a "matrimonial action". The item (*l*) in the Schedule to the Stamp Ordinance indicates a method of assessing stamp duty in respect of certain kinds of relief claimed in an action, namely, claim for separation *a mensa et thoro*, declaration of nullity of marriage or dissolution of marriage and damages. It has not the effect of overriding the general principle that the stamp duty should be assessed on the aggregate value of the various claims even if such claims have been wrongly joined.

It was also suggested in the course of the argument that the only parties concerned in the present appeal were the plaintiff and the defendant, as the added-defendant had no interest whatever in the question of alimony and therefore the sum of Rs. 10,000 claimed against the added-defendant should not be taken into account in assessing the necessary stamp duty. That argument cannot be entertained as it ignores the fact that the value of the stamps should be ascertained according to the class of the particular action and not on the value of the interest of the appellant in the order appealed against. (Vide *Sinnetamby v. Thangamma* [1]).

I am of opinion that the appellant has failed to deliver the necessary stamps as required by the Stamp Ordinance and that the appeal must therefore be rejected. *Objection over-ruled.*

[1] *1 C. A. C. 151.*