1935 *Present:* **Dalton S.P.J. and Maartensz J.**

ASERAPPA *v.* ASERAPPA.

8—D. C. Colombo, 52,518.

Divorce—Decree for alimony pendente lite*—Period during which it is payable —Decree made absolute—Does not relate back—Application to make decree absolute—Civil Procedure Code, ss. 605 and 614.*

In an action for divorce, the liability to pay alimony *pendente lite* continues until the decree is made absolute.

The decree absolute does not relate back to the date on which, according to the provisions of section 605 of the Civil Procedure Code, the decree should have been made absolute.

Per DALTON J.—The party who is interested should move the Court to have the decree made absolute.

THIS was an action brought by the plaintiff against his wife the first defendant for dissolution of his marriage on the ground of her adultery with the scond defendant. During the pendency of the action the plaintiff was directed to pay the first defendant Rs. 300 per mensem as alimony. On March 19, 1934, the District Judge granted the plaintiff a decree *nisi* declaring the marriage to be dissolved, to be made absolute in three months. The plaintiff continued the payment of alimony for a period of three months after the decree *nisi* and then stopped payment, whereupon the first defendant applied for writ to recover the alimony. The plaintiff opposed the application on the ground that first defendant was living in adultery with the second defendant.

The learned District Judge held that the first defendant has been living in adultery with the second defendant and refused the first defendant's application. He further made the decree absolute as from June 29, 1934.

E. F. N. Gratiaen, for first defendant, appellant.—The payment of alimony *pendente lite* shall continue, under the provisions of section 614, until the actual date on which a decree *nisi* against the wife is made

absolute. The learned Judge has purported to give retrospective effect to the decree absolute after it was entered. He had no jurisdiction to do so.

R. L. Pereira, K.C. (with him *Choksy* and *D. W. Fernado*), for plaintiff, respondent.—A wife's right to alimony *pendente lite* ceases when there is a decision against her in the Court of first instance on a charge of adultery (*Wells v. Wells and Hudson* [1]). It has also been proved that she is being maintained by the co-respondent, which circumstance also disentitles her to alimony from her husband (*Madan v. Madan and de Thoren* [2]; *Holt v. Holt* [3]). The English practice in matrimonial suits has always been followed in Ceylon (vide *Silva v. Silva* [4]).

In the present case the Court entered decree *nisi* against the wife on March 19, 1934, to be made absolute at the expiration of three months, *i.e.*, on June 19, 1934. The Court should automatically have made the decree absolute on June 19 (*De Silva v. De Silva et al.* [5]), or at the latest on August 16, 1934, when the husband specifically applied that the decree be made absolute.

Gratiaen, in reply.—The English practice does not apply when there is specific provision to the contrary in the Code. The Court refused the husband's application of August 16, 1934, on the ground that an appeal was pending against the decree *nisi*. The husband did not appeal against that order, and is therefore bound by it.

Cur. adv. vult.

December 12, 1935. DALTON S.P.J.—

This appeal arises out of an order made in an action for dissolution of marriage. On July 21, 1933, a consent order for alimony *pendente lite* was made by the Court in favour of the first defendant, the plaintiff to pay the sum of Rs. 300 per month as from May 1, 1933. On March 19, 1934, the plaintiff obtained a decree dissolving the marriage "unless sufficient cause be shown to the Court why this decree should not be made absolute within three months from the making thereof". From this judgment the defendants appealed. There seems to have been some confusion over the date of the decree *nisi*. It is in fact, March 19, although in these proceedings it seems to have been treated as March 29. The plaintiff has paid alimony up to the end of June, 1934, *i.e.*, for three months after the date of the decree *nisi*.

On August 16 an application was made to the Court on behalf of the plaintiff that the decree be made absolute, but the Judge ordered that the application await the decision in appeal. The application was renewed on November 5, on the ground that notwithstanding the appeal the plaintiff was entitled to have the decree made absolute. On the same date the first defendant in the divorce proceedings applied for a writ against the plaintiff for decovery of the sum of Rs. 1,200, being alimony at the rate of Rs. 300 a month, for July, August, September, and October. Both applications were heard together on November 26 and December 7. On the latter date the trial Judge allowed the plaintiff's

[1] (1864) *3 Sw. and Tr. 542.*
[2] (1867) *17 L. T. 326.*
[3] (1868) *L. R. I. P. and D. 610.*
[4] *8 N. L. R. 280.*
[5] *29 N. L. R. 378.*

application, making the decree absolute, dating it back to June 29, 1934, and dismisssing the first defendant's application. From that order the first defendant appeals.

The provisions of section 614 of the Code seem to me to be quite clear. Under that section alimony shall continue, in the case of a decree for dissolution of marriage as here, until the decree is made absolute. The decree was made absolute on December 7, but the learned Judge has directed that it be entered as of date June 29. The reasons he gives for makking the order date back to June are based upon what is said to be the practice of the District Court.

According to the practice of that Court, he states that decrees absolute, in matrimonial cases I presume, are entered as a matter of course after the lapse of the prescribed period without the Court being moved thereto by either party. The practice, I understand, is based upon what are stated to be the explicit provisions in section 605 of the Code. If that practice had been followed therefore in this case, the Court would have made the decree absolute immediately after the expiration of three months from the date of the decree *nisi*. It is clear that the practice is not uniform, because it was not followed in this case. Even in August when the plaintiff's application was dealt with, the failure to act in accordance with this practice was not mentioned.

If there is any such practice in force, and my brother Maartensz informs me that it was in force when he was District Judge, Colombo, I am not satisfied that it is justified by any provision of the Code. It seems to me that the person who requires the Court to move, should move the Court, and not that the Court should act of its own motion in making the decree absolute. This is the English practice and I see nothing contrary to it in our Code. One can visualise a case, without any difficulty, in which the successful party might not wish to have the decree made absolute immediately the time limit had expired. Cases are not unknown, for example, even if they are rare, of husbands and wives coming together again after a decree *nisi* has been entered. In the case before us the plaintiff did apply, but not until August. He could have applied earlier, if he had wished, immediately the three months had expired, but he did not do so. Had he done so, in the absence of any cause to the contrary being shown, the Court would as a matter of course have made the decree absolute. In August his application was ordered to stand over, wrongly as was afterwards shown by counsel who appeared on his behalf; even then no practice of the Court acting of its own motion was mentioned or relied on. Section 625 prohibits any further marriage of the parties after the decree dissolving a marriage has been made absolute, until any pending appeal has been dismissed, so no risk or difficulty would arise from making a decree absolute on that ground. In my opinion, the learned Judge had no power to direct that the decree absolute made by him on December 7 should date as from June 29. The decree was made absolute on December 7, and therefore, under the provisions of section 614, the alimony ordered to be paid continues to that date. For some purposes the decree absolute dates back to the date of the decree *nisi*, but it is not suggested it does so in this case.

In my opinion, no question arises in these proceedings, in the face of the existing order of July 21, 1933, as to whether the first defendant was or was not being maintained during the months of July, August, September, and October, by the second defendant.

The first defendant is therefore entitled to alimony under the order made in July, 1933, until the date of the decree absolute, that is, up to December 7. Her appeal must therefore be allowed and her application against the plaintiff must be granted. She is entitled to her costs of this appeal and to the costs of her application in the Court below.

MAARTENSZ J.—

The first defendant in this action was the wife of the plaintiff whom he sued for dissolution of his marriage on the ground of her adultery with the second defendant. During the pendency of the action the plaintiff was directed to pay the first defendant Rs. 300 per mensem as alimony *pendente lite*. On March 19, 1934, the District Judge granted the plaintiff a decree *nisi* declaring the marriage dissolved, to be made absolute at the expiration of three months. The plaintiff continued the payment of alimony for a period of three months after the decree *nisi* was entered and then stopped payment, and the first defendant applied for issue of writ to recover the alimony due to her.

On August 16, 1934, the Court directed that an application to have the decree made absolute should await decision in appeal. The first defendant renewed her application for writ which was opposed by the plaintiff who again moved to have the "decree *nisi*" made absolute.

The plaintiff supported his opposition to the application for writ with an affidavit from one K. John, who according to the affidavit had been employed as a cook by the first and second defendants—to the effect that the first and second defendants lived together in a house called "Mohini" from April, 1934, to November 8, 1934. The allegations in this affidavit were not contested by the first defendant. She contended that the allegations even if true were not a ground on which the application for writ could be refused in view of the provisions of section 605 of the Code.

The District Judge held that it had been proved that the first defendant had been living in adultery with the second defendant since April, 1934, and on the authority of the English cases in which it was held that alimony should cease when the wife was found guilty of adultery refused the first defendant's application on December 7, 1934. In the same order he made the decree *nisi absolute* as from June 29, 1934. The first defendant appeals from this order.

I am of opinion that the English cases referred to by the District Judge are not applicable. The period during which alimony *pendente lite* must be paid is fixed by section 614 of the Civil Procedure Code which provides that alimony pending the action shall continue in case of a decree for dissolution of marriage until the decree is made absolute.

The question then arises whether the liability to pay alimony *pendente lite continues* until the decree is actually made absolute or only until the date on which the decree should have been absolute.

Section 605 of the Civil Procedure Code enacts that: "Whenever a decree *nisi* has been made and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited, such decree *nisi* shall on the expiration of such time be made absolute".

The respondent contended that the District Judge should have made the decree absolute on the expiration of three months from March 29 and that the District Judge was entitled to make the decree absolute and effective from June 29, or at all events from August 16, 1934, when the plaintiff moved the Court to make the decree absolute.

I am unable to agree with either contention as there is no provision in Chapter XLII. of the Code relating to matrimonial actions that a decree absolute whenever made should relate back to the date on which according to the provisions of section 605 of the Code the decree should have been made absolute.

I would accordingly allow the appeal with costs in both Courts.

Appeal allowed.