

1950

Present: Dias S.P.J. and Gunasekara J.

THANGAVADIVEL, Appellant, and INTHIRAVATHY, Respondent

*S. C. 49—D. C. Jaffna, D/230**Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48)—Summary proceedings under Section 10—Plaintiff's loss of status as wife pending inquiry—Proceedings cannot continue.*

Where proceedings by way of summary procedure under section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance were instituted by a wife against her husband for the return of certain jewellery, but, while the inquiry was proceeding, a decree absolute was entered in a divorce case dissolving the marriage between the spouses—

Held, that the plaintiff, having ceased to be the wife of the defendant during the pendency of the inquiry, lost her status to continue the proceedings. The general rule that the claims of a litigant are to be ascertained as at the commencement of the action would not be applicable in such a case.

APPEAL from a judgment of the District Court, Jaffna.

H. Wanigatunga, with *V. Kumaraswamy*, for the appellant (husband).

A. C. Natarajah, for the respondent (wife).

Cur adv. vult.

June 21, 1950. DIAS, S.P.J.—

Spouses governed by the Jaffna Matrimonial Rights and Inheritance Ordinance, 1911 (*Chapter 48*), are provided with a summary remedy in regard to any questions or disputes which shall arise between them relative to their "separate property". Section 10 of the Ordinance provides:—

" 10. (1) If any question or dispute shall arise between any husband and wife (whether married before or after the commencement of this Ordinance) relative to any property declared by this Ordinance

to be the separate property of the wife, either party may apply by motion in a summary way to the District Court of the district in which either party resides, and thereupon the District Judge may make such order, direct such inquiry, and award such costs as he shall think fit; and the District Judge may, if either party so require, hear the application in his private room.

(2) Any order so made shall be subject to appeal to the Supreme Court.

(3) Every such motion shall require a stamp of ten rupees, but no further stamp duty shall be required for any other legal proceedings under this section ”.

The respondent to this appeal, who was the wife of the appellant, instituted proceedings against him under section 10 claiming the return of certain jewellery valued at Rs. 2,020.50 said to be her separate property, and which the appellant is alleged to be wrongfully withholding from her. The appellant, although represented at the inquiry, called his father as a witness, but refrained from giving evidence himself. The District Judge held against him, and decreed that he should return to the respondent the jewellery or pay to her the sum of Rs. 2,020.50.

In view of the order I am making in this case, it is inexpedient that I should express any opinion on the findings of fact of the District Judge.

It appears that the respondent had proved to be an unfaithful wife, having eloped with one man, and was being kept as the mistress of another. She had instituted proceedings for divorce against the appellant alleging that he had maliciously deserted her. The appellant did not contest her claim, and while the present inquiry under section 10 was pending a decree absolute had been entered in the divorce case dissolving the marriage between the spouses.

The point taken on behalf of the appellant is that the respondent having ceased to be the wife of the appellant during the pendency of these proceedings, she lost her status to continue the proceedings under section 10. This question was raised as Issue 5, namely:—

“ Is the petitioner entitled to avail herself of the summary remedy provided for under section 10 of Chapter 48 inasmuch as she is no longer the wife of the respondent? ”

The Privy Council has laid it down that as a general rule the claims of a litigant are to be ascertained as at the commencement of the action—*Silva v Fernando*¹. The facts were that the Crown had conveyed land to the plaintiff, reserving to itself the title to the minerals in the land. The plaintiff sued the defendant who had trespassed and removed the plumbago. After action was filed, the Crown by letter informed the plaintiff that it waived its rights to the plumbago. It was held that no retrospective effect could be given to the letter, because the rights of the litigants had to be ascertained as at the commencement of the action. The four-judge decision in *de Silva v. Goonetilleke*² is to the same effect—see also *de Silva v. Edirisuriya*³. It was contended for the respondent

¹ (1912) 15 N. L. R. 499.

² (1931) 32 N. L. R. at p. 219.

³ (1940) 41 N. L. R. at p. 463.

that the proceedings under section 10 having been instituted on February 24, 1949, and the decree absolute in the divorce action having only been entered on July 11, 1949, her right to maintain this action had to be determined as at the former date. She being a lawfully married spouse at that date, it is contended that her subsequent loss of that status is not a bar to her right to continue the proceedings. It is submitted that the Court, once it has been lawfully vested with jurisdiction, cannot be deprived of jurisdiction by the fact that the respondent lost her status to *institute* such a proceeding during the pendency of the proceedings.

The appellant rejoins that the principle laid down in *Silva v. Fernando*¹ only deals with substantive rights, and does not affect rules of procedure—but no authority was cited in support of this proposition.

Without deciding the precise scope of the principle laid down in *Silva v. Fernando*¹, I find that there are certain exceptions to the rule there laid down.

In *Sabapathipillai v. Vaithialingam*² it was held that a trustee whose term of office had expired during the pendency of an action brought by him, is not entitled to continue the action. Maartensz J. said: "This objection was tried as a preliminary issue, and the 2nd and 3rd defendants appeal from the order of the District Judge in which he held that the plaintiffs are entitled to continue the action as new trustees have not been appointed, and the rights of the parties have to be determined as at the date of the action. This order cannot be supported. Even if the principle that the rights of the parties must be determined as at the date of the action is applicable, the trustees who have ceased to hold office cannot get a decree for declaration of title and ejection—*Elisahamy v. Punchi Banda*³. In the case of *Appusinno v. Balasuriya*⁴ it was laid down that the principle that a case must be decided as at the time of the institution of the suit, cannot be applied to the case of an action brought by a trustee who had ceased to hold office during the pendency of the action, and that *the moment he ceased to have that status, he could not continue the action to bring it to determination*. There is no provision in the Code under which a trustee who has ceased to hold office can continue the action".

Why was this case not cited during the argument? It is in point. I can only conclude that owing to the absence of adequate digests and books of reference, counsel are often unable to perform their duty of giving counsel and aid to the Bench. This is a situation which cannot be tolerated either by the Bar or the Bench.

The principle laid down in *Sabapathipillai v. Vaithilingam*² applies to this case. There is no provision in the Civil Procedure Code (*cf.* Chapter XXV) which would justify this respondent in continuing the proceeding under section 10 after she had lost her status as a wedded wife.

The use of the word "may" in section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance indicates that it was not the intention of the legislature to deprive a wife of the option of filing a regular action

¹ (1912) 15 N. L. R. 499.

³ (1911) 14 N. L. R. 113.

² (1938) 40 N. L. R. 107.

⁴ (1913) 16 N. L. R. 385.

to recover his or her separate property without having recourse to the remedy provided in section 10. The principle laid down by the Divisional Court in *Lamahamy v. Karunaratne*¹ that a civil action for maintenance will not lie and that the proper procedure is to proceed under the Maintenance Ordinance, does not apply to a case like this. The remedy provided by section 10 is an alternative remedy. The spouse may or may not elect to proceed under section 10.

I, therefore, set aside the order and decree appealed against and dismiss the respondent's application under section 10, but without prejudice to her right, if so advised, to proceed against the appellant by civil action. The fairest order to make in regard to costs is that each party should bear their own costs.

GUNASEKARA J.—I agree.

Order and decree set aside.
