

1935

*Present : Soertsz A.J.**SIVAPAKIAM et al v. NAWAMANI AMMAL.**50—C. R. Colombo, 4,044.*

*Husband and wife—Liability of husband for necessaries supplied to wife—Wife living separately—Husband's misconduct—Roman-Dutch law—Courts Ordinance, s. 39*

The rule of the Roman-Dutch law that the liability of the husband for necessaries supplied to the wife depends upon their having a common household does not apply where the wife has separated from the husband owing to the bad character of the latter.

**A** PPEAL from a judgment of the Commissioner of Requests, Colombo.

*Nadesan*, for second defendant, appellant.

*T. S. Fernando* (with him *H. N. G. Fernando*), for plaintiff, respondent.

*Cur. adv. vult.*

July 17, 1935. SOERTSZ A.J.—

This appeal was pressed before me by Mr. Nadesan, firstly on the law and secondly, with permission, on the facts. On the law, he maintained that the husband, his client, was not liable on the plaintiff's claim, because at the time the claim was created, his wife was, to the knowledge of the plaintiff, living apart from him. It was argued that the liability of the husband for necessaries supplied to the wife was dependent upon the husband and wife living together and having a common household. In *Janion v. Watson & Co.*<sup>1</sup> referred to in *1 Nathan p. 244*, it was held that where the wife had left her husband's house without his consent and there is no common domestic establishment, the husband is not liable for the wife's purchases of necessaries for herself. This decision, Nathan comments, is based on the rule laid down by Voet that where a wife is wrongfully away, her husband is not bound to supply her with aliment outside his house. The passage in Voet which Nathan is paraphrasing is "Interim durante absentia injusta, maritum ad alimenta uxori extra domum suam praestanda obstrictum non esse," Monet *Groenewegen . . . —Leeuwen Cens. For. Part 1. lib. i cap. 15. Num. 19.* "Rodenbruch de Jure Conjugum . . ." tit 2, parte, altera, cap. 1, num 4, p. 106, *diversum esset*,—"si autoritate publica separatio thori ac mensae impetrata esset et ita mulier extra viri domum haereat: tunc enim congrua uxori alimenta a viro subministranda essent, si viri ipsus mali mores isti separationi thori et mensae causam dedissent."

Now in this case the order made in Additional Police Court, Colombo, No. 15,159, was read in evidence. That was a maintenance case and the learned Commissioner says with reference to it "It is not denied that the first defendant had to leave her husband on account of his cruelty" and that an order of maintenance has since been made against him. The case therefore falls within the provision that says that if the separation from bed and board is due to the husband's bad ways "viri ipsius mali mores", the husband had to provide maintenance suitable to her station "Congrua uxori alimenta subministranda". In this case the "maintenance" of the wife cost Rs. 20 a month and it cannot be said that this is excessive or "non congrua". I, therefore, hold that the first point taken on appeal fails. As regards the second point, counsel for the appellant contended that the plaintiff came into Court on the footing that the first defendant had *borrowed* various sums aggregating Rs. 86.25, but that the evidence did not disclose a case of *borrowing* at all, but that it was a case in which the plaintiff had expended certain sums of money on behalf of the first defendant. It is said that the Commissioner has awarded the plaintiff Rs. 50 for money spent by her in connection with the funeral of the defendant's child, whereas

<sup>1</sup> 6 *Natal Law Reports.*



this sum was included in the Rs. 86.25 as money borrowed. If the issue had been definitely raised "whether the plaintiff had incurred this expenditure on account of the funeral, the second defendant appellant would have been able to show that he had spent for the funeral". There is technical merit in this contention, but I think it is the kind of contention contemplated in section 39 of the Courts Ordinance which says "no judgment, sentence, or order pronounced by any Court shall on appeal . . . . be reversed, altered, or amended on account of any error, defect, or irregularity which shall not have prejudiced the substantial rights of either party". In this case the plaintiff said in the course of her evidence "The second defendant did not come either for the birth or for the funeral of the child". This was not contradicted. In fact the second defendant gave no evidence and I do not think he can now successfully contend that he spent for the funeral. The sum allowed on this account is moderate.

I would, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

