

1975 Present : Tennekoon C.J., Ismail, J. and Gunasekera, J.

A. SHANMUGANATHAN, Appellant and NAMAGAL,
Respondent

S. C. 441/71, D.C. Jaffna 896/D.

Action for divorce—Malicious desertion by defendant (wife)—Permanent alimony—Settlement—Civil Procedure Code Sections 408, 218 (h), 596, 624.

Held, An order to pay permanent alimony by consent contained in the decree in a matrimonial action is referable to section 408 of the Civil Procedure Code and is enforceable as an order to pay money in terms of section 217A of the Civil Procedure Code. Accordingly the provisions of section 218(h) of the Civil Procedure Code are applicable to the enforcement of such an order, based as it is on an agreement under section 408 of the Civil Procedure Code.

Nadarasa Vs. Navamany—64 N.L.R. 232 not followed.

De Jonk Vs. De Jonk—72 N.L.R. 140 and

Louis Vs. Emmanuel—73 N.L.R. 42 distinguished.

A PPEAL from a judgment of the District Court of Jaffna.

P. Somatilakam for the Plaintiff-Appellant.

C. Thiagalingam with *C. Chellappah*, for the 1st defendant-respondent.

Cur. adv. vult.

March 31, 1975. GUNASEKERA, J.—

The Plaintiff-Appellant sued his wife the 1st Defendant-Respondent for divorce on the ground of malicious desertion by her and also her adultery with the 2nd Defendant ; he also asked for a declaration that he was not the father of the four children born to her. The wife denied the Plaintiff's allegations and asked for a judicial separation on the ground of his habitual cruelty.

At the trial by way of a settlement the Plaintiff withdrew the allegation of adultery and admitted paternity of the children, and the second Defendant was discharged from the case. The Plaintiff gave evidence of malicious desertion by the wife and further said :

“ I am prepared to pay permanent alimony at Rs. 90 to the 1st Defendant and Rs. 125 as maintenance for the four children as follows :

Anthumanathan Rs. 40.

Nirmalan Rs. 40

Arulnithi Rs. 22.50.

Vimalan Rs. 22.50.

I am also willing to allow the custody of the children to be given to the 1st Defendant ”.

Decree Nisi was thereafter entered for the dissolution of the marriage on the ground of malicious desertion by the Defendant.

The Decree also said :

“ And it is further ordered and decreed of consent that the Plaintiff do pay to the 1st Defendant alimony at the rate of Rs. 90 per month and maintenance as follows :

On 1.3.1965 before Decree Nisi was made absolute the Defendant filed an Application to court stating :

“ The Plaintiff has not (been) paid alimony and maintenance for the 1st Defendant’s children so far. The 1st Defendant now believes that the Plaintiff is not serious about his offer of alimony and maintenance to the 1st Defendant and that the 1st Defendant has no way of recovering the alimony, if the Plaintiff fails to pay the alimony as the Plaintiff’s salary cannot be seized as he in the service of the Government ”,

and she prayed “ that the Plaintiff be directed by Court in terms of Section 615 of the Civil Procedure Code to secure to the 1st Defendant the payment of alimony in such gross sum of money as the Court deems reasonable in the circumstances and as averred in the plaint, before the Decree is made absolute ”.

The Plaintiff opposed this application and even moved the Court to delete from the Decree the order to pay alimony and maintenance,

“ as the Decree was entered and obtained by the Plaintiff-Petitioner and no Decree of alimony would have been entered in favour of the 1st Defendant ”,

He relied on the decision in *Ebert vs. Ebert* (1939) 40 N. L. R. 388. The learned District Judge in his order of 9.11.65 held that the Plaintiff—

“cannot now resile from his agreement and he must pay the alimony as agreed upon by him”;

but he also held¹ that the wife was—

“not entitled to ask that a notarial agreement should be executed by the Plaintiff to secure the alimony because apart from consent, the Plaintiff having obtained judgment against her the 1st Defendant is not entitled to claim any benefits under Section 615 of the Civil Procedure Code”.

The Decree for divorce was accordingly made absolute. An appeal by the wife against this order to this Court was dismissed with costs.

Thereafter, six years later, the first Defendant obtained a writ to recover the sum of Rs. 6,940.50 as accumulated permanent alimony and maintenance and caused the Plaintiff's salary to be seized on 16.3.71.

The Plaintiff filed this application for a declaration that as he was “a public officer and a servant of the Government of Ceylon his salary and allowances are exempt from seizure”. He also stated in his application that the two elder children above referred to had since died and that an application for maintenance for the remaining two children in case, M.C., Kayts No. 3741 filed during the pendency of the earlier appeal was settled on 30.3.67 “on the footing that the 1st Defendant-Respondent will not claim alimony for herself, and that the Plaintiff-Petitioner agreed to pay Rs. 150 per month for the four children. The 1st Defendant-Respondent agreed to withdraw the appeal. Later the sum was enhanced to Rs. 170 on an application by the 1st Respondent.” He also averred that after the Decree was made absolute in this case he had married again and that now he has to maintain his present wife and two children of that marriage as well.

• At the inquiry into this application Plaintiff relied on the decision in *De Jonk vs. De Jonk* (1964) 72 NLR 140 whilst the first Respondent relied on the decision in *A. R. F. Louis vs. Agnes Emmanuel* (1970) 73 NLR 42 and the learned District Judge preferred to follow the latter decision, but as the Defendant had waited for six years to apply for a writ and as the Plaintiff was paying Rs. 170 per month maintenance for the two surviving children in the case, M. C., Kayts No. 3721, and as the Plaintiff had married again and was having two children by that marriage, he made order that only 1/3 of the consolidated salary of the Plaintiff should be available for seizure monthly.

The Plaintiff has appealed against this order. Mr. Somatilakam relied on Section 624 of the Civil Procedure Code, and submitted that however such a matrimonial action may differ from ordinary civil actions in certain respects, Decrees and Orders made under Chapter XLII of the Civil Procedure Code had to be enforced "in like manner as the Decrees and Orders of the Court made in the exercise of its original "Civil Jurisdiction". He also referred to the decision in *Postmaster-General, Bombay vs. Chimal*, A. I. R. (1941) Bombay, 389, and *Subramaniam vs. Satyandhan*, A. I. R. (1942) Madras, 391, in support of the submission that the exemption from seizure under Section 218 (h) is based on public policy, "as the salary (of his office) is given for the purposes of upholding its dignity and the performance of its duties"; and that this paramount interest of the State made no exception whatsoever even in regard to the claims of a public servant's wife and children.

Mr. Thiagalingam for the Respondent contended that Section 596 and 624 of the Civil Procedure Code made applicable to matrimonial actions under Chapter XLII, only the procedural provisions relating to ordinary civil actions and that Section 218 (h) contains substantive law and not procedure and that therefore that Section did not apply to enforcement of orders made under that Chapter. He submitted, therefore, that though alimony orders in matrimonial actions had to be recovered as orders to pay money within the meaning of head A of Section 217, Section 218 (h) will not be applicable to such recoveries.

Section 218 (h) is clearly not substantive law, because it is only a part of the proviso to Section 218, which is beyond question procedural law being the "method of procedure to be followed" for recovery of any order "to pay money" (Section 217). Besides though Section 596, relating only to trial procedure in Matrimonial actions does refer to the 'procedure thereafter set out with respect to ordinary civil actions', Section 624 relating to the enforcement of orders in such actions, says differently, that it should be done "in like manner as the decrees and orders of the Court made in the exercise of its original Civil jurisdiction are enforced".

However, this submission of Mr. Thiagalingam or even the reasoning in the case of *A. R. F. Louis vs. Agnes Emmanuel* need not be considered in the instant case, because the order sought to be enforced by seizure of the Plaintiff's salary though made in the course of a Matrimonial action, was not one made under Section 615 of the Code, and so, is not an Alimony order made under the provisions of Chapter XLII. The Plaintiff's liability arose in this case as a result of a settlement in a divorce

granted to the husband and for this reason, the Plaintiff has in fact, asked once again in his petition of Appeal that the order to pay alimony by consent be deleted from the Decree for divorce. This claim was not pursued at the argument but such an application was allowed by this Court in the case of Nadarasa vs. Navamany (1962) 64 NLR 232 which to my mind has been decided wrongly because the Court was not referred to the provisions of Section 408 of the Code, which is clearly made applicable to Matrimonial actions by Section 596 in so far as the provisions of that Section are not in conflict with anything contained in Chapter XLII of the Civil Procedure Code. In terms of Section 408 any "lawful agreement or compromise" must be embodied in the Decree in the case and is final between the parties; and accordingly, the order to pay alimony by consent contained in the decree in this case is properly there and is properly enforceable as an order to pay money in terms of Section 217A. It also follows that it cannot be argued that Section 218 (h) will not be applicable to the enforcement of this order based on an agreement under Section 408, because whatever be the nature of the action or whatever be the relationship of the parties, this liability arises in law only from the agreement.

For these reasons I, therefore, allow the appeal of the Plaintiff-Appellant and hold that the money agreed to be paid to the Respondent wife by the Plaintiff in this action cannot be recovered by seizure of the Plaintiff's salary on account of the bar contained in Section 218 (h). I accordingly set aside the Order of the learned District Judge dated 2.12.1971 and make order releasing the Plaintiff's salary from seizure in this case. The Plaintiff, however, will not be entitled to any costs in these proceedings.

TENNEKOON, C. J.

I agree.

ISMAL, J.

I agree.