1970 *Present:* H. N. G. Fernando, C.J., and Weeramantry, J.

RANEE WELLALA, Appellant, *and* D. R. WELLALA, Respondent

S. C. 236/68 (Inty.), with Application in Revision No. 710—D. C. Colombo, 6896/D

Action for divorce—Order for permanent alimony—Proper stage at which it should be made—Civil Procedure Code, s. 615.

The jurisdiction of the Court under section 615 of the Civil Procedure Code to make an order for permanent alimony becomes exercisable only at the stage when a divorce decree is being or has been made absolute (although, in practice, matters concerning the liability to pay alimony, and the nature and quantum of the payment, are investigated at an earlier stage). Accordingly, it is open to the wife to defer her application for permanent alimony to a stage subsequent to the entry of the decree absolute.

APPEAL, with application in revision, from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *S. D. Jayawardene* and *G. M. S. Samaraweera*, for the plaintiff-appellant.

C. Ranganathan, Q.C., with *A. A. M. Marleen*, for the defendant-respondent.

Cur. adv. vult.

September 30, 1970. H. N. G. FERNANDO, C.J.—

The plaintiff in this case sued her husband the defendant for a decree of divorce, for alimony *pendente lite* and for permanent alimony in a sum of Rs. 500 per month. A separate petition, asking for Rs. 500 as alimony *pendente lite* and for costs, was filed a few weeks after the plaint. An interlocutory order allowing the prayer in the petition was made on 11th October 1965 and served on the defendant. Thereafter the defendant filed objections to that order, denying that the plaintiff was entitled to claim alimony *pendente lite* or costs of her action. Nevertheless a consent motion in which the defendant agreed to pay Rs. 200 per month as alimony *pendente lite* was filed in Court, and the Court made order accordingly on 16th January 1967. The defendant having filed answer, the case was then fixed for trial.

When the case was taken up for trial on 19th May 1967, both parties were represented by experienced Counsel, and Advocate Vernon Wijetunge (appearing for the plaintiff) informed the Court that "there is no contest".

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The plaintiff then gave evidence concerning the marriage and the fact of malicious desertion by the defendant. She concluded her evidence by stating " I am asking for a divorce and permanent alimony at Rs. 200 per month ". She was not cross-examined. The Judge then ordered decree nisi for divorce to be entered, and the decree was made absolute on 25th August 1967.

Neither the decree nisi nor the decree absolute contained provision for the payment of permanent alimony. Nevertheless, it is common ground that the defendant did pay Rs. 200 per month for the months of September to December 1967, and that he sent a cheque for Rs. 200 for the month of February 1968. In the letter which accompanied the cheque, the defendant stated that the " March amount will follow in due course ". The plaintiff's affidavit, filed in the present applications in revision, states that these payments were made in pursuance of an agreement reached before the trial that the defendant would pay Rs. 200 per month, both *pendente lite* and as permanent alimony. The defendant's affidavit states that, on a request made by the plaintiff, he agreed to pay her Rs. 200 per month for a period of about 12 months, but denies that he paid or agreed to pay any money by way of permanent alimony.

The monthly payments then ceased, and the plaintiff at that stage appears to have realised that the Court had made no order for permanent alimony. The plaintiff thereupon moved the District Court to amend the decree in terms of s. 189 of the Civil Procedure Code. The ground actually relied on was that the Court had failed to record at the trial a statement of Counsel concerning the agreement of the parties as to permanent alimony, and that accordingly there had been an accidental slip or omission in entering the decree. This ground was in my opinion properly rejected by the District Judge. If the proper rule of procedure is that an order for permanent alimony must be made either in a decree nisi for divorce or contemporaneously with that decree, the circumstances of this case do not disclose that the omission to make such an order was due to any error or inadvertence on the part of the Court.

The relevant provision in s. 615 of the Civil Procedure Code is that " The Court may, on any decree absolute declaring a marriage to be dissolved make an order " for alimony. Hence the jurisdiction to make an order for permanent alimony becomes exercisable only at the stage when the Court determines that a decree for divorce is to be made absolute. It is no doubt an usual and convenient practice that matters concerning the liability to pay alimony, and the nature and quantum of the payment, are investigated at an earlier stage. This practice was approved in the case of *Karunanayake v. Karunanayake* [1]. which also

[1] *(1937) 39 N. L. R. 275.*

accepted as valid an actual order made at the invitation of parties before the stage of the decree absolute, fixing the amount of permanent alimony. Nevertheless the Court in that case placed on s. 615 the same construction as I do, that an order for permanent alimony should properly be made only when a divorce decree is made absolute.

The prescribed Form for a decree of divorce (Form 97) can contain adaptations from Form 95, which provides for the inclusion in the decree of an order for permanent alimony. This circumstance may lend some support to the construction that an order for permanent alimony cannot be made otherwise than in a decree absolute. But there is nothing in the Code itself to indicate that a claim for permanent alimony must necessarily be made in a plaint in a divorce action or at any stage prior to the entry of a decree absolute. As I have already emphasised, the jurisdiction of the Court under s. 615 to order the payment of permanent alimony depends on the fact that a divorce decree is being or has been made absolute. That being so, it is in my opinion open to the plaintiff-wife in a divorce action to defer her application for permanent alimony to a stage subsequent to the entry of the decree absolute. Indeed, the judgment in the *Karunanayake* case expressly states that (strictly speaking) the order for alimony should be made *after* the decree nisi is made absolute.

The statutory power of the Courts in England * to grant of alimony is expressed in much the same terms as the corresponding power in Ceylon : " *On any decree for divorce*, the Court may order maintenance ". In the case of *Sydney v. Sydney* [1] the House of Lords considered a case where a decree absolute included an order for maintenance. Referring to the propriety and effect of such a decree, Lord Westbury made the following observations :—

> " ..... if, as a matter of convenience and to save expense, one order only is drawn up, or one decree recorded, in which the Court, having first finally pronounced for the dissolution of the marriage, goes on to exercise the supplementary jurisdiction of ordering an allowance, still that second part of the decree, though for convenience it is all contained in one piece of parchment, is in reality the exercise of a different jurisdiction and of a different judicial power and consideration ; and the one jurisdiction and its exercise is wholly distinct from the other jurisdiction and the exercise thereof. It would be absurd, therefore, and we should be allowing ourselves to be caught by mere forms of expression, if we were to hold that that portion of the decree which relates to the maintenance is decision of the Court upon a petition, that is, a petition for the dissolution of a marriage. As I have already observed, the petition for the dissolution of the marriage must be finally decided first, before the right to exercise the auxiliary or supplementary discretionary power can by possibility arise. It is

[1] *(1867) 36 L. J. P. and M. 73.*

* Matrimonial Causes Act 1857, S. 32.
Matrimonial Causes Act of 1950, S.19 (1).

absurd, therefore, to confound the one thing with the other, and to ascribe to the discretionary order which follows upon the judgment the character of being an order pronounced upon a petition for the dissolution of the marriage. In fact, although it may not be so in terms, it is really an order pronounced upon an application to the discretionary power of the Court, which application can only be made after the other and more important jurisdiction has been exercised."

In fact in England there are rules of Court which provide for the filing of an application for maintenance, and it has been held that such an application may be made within a reasonable time after entry of decree absolute for divorce. (*Scott v. Scott*[1].) Considering that in the present case after decree absolute was entered in August 1967, the defendant continued to make payments of Rs. 200 a month until March 1968, it seems to me that her petition of September 1968 was filed within a reasonable time.

It is unfortunate that the plaintiff's advisers thought it necessary to invoke s. 189 of the Code, instead of relying upon the plaintiff's right to ask for an order for alimony after the divorce decree was made absolute. But justice requires us to enforce that right in the exercise of our powers in revision.

I have considered the question whether it is desirable to refer back to the District Court the question whether the plaintiff's prayer for Rs. 200 per month as permanent alimony should be granted. But certain relevant matters are already established. The defendant, in the motion filed prior to 16th January 1967, consented to pay Rs. 200 per month as alimony *pendente lite* and an order of Court was made on that basis ; that being so, the subsequent statement in the defendant's affidavit of 10th January 1970, that he had merely agreed to pay Rs. 200 per month " for about 12 months " conflicts with the motion filed on his behalf. Thereafter, when the case was taken up for trial, the defendant's Counsel acquiesced in the statement of plaintiff's Counsel that there was no contest, and refrained from cross-examining the plaintiff on her statement that she claimed Rs. 200 per month as permanent alimony. It is to me sufficiently clear that the defendant did not at that stage contest either the plaintiff's claim for alimony or the quantum of her claim. The fact that the defendant continued to pay Rs. 200 per month to the plaintiff even after entry of the decree absolute indicates his own acceptance of the course which his Counsel (I think quite properly and in accordance with instructions) took at the trial. When the defendant's Counsel refrained from cross-examining the plaintiff, after acquiescing in the statement of plaintiff's Counsel that there is no contest, it must be assumed that he admitted the defendant's liability to pay the alimony which the plaintiff claimed in her evidence.

[1] *(1921) L. R. Probate 118.*

In the exercise of the powers in revision of this Court, I order that with effect from 1st January 1970 the defendant do pay to the plaintiff permanent alimony at the rate of Rs. 200 per month, that is to say a sum of Rs. 1,800 in respect of the period January to September 1970, and Rs. 200 for each subsequent month. *Pro forma*, the plaintiff's appeal No. 236/68 Inty. is dismissed, but without prejudice to the order now made in the Application in Revision.

WEERAMANTRY, J.—I agree.

Appeal dismissed.

Application in revision allowed.