1956 *Present:* **Basnayake, C.J., and de Silva, J.**

MATHEW, Appellant, *and* MATHEW, Respondent

S. C. 280—D. C. Colombo, 2,990/D

Husband and wife—Decree of separation—Permanent alimony—Scope of ss. 614 and 615 of Civil Procedure Code—Distinction between the words " secure " and " pay ".

The Court, when granting a decree of separation in favour of a wife, ordered the husband to pay an annual sum of Rs. 20,400 in monthly instalments of Rs. 1,700. With a view to securing for the wife the payment of the annual sum of Rs. 20,400 the husband was ordered to hypothecate certain immovable property specified in the decree.

Held, (i) that the order for hypothecation of immovable property did not fall within the ambit of either sub-section 1 or sub-section 2 of section 615 of the Civil Procedure Code and could not therefore stand.

(ii) that the order for paying the annual sum of Rs. 20,400 in monthly instalments did not come within the ambit of sub-section 1 of Section 615 of the Civil Procedure Code but could be treated as an order falling within the ambit of sub-section 2.

Held further, that in deciding the amount of permanent alimony no fetter was imposed by section 615 of the Civil Procedure Code on the discretion of the Judge. Nor was the Judge bound by the amount awarded as alimony *pendente lite.*

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *John de Saram*, for defendant-appellant.

E. G. Wickremanayake, Q.C., with *Vernon Wijetunge*, for plaintiff-respondent.

Cur. adv. vult.

May 7, 1956. BASNAYAKE, C.J.—

The plaintiff, the wife of the defendant, has been granted a separation on the ground of malicious desertion. The Court has also ordered the defendant to pay an annual sum of Rs. 20,400 in monthly instalments of Rs. 1,700 and a sum of Rs. 750 as maintenance for the five children of the marriage. With a view to securing for the plaintiff the payment of the annual sum of Rs. 20,400 the defendant has been ordered to hypothecate certain immovable property specified in the decree.

Learned Counsel for the appellant did not question the part of the order granting the separation but he canvassed the order for the payment of an annual sum of Rs. 20,400 and the order directing the defendant to hypothecate his property.

It is contended on behalf of the appellant that the sum ordered as alimony *pendente lite* was Rs. 750 and that that sum was determined as a sum sufficient for the plaintiff's maintenance by the learned District Judge (who is not the Judge who made the order for separation), after considering all the circumstances of the appellant and the respondent. He did not complain against the order in respect of the children, but he submitted that the order for the payment by the defendant of such a large annual sum as Rs. 20,400 to the plaintiff as permanent alimony is unreasonable and should be reduced.

Learned Counsel also submitted that the order that the appellant should hypothecate his properties in a sum of Rs. 60,000, is not warranted by section 615 of the Civil Procedure Code.

For the decision of this appeal it is necessary that the true meaning and content of the provisions of section 615 should be ascertained. That section reads as follows :—

> " 615. (1) The Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of separation obtained by the wife, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable ; and for that purpose may cause a proper instrument to be executed by all necessary parties.
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> (2) In every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable :
>
> Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to

discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the court seems fit ".

Sub-section (1) enables the Court to *secure* to the wife a gross or annual sum of money for a term not exceeding her own life. It does not empower the Court to order the husband to pay direct to the wife a gross or annual sum.

The meaning of the word " secure " in a similar context has been the subject of decision in the case of *Medley v. Medley* [1]. In that case Jessel M. R. observed as follows :—

" The further point was, however, one of more difficulty, as to the *form* of the order by which the appellant was ordered in the alternative to pay to the petitioner the annual sum of £ 500 by monthly payments. Now, when we look at the 32nd section of the 20 & 21 Vict. c. 85, the word ' secure ' appears to be used in a particular way. It is contrasted with payment. The words are, ' that the Court may order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune, etc., it shall deem reasonable ' ; and then at the end of the section it provides that ' upon any petition for the dissolution of marriage the Court shall have the same power to make interim orders for payment of money by way of alimony or allowance to his wife as it would in a suit instituted for judicial separation '. Therefore I think that the intention of the legislature was that the gross or annual sum should not be ordered at once to be paid over to the wife but should be secured, and being secured should be paid to her from time to time, that would give a meaning to the word ' secure ' as contrasted with ' pay ' ".

In the later case of *Yates (Inspector of Taxes) v. Starkey* [2] Jenkins, L.J., when dealing with a similar provision in the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 10, sub-section 4 of the Matrimonial Causes Act, 1937, expresses the following opinion :—

" An order ' to secure ' seems to me to suggest a disposition or obligation of some sort made or entered into pursuant to the order, as opposed to a mere direction to pay contained in the order itself. This is borne out by the provision of reference to conveyancing counsel at the end of sub-section 3. It is also supported by the clear distinction drawn in section 190 between an order on a husband to secure a gross or annual sum to the wife for any term not exceeding her life under sub-section 1 and a direction on a husband to pay to the wife during the joint lives a monthly or weekly sum under sub-section 2 ".

Sub-section (2) authorises the Court, either in addition to or instead of an order under sub-section (1), to order the husband to pay to the wife such monthly or weekly sums, for her maintenance and support, as it

[1] *7 L. R. Probate 122 at 124.* [2] *(1951) L. R. Ch. Div. 465 at 473.*

thinks reasonable. It would appear from a comparison of the two sub-sections that an order under sub-section (1) can operate even after the husband's death in the event of his predeceasing the wife and can be made only where the husband has assets which can be secured. The claim of the wife in whose favour an order to secure has been made is enforceable even after the death of the husband against his estate.

An order under sub-section (2) can operate only during the joint lives of the husband and the wife. Any maintenance ordered under this sub-section is liable to cancellation, temporary suspension, or modification, or reduction if the husband becomes unable to make the payments. But an order under sub-section (1) is not liable to be varied.

The order for hypothecation of immovable property by the defendant does not fall within the ambit of either sub-section and cannot therefore stand. The order for paying the annual sum of Rs. 20,400 in monthly instalments does not come within the ambit of sub-section (1) but may be treated as an order falling within the ambit of sub-section (2). The payment is one that may properly be described as maintenance and not permanent alimony. Permanent alimony as opposed to alimony *pendente lite* is granted on dissolution of a marriage or grant of judicial separation. Section 614 limits the maximum amount that may be ordered as alimony *pendente lite* to one-fifth of the husband's average net income for the three years next preceding the date of the order while there is no such limit in the case of permanent alimony. In the early days the Ecclesiastical Courts of England observed the one-fifth rule in regard to alimony *pendente lite* and granted a sum in the neighbourhood of a third of the husband's income in the case of permanent alimony. Neither the English statutes nor our Code has imposed such a limitation in the case of permanent alimony. The Court has a discretion and is not bound by any hard and fast rule. There are instances in which the Courts in England have awarded as much as half. In the instant case the plaintiff was awarded alimony *pendente lite* in a sum of Rs. 750 per mensem if she was permitted to reside in the house belonging to the defendant No. 10 Frances Road, Wellawatte, and Rs. 1,000 per mensem if she was not permitted to do so. The learned District Judge who made the order granting a separation has considered all the matters which were before the Judge who ordered alimony *pendente lite* as well as the facts and circumstances disclosed by the evidence led at the trial. The section in no way fetters the discretion of the Judge in deciding the amount of permanent alimony, nor is he bound by the amount awarded as alimony *pendente lite*. On the material before me I am not prepared to interfere with the order made by the learned trial Judge as I am unable to hold that his order is unreasonable.

The order for hypothecation of property and that portion of the decree which relates to it is set aside.

I make no order as to costs of appeal.

DE SILVA, J.—I agree.

Order partly set aside.