1945 *Present:* **Soertsz A.C.J.**

BLANCHE ANLEY, Petitioner, *and* HERBERT BOIS, Respondent.

IN THE MATTER OF AN APPLICATION UNDER THE CEYLON DIVORCE JURISDICTION ORDER IN COUNCIL, 1936, AND THE CEYLON (NON-DOMICILED PARTIES) DIVORCE RULES, 1936.

Divorce—Application for modification of order for the custody of children—Respondent's departure from Ceylon after date of filing of the application—No bar—Access to children—Children's interests, paramount consideration—The Ceylon (Non-Domiciled Parties) Divorce Rules, 1936, rule 21.

An application, under rule 21 of the Ceylon (Non-Domiciled Parties) Divorce Rules, 1936, for the modification of an order for the custody of children can be considered by Court, although the person at whose instance the divorce proceedings had begun is absent beyond the seas, provided that at the time the application was filed in Court he (or she) was resident in Ceylon.

The fact that the applicant was the guilty party in the divorce case is not, *per se*, a good reason for refusing the application for access to the children. The paramount consideration is the interests of the children.

THIS was an application by the mother of two children for an order allowing her access to them subject to such terms and conditions as may either be agreed on by the parties or as may be fixed by the Court. The respondent was the father the marriage between whom and the petitioner had been dissolved on the ground of adultery on the part of the petitioner.

N. K. Choksy, for the petitioner.

E. F. N. Gratiaen, for the respondent.

October 26, 1945. SOERTSZ A.C.J.—

This is an application by the mother of a girl born on February 8, 1935, and of a boy born on September 20, 1937, for an order allowing her access to them subject to such terms and conditions in regard to times and places

[1] *23 N. L. R. 80.*

of meetings as may either be agreed on by the parties or as may be fixed by the Court. The respondent is the father. He and petitioner were married on March 10, 1934. That marriage was dissolved on April 9, 1940, on the ground of adultery on the part of the petitioner with her present husband whom she married on February 18, 1941. In the divorce proceedings which do not appear to have been contested, unqualified custody of the two children was given to the respondent, but, thereafter, on many occasions, the petitioner was allowed access to the children by the respondent and, on several occasions, he even sent them to stay for varying periods with her and her present husband, and also with the petitioner's parents. This state of things existed till about the end of 1944. On December 9, of that year, the respondent married his present wife who, herself, had been previously married and had been divorced. In March, 1945, the respondent wrote to the petitioner saying " Now that we have got our own families straightened out, I feel it is really most important that the children's minds should be straightened out as to what has happened, and that they should be made to realise that all this divorce business is really very wrong indeed, and not at all a usual thing. If we don't do something very definite pretty soon, and put a stop to all this intermingling of families they really will think it is quite usual. It is impossible, however, to keep their minds clear as to which is their own proper family and home when there are so many outside influences continually at work. Their whole outlook on life, if one could only picture it, must be a very puzzled affair and I feel that everything possible must be done to get it sorted out properly before it is too late. With letters and presents arriving from you however, letters and visits from your mother, and invitations to stay, you will see how difficult it is as they are continually being reminded of things to which they really no longer belong and with which they should neither be confused nor concerned. I feel it is absolutely essential therefore, that all this must be stopped, and that the break should be clear and complete, and that I must therefore ask you not to write or send them things any more or try and see them until such time as they are properly grown up and can judge matters for themselves ". (R1).

The petitioner appears to have endeavoured to persuade the respondent to reconsider this decision of his, but without success. She then made this application on June 19, 1945, and the respondent was served with notice of it on July 12, 1945. Before that date the respondent had made arrangements to go home to England on furlough with his present wife and his children and it was known to the petitioner that the children would be put to school there. Within a week or so of the respondent being served with notice, he sailed for home with his family. I have been informed by Counsel appearing for the petitioner that the purpose of this application is to enable the petitioner to have access to her children whenever she herself happens to be in England.

When the application came up for consideration, Counsel appearing on behalf of the respondent raised a preliminary objection and contended that the jurisdiction of this Court was ousted by reason of the absence of the respondent beyond the seas. He relied on rule 21 of the Statutory

Rules and Orders 1936, No. 742, dated July 1, 1936. That rule lays down that—

> " Proceedings relating to alimony, maintenance, custody of children, and to the payment, application or settlement of damages assessed by the Court shall be conducted in accordance with the provisions of the Civil Procedure Code, 1889:
>
> Provided that when a decree is made for the dissolution of a marriage the parties to which are domiciled in Scotland the Court shall not make an order for the securing of a gross or annual sum of money:
>
> Provided further that the Supreme Court of Ceylon shall not entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children, unless the person on whose petition the decree for the dissolution of the marriage was pronounced is at the time the application is made resident in Ceylon ".

Counsel pointed out that the proviso enacted that this Court " shall not entertain an application " of this kind " unless the person on whose petition the decree for dissolution . . . was pronounced (that is the respondent in this instance) *is at the time the application is made resident in Ceylon* ". I have italicised the concluding words because they were the words Counsel laid stress on in order to maintain that the meaning of the words " at the time the application is made ", on the correct interpretation of those words is not merely at the time the application is filed in Court, but also the time when the application comes to be considered. According to Counsel's contention it was more important that the respondent should be in the Island at the time the application came to be *entertained* than that he should have been here at the time it was *made*, that is to say, brought into Court. I am unable to read those words in that way. They seem to me to mean very clearly that the " entertainability " of the application is made dependent on the condition that at the time the application is submitted to the Court, for it to take action thereupon, the person at whose instance divorce proceedings had begun, should be resident in Ceylon. On the interpretation suggested by respondent's Counsel it would be open to one in the position of the respondent in this matter to thwart and even defeat, at will, one in the position of the present petitioner in regard to an application of this kind. The legislature could not have intended that, but I do not think there is any occasion here to speculate in regard to the " pros " and " cons " of intention for the words are quite clear.

Now, to deal with the merits of the application, I do not think the fact that the petitioner was the guilty party in the divorce case is a good reason, either in law or on the facts of this case, for refusing her application for access. So far as the law is concerned the days when the view in *Seddon v. Seddon & Doyle*[1] obtained have ceased to be. There is no longer any question of refusal of access in order to punish the guilty spouse, or in order to work " a salutary effect on the interests of public morality ", which appears to have been the somewhat optimistic view entertained in that case of the effect of holding the guilty party aloof from the children. The paramount consideration today is the interests

[1] *2 S. W. and Tr. 640.*

of the children. In regard to the reason given in the respondent's letter of March, 1945, for refusing the petitioner access, it was said in *Mozley Sark v. Mozley Stark & Hitchins* [1] " the fact that liberty of access, might unsettle the mind of the child ought not to be regarded as a *complete* bar to any order ". (Rayden p. 340-341). But undoubtedly, it is a matter seriously to be considered when the whole question of the children's best interests is being considered. It is important to bear in mind that the respondent allowed the petitioner access in a liberal measure till about the time of his second marriage. It was said that that was done *faute de mieux*, that now that he is married again he is in a position to exercise fully the custody the Court gave him. There is much force in that contention but, in my opinion, natural ties ought not to be completely disregarded and denied unless the interests of the children are likely to be substantially prejudiced.

Having regard to all the facts of this case, I am satisfied that the interests of the children will not suffer in the way the respondent is apprehensive they may, if the petitioner is given limited access to them. At any rate, the order for limited access can always be reconsidered if that apprehension proves substantial. By force of circumstances the access sought is already limited, for it would be only when the petitioner is on visits to England that she will be able to avail herself of the order for access. I would, therefore, make order that, subject to the conditions and rules obtaining in the schools at which these children are being educated, the petitioner be given access to them in England on two days a month during school terms and that she be allowed, if the children so desire, to have them stay with her in England during a third of the period of the vacations occurring during her stay in England. If the petitioner goes back home for good, or for a long time this question can, of course, if the parties desire it, be re-considered.

I should wish to say that I cannot help feeling confident that, in view of the social status of all the parties concerned in this matter, they will bear in mind that the interests of the children must always come first and that anything said to them calculated or likely to turn them against one party or the other would have an adverse effect on their upbringing and the formation of their characters.

I make no order for costs.

Application allowed.

[1] *1910 P. 190. C. A.*