

1940

Present : Keuneman and Nihill JJ.

JOSEPH *v.* JOSEPHApplication for *restitutio in integrum*.

D. C. Jaffna, 138.

Judicial separation (*a mensa et thoro*)—Decree entered of consent—Civil Procedure Code, s. 608.

A Court has no authority to enter a decree for separation *a mensa et thoro* based entirely on the consent of parties.

A PPLICATION for revision or *restitutio in integrum*.

N. Nadarajah (with him N. Kumarasingham), for the petitioner

S. J. V. Chelvanayagam, for the respondent.

Cur. adv. vult.

June 11, 1940. KEUNEMAN J.—

In this case the plaintiff brought an action against his wife, the defendant, asking for a separation *a mensa et thoro*. The matter came up for trial on February 14, 1940. The plaintiff alleged, first, cruelty, and

secondly, malicious desertion on the part of the defendant, and issues were framed upon that footing. At the trial the plaintiff actually got into the witness-box to give evidence, but before he had given any evidence relating either to cruelty or to malicious desertion it is recorded that the case was settled and that the defendant consents to a decree for separation and for the return of certain articles in the schedule to the plaintiff. Thereupon the Judge proceeded to enter decree for the plaintiff accordingly.

The objection is taken here that the learned District Judge had no power to enter a decree entirely based upon the consent of parties. Our attention has been called to section 608 of the Civil Procedure Code which lays down that the Court should enter decree on being satisfied on due trial of the truth of the statements made in the plaint, and that there is no legal ground why the application should not be granted. It is clear that there was no evidence whatsoever on which the Court could have decided as to the truth of the statements made in the plaint. The Court purported to act entirely upon the consent of parties. I think it is clear from the terms of this section that the Court had no authority to enter such a decree based entirely upon consent. If we examine the subsequent sections 609 and 610, we see that a decree entered by Court materially affects the wife's right with regard to property, with regard to contracts and with regard to the right to sue. This relates to a decree of separation entered by Court under section 608. I think accordingly that the Court should not enter such a decree.

The present application is for *restitutio in integrum* or in the alternative for revision. Counsel for the respondent argues that there was a right of appeal in this case. I am not at all satisfied that there was any such right of appeal. Even if it can be conceded that there might possibly be a right of appeal, I do not think it is any good ground for refusing the defendant the remedy which she claims. At the least it was extremely dubious as to whether there would be an appeal or not.

Under the circumstances I think we must allow the application and set aside the proceedings taken and the order made on February 14, 1940, and any subsequent proceedings taken thereafter. The case will be sent back to the Court for trial in due course. The petitioner is entitled to the costs of this application.

NIHILL J.—I agree.

Application allowed.

