

1948

Present: Keuneman and Jayetilleke JJ.

ASILIN NONA, Appellant, and PETER PERERA, Respondent.

65—D. C. (Inty.) Colombo, 655.

Divorce—Order of court to pay alimony pendente lite—Non-compliance with order—Power of court to stay proceedings—Civil Procedure Code, s. 839.

Non-compliance with an order of court in divorce proceedings to pay alimony *pendente lite* amounts to contempt of court. In such a case the court may in its discretion stay proceedings until the alimony due is paid.

A PPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *P. Malalgoda*), for the 1st defendant, appellant.—The plaintiff was ordered to pay Rs. 20 per mensem as alimony *pendente lite* to the 1st defendant. He has refused to comply

with the order although he is able to pay. The question for consideration is whether the District Court has power to stay proceedings until the alimony is paid. The District Judge has held that he has no such power under the Civil Procedure Code.

[JAYETILEKE J.—Is this not a case in which steps should have been taken under section 4 of the Civil Procedure Code?]

The inherent power of the court referred to in section 839 of the Civil Procedure Code can be invoked in a case like this—*Ramen Chettiar v. Vyraven Chettiar*¹; *Selvadurai v. Rajah et al*²; *Mohamed v. Annamalai Chettiar et al*³. It has been held in India that when an adjournment of a case is granted on condition of prepayment of costs the order should not be allowed to be flouted—*East India Railway Company v. Jit Mal Kalloo Mal*⁴. In spite of the absence of any provision in the Civil Procedure Code the rule of English practice that in a divorce case the husband may be ordered to pay into court his wife's expenses for contest has been adopted in Ceylon.—*Abeyagoonesekera v. Abeyagoonesekera*⁵; *Silva v. Silva*⁶. Alimony is even more important than the costs of suit; and the practice in England, India and South Africa of enforcing, whenever necessary, by stay of proceedings, the payment of all alimony due may likewise be adopted—*Leavis v. Leavis*⁷; *P. V. P. and T.*⁸; *Chappell v. Chappell*⁹; *Berry v. Berry*¹⁰; *Yaqub Masih v. Christina Masih*¹¹.

M. M. Kumarakulasingham for the plaintiff, respondent.—The enactment which governs procedure in matrimonial actions is section 596 of the Civil Procedure Code. There is no provision for stay of proceedings for non-payment of alimony. It cannot be said that the wife has no remedy in law for enforcing the payment of alimony. In the present case, the 1st defendant has already a writ in her hands. She can also seek relief under the provisions of the Maintenance Ordinance—*Fernando v. Amarasena*¹². Where a party has another remedy open a court will not act under section 839 of the Civil Procedure Code—*Paulusz v. Perera*¹³; Chitale and Rao's Commentary on the Indian Civil Procedure Code (2nd ed.) P.1036.

Cur. adv. vult.

February 23, 1945. KEUNEMAN J.—

The plaintiff brought this action for divorce against the 1st defendant on the ground of malicious desertion and adultery with the 2nd defendant. The 1st defendant denied the allegation made and counterclaimed for a divorce against the plaintiff on the ground of malicious desertion and adultery.

On March 24, 1943, the District Judge ordered plaintiff to pay the 1st defendant alimony *pendente lite* at the of Rs. 20 per mensem and also Rs. 125 as expenses of litigation.

¹ 1940 41 N. L. R. 371

² (1940) 41 N. L. R. 423.

³ (1932) 34 N. L. R. 321.

⁴ A. I. R. 1925 AU. 280.

⁵ (1909) 12 N. L. R. 95.

⁶ (1905) 8 N. L. R. 280.

⁷ L. R. 1921 p. 299.

⁸ (1910) 26 T. L. R. 607.

⁹ (1938) 4 A. E. R. 814.

¹⁰ Vol. 27 Empire Digest 443.

¹¹ A. I. R. 1941 AU. 93.

¹² (1943) 45 N. L. R. 25.

¹³ (1933) 34 N. L. R. 437.

Admittedly the plaintiff has paid the expenses of litigation but has failed to pay any of the alimony. At the time of this inquiry the 1st defendant had taken out writ, and subsequently a small part of the alimony due was recovered. On the trial date—April 4, 1944—application was made on the part of the 1st defendant that as the plaintiff had avoided payment of the alimony the court should stay the proceedings until the alimony due was paid.

The District Judge refused this application. He held that there was no provision in the Civil Procedure Code which enabled him to grant it, and that he had no authority to adopt the procedure and practice of the English Courts in this matter, and that he would be making law if he acceded to that argument. He held this to be the case even if the plaintiff was possessed of means and refused to pay or avoided paying the alimony ordered.

The 1st defendant appeals from this order.

Counsel for the appellant argues that the District Judge has failed to take into account the inherent power of the court, now set out in section 839 of the Civil Procedure Code but recognised even before that section came into being. Counsel contends that the application he made was "necessary for the ends of justice or to prevent abuse of the process of the court".

For example, in 1905 and 1909, long before section 839 was enacted, it was held that our courts could adopt the rule of English practice that in a divorce case the husband is as general rule liable to pay into court or give security for an amount sufficient to cover the wife's costs in connection with the case. This decision was arrived at in spite of the fact that our Civil Procedure Code was silent on the point; see *Silva v. Silva*¹ and *Abeygoonesekera v. Abeygoonesekera*². Since these cases were decided section 839 has been enacted reserving to the court the inherent power of the court "to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court".

Under the corresponding section of the Indian Code of Civil Procedure (section 151) it was held that when payment of costs is made a condition precedent of adjournment granted to the defendants it is open to the court to strike off the defence and proceed *ex parte* when the costs are not paid as directed; *A.I.R. (1925) Allahabad 280*. In this case Mukerjee J. said—

"Further section 151 of the Civil Procedure Code would also justify the Court in acting in the way it did act. To have allowed the defendant to flout the orders of the court would certainly have been an abuse of the process of the court, and would certainly not have been consistent with the ends of justice. I am prepared therefore to hold that if no other rule applied section 151 would enable the court to exercise its inherent power by enforcing its reasonable orders."

It is unnecessary to consider whether in view of our own decisions this dictum is applicable in Ceylon to its fullest extent. But in my opinion the Court would certainly in circumstances such as these, be entitled

¹ 8 N. L. R. 280.

² 12 N. L. R. 95.

to order a stay of proceedings until the costs have been paid. I may add, in view of the District Judge's comments on this matter, that if the matter be treated as a contempt we are not in fact increasing our punitive powers as regards contempt; for contempt may also operate as an abuse of the process of the court, and may therefore bring the party within the ambit of section 839.

I think it is also open to us to consider the English practice in this matter, not indeed for the purpose of importing English practice and procedure into Ceylon but for the purpose of considering the principles on which the English Courts act and of seeing whether those principles are reconcilable with section 839.

In the case of *Leavis v. Leavis*¹ it was held that orders of the Divorce Division for payment of costs and alimony, cannot, since the Debtors Act of 1869, be enforced by attachment, but non-compliance with such orders still constitutes contempt of court. The court may in its discretion refuse to hear a party to divorce proceedings so in contempt or to permit him to take further proceedings in the suit. In this connection Hall J. said.—

“Compliance with orders for the payment of the wife's costs and alimony *pendente lite* is regarded by the court as important to the administration of justice in order that the wife should be provided with the means to carry on the litigation, and should not be left destitute. I have come to the conclusion that it is a matter of discretion for the court to determine upon all the circumstances of the case whether the respondent so in contempt should be heard; and that it is a matter material to the exercise of that discretion to consider whether non-compliance with the orders is due to the fault or to the misfortune of the respondent.”

See also the case of *P. V. P. and T.*² where the non-compliance was with regard to an order for alimony—not in the suit stayed but in a separate suit, where the alimony was not granted in a particular suit but was given to the wife for her support generally. See also *Chappell v. Chappell*.

These English cases are interesting because they are based on the matter of contempt, and in my opinion the principles enunciated are applicable to Ceylon because contempt may be regarded as an abuse of the process of the court.

An attempt was made in this case to distinguish between the order for the prepayment of costs and the order for alimony *pendente lite*. I do not think there is any substance in the distinction. If it is a contempt to refuse to prepay costs, it will equally I think be a contempt to try to starve the wife into surrender, or to reduce her to such a state of destitution that she cannot efficiently carry on the litigation.

In this case the District Judge has assumed that the plaintiff being possessed of means has refused to pay or avoided paying the alimony.

¹ (1921) *Prob. Divn.* 299.

² (1933) 4 *A. E. R.* 314.

³ 26 *Times L. R.* 607.

He has not definitely held that this is the fact. The order appealed from is set aside with costs, and the case is remitted to the District Judge so that he may consider the facts and exercise his discretion in the matter. Either party may adduce any evidence he desires in this connection. All other costs will be in the discretion of the District Judge.

JAYETILEKE J.—I agree.

Appeal allowed.

