

1946

Present : Soertsz A.C.J.

MILLEN, Petitioner, and MILLEN, Respondent.

Divorce Suit No. 30.

Divorce—Application for temporary suspension of order for alimony—Residence in Ceylon of respondent necessary at time of such application—The Ceylon (Non-Domiciled Parties) Divorce Rules, 1936, rule 21.

Where a husband who had been divorced under the Indian and Colonial Divorce Jurisdiction Act, 1936, made application to have an order for alimony made in favour of the wife suspended temporarily as to a part of the sum—

Held, that the application could not, under rule 21 of the Ceylon (Non-Domiciled Parties) Divorce Rules, 1936, be entertained unless, at the time it was made, the wife was resident in Ceylon.

A PPLICATION to have an order for alimony partly suspended.

S. J. Kadirgamer, for the petitioner.

N. K. Choksy, for the respondent.

Cur. adv. vult.

¹ (1862) 31 *Beaven* 407, at p. 418.

² (1923) 2 *Ch. Div.* 136, at p. 151.

³ (1924) *A.O.* 196.

⁴ (1926) 28 *N. L. R.* 223.

1*—*J. N. A.* 63532 (8/46)

September 2, 1946. SOERTSZ A.C.J.—

This is an application by a husband to have an order for alimony made in favour of the wife "suspended temporarily as to a part of the sum till such time as he resumes his substantive appointment". The order was made on July 9, 1945, both parties having agreed thereto, and it directed the payment of £600 a year to the wife from May 1, 1945, a date nine days anterior to the entering of a *decree nisi* dissolving the marriage on a petition for divorce presented by the wife. The ground upon which this application by the husband is based is stated in the 6th paragraph of the husband's petition to be that he is about to leave the Island on furlough and that during the period of his leave he will receive on account of salary and allowances £1,125 as against the £2,665 he draws when he is actively in office.

The husband's petition is dated December 21, 1945, and at that date, the wife was absent from the Island, having left it on July 20, 1945.

When the application came before me for inquiry, Counsel appearing on behalf of the wife took the preliminary objection that the husband's application cannot be entertained by me because, he contended, it is in contravention of regulation 21. The material part of that regulation lays down that—

"the Supreme Court of Ceylon shall not entertain an application for the modification or discharge of an order for alimony unless the person on whose petition the decree for dissolution of the marriage was pronounced is at the time the application is made resident in Ceylon".

It is not disputed that the wife has been abroad since July 20, 1945, and for that reason this application by the husband must fail if it is, in reality, an application for modification of the order for alimony made in this case. But, Counsel for the husband submits that his client's application is not for a modification but for a temporary suspension of the order as to a part of the alimony and not one for a modification of that order. He invites attention to section 615 of the Civil Procedure Code which provides in its concluding sentence 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 said order wholly or in part, as to the Court seems fit", and he submits that

the omission of the words italicised by me and the subsequent words of section 615 of the Civil Procedure Code from rule 21 of the Ceylon (Non-Domiciled Parties) Divorce Rules, 1936, implies that it was not intended to debar a husband from making an application for suspension of the order in the absence from the Island of the wife who had been the party at whose instance the marriage was dissolved. The bar, he argued, was restricted to applications for discharge or modification.

It is difficult to imagine a temporary suspension such as is contemplated in section 615 of the Civil Procedure Code which would not amount to a modification. It seems to me that such a suspension is a species of

the class connoted by the generic term "modification." But be that as it may, the temporary suspension asked for in this case is clearly a modification of the order made for alimony for the husband asks that the order allowing £800 a year to the wife be converted into an order allowing her £300 for a certain period.

The reason for the provision in rule 21 appears to be to give effect to the important principle contained in the maxim *audi alteram partem*. It would be manifestly unfair to deprive wholly or in part a party so vitally concerned in an order of this kind when owing to her absence from the Island she would not have the fullest opportunity of putting her case before the Tribunal. It would be unsound in every way, in logic, in legal procedure, and in fair play to provide in a case of this kind for the wife's presence in the Island being necessary when a question of the modification however small of an order arises and to dispense with that requirement when the question is, for instance, of a suspension of the whole order possibly for a period of considerable duration.

In this view, no occasion arises for dealing with the application on its merits on the facts deposed to in the affidavits of the parties.

I refuse the application with costs.

Application refused.
