

1940

Present : Soertsz and Hearne JJ.

SWARIS *v.* PERERA.

169—D. C. Kalutara, 20,619.

Alimony—Action for separation—Order for payment of alimony secured by mortgage of property entered of consent—Application by husband to modify order—Civil Procedure Code, s. 615.

Section 615 of the Civil Procedure Code gives no right to a husband to apply for the modification of an order for the monthly payment of alimony when the order is accompanied by a direction that the payment should be secured by the hypothecation of property.

Held, further that such an order could not be made under the section apart from the consent of parties.

APPEAL from an order of the District Judge of Kalutara.

H. V. Perera, K.C. (with him *U. A. Jayasundere* and *A. C. Alles*), for defendant, appellant.

N. E. Weerasooria, K.C. (with him *A. C. Z. Wijeratne*), for plaintiff, respondent.

Cur. adv. vult.

August 30, 1940. HEARNE J.—

The plaintiff-respondent sued the defendant-appellant for separation *a mensa et thoro*, for alimony at Rs. 500 per mensem and for an order on the defendant to secure “the said sum of Rs. 500 per mensem by a proper instrument”.

The first point to be noted is that in the plaintiff’s prayer in regard to alimony she asked for an order which, in the absence of consent by the defendant thereto, it was beyond the competence of the Court to make.

Under section 615 of the Civil Procedure Code the Court may order that the husband should secure to the wife a gross or annual sum of money for any term not exceeding her own life . . . and for this purpose may cause a proper instrument to be executed by all necessary parties.

It may also order the husband to make a monthly or weekly payment to the wife, subject to the former’s right to make an application at a later stage to have the order discharged, modified or suspended.

But the Court has no jurisdiction to make an order against the husband for monthly or weekly payments coupled with an order requiring him to give security for such payments.

The parties arrived at a settlement. The defendant agreed to pay and the plaintiff agreed to accept a sum of Rs. 150 per mensem. The defendant also agreed to secure the monthly payments, and in the result, that portion of the decree which dealt with alimony gave effect to the agreement in the following terms:—"Defendant to pay Rs. 150 per mensem as alimony to the plaintiff for herself, to be secured by the hypothecation of his coconut estate at Ambepitiya and all his land at Katukurunda".

Subsequently the defendant applied to the Court to modify the order for the payment of alimony. His application was dismissed and he has now appealed.

In the course of his order the Judge referred to the fact that the words "until further orders", which usually appear in decrees passed by the Court, have been omitted from the decree entered in this case: that, as those words are intended to secure to the defendant the right to apply to the Court for a variation of its order in regard to alimony, their deliberate omission, following the terms of settlement, indicates that the defendant had agreed to waive whatever right he had under section 615 C. P. C.

Mr. Perera has, however, brought to our notice the case of *Smith v. Smith*¹, in which grave doubt was expressed whether the omission of such words of release as "liberty to apply" or "until further order", can be taken to mean that the parties had agreed to contract themselves out of their statutory rights.

It would have been necessary to consider the doubt to which Langton J. gave expression, if the defendant had a right under section 615 to apply to the Court for a variation of its order, and if the omission of the words "until further order" was the only circumstance which suggested he had bargained away such right.

But I am clearly of the opinion that the form of the order to which the defendant agreed left him no statutory right to reopen the matter.

Section 615 gives the husband the right to apply for the discharge, modification or suspension of an order for the monthly or weekly payment of alimony, but not when the order is accompanied by a direction that these monthly or weekly payments should be secured. Such an order could not have been made, apart from consent, and, in the circumstances of this case, the Court could not vary the order unless the plaintiff also agreed to this being done.

In the case of *Maidlow v. Maidlow*², it was held that, having regard to section 1 (2) of the Matrimonial Causes Act 1907—this provides for the payment by the husband to the wife of monthly or weekly sums "during their joint lives"—an order for the payment to the wife "during her life" could only be made by consent, and the order being so made could not be varied.

In the course of the argument on appeal the point was taken by Counsel for the respondent that as the decree was a consent decree under section 408 C. P. C. it could, in no circumstances, be impugned. I expressly

¹ 145 L. T. R. 23.

² (1914) Probate 245.

dissociate myself from this view. I do not think that a decree which gives effect to and embodies an agreement between parties is sacrosanct. It is true that no appeal lies. That is the significance of the word "final" in the section. But such a decree may be set aside on any ground which would invalidate an agreement, as for instance, fraud, misrepresentation or mistake. The adjustment or settlement must be "lawful". If it is not, the Court will not perpetuate it. I do not know if section 408 has been judicially interpreted by this Court. No authorities were cited and, in the absence of local authority, I would follow the general principle laid down in *Huddersfield Banking Co., Ltd. v. Lister*¹; and *Wilding v. Sanderson*². I find that in India too, *Fatmabai v. Sonbai*³, it was held that a consent decree could be impeached on the ground of fraud in a regular suit or by an application for review. In the present case, however, there was no suggestion of fraud, misrepresentation or mistake and, for the reasons which I have given, the appeal in my opinion fails and must be dismissed with costs.

There is a connected application in revision which seeks a modification by this Court of the decree entered in the lower Court. This is without merit and is also dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.

