Privy Council Appeal No. 95 *of* 1934

Dorothy Margaret Catherine Hulme-King - - - - - *Appellant*

v.

Henry Peter Christopher De Silva - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH FEBRUARY, 1936.

Present at the hearing:
LORD ATKIN.
LORD MAUGHAM.
SIR SIDNEY ROWLATT.
[*Delivered by* LORD MAUGHAM.]

This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated the 28th March, 1934, affirming a decree of the District Court of Colombo dated the 5th April, 1923. The action was one in which the respondent was the plaintiff and the appellant was the defendant. The respondent was the husband of the appellant until the decree absolute pronounced by the Supreme Court on the 18th May, 1926, in certain divorce proceedings brought at the instance of the respondent.

The action which led to the present appeal was commenced by the respondent by plaint dated 11th May, 1932, in which the respondent claimed from the appellant a sum of Rs.12,118 under and by virtue of an agreement No. 326 dated the 4th February, 1926, and a mortgage bond No. 329 dated the 18th February, 1926. Of the sum named Rs.11,500 were arrears of monthly payments due from the appellant to the respondent by virtue of the said instruments. The balance claimed was for interest. The circumstances under which the said instruments were entered into are not in dispute. The parties were married on the 10th May, 1915. On the 15th December, 1924, the respondent in an action in the District Court of Colombo No. 10899 obtained a decree nisi for divorce against his wife, the first defendant. By that decree the respondent further obtained under section 617 of the Civil Procedure Code of Ceylon a direction that a settlement be made out of the property of the appellant to secure to the respondent a monthly income of Rs.1,000. There was a second defendant, Mr. Lister Hulme-King, a

person with whom the appellant was alleged to have committed adultery, who was ordered to pay to the respondent Rs.10,000 as damages. From the said decree of the 15th December, 1924, all the parties appealed. The issue of adultery was, however, no longer contested on such appeal. On the 27th October, 1925, the Supreme Court by its judgment varied the decree of the District Court by reducing the damages payable by the second defendant to the sum of Rs.2,500 and by reducing the monthly income to be secured by the settlement to the respondent to the sum of Rs.400.

On the 30th November, 1925, the respondent, who was dissatisfied with the reduced monthly income secured to him, obtained from the Supreme Court conditional leave to appeal to His Majesty in Council against the last-mentioned judgment and final leave to appeal was granted on the 2nd February, 1926. Previously to that date, namely on the 6th November, 1925, the appellant applied by motion in the District Court of Colombo that the decree nisi of divorce dated 15th December, 1924, be made absolute, in accordance with sections 604 and 605 of the Civil Procedure Code. The respondent objected to this course on the footing of his proposed appeal to His Majesty in Council, and the District Judge on the 10th November, 1925, declined to make the decree absolute. The appellant filed a petition of appeal to the Supreme Court against that order. It was at this stage that the disputes between the appellant and the respondent were compromised by the agreement No. 326.

The agreement was made at Colombo on the 4th February, 1926, between the respondent and the appellant and it is notarially attested. It recites the marriage of the parties on the 10th May, 1915, the proceedings in divorce in the District Court of Colombo, and the order made thereon, the appeal to the Supreme Court, the order of the Supreme Court, the application by the present respondent for leave to appeal to His Majesty in Council, and that the respondent and the appellant had agreed to effect a compromise regarding the monthly allowance payable to the respondent and to settle all matters and disputes between them. By clause 1 the appellant agreed to pay to the respondent Rs.750 per month commencing on the 1st January, 1926, and to execute as security for such payment a primary mortgage of certain property belonging to the appellant. By clause 2 the appellant agreed to pay to the respondent Rs.6,000 in full settlement of the monthly allowance due to him up to the 31st December, 1925. By clause 3 the respondent agreed to pay to the appellant her taxed costs of appeal in the original action. By clause 4 he agreed to withdraw his appeal in another action between the parties. By clause 5 the respondent agreed to renounce his right to any moveable property of the appellant. By clause 6 he agreed to consent to the appeal of the appellant against the order of the District Court dated 10th November,

1925, being allowed, the parties bearing their own costs; and by clause 7 he agreed not to prosecute his appeal to His Majesty in Council against the judgment of the Supreme Court so far as it affected the appellant. Clause 8 gave the respondent the right in the event of default by the appellant in payment of the monthly payments to apply to the District Court for the appointment of a receiver.

On the 18th February, 1926, the mortgage bond No. 329 was executed by the attorney for the appellant in compliance with clause 1 of the agreement.

On the 18th May, 1926, the Supreme Court gave judgment in the appellant's appeal against the order of the District Court dated 10th November, 1925, refusing the decree absolute. The respondent by his counsel consented to the appeal being allowed, in other words, consented to the application by the appellant to have the decree made absolute. The Supreme Court dealt with the appeal to the Privy Council and stated that the question as to whether or not the marriage should be dissolved was no longer in issue. Garvin J. further observed as follows :—

> "That appeal cannot in any way affect the question of the dissolution of the marriage between the parties. The provisions relating to matrimonial actions seem to indicate that in the case of an action for a dissolution of marriage the order directing such marriage to be dissolved should be embodied in a decree nisi. At the expiration of three months in the absence of any objection, the Court is required to make the decree so entered absolute."

He concluded by saying that he saw no reason why the decree nisi should not be declared absolute. The decree absolute was made.

After the said judgment and order of the Supreme Court the appellant married Mr. Lister Hulme-King, the second defendant above referred to. She paid to the respondent, who had complied with all his obligations under the agreement, the monthly sums of Rs.750 up to December, 1930, and Rs.500 out of the allowance for the month of January, 1931; but she thereafter refused to make any payment to the respondent, and this action was accordingly commenced to recover the amount of such monthly payments as were in default, together with interest.

On the 5th April, 1933, the District Judge decided the various points which had been raised by the appellant in a sense favourable to the respondent, and granted him a decree for the relief he claimed. He also dismissed the claim of the appellant in reconvention, a claim by the appellant to recover sums already paid by her under the agreement No. 326. It may be stated here that counsel for the appellant did not dispute this part of the case, and their Lordships need not further refer to it. The appellant appealed to the Supreme Court, who on the 28th March, 1934, delivered their judgment. In that appeal the appellant relied on three contentions substantially those on which he

relied before their Lordships. The learned Judges, consisting of Garvin, Senior Puisne Judge, and Poyser J. unanimously decided against the contentions raised on behalf of the appellant and dismissed the appeal. It is from that decision that the appellant has appealed to His Majesty in Council.

Three points were taken by the appellant before their Lordships. First, it was said that the agreement No. 326 and the bond No. 329 executed in pursuance thereof were void as being contrary to public policy. Secondly, it was argued that the said agreement, having been entered into before the decree absolute and therefore whilst the relation of husband and wife still subsisted between the parties and without the sanction of the Court was unenforceable under the law of Ceylon. Thirdly, it was contended that the agreement was an " adjustment " of a decree within the meaning of section 349 of the Civil Procedure Code, and not having been certified to the Court whose duty it was to execute the decree could not be recognised by any Court and therefore could not be made the basis of an action.

The first point appears to be based on the suggestion that the agreement No. 326 amounted in substance to a bargain for the sale of the decree absolute, or, more accurately, amounted to an agreement by the husband for a pecuniary consideration not to oppose an application by the wife for an order that the decree nisi should be made absolute. If the suggestion were well founded in fact the point would no doubt call for careful consideration; but in the view of their Lordships it is not. A number of English authorities were referred to, but the law of Ceylon in regard to making a decree absolute rests on section 605 of the Civil Procedure Code and differs in an important respect from the English law and well settled practice. The application in England can only be made by the innocent party. In Ceylon the relevant section is in these terms:—

> " 605. Whenever a decree nisi has been made and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited, such decree shall on the expiration of such time be made absolute."

If the conditions have been complied with (i.e. if no cause has been shown and the time fixed has elapsed) the Court is bound to make the decree absolute, and it has been held that in Ceylon there is nothing either in the law or the practice to prevent the application being made by the innocent or by the guilty spouse. Their Lordships see no reason for differing from this view and indeed they were not invited to hold the contrary. The conclusion is inevitable that all that the innocent husband agreed to do as regards the decree absolute was to abandon an appeal to the Privy Council and not to oppose an application by the wife, the result of which was in the circumstances inevitable. The

language used by Chief Puisne Judge Garvin in delivering judgment aptly describes the position:—

> "It is not suggested that even at the date of this agreement there was any fact or circumstance which should in the interests of justice have been brought to the notice of the Court which had been suppressed or that the parties had agreed to suppress any such facts . . . . Now there is not the slightest suggestion of any collusion or even impropriety in regard to the institution of these proceedings or their conduct up to the time of decree nisi and until its confirmation by the Supreme Court. And moreover there is not even a suggestion that there was any collusion for any improper purpose at the time this agreement was entered into. In consenting not to oppose the appeal from the order made by District Court upon the defendant's application for a decree absolute the plaintiff was only doing indirectly that which he was entitled to do himself. . . . . Since the defendant had already herself taken steps to that end I can see no impropriety in the plaintiff consenting that such a decree should be entered."

Their Lordships have no difficulty in agreeing with the Supreme Court that there was nothing in the agreement or in the circumstances under which it was entered into which would justify the Court in holding that it had any improper object or purpose or that it was in any way contrary to public policy.

The second point may also be concisely dealt with. Their Lordships accept the view that prior to the decree absolute the relation of husband and wife existed between the appellant and the respondent. Whatever may have been the capacity of a wife in Ceylon prior to the year 1923 as regards a disposition, transfer or settlement of movable or immovable property in favour of her husband, their Lordships can see no reason for doubting that under section 5 of Ordinance 18 of 1923 a wife is under no disability as regards coverture in disposing of her movable or immovable property in favour of her husband. Section 5 of the Ordinance (borrowed as will be seen from section 1 of the Married Women's Property Act, 1882) is in these terms :—

> "(1) A married woman shall, in accordance with the provisions of this Ordinance, be capable of . . . . disposing by will or otherwise of any movable or immovable property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.
>
> "(2) A married woman shall be capable of entering into, and rendering herself liable in respect of and to the extent of her separate property on, any contract, and . . . . of being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*."

There is nothing in this section or in the Ordinance or in the Roman-Dutch law which justifies an exception from the generality of the provisions of transactions between spouses. It may be observed by way of illustration that dispositions between husband and wife were illegal at common law in England before the 1st January, 1883, but made legal by section 1 of that Act by words not distinguishable as regards their effect from section 5 of the Ordinance.

Their Lordships feel a difficulty in relying on the decision of the Board in *Soysa* v. *Soysa* 19 N.L.R. 146, since that case was based on section 13 of Ordinance No. 15 of 1876, which was repealed by section 4 of Ordinance 18 of 1923. The question, however, is now free from doubt under section 5 of that Ordinance and this point plainly fails.

The third point relied on by the appellant depends upon the true construction of section 349 of the Civil Procedure Code, a section which has occasioned considerable difficulty both in Ceylon and in India, where a provision very similar is in force. Section 349 is as follows :—

> " If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the Court whose duty it is to execute the decree. The judgment-debtor may also by petition inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court why such payment or adjustment should not be recorded as certified. And if after due service of such notice the decree-holder fails to appear on the day fixed, or having appeared to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly. No such payment or adjustment shall be recognised by any Court unless it has been certified as aforesaid."

The appellant contends that the agreement No. 326 was an adjustment of a decree of Court, that it was not certified to the Court whose duty it was to execute the decree, and that the agreement therefore cannot be recognised by any Court. A number of questions arise on this contention. Does the section apply to any decree except a money decree? Is the agreement " an adjustment " of the decree? Ought the final words " no such payment or adjustment shall be recognised by any Court unless it has been certified as aforesaid " to be construed as a rule of evidence excluding every evidence of the payment or adjustment of a decree unless it has been certified, or have they the effect of rendering the payment or adjustment wholly void and of no effect unless duly certified?

In the view of their Lordships the section relates only to decrees for the payment of money. It begins with the words, " If any money payable under a decree is paid out of Court ", and the next words are, " or the decree is otherwise adjusted ". " Otherwise " grammatically can only mean " otherwise than by payment out of Court ", and no doubt payment into Court does not require a certificate. If we add these words the section would run, " If any money payable under a decree is paid out of Court or the decree is adjusted otherwise than by payment into Court or out of Court, etc." The definite article before the word " decree " and words which seem to assume the possibility of the judgment-debtor paying money out of Court in satisfaction of the decree point strongly to the conclusion that the decree which may be adjusted is one for the payment of

money. The matter may be tested by applying the facts of the present case. The decree in question so far as " the decree-holder " and " the judgment-debtor " (terms which are defined in the Code) are concerned is for the execution by the latter of a settlement securing to the former a certain monthly sum. If we introduce these words into the first sentence we get the following, " If any money payable under a decree is paid out of Court or a decree for the execution of a settlement is adjusted otherwise than by payment out of Court, etc."—a strange sequence of ideas where the decree is not one for the payment of money, for one would not expect a decree for the execution of a deed, or indeed for any specific relief (e.g. the delivery up of a chattel or of land) to be " adjusted " in the ordinary course by a payment out of Court. Nor does the difficulty stop there. The consequence of the lack of a certificate is that " the payment or adjustment is not to be recognised by any Court ". Suppose the decree is for the execution of a deed to carry out defined objects and that the parties by mutual agreement have varied the substance of it in some respects. On the assumption that such a decree is within the section, and that what has been done is an adjustment, the Court is apparently precluded from recognising this adjustment, and it would seem as though the Court executing the decree would be bound to require a deed to be executed in exact conformity with the decree at the suit of the decree-holder whose default has occasioned the whole difficulty, and even though in the result he would or might become apparently entitled to some at least of his relief twice over.

It is not difficult to see good reasons for the section in relation to money decrees in a country where experience may have shown that after such a decree disputes constantly arose between the parties as to whether payment in satisfaction had in fact been made wholly or in part, so that the action had in effect to be tried over again. On the other hand, harsh as the rule may be, there is no practical difficulty in making a judgment debtor pay money twice over if he has neglected a certain precaution; but it seems very difficult to think that the legislature has contemplated a position in which the Court would require a man to deliver up movable or immovable property which he has already parted with to the judgment-creditor and would be precluded in the exercise of its great powers as regards execution from " recognising " the true facts.

Their Lordships are conscious that the latter of these difficulties might be avoided by attaching a somewhat artificial meaning to the words " adjustment " and " adjusted ". If the Court is at liberty to recognise anything done by the judgment-debtor *in conformity* with the decree (other than a payment), the effect of any partial compliance with it would have to be considered before executing the decree. This contention has considerable

force, but without expressing a final opinion on it their Lordships must observe that such a construction would not help the appellant, since the settlement executed in the present case is in substance a full compliance with the decree; the objection to the agreement and the mortgage bond is that they effect something more in favour of the decree-holder than the decree required.

Accepting then the view that the section relates only to decrees for the payment of money, a view sufficient for the purposes of the present appeal, their Lordships do not propose to deal with the other questions which arise on the construction of the section, merely observing that this is not to be taken as implying in any way an opinion adverse to that expressed in the Supreme Court in regard to them.

In order to preclude misconception their Lordships think it right to observe that in the above they have been dealing only with the section as it exists in the Civil Procedure Code of Ceylon and not with the corresponding section (section 258) of the Indian Civil Procedure Code, now embodied in Order 21 r. 2 of the First Schedule thereto. That rule has repeatedly been amended in some important respects and it is not now in the same form as the Ceylon section. It has been the main subject discussed in more than a hundred cases in the various Courts of India with results that are by no means uniform. Their Lordships content themselves with saying that the conclusion at which they have arrived, namely, that section 349 of the Ceylon Code relates only to decrees for the payment of money, agrees not only with the opinion expressed in the judgment under appeal, but also with the judgments of several of the Courts in India pronounced before the words " of any kind " were added to the words " where any money payable under a decree ".

In the result the appellant fails on all three of the points on which she relies. Their Lordships will humbly advise His Majesty to affirm the judgment appealed from and to dismiss this appeal with costs.

(34218—3A) Wt. 8034—41 90 3/36 P. St. G. 338

In the Privy Council

DOROTHY MARGARET CATHERINE HULME-KING

v.

HENRY PETER CHRISTOPHER DE SILVA

DELIVERED BY LORD MAUGHAM

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1936