

1968 Present : T. S. Fernando, J., and Alles, J.

N. J. CANEKERATNE, Appellant, and
R. M. D. CANEKERATNE, Respondent

S. C. 332/64—D. C. Colombo, 58606/M

Husband and wife—Matrimonial home—Right of deserted wife to remain in occupation of it—Prevention of Frauds Ordinance (Cap. 70), s. 2.

A wife who has been deserted by her husband is not liable to be ejected by her husband from the matrimonial home (unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her).

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *P. N. Wikramanayake* and *P. Edussuriya*, for the plaintiff-appellant.

Miss Maureen Seneviratne, with *Clarence Fernando*, for the defendant-respondent.

Cur. adv. vult.

February 17, 1968. T. S. FERNANDO, J.—

The appellant married the respondent in the year 1950 and they appear to have lived together till December 1954 when they separated, and the appellant left the matrimonial home which at the time he was leaving was the flat from which he seeks in these proceedings to eject the respondent. The parties appear to have moved into this flat about June 1953.

A divorce action in which both husband and wife were claiming a divorce from each other was filed by the appellant in March 1956, and that action was eventually decided in the District Court on 20th December 1962 with the entering of a decree *nisi* in favour of the respondent. Decree absolute could therefore not have been entered before 20th March 1963. The appellant filed an appeal against the judgment of the District Court granting decree *nisi*, an appeal that was finally disposed of only sometime in 1967.

The action we are concerned with on this appeal was instituted by the appellant on 20th February 1963, and in the plaint filed by him on that day he alleged that the respondent occupied the flat in question—(the appellant is the owner of the flat)—with his leave and licence. On 29th December 1962 he had given her notice to quit the flat and

prayed in the action for her ejection with damages at the rate of Rs. 600 per mensem which he alleged was the reasonable rent therefor. The learned trial judge has held that on the date of the notice to quit as well as on the date of the institution of this action the divorce action was pending — indeed it was the appellant himself who had presented the appeal against the judgment of the District Court — and therefore the parties were then still husband and wife in law, and that the action so filed was not maintainable. We are in complete agreement with that view of the learned judge, and indeed appellant's counsel was constrained to abandon an argument to the contrary he had begun to outline in this court.

Some argument was addressed to us as to whether a deserted wife has an irrevocable licence to remain in occupation of the matrimonial home or whether she is only a contractual licensee, and it was pointed out to us that certain English cases relied on by the respondent had recently been overruled by the House of Lords in *National Provincial Bank Ltd. v. Ainsworth*¹, but we need not enter here upon an examination of a deserted wife's right under the English law to occupation of the matrimonial home as against third parties. It is sufficient to say that under the Roman-Dutch law the husband, by reason of his duty of support, has to provide his wife with accommodation, food, clothing, medical attention, and whatever else she reasonably requires. Professor Hahlo in his treatise "The South African Law of Husband and Wife" — (2nd ed., 1963, at p. 101) — states: "The husband's duty to support his wife does not necessarily come to an end if the joint household breaks up. On the principle that no one can escape his legal obligations by his own wrongdoing, the husband's duty of support continues if the separation was due to his fault—he deserted his wife without just cause or drove her away by his misconduct."

Mr. Thiagalingam referred to a certain issue raised in the course of the trial relating to the effect of section 2 of the Prevention of Frauds Ordinance (Cap. 70) upon the wife's claim to remain in the flat, and contended that the upholding of her claim may involve a recognition of a new kind of land tenure in this Country. I do not think that the upholding of a deserted wife's right to remain in the matrimonial home unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her means establishing any such tenure. I need only refer to certain observations made by Lord Upjohn in the case to which I have referred above — see page 485 — as to the position of the wife in relation to her matrimonial home. "A wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains there because, as a result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully there as a wife, the situation is one *sui generis*. She may be described as a licensee if that word means no more than one who is lawfully present,

¹ (1965) 2 A. E. R. 472.

but it is objectionable for the description of anyone as a licensee at once conjures up the notion of a licensor, which her deserting husband most emphatically is not."

Certain other arguments were addressed to us bearing on the questions : (1) whether in an action for recovery of immovable property a claim to recover movables can be added and (2) whether on a decree granting a divorce or a separation the wife can be granted a right to receive alimony. These questions involve the interpretation of sections 35 and 615 respectively of the Civil Procedure Code. We do not propose on this appeal to examine these arguments as in regard to (1) the inclusion of the claim to recover movables was the act of the husband himself and in regard to (2) the question is one which should have been raised in the divorce case if it was ever intended seriously to pursue it.

For reasons briefly outlined above we have dismissed the appeal with costs.

ALLES, J.—I agree.

Appeal dismissed.
