

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and
Mr. Justice Middleton.

1907.
October 3.

DISSAN APPU v. BABAHAMI *et al.*

D.C., Matara, 3,856.

*Divorce—Connivance—Conduct conducing to adultery—Dismissal of action—
Damages—Civil Procedure Code, s. 601.*

Where an action for divorce brought by the husband is dismissed on the ground that the plaintiff has been guilty of connivance under section 601 of the Civil Procedure Code, the Court has no power to award the plaintiff damages against the co-respondent.

*Bernstein v. Bernstein*¹ followed.

A PPEAL from a judgment of the District Judge of Matara. The facts are fully set out in the judgment of the Chief Justice.

Sampayo, K.C. (with him *A. St. V. Jayewardene*), for the plaintiff, appellant.

H. J. C. Pereira (with him *Elliott*), for the second defendant, respondent.

Cur. adv. vult.

October 3, 1907. HUTCHINSON C.J.—

The plaintiff in this action asks that his marriage with the first defendant, who is his wife, may be dissolved because of her adultery with the second defendant, and that the second defendant may be ordered to pay him damages for having committed adultery with the first defendant.

He was married to the first defendant on August 21, 1896, before a registrar of marriages. After the marriage they lived together for a few months at Sultanagoda in the Matara District, and then the plaintiff went away to Batticaloa, leaving his wife with her mother. He says that there was no quarrel between them; that he went to Batticaloa to get work; and that when he went he gave back to her the dowry which he had received, viz., two head of cattle and Rs. 25, and that he gave her also a further sum of about Rs. 15. She says that they were always quarrelling, and that that was the reason he left her. He stayed at Batticaloa for some time, working, as he says, for one man for about a year at Rs. 15 a month, and for another man for five months; then he went to Negombo and worked there for six months; and in May, 1899, he returned to the village where his wife was living with her mother. He says that she refused to speak to him, and that there was a violent scene

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between them, and that her mother and the police officer interfered. A few days afterwards he and his wife executed a deed of separation, which is dated May 23, 1899; by this, after a recital that a number of reasons have occurred which make it impossible for them to live peaceably as husband and wife, they agree " hereafter to live separately apart from each other, acting according to each of our individual wishes," and that neither of them shall have hereafter " any right or control or power according to law " or any claim on the other's property; the wife acknowledges that she has received back her dowry; and they agree " not to go to law."

The wife had then already committed adultery with the second defendant. There is evidence, which the Judge believed, that she was about eight months advanced in pregnancy, and that she gave birth to a child, of which the second defendant was the father, about a month after the execution of the separation deed. The plaintiff says that he first heard of the adultery two weeks after he returned to the village, and that four days after the execution of the separation deed he heard that she was living at the second defendant's house—that she had gone there the previous night. He says that he saw her there from the road, and the second defendant near her. The Judge, however, thought that the fact of her pregnancy must have been patent to the plaintiff, and he had no doubt that the plaintiff learnt the state of affairs from the villagers directly he came back. I think that that is a reasonable conclusion to draw from the evidence.

After the execution of the separation deed the plaintiff sent in various petitions about this matter to the Governor and (as he says) to the Assistant Government Agent. The Judge finds, and I think rightly, that the first petition was sent on November 25, 1900. The present action was commenced on March 8, 1906.

The defendants admitted the adultery, but they alleged that the plaintiff connived at and was accessory to the adultery and condoned it; and the first defendant also alleged that previous to the adultery the plaintiff deserted and wilfully separated himself from her and neglected to maintain her, and also that he had been guilty of unreasonable delay in instituting this action.

The following issues, with others which are not now material, were settled:—

1. Did the plaintiff connive at the adultery?
2. Did he wilfully separate himself from his wife before the adultery and leave her without maintenance and support, and did that conduct induce to the adultery?
3. Damages.

The District Judge found that the plaintiff was not aware of the adultery until his return in May, 1899, but that after that date he was aware of it and connived at it. If that finding was right the

Court was bound by section 601 of the Civil Procedure Code to dismiss the plaint, and the Judge accordingly dismissed the claim against the first defendant. On the next issue the Judge found that the plaintiff deliberately left his wife and gave her back her dowry as they could not live happily together; that he sent her no maintenance; and that his leaving her without support conduced to the adultery. And the Judge awarded Rs. 50 damages to the plaintiff against the second defendant.

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In my opinion the findings of fact to which I have referred were justified by the evidence. I believe that when the plaintiff signed the deed of separation he knew what it was; he knew that his wife had been committing adultery with, and that she was then with child by, the second defendant; he knew that she was a poor woman, and that the adulterer was a man of some rank and substance; with that knowledge he agreed with her that they should thenceforth live apart, and that neither of them should have any claim against the other. He could not help knowing that the result of that agreement would probably be, as it was, that she would continue her adultery with the second defendant. He therefore connived at the adultery which took place after that agreement; and that is the adultery which is alleged in the plaint as constituting the ground upon which the dissolution of the marriage is prayed for.

I agree with the Judge that the plaintiff sent his wife no maintenance during his absence of upward of two years, and that he was guilty of wilful neglect, which conduced to the adultery.

There remains the question which the second defendant has duly raised, whether the Judge, being bound because of the plaintiff's connivance to dismiss the claim for divorce, had power to award damages against the second defendant. By section 598 the husband, when he presents a plaint in which the adultery of the wife is the cause of the action, must make the adulterer a co-defendant, and may include in the plaint a claim for damages against the co-defendant. And by section 601 if the Court finds that the plaintiff has, during the marriage, been conniving at the act or conduct which constitutes the ground upon which the dissolution of marriage is prayed for, "it shall dismiss the plaint." There is no reservation in favour of that part of the plaint which asks for damages. It appears to me that this means that the Court, having found that there was connivance, is bound to dismiss the whole plaint. This view is supported by the decision of the Court of Appeal in England in *Bernstein v. Bernstein*.¹ That was a decision on the English Act of 1857, which is largely the foundation of chapter XLII. of our Civil Procedure Code. Sections 27 and 31 of the Act deal with petitions for divorce where no damages are claimed; and section 30 enacts that if the petitioner has condoned the adultery the Court

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shall dismiss the petition. Section 33 allows the husband to claim damages against the adulterer in a petition for divorce, or in a petition for damages only, and enacts that all the enactments therein contained with reference to the decision of petitions shall, so far as may be necessary, apply to the decision of petitions for damages. The Court held that where the husband had condoned the adultery there was no power to award damages. On the other hand, in the earlier case of *Long v. Long*,¹ where the jury had found that the co-respondent had committed adultery with the respondent, but the Judge held that the charge against the wife (who appeared to be mentally weak) was not proved, Mr. Justice Butt dismissed the suit against the wife, and gave judgment against the co-respondent for the damages found by the jury. If that case is inconsistent with *Bernstein v. Bernstein*, of course the ruling in the latter case must prevail. That ruling is not a binding authority here, because the terms of the Act of 1857 are not in all respects identical with chapter XLII. of our Code; but it is satisfactory to me to find that it is consistent with what I take to be the clear language of section 601.

In my opinion, therefore, the plaintiff's appeal should be dismissed, so much of the judgment of the District Court as awards damages and costs against the second defendant should be set aside, and the plaintiff's action should be dismissed with costs as against the first defendant. I would make no order as to the costs of the second defendant in either Court.

MIDDLETON J.—I entirely agree.

Plaintiff's appeal dismissed.

Second defendant's appeal allowed.