1977 *Present*: **Rajaratnam, J., Sharvananda, J. and Wanasundera, J.**

M. D. I. WIJESINGHE, Petitioner *and* ASLIN NONA, Respondent.

S.C. 467/70 (F) — D.C. Kalutara 897

Matrimonial actions – Divorce – Res judicata – Civil Procedure Code Sections 33, 34 and 207 – Do estoppels bind the Divorce Court? – Civil Procedure Code Sections 600, 601 and 602 – Mandatory provisions.

Plaintiff filed action for dissolution of his marriage with the defendant, on the ground that defendant had since his separation in early 1965 committed adultery with persons unknown to the plaintiff.

Plaintiff called no oral evidence in support of his allegation of the defendant's adultery but marked in evidence the plaint, answer, replication, issues and answer to issues, judgment and decree in action No. D/666 of the same Court.

Defendant on the other hand denied the allegation of the plaintiff and stated that action No. D/666 was filed by the plaintiff for a dissolution of his marriage with the defendant on the ground only of malicious desertion on the part of the defendant and it was dismissed.

Plaintiff had in earlier action D/666 although he denied paternity of the child Sarath Wijesinghe omitted to make any charge of adultery but only pleaded malicious desertion. After trial, the action was dismissed but the Judge held that Sarath Wijesinghe could not be the child of the plaintiff.

The District Judge in the present case under appeal held that the dismissal of the plaintiff's action in D/666 did not operate to bar the plaintiff from maintaining the present action as adultery and malicious desertion gave rise to two separate causes of action which are different and distinct.

HELD:

(1) that this view is erroneous and untenable.

(2) that the cause of action in an action for divorce is the misconduct of the offending spouse. Adultery and malicious desertion are species of that misconduct and are grounds for divorce.

with regard to *res judicata*–

HELD:

(1) In terms of sections 33 and 34 of the Civil Procedure Code, the plaintiff is bound to include all the grounds of his causes of action that are available to him in one action. It is not open to him to split the grounds and institute different actions. A party who has failed in one action cannot afterwards set up the same claim in another action against the same opponent and support it on grounds which might have been put forward in the first action (see section 207).

The subject of complaint in the present action is the very same adultery which loomed in the earlier case. Plaintiff is estopped from raising such a ground of claim in the present proceeding.

(2) The finding in an earlier action on the issue of paternity of the child Sarath Wijesinghe is not *res judicata* between the parties and the defendant is not estopped from raising the issue again in this case. An adverse finding against the successful party cannot operate as *res judicata* in a subsequent action between the parties.

(3) The scope of the plea of estoppel has only a limited application in divorce jurisdiction.

A Petitioner in Divorce proceedings whose claim for relief is based on the commission of a matrimonial offence by the respondent cannot require the Court to decide the issue in his favour on the ground that the respondent is estopped from denying the charge by the finding in his favour in an earlier action.

Per Sharvananda, J. "It is because of the statutory obligation of a court in matrimonial proceedings to satisfy itself of the plaintiff's case that it has been said that estoppels do not bind the divorce court."

(4) The Trial Judge's finding, that the decision in the earlier case D/666 regarding the paternity of the child Sarath Wijesinghe was wrong, is upheld.

Appeal from a judgment of the District Court of Kalutara.

H. W. Jayewardene with *Gamini Dissanayake* and *Miss P. Seneviratne* for plaintiff-appellant.

L. W. Athulathmudali with *A. J. I. Tillakawardene* for defendant-respondent.

Cur. adv. vult.

May 18, 1977. SHARVANANDA, J. —

This is an appeal by the plaintiff-appellant from the judgment of the District Judge, Kalutara, dismissing his action for divorce.

The plaintiff filed this action for a dissolution of his marriage with the defendant on the ground that the latter had, since his separation in early 1965, committed adultery with persons unknown to the plaintiff.

The defendant filed answer denying the plaintiff's allegation and prayed for the dismissal of the action.

The plaintiff called no oral evidence in support of his allegation of the defendant's adultery, but, marked in evidence the plaint, answer, replication, issues and answer to issues, judgment and decree in action D/666 of the same Court (documents P1A to PG).

The plaintiff pleaded that the fourth child of the defendant, Sarath Wijesinghe, had been begotten in adultery by the defendant. The question of paternity of this child was put in issue in action D/666 and was answered in favour of the plaintiff; the Court held that the plaintiff was not the father of the child. It has been urged by the plaintiff that a finding of adultery on the part of the defendant was implicit in this finding in action D/666 and that this finding operated as *res judicata* against the defendant.

The defendant, on the other hand, denied the allegation of the plaintiff and stated that action D/666 was filed by the plaintiff for a dissolution of his marriage with the defendant on the ground only of malicious desertion on the part of the defendant and that, after trial, it was dismissed. She pleaded that the judgment and decree in the said case D/666 operated as *res judicata* between the parties not only on the issue of malicious desertion which was raised and decided, but also on the issue of adultery which might, and ought to have been raised, but was not raised deliberately or otherwise.

In action D/666, instituted on 3.10.66, the plaintiff sued the defendant for a divorce on the ground of constructive malicious desertion. By his amended plaint dated 28.2.67, the plaintiff stated that there were three children by the marriage; he claimed the custody of those three children. By her answer dated 16.3.67, the defendant denied the plaintiff's allegation of constructive malicious desertion and prayed that the plaintiff's action be dismissed. In her answer, she disclosed that in addition to the three children mentioned by the plaintiff, there was a fourth child called Sarath Wijesinghe born on 23.9.66 by the marriage with the plaintiff. By his replication dated 13.5.67, the

plaintiff stated that he had nothing to do with the defendant since he left in December, 1964, and denied the paternity of the child Sarath Wijesinghe. The plaintiff, however, omitted to make any charge of adultery against the defendant, and at the trial raised no issue of adultery, though that issue stemmed from the plaintiff's denial of his paternity of the fourth child and his prayer for divorce could have been grounded on the defendant's adultery. The case proceeded to trial on the main issue as to whether the defendant was guilty of constructive malicious desertion. The defendant, having in her answer prayed for the custody of her four children, including her last child, her Counsel raised the following issues:—

Issue 8: Is the plaintiff the father of the child Sarath Wijesinghe?

Issue 9: Is the defendant entitled to the custody of the four children?

After trial, the District Judge answered the issue relating to the defendant's malicious desertion in the negative and dismissed the plaintiff's action with half costs. In the course of his judgment, he stated that the child Sarath Wijesinghe could not be the child of the plaintiff and answered issue 8 in the negative. There was no appeal to the Supreme Court by either party from that judgment.

In this action, both parties have relied on the issue of *res judicata*. The plaintiff raised, *inter alia,* the following issues:—

Issue 3: Are the plaint, answer, replication, judgment and decree in the said case No. D/666 *res judicata* between the parties in this action as regards the legitimacy of the child Sarath Wijesinghe?

Issue 4: If so, did the defendant have adulterous relations with persons unknown to the plaintiff?

Issue 5: If so, is the plaintiff entitled to a decree for divorce on the ground of adultery and for the relief claimed in the plaint?

Counsel for the defendant, in turn, raised the following issues:—

Issue 6: Are the pleadings, answer, replication, judgment and decree in case No. D/666 *res judicata* between the parties to this action?

Issue 7: If so, can the plaintiff have and maintain this action?

The District Judge answered issue 6 in the negative and held that the dismissal of action D/666 did not preclude the plaintiff from bringing the present action to have his marriage dissolved on the ground of the very adultery which resulted in the conception of the fourth child Sarath Wijesinghe. It is to be noted that the plaintiff is not relying in this action on any act of adultery subsequent to the conception of the said child Sarath Wijesinghe. In the Trial Judge's view, "the cause of action relied upon by the plaintiff in this action as a ground for divorce, viz. adultery, is a distinct and separate cause of action from the ground relied upon by the plaintiff for the dissolution of his marriage in action D/666 where the plaintiff sought to have the marriage dissolved on the ground of malicious desertion on the part of the defendant." He concluded that the dismissal of the plaintiff's action in D/666 did not operate to bar the plaintiff from maintaining the present action as, in his view, adultery and malicious desertion gave rise to two separate causes of action which are different and distinct. This view is erroneous and not tenable in law.

The cause of action in an action for divorce is the misconduct of the offending spouse. Adultery and malicious desertion are species of that misconduct and are grounds for divorce. They are breaches of the fundamental obligations flowing from the marriage contract. By our law, spouses are bound to observe perfect conjugal fidelity towards each other and to live together affording to each other the marital privileges. Any voluntary breach of these duties constitutes the guilt on the part of the offending spouse which entitles the other spouse to a divorce *vinculo matrimonii*. Thus, the cause of action for divorce may be based on the ground of adultery or malicious desertion, or of both. These grounds represent two different facets of the misconduct which forms the foundation of that cause of action.

In terms of sections 33 and 34 of the Civil Procedure Code, the plaintiff is bound to include all the grounds of his cause of action, that are available to him, in one action; it is not open to him to split the grounds and institute different actions, even though each ground may by itself be sufficient to support the cause of action for divorce. If the ground of adultery exists, at the time of the action for divorce on the ground of malicious desertion, and the plaintiff is aware of its existence, the plaintiff is bound to rely on both grounds in his action, as both give rise to one and the same cause of action entitling the plaintiff to have the marriage dissolved. In action D/666, the plaintiff claimed a divorce on the ground of malicious desertion. In the present action, he claims the same relief but bases it on the ground of adultery. The allegations in the present plaint show that he could have framed the earlier action on both grounds. The adultery complained of in the

present action was the adultery that resulted in the conception of the fourth child who was disowned by the plaintiff in the earlier action. The defendant's objection is that, in the circumstances, the plaintiff should have based his claim for divorce in action D/666 on the ground of such adultery also and, having failed to do so, he is now barred from bringing a second action for divorce founded on the very same act of adultery.

Section 33 of the Civil Procedure Code provides that every regular action shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and so as to prevent further litigation concerning them. The object of this rule is that all matters in dispute between the parties relating to the same subject should, as far as possible, be disposed of in the same suit. This rule requires the plaintiff to state his whole case as to the particular legal relation or transaction on which the action is based. Section 34 further provides that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. This provision gives expression to the principle that the defendant should not be twice vexed for one and the same cause. It is directed against the evils of splitting of claims and of remedies. The object of this salutary rule is doubtless to prevent multiplicity of suits. The section, however, does not require that the plaintiff should unite in the same action all the causes of action he may have against the defendant. So, it does not operate as a bar when the subsequent suit is based on a cause of action different from that on which the earlier suit was based. The Explanation to section 207 is complementary to the provisions of sections 33 and 34 of the Code. It reads as follows:—

> "Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue in the action, becomes, on the passing of final decree in the action, a *res judicata* which cannot, afterwards, be made the subject of action for the same cause between the same parties."

The penalty for non-compliance with sections 33 and 34 is provided by the Explanation to section 207. A party who has failed in one action cannot afterwards set up the same claim in another action against the same opponent and support it on grounds which might have been put forward in the first action. A party is bound to bring forward the whole case in respect of the matter in litigation which is open to him upon the points for decision in that suit. The object of the Explanation is to compel the parties to rely upon all

the grounds of attack or defence which are open to them. The rule of *res judicata* enshrined in section 207 applies not only to points on which the Court was actually required by the parties to pronounce judgment, but also to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at that time. All matters in controversy between the parties relating to the subject-matter of the suit must be brought before a Court of Law once and for all and should not be left to be adjudicated over and over again. Thus, if the plaintiff has several grounds on which he can make his claim, he should put forward all the grounds on which he can make his claim; he will be barred from bringing a second suit based on any ground which was open to him but omitted by him in the former action. "The rule of *res judicata* is not confined to issues which the Court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them." — per Somerville, L. J. in *Greenhalgh v. Mallard.*[1] The *locus classicus* of this principle of *res judicata* is the judgment of Wigram, V.C. in *Henderson v. Henderson* [2] where he says:

> "Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

This statement of the law has been cited with approval by the Privy Council in *Hoystead v. Commissioner of Taxation*[3] and in *Yat Tung Investment Ltd., v. Dao Heng Bank Ltd.*[4]

In his replication filed in action D/666, the plaintiff denied paternity of the fourth child Sarath Wijesinghe. This denial necessarily involved the assertion that the child was conceived in adultery. Though there was the specific issue as to whether the plaintiff was the father of this child, the plaintiff, however,

[1] (1947) 2 All E.R. 255 at 257.
[2] (1843) 3 Hare 114.
[3] (1926) A.C. 155.
[4] (1957) A.C. 581.

omitted, through his negligence or inadvertence, to raise the issue of the defendant's adultery. The subject of complaint in the present action is the very same adultery which loomed in the earlier case. That adultery very properly belonged to the subject-matter of the earlier litigation. The plaintiff, exercising reasonable diligence, might, and ought to have brought it forward in the earlier action. On the principles of *res judicata* enunciated above, the plaintiff is estopped from raising such a ground of claim in the present proceeding. The decision in the earlier case, though it contains no determination to that effect, is deemed to carry with it an adverse decision on the issue of adultery, just as much as if it had been expressly raised by the plaintiff and expressly decided against him. Issues 6 and 7 should thus have been decided against the plaintiff and in the defendant's favour.

As regards the plaintiff's plea of *res judicata*, Counsel for the plaintiff-appellant contended that paternity of the last child was put in issue in the earlier action and since it was held that the plaintiff was not the father of that child, the defendant is bound by that finding and is estopped, by *res judicata*, from reagitating that issue of paternity in this action. Counsel submitted that the defendant should have appealed against that finding, but having failed to do so, she is estopped from questioning the correctness of that finding. According to him, on that finding the defendant's adultery is established and the plaintiff is entitled, in this action, to a decree for divorce.

It is to be borne in mind that in spite of that finding, the plaintiff's action D/666 was dismissed. Since the ultimate judgment was thus in the defendant's favour, the defendant could not have appealed from the judgment, for, ultimately, no adverse decision had been given against her. A party has a right of appeal only against the judgment or decree in an action, but not against the reasons for that decision. Since the judgment and decree in that action directed the dismissal of the plaintiff's action, there was nothing of which the defendant could have complained in the judgment and decree and hence had nothing against which she could have appealed. (See *Lake v. Lake*).[5] A party would not be bound by a ruling from which he could not appeal. As stated by Lord Denning in *Penn-Texas Corporation v. Murat Anstalt*.[6]

> "A previous judgment between the same parties is only conclusive on matters which were essential and necessary to the decision. It is not conclusive on other matters which came incidentally into consideration in the course of reasoning. One of the tests in asking whether a matter was necessary to a decision or only incidental to it is to ask: could the party

[5](1955) 2 All E.R. 538.

[6](1964) 2 All E.R. 594 at 597.

have appealed from it? If he could have appealed and did not, he is bound by it. (See *Badarbee v. Habeeb Marikkar Noordeen*)[7] — per Lord Mac Naghten. If he could not have appealed from it (because it did not affect the order made), then it is only an incidental matter not essential to the decision and he is not bound. (See *Concha v. Concha*)[8] — per Lord Herschell."

The finding in the earlier action on the issue of paternity of the last child Sarath Wijesinghe is not therefore *res judicata* between the parties and the defendant is not estopped. As that finding was not necessary to the ultimate decision of the Court, it is not deemed a part of the decision in that case or involved therein. (See also *Zaneek v. Ahamed*).[9] The decree dismissing the plaintiff's action was based not upon the finding adverse to the defendant, but in spite of it. An adverse finding against the successful party cannot operate as *res judicata* in a subsequent action between the parties. It has been stated that "any issue decided by a Court in favour of the plaintiff whose suit is ultimately dismissed on another ground cannot operate as *res judicata* as against the defendant in a subsequent action. A finding cannot be conclusive against a party if the decree was not based upon it, but was made in spite of it." — *Paratnath Rameswar*[10] followed in *Roweena Umma v. Rahuma Umma*.[11]

In the present proceeding, the plaintiff relied only on the issue of *res judicata* in support of his allegation of the defendant's adultery. He marked the pleadings, issues, answer to issues, and judgment and decree in action D/666 and did not lead any other evidence to substantiate his allegation. In doing so, he has misconceived the scope of the plea of estoppel in matrimonial proceedings. The doctrine has only a limited application in divorce jurisdiction. The provisions of sections 600, 601 and 602 of the Civil Procedure Code define the jurisdiction of the Court to grant a divorce. These provisions are mandatory and provide that **"the Court shall satisfy itself"** that the plaintiff's case is proved before it pronounces a decree for divorce. The relief is made dependent on the Court being satisfied, on the evidence, that the petitioner's case has been proved as a fact and not merely proved *inter partes*. A petitioner in a divorce action cannot obtain relief simply because the defendant is estopped from denying the charges; for, in terms of the aforesaid sections, the Court has a statutory duty to inquire into the truth of the plaintiff's allegation and be satisfied that a matrimonial offence has

[7] (1909) A.C 615 at 625
[8] (1886) 11 A.C. 541 at 225.
[9] 80 C.L.W. 109.
[10] (1938) A.I.R. (Allahab) 491.
[11] (1946) 41 N.L.R. 522 at 524

been committed notwithstanding any estoppel binding the parties. The earlier judgment relied upon by the petitioner is therefore not conclusive of the offence charged. Where there is a statutory direction, it cannot be circumvented by a previous judgment between the parties. The ordinary rules of estoppel per *rem judicatum* thus apply to matrimonial actions subject to the qualification that it is the statutory duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the plaintiff and the defendant, and no doctrine of *res judicata* can abrogate that duty. As was stated by Lord Merriman in *Hudson v. Hudson*.[12]

> "The doctrine of estoppel will not operate so as to abrogate the statutory duty of the Court to inquire into the truth of a petition which is properly brought before it."

Hence, a petitioner in divorce proceedings whose claim for relief is based on the commission of a matrimonial offence by the respondent cannot require the Court to decide the issue in his favour on the ground that the respondent is estopped from denying the charge by the finding in his favour in an earlier action. The Court is not bound to be satisfied of the commission of the offence because the respondent is estopped as against the petitioner from denying it. Hence, the production of the issues, answer to the issues and judgment in action D/666 P(d), P(e) and P(f) is not, as a matter of law, sufficient to obligate the Court to treat as proved that the defendant had been guilty of adultery.

A distinction has however to be drawn between estoppel as against a party charged with an offence and estoppel as against a party putting forward a charge as dissolvent of the marriage. It is one thing to say that the defendant is not estopped from denying the charges made by the plaintiff, i.e. that the plaintiff in this case cannot obtain relief simply because the defendant is estopped from denying the charges. In that case, the public interest, no doubt, does intervene to see that relief is not improperly obtained by the plaintiff merely through some technical rule. But it is quite another thing to say that the plaintiff, who is the party bringing the charges, is entitled to persist in repeating the allegations which have already been decided against him, or have already been deemed to have been determined against him in previous proceedings and to do this is merely for the purpose of obtaining relief for himself. In such circumstances, no interest of the public is infringed by saying that the plaintiff is estopped per *rem judicatum* from repeating the allegations that have previously been made or deemed the subject of judicial determination. In such a case, the doctrine of estoppel applies with full force. (See (1953) 2 A.E.R. 939). This distinction is found in the imperative language of the provisions of the Civil Procedure Code which require the

[12] (1948) 1 All E.R. 773 at 775.

Court to be satisfied with the proof of the allegations of the petitioner before matrimonial relief is granted. Lord Merriman, in *Hudson v. Hudson*, referred to the distinction between a judgment dismissing the cause of complaint and a judgment finding that the cause of complaint is proved.

It is because of the statutory obligation of a Court in matrimonial proceedings to satisfy itself of the truth of the plaintiff's case that it has been said that estoppel does not bind the divorce Court. This topic is developed in the judgment of Denning, L.J. in *Thompson v. Thompson*[13] as follows:

"The question in this case is whether those ordinary principles (of estoppel by *res judicata*) do apply to the Divorce Division: The answer is, I think, that they do apply, but subject to the important qualification that it is the statutory duty of the Divorce Court to inquire into the truth of a petition and of any countercharge which is properly before it, and no doctrine of estoppel by *res judicata* can abrogate the duty of the Court. The situation has been neatly summarised by saying that in the Divorce Court "estoppel binds the parties but does not bind the Court;" but this is perhaps a little too abbreviated. The full proposition is that once the issue of a matrimonial offence has been litigated between the parties and decided by a competent Court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties): but the Divorce Court has the right, and indeed the duty, in a proper case to reopen the issue, or to allow either party to reopen it, despite the objection of the other party (that is what is meant by saying that estoppels do not bind the Court). Whether the Divorce Court should reopen the issue depends on the circumstances. If the Court is satisfied that there has already been a full and proper inquiry in the previous litigation, it will often hold that it is not necessary to hold another inquiry all over again. But, if the Court is not so satisfied, it has a right and a duty to inquire into it afresh. If the Court does decide to reopen the matter, then there is no longer any estoppel on either party. Each can go into the matter afresh."

The precise dispute between the parties in the present action, i.e. whether the marriage should be dissolved on the ground of the defendant's adultery, was not adjudicated on in the earlier suit D/666. It is only by a process of inference that it can be said that there was a confrontation on that question. In the circumstances, the Court is not absolved from its statutory duty to satisfy itself that the matrimonial offence of adultery has been committed before matrimonial relief can be granted to the plaintiff. This Court must be satisfied, on the evidence placed before it, that the defendant is guilty of the matrimonial offence complained of. A divorce Court deals with the status of

[13] ((1957) 1 All E.R. 161) at 165.

parties and it is of fundamental importance that its jurisdiction should be exercised in strict conformity with statutory requirements which rest upon principles of public policy.

In support of his case, the plaintiff relied only on the issue of *res judicata*. Even if that issue had been answered in the plaintiff's favour, such answer will be insufficient to entitle him to matrimonial relief and hence his action fails. The defendant has however led evidence and satisfied the Court that the finding in the earlier case regarding paternity of the fourth child was a wrong finding. According to her, the plaintiff lived with her till 2nd May, 1966. On the evidence placed by the defendant, the Court was satisfied that she has not committed adultery and that the plaintiff is the father of the child Sarath Wijesinghe born on 23.9.66. The Trial Judge has accepted her evidence and we see no reason to disturb that finding.

For the reasons given above, we affirm the conclusion of the Trial Judge and dismiss the appeal with costs.

RAJARATNAM, J. — I agree.

WANASUNDERA, J. — I agree.

Appeal dismissed.