

1940

Present : Soertsz and Hearne JJ.

BLOK v. BLOK

61 & 62—D. C. Colombo, 208.

Divorce—Allegation of adultery against co-respondent unproved—Decree based on adultery with unknown person—Suspicion against co-respondent—Costs.

Where in an action for divorce the only adultery put in issue is the adultery alleged between the two defendants, it is not open to the Judge, on finding that the allegation has not been established, to base his decree on adultery with a person unknown without an allegation made to that effect and an issue raised upon it.

Where the co-respondent's conduct is such as to lead to a reasonable suspicion that he had been guilty of adultery, the Court will refuse to allow him his costs.

A PPEAL from a judgment of the District Judge of Colombo.

E. B. Wikremanayake (with him *A. H. C. de Silva*), for first defendant-appellant in 61 and for first defendant-respondent in 62.

R. L. Pereira, K.C. (with him *C. Thiagalingam* and *N. Nadarasa*), for plaintiff-respondent in case No. 61 and for plaintiff-appellant in case No. 62.

N. Nadarajah (with him *A. S. Ponnambalam* and *Kandasamy*), for second defendant, respondent.

Cur. adv. vult.

October 4, 1940. SOERTSZ J.—

There are two appeals before us. In appeal No. 61 the first defendant appeals from the decree *nisi* entered by the District Judge dissolving the marriage between her and the plaintiff on the grounds (a) of malicious desertion; (b) of adultery. Counsel for the appellant did not seriously contest the correctness of the decree in so far as it is based on malicious desertion. In view of the evidence in the case, it would, in my opinion, have been futile for him to do that. But his complaint that once the learned Judge found that the adultery alleged between the two defendants had not been established, adultery ceased to be a ground upon which to base the decree, seems to me to be well founded. That was the only adultery put in issue between the parties, and it was not open to the Judge to find adultery with an unknown man without an allegation made to that effect and an issue raised upon it.

I would, therefore, vary the decree by deleting the words "and adultery" after the words "malicious desertion" in paragraph 2 of the decree, but when I do that I must not be understood as dissenting in any manner at all from the learned Judge's finding that the child Anton Samuel Blok is not a child of the plaintiff. It was necessary for the learned Judge to pronounce upon that question in order to answer the issue "who is entitled to the custody of the children, the plaintiff or the first defendant?" Subject to the variation I have made the appeal is dismissed without costs.

Appeal No. 62 is an appeal by the plaintiff praying for a reversal of the finding of the trial Judge that adultery between the defendants on the dates alleged has not been established. This appeal too was not pressed, quite properly. On the evidence it is impossible to say that adultery has been established. The most that can be said is that there is a cloud of suspicion surrounding the relations between the two defendants.

I would, therefore, dismiss this appeal too without costs.

In regard to the costs of the second defendant too I make no order for costs in appeal, for, in my view, he has by his conduct brought the suit on himself—see *Robinson v. Robinson & Gamble*¹.

HEARNE J.—I agree.

Appeal dismissed.

