Garvin and Lyall Grant JJ.

SENEVIRATNE *v.* PANISHAMY *et al.*

280—D. C. Galle, 22,893.

Divorce—Adultery of wife—Husband himself guilty of adultery—Discretion of Court—Civil Procedure Code, s. 602.

Where a plaintiff, who institutes proceedings for divorce from his wife, four and a half years after the adultery complained of, is himself found to have lived in adultery for four years up to the institution of the action and also during its pendency,—

Held, that the Court is justified in refusing to grant the plaintiff a divorce.

Per GARVIN J.—He who seeks to be released from the matrimonial tie must himself be free from matrimonial offence. This rule may only be relaxed in exceptional cases and where the relief prayed for may be granted without prejudice to the interests of public morality.

APPEAL from a judgment of the District Judge of Galle. The facts appear from the judgment of Garvin J.

Hayley, K.C. (with *Ranawake*), for plaintiff, appellant.

T. Weeraratne (with *Zoysa*), for first defendant, respondent.

H. V. Perera (with *Rajapakse*), for second defendant, respondent.

August 29, 1927. GARVIN J.—

This is an appeal from a decree refusing to grant a divorce *a vinculo matrimonii*. The action was by a husband on the alleged ground of his wife's adultery. He endeavoured to establish specific acts of adultery in April, 1921, between his father and the defendant his wife. To this the crucial issue in the case the District Judge has given a somewhat halting answer. He says it is "probable" and it would seem from his judgment that he thought it a case of strong suspicion but not proved "to the hilt." It has also been found by the Judge that the plaintiff committed adultery prior to the alleged adultery by the wife, and it is admitted that from some date in 1921 and continuously thereafter up to the present time the plaintiff lived and is living in adultery with one Elo Nona.

In appeal the case was treated by learned counsel for the appellant as one in which though the adultery of the wife had been found or at least established the learned District Judge had refused a divorce to the plaintiff on the ground of his own adultery.

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It has been clearly established that the plaintiff has been actually living with Elo Nona from the middle of 1921 at the latest. This is the position in which the case on this point is left by the evidence of the plaintiff and his witnesses. The defendant, however, says that the plaintiff's association with Elo Nona commenced seven years before the date on which she gave her evidence. She was then confronted with her evidence in a proceeding under the Maintenance Ordinance in which speaking on July 20, 1925, she said "He left me four years ago." Her explanation that her husband finally abandoned her two years after he commenced to associate with Elo Nona is a possible one and has been accepted by the Judge.

But there is in addition the evidence of the plaintiff's daughter that her father used to visit a woman for six or seven years and "for the last four years he stayed there altogether." There is therefore ample evidence to support the Judge's finding that the plaintiff's misconduct preceded the alleged misconduct of his wife. If it be necessary in law to establish the prior misconduct of the plaintiff as a justification for refusing to grant him a divorce upon the ground of his wife's adultery, I should hold that the Judge was right in his finding upon the evidence that such prior misconduct has been proved.

In a case where a plaintiff, who institutes proceedings for a divorce from his wife four and a half years after the adultery complained of, is compelled to admit that for at least four of those years, up to the institution of the action, and during its pendency he has lived and is continuing to live in adultery a Court would be justified in refusing him the relief he claims.

Section 602 of the Civil Procedure Code vests in the Court a discretion in the following terms:—

> "Provided that the Court shall not be bound to pronounce such decree if it finds that the plaintiff has, during the marriage, been guilty of adultery, or if the plaintiff has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such plaint, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery."

On the one hand, the plaintiff being himself guilty of adultery is not entitled to a divorce; on the other, the Court is not bound on that ground alone to refuse him relief. The discretion must be exercised judicially; that is to say, it must not be capricious but must be governed by principle and rule.

It is urged that a divorce should not be refused to a plaintiff on the ground of his adultery unless such misconduct conduced to the adultery of his spouse nor where the adultery of his spouse with the co-respondent caused or conduced to the adultery of the plaintiff. These are circumstances to which a Court is clearly entitled to give due weight, but I am unable to assent to the proposal to confine the matters to which the Court should have regard within these limits.

The principles by which a Court should be guided should, I think, be those set out in the judgment of McCardie J. in the case of *Hines v. Hines.*[1] That learned Judge, after reviewing the leading cases as to the exercise of the discretion vested by section 31 of the Matrimonial Causes Act, 1857, proceeds as follows :—

> "The Court has undoubtedly increased its willingness to grant relief under section 31. But the principle, in my view, still remains that exceptional circumstances only will lead the Court to overlook the matrimonial default of a petitioner . . . . It is based on the general and cogent requirements of public morality, and the resultant duty of the Court to vindicate a high standard of matrimonial obligation.
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> "The enforcement of this duty will create a standard which all may know and find it well to follow. If the rule be enfeebled by an unduly sensitive regard to the hardship of particular cases, then the spouse who has been guilty of matrimonial offences would stand upon a footing dangerously akin to that of a petitioner who is free from conjugal stain. It is better that occasional hardship should exist than that the permanent and supreme requirement of matrimonial morality should be relaxed."

The learned Judge refused to exercise his discretion in favour of the petitioner in a case in which the facts were as follows:—

> "The parties were married in February, 1907. There was one child of the marriage. In January, 1908, the petitioner was out of work, and unable to support his wife. She left him and went to live with her mother. Soon afterwards she met the co-respondent and committed adultery with him. Then she went to live with him and at the date of the hearing they had lived together for nine years as man and wife and had had three illegitimate children, and they were still living together.
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> "For five years after his wife left him the petitioner was guilty of no moral lapse. He then met an unmarried girl and committed adultery with her and ever since connection

[1] *(1918) L. R. Probate Div. 364.*

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had habitually taken place between them up to and after the presentation of the petition. The petitioner was anxious to marry the girl with whom he was living, and the respondent and co-respondent were happily together and only waiting for the pronouncement of a decree absolute to be legally married."

If the conduct of the parties, their rights and their interests were to be the only considerations which should determine the question whether the discretion vested in the Court should be exercised in favour of the petitioner, this was a case in which a divorce should certainly have been allowed. But the interests of public morality were regarded as the paramount consideration and the petition was dismissed.

He who seeks to be released from the matrimonial tie must himself be free from matrimonial offence. This rule may only be relaxed in exceptional cases and where the relief prayed for may be granted without prejudice to the interests of public morality.

Assuming that the adultery of the wife has been established, the discretion exercised by the District Judge in refusing the petition is, in my opinion, strictly in accordance with these principles. It is unnecessary therefore to consider whether or not the adultery of the wife can fairly be said to be proved by the evidence on record.

The appeal is dismissed with costs.

LYALL GRANT J.—

This is an appeal from a judgment of the District Court of Galle, refusing a petition for a dissolution of marriage brought by a husband against his wife on the ground of adultery.

On the question of whether the defendant committed adultery with the co-defendant the learned District Judge has not expressed an opinion, but he has dismissed the plaintiff's claim on the ground that he has been guilty of laches, in other words, I presume, of unreasonable delay in presenting the plaint.

A discretion to refuse a petition of divorce on this ground is vested in the Court by section 602 of the Civil Procedure Code.

In appeal counsel's argument was directed principally to the question of the discretion of the Court. The other question in this action, namely, whether the wife was guilty of the adultery complained of, was not fully argued.

The English case of *Hines v. Hines* [1] was cited to us. That case shows that in circumstances similar to those of the present case, the English courts will refuse such a petition.

[1] *(1918) L. R. Probate Div. 364.*

I think it is somewhat unsafe to proceed upon the analogy of English law even although the wording of section 602 of the Civil Procedure Code follows closely the wording of section 31 of the Matrimonial Causes Act of 1867.

The common law governing divorce here is the Roman-Dutch law which is in important respects different from the English law, and the manner in which the Court will exercise its discretion ought, I think, to depend on the principles of the Roman-Dutch law. Those principles were not cited to us in any detail, and a cursory perusal of the institutional writers does not throw light upon the question whether the Court will decree a divorce where both parties are guilty of adultery or other misconduct.

The fullest exposition which I have been able to find of the modern developments of this branch of the Roman-Dutch law are contained in *Nathan's Common Law of South Africa, Vol. I.*

In South Africa it appears that where both parties are guilty of adultery, the Court will not ordinarily decree a divorce, but that on the other hand, desertion by the husband is no defence on the part of the wife in a suit for a divorce on account of adultery.

I do not see my way to expressing any view as to the general principles which should guide our Courts in the exercise of the discretion vested in them by section 602, but I agree with my brother that the circumstances of this case are such as to entitle the learned District Judge to exercise the discretion which he has exercised.

It seems to me that the evidence shows that the plaintiff has been guilty of almost all the acts and neglects which are set out in the proviso to section 602 as acts and neglects entitling the Court to refuse divorce.

I agree that the appeal should be dismissed.

Appeal dismissed.