

Sediris Singho

v.

Somawathy

**COURT OF APPEAL.**

WIMALARATNE, P. AND ATUKORALE, J.

C. A. (S.C.) 35/73 (F) ; D.C. GAMPAHA, 15846/D.

DECEMBER 6, 1978.

*Civil Procedure Code, as amended by Law No. 20 of 1977, section 602—Action for divorce—Findings of desertion and adultery in favour of plaintiff—Plaintiff himself living in adultery—Dismissal of action on this ground—Effect of amending Law No. 20 of 1977—Plaintiff entitled to decree in his favour.*

**Held**

That inasmuch as the former proviso to section 602 of Civil Procedure Code has been repealed by the amending Law No. 20 of 1977, the fact that a plaintiff has during the subsistence of the marriage been guilty of adultery will not be a bar to his obtaining a decree for divorce where there are findings in his favour of malicious desertion and adultery on the part of the wife.

H. W. Jayewardene, Q.C., with Laxman Perera, for the plaintiff-appellant.

No appearance for the defendants-respondents.

December 6, 1978.

**WIMALARATNE, P.**

The learned District Judge has answered issues 1 and 2 in favour of the plaintiff, as he had held that the 1st defendant was guilty of malicious desertion and adultery with the 2nd defendant. There was ample evidence for the Judge to have come to these findings. But, he has dismissed the plaintiff's action for a divorce on the ground that he himself had been living in adultery. Issues 10 and 11 relate to adultery on the part of the plaintiff, and they were raised at a later stage of the trial. The Judge has held against the plaintiff on issues 10 and 11 and has dismissed the plaintiff's action for a divorce. Mr. Jayewardene has referred us to section 602 of the new Civil Procedure Code which has left out the proviso contained in the former Code. The fact that the plaintiff has during the marriage been guilty of adultery, will not be a bar to his obtaining a divorce, if issues 1 and 2 have been answered in his favour.

We, accordingly, set aside the judgment and decree and order that Decree nisi be entered dissolving the marriage between the plaintiff and the 1st defendant on the grounds of malicious desertion and adultery on the part of the 1st defendant. There is a boy Gamini Jayatillake, 14 years of age living with the 1st defendant. As the 1st defendant is living in adultery, we are of the view that the custody of this boy should be handed over to the plaintiff-appellant, the father. The plaintiff-appellant will also be entitled to damages, as claimed, against the 2nd defendant, and to the cost of this appeal as well as the costs of the trial against both defendants.

**ATUKORALE, J.**—I agree.

*Appeal allowed.*

