

1911.

Present: Lascelles C.J. and Middleton J.APPUHAMY *v.* MENIKHAMY *et al.*

325—D. C. Chilaw, 4,326.

Action for divorce on the ground of adultery of wife—Husband himself guilty of adultery—Discretion of Court to dismiss action—Discretion as to costs—Civil Procedure Code, ss. 211 and 602.

An action by a husband for divorce on the ground of adultery of his wife was dismissed as the husband himself was guilty of adultery.

For a Court to exercise its discretion under section 602 of the Civil Procedure Code in favour of the adulterous husband, it is not enough that the adultery of the petitioner was more or less pardonable or capable of excuse, but the Court must find, as a fact, that the misconduct of the petitioner was caused directly by the matrimonial offences of the respondent.

Section 211 of the Civil Procedure Code gives a discretionary power to the Court with regard to costs in all actions, including matrimonial actions.

THE facts appears in the judgment.

Sampayo, K.C., for appellant.

H. A. Jayewardene, for the first defendant, respondent.

Tambimuttu, for the second defendant, respondent.

November 9, 1911. LASCELLES C.J.—

This is an appeal from a judgment of the District Judge of Chilaw dismissing the action. The claim was for a dissolution of marriage on account of the adultery of the wife. The ground on which the action was dismissed was that the plaintiff himself had been proved to have been guilty of adultery. Now, the ground on which we are invited to set aside the judgment of the District Judge is that the circumstances of the present case are such that the Court ought to have exercised its discretion under section 602 of the Civil Procedure Code in favour of the adulterous husband. The rule which is applicable in such cases is well settled by the English authorities. It is not enough that the adultery of the petitioner was more or less pardonable or capable of excuse, but the Court must find, as a fact, that the misconduct of the petitioner was caused directly by the matrimonial offences of the respondent before it will exercise its discretion in favour of the petitioner. I am citing from the head-note in *Wyke v. Wyke*¹, where all the authorities on the subject are collected and discussed. Here it cannot for a moment be contended that the offence of the wife in any way conduced to the misconduct

¹ (1904) *Probate* 149.

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of the plaintiff. The plaintiff turned his wife out of doors for an apparently trivial reason within a few months of the marriage, and within eight months or a year of the marriage he was the defendant in a maintenance case, which he settled on payment of Rs. 25. It is clear that it was the conduct of the plaintiff that conduced to the misconduct of the defendant, rather than the misconduct of the defendant that conduced to that of the plaintiff. Following the principles that have been adopted in the English cases, I find no reason to interfere with the decision of the District Judge.

Next we come to the question of the costs, and it was said that we ought to follow the English rule, that the respondent in all cases ought to pay the costs of the wife. It is true that the English rule has been followed in the case of *Abeyagoonesekera v. Abeyagoonesekera*,¹ and also in *Silva v. Silva*,² but I think that there can be no doubt but that the Court, in matrimonial cases, has the same discretion which it has in all other cases under chapter XXI. of the Civil Procedure Code; for this is a chapter of the Code applicable generally to all proceedings. Now, the order of the District Judge was that each party should bear his own costs. He has not, as he ought to have done, stated the grounds for his order, but I think they are not far to seek. The conduct of the first defendant has been such as to disentitle her to any indulgence. She obtained a maintenance order against her husband for the maintenance of the child which (the Judge has found, and there is no appeal against his finding) was not the child of her husband but of the man with whom she afterwards lived. She has also denied the adultery, and put the husband to the costs of proving it. In the circumstances, I think the order of the District Judge that each side should pay their own costs is a fair and equitable one.

As regards the costs of the second respondent, I think he is to a considerable extent in the same position as the first respondent, and I do not think that he is entitled to any greater indulgence. I would not interfere with the order of the District Judge as regards the costs of the action. In the result the appeal is dismissed with costs.

MIDDLETON J.—

I agree with all that has fallen from my Lord, and only wish to add a few words to the effect that I think that section 211 of the Code applies and gives discretionary power to the Court with regard to costs in all actions in the Courts of Ceylon, including matrimonial actions, and the rules and practice in the English Courts which have been applied are no doubt very applicable in some cases, but they must be applied, as some rules and principles are, according to the discretion of the Court.

*Appeal dismissed.*¹ (1909) 12 N. L. R. 95.² (1905) 8 N. L. R. 280.