

Jan. 25, 1911

Present : Hutchinson C.J. and Middleton J.

PINHAMY v. BABYNONA *et al.*

358—D. C. Nuwara Eliya, 70.

Husband and wife—Separation by agreement—Covenant not to take legal proceedings—Condonation—Action for divorce—Agreement bar to action—Past misconduct.

An agreement between husband and wife contained the following clause : " From henceforth we shall live separate from each other, and that while our modes of living hereafter shall be as both of us shall individually and separately will and desire, our deeds, acts, conducts, and behaviours can and shall be independent of one another and as each party shall separately will and desire, and that both of us shall not hereafter seek any legal remedy against one another according to law " .

In an action for divorce by the husband against the wife, on the ground of adultery, where the husband was unable to prove any adultery subsequent to the agreement,—

Held, that the agreement was a bar to this action.

THE plaintiff and his wife, the defendant, entered into an agreement to live separately, and further agreed not to " seek any legal remedy against one another according to law " .

The plaintiff sued the defendant and the co-defendant to obtain divorce on the ground of adultery with the co-defendant. The District Judge dismissed the action on the ground that (1) no adultery was proved, (2) that the agreement was a bar to this action.

The plaintiff appealed.

H. J. C. Pereira (with him *J. W. Silva*), for the plaintiff, appellant.—The agreement cannot be pleaded as a bar to this action, for it is an immoral agreement and against public policy. If the agreement be upheld, it would give the defendant full liberty to lead an immoral life, and the plaintiff would be deprived of his right under the law. A private agreement like this should not be allowed to prevent the course of the law. See *Gooch v. Gooch* ;¹ *Rose v. Rose* ;² *Pereira's Laws of Ceylon, vol. II., p. 476.*

Bawa, S.-G., for respondent, not called upon.

January 25, 1911. HUTCHINSON C.J.—

This is the plaintiff's appeal against the dismissal of his action. He sued his wife and the co-defendant to obtain a divorce from his wife on the ground of her adultery with the co-defendant. The

¹ (1893) P. D. 99.

² (1883) P. D. 98.

District Judge dismissed the action on the ground that no adultery had been proved. But there was also a legal objection taken by the defendant founded on an agreement made between the husband and the wife about two months before the action was commenced. The agreement is in Sinhalese, and according to the translation filed the parties agreed "that from henceforth we shall live separate from each other, and that while our modes of living hereafter shall be as both of us shall individually and separately will and desire, our deeds, acts, conducts, and behaviours can and shall be independent of one another and as each party shall separately will and desire, and that both of us shall not hereafter seek any legal remedy against one another according to law". The defendants contended that this agreement was a bar to the action, and the District Judge was of opinion that it was so; and I think that he was right. That is the only matter which has been argued on the appeal, and we have not heard the appellant's argument against the finding of the Judge that no adultery was proved. Mr. Pereira, for the appellant, contended that this agreement was immoral, and therefore not enforceable, because it, in effect, stipulates that the wife may live as she pleases, and that no matter how she lives, and even if she lives in adultery, the husband will not sue her for divorce or separation in respect of such misconduct.

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If the agreement does, in effect, include such stipulation, it would probably, so far as regards that stipulation, be void. The agreement, however, to my mind includes a stipulation that neither party shall sue the other in respect of any transaction prior to the agreement, and, so far as regards that stipulation, there is no reason for holding it to be invalid. See the opinion on that point expressed by the President in *Gooch v. Gooch*.¹ There is no evidence here that the wife has been guilty of any misconduct since the agreement. I think that the agreement binds the husband not to sue the wife in respect of any transaction which took place before, and which he was aware of at the date of the agreement, and that such a stipulation is valid, and is a bar to this action. I think, therefore, that the appeal should be dismissed with costs.

MIDDLETON J.—I entirely agree.

*Appeal dismissed.*¹ L. R. (1893) P. D. 106.