1948 *Present :* **Howard C. J. and Nagalingam J.**

FERNANDO, Appellant, *and* FERNANDO, Respondent.

S. C. 284—D. C. Colombo, 814D

Divorce—Decree nisi *entered—Petition by defendant that decree be not made absolute—Allegation of adultery—Right of Court to entertain petition—*Res judicata*—Civil Procedure Code, sections 604 and 207.*

In a divorce action decree *nisi* was entered in favour of the plaintiff. Before the decree was made absolute the defendant presented a petition alleging that the plaintiff had been guilty of adultery at the time of the action and praying that the decree *nisi* in his favour should not be made absolute. The learned Judge, after inquiry, held that the plaintiff had been living in adultery and dismissed his action.

Held, that the decree *nisi* was *res judicata* between the parties since the plaintiff's adultery could have been put in issue at the trial.

Held, further, that the words, "any person" in section 604 of the Civil Procedure Code do not include a party to the suit.

APPEAL from a judgment of the District Judge, Colombo.

H. W. Jayewardene, with *Sam Wijesinha*, for the plaintiff, appellant.

E. B. Wikramanayake, for the defendant, respondent.

Cur. adv. vult.

January 29, 1948. NAGALINGAM J.—

The plaintiff appeals from a judgment of the District Judge of Colombo dismissing the action instituted by him for divorce of his wife on the ground of malicious desertion.

After trial, the learned Judge entered decree *nisi* in favour of the plaintiff. Before, however, the decree *nisi* could have been made absolute, the defendant filed petition alleging that the decree pronounced in plaintiff's favour should not be made absolute. The plaintiff contested the right of the defendant either to present the petition which she had presented or to adduce evidence in support of the allegations contained therein at that stage. The learned Judge overruled the objection and after hearing evidence in regard to the allegation of adultery reversed the decree *nisi* and dismissed the plaintiff's action, holding it established that the plaintiff had been living in adultery.

Before proceeding to consider the questions argued on appeal, it would be satisfactory to set out briefly the salient facts of the case. The parties were married on March 5, 1936. The wife returned to her mother's house about three months later, namely, on June 2, 1936, and has ever since lived in separation from the plaintiff. On August 1, 1937, the plaintiff made an application for a Writ of Habeas Corpus for restoration of his wife. At the inquiry the wife alleged that she had found that the husband was keeping a woman called Alo Nona and that therefore she was not prepared to go and live with him. The plaintiff appears to have made a second application for a Writ of Habeas Corpus and on that occasion the wife said she was prepared to go with the husband if he provided her with a home which would be shared by nobody else. The husband agreed to do so and his evidence, which has been accepted by the trial Judge, is that after renting out a separate house he went and invited the wife but she refused to accompany him.

Thereafter he commenced divorce proceedings. The wife in her answer did not plead that the husband was living in adultery, although it is to be remembered that as early as 1937 in the first Habeas Corpus Application she had made an allegation of adultery against him. No issue in regard to it was raised even *ore tenus* at the trial. No application was made for a postponement of the trial to enable such a plea to be raised. The wife, however, in giving evidence expressly stated that she had seen the husband commit adultery with Alo Nona already referred to and that she had heard that the husband was keeping another woman by the name of Gunawathie. She further deposed that she could produce witnesses to prove the fact of the husband living in adultery with

Gunawathie. Even then no application was made for an adjournment to enable her to do so. She also added that she had given instructions to her Proctor about both Alo Nona and Gunawathie prior to trial, but she gave no explanation as to why no plea based on adultery was put forward on her behalf.

With reference to the allegation of adultery made in the witness box by the wife, the Judge in the course of his judgment observed :—

> " The defendant has stated that the plaintiff is now living in adultery. This has not been pleaded. It was not put to the plaintiff and beyond the *ipse dixit* of the defendant, there is no prooof. "

The question that now arises for determination is whether it was open to the defendant to have moved the Court to try the issue of adultery after the pronouncement of the decree *nisi* and before the date for making it absolute. Counsel for the defendant conceded that in the ordinary run of cases a party would not be permitted to raise a new issue after judgment, but he contends that in regard to matrimonial actions the special provisions to be found in the Civil Procedure Code enable a party to pursue such a course without objection. Reliance is placed for this proposition on section 604 of the Civil Procedure Code which provides that during the period between the entering of the decree *nisi* and its being made absolute any person would be at liberty to show cause against the decree being made absolute, and it is contended that the words " any person " are wide enough to include a party to the suit. Counsel does not, however, go to the length of arguing that this provision would enable a party who had raised a specific issue before judgment and on which issue he or she had failed, to invite the Court thereafter to arrive at a different conclusion by placing other and further material before it, He, however, limits his contention to issues which were not raised between the parties prior to judgment. The basis for this distinction is rather difficult to follow. Says Counsel that the reason why in the former case the party would be debarred is that the principle of *res judicata* would apply, whereas in the latter it would not ; the doctrine of *res judicata* is, however, wide enough to cover both classes of cases.

Section 207, Civil Procedure Code, expressly declares in the explanation to it that every right which can be put in issue between the parties whether it be actually so put in issue or not, becomes on the passing of the final decree a *res adjudicata*. A common instance of this principle is furnished by an action for declaration of title to land where a plaintiff after unsuccessfully seeking to vindicate his right on the basis of documentary title, finds himself confronted by a plea of *res judicata* on his attempting to claim the land in a subsequent action, basing his right on prescription. See also the judgment of Wendt J. in *Baban Appu v. Gunewardene et al.* [1] In English Law, too, the principle is identical. In the case of *Newington v. Levy* [2] Blackburn J. observed at page 193 :—

> " I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity of bringing before the Court."

[1] *(1907) 10 N. L. R. 167.* [2] *L. R. (1870) C. P. 180.*

I do not, therefore, think that the distinction sought to be drawn by learned Counsel for the defendant can be sustained.

The question, however, remains whether apart from the alleged distinction the words " any person " can include a party to the suit. There can be little doubt that ordinarily the term cannot be said to be subject to any limitation or qualification and that it is a term of very wide import. But equally, there can be little doubt that in particular instances its generality may be restricted by the subject-matter or the context. In the present instance, the section proceeds to say that to the petition presented by " any person " the plaintiff and the defendants shall if reasonably possible be made respondents. It would be noticed that the words " the plaintiff " and " defendants " are joined by the conjunctive " and " and not by the disjunctive " or ", so that the plaintiff and the defendants would all have to figure as respondents and cannot in any circumstances assume the character of a petitioner, for such a party could not at the same time be a respondent. It is, however, said that by the use of the phrase " if reasonably possible " the Legislature intended to include the case of one of the parties to the suit as by the use of this phrase the Legislature has recognised that it would not be possible to make the petitioner a respondent. I do not think that this is the meaning to be attached to the phrase in this context, for if that was the intention, more apt and direct language could have been used.

Section 604 of our Code is substantially the same as section 7 of the English Matrimonial Causes Act, 1860 (23 & 24 Vict. Cap. 144) where, too, the words " any person " occur. This has been subsequently repealed by the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 George V. Cap. 49) which substantially re-enacts this provision in section 183 thereof, where, again, the words " any person " are retained.

In construing the English provision, the English Courts have consistently refused to interpret the words " any person " as including a party to the suit. In *Stoate v. Stoate* [1] the respondent against whom a decree *nisi* for dissolution of marriage had been pronounced was held not entitled to show cause against the decree being made absolute. In *Harries v. Harries and Gregory* [2] a co-respondent who had entered appearance in a divorce suit but did not defend the action was not permitted to intervene after the decree *nisi* to show cause against the decree being made absolute. In fact, even on the ground of the discovery of fresh evidence after trial, a party to the suit has not been permitted to intervene after decree *nisi*. See *Howarth v. Howarth* [3] where a husband who unsuccessfully contested the action of the wife was denied the right to intervene on his allegation that he had discovered fresh evidence after the entering of the decree *nisi*. Furthermore, where the Court was satisfied that the intervention of a member of the public was at the instance of one of the parties it refused to recognise it (*Forster v. Forster and Berridge* [4] and *Clements v. Clements and Thomas* [5]).

In the lower Court the principal reason for construing the words " any person " as including a party to the suit appears to have been that as

[1] *(1861) 2 Sw. & Tr. 384.*
[2] *(1901) 86 L. T. 262.*
[3] *(1884) 9 P. D. 218.*
[4] *(1863) 3 Sw. & Tr. 151.*
[5] *(1864) 2 Sw. & Tr. 394.*

there is no official here corresponding to the King's Proctor in England any other construction would leave a party with no remedy, while in England such a party would have been able to move the King's Proctor to intervene. But even in England, instances are not unknown where the King's Proctor though moved by a party refuses to act in the matter. What, then, is the position of such a party ? Is the party in those circumstances entitled to apply to the Court for relief direct ? This question has been answered in the negative in the case of *Pattenden v. Pattenden*[1] where, after decree *nisi* had been pronounced on the husband's petition, the Queen's Proctor intervened on information furnished by the wife but subsequently withdrew his intervention, the Court refused to entertain an application by the wife in person. I do not therefore think that the absence of an official corresponding to the King's Proctor in Ceylon can be said to compel one to hlod that a party to the suit can be included in the term " any person " in the context in which it appears in section 604 of the Civil Procedure Code.

This question is not without authority in our own Courts, though, no doubt, it did not arise in the specific form it arises in this case. In *Lucy Nona v. Bandara* [2] in regard to the question whether a decree *nisi* entered under section 604 is a final decision within the meaning of the Appeals (Privy Council) Ordinance, 1909, Schneider J. said :

> " The language of section 604 indicates that the decree *nisi* is a final decision of this Court in regard to parties to that decree and that the period of three months during which it is not to be made absolute is provided with a view to enable *others than the parties to the action to show cause* against the decree being made absolute,"

I therefore reach the view that by reason of the principle of *res judicata* and on a proper construction of section 604 of the Civil Procedure Code the defendant should not have been permitted, after the passing of the decree *nisi*, to set up the defence that the plaintiff, was guilty of adultery.

It is also to be observed that this is not a case where it could even be said that the defendant became aware of the facts she sought to lay before Court only after the conclusion of the trial. She had knowledge of those facts anterior to the date of trial, and for reasons of her own she chose to withhold them. In view of the conclusions reached by me on this question, it is hardly necessary to enter upon a discussion of the adequacy of the evidence led to establish the adultery of the plaintiff. Suffice it to say that the best evidence was not placed before Court, and the alleged adultery of the plaintiff is not free from doubt.

I would therefore set aside the order of the District Judge and direct that the decree *nisi* be made absolute. As this is an action by the husband against the wife, I make no order as to costs either of appeal or of the proceedings in the lower Court.

HOWARD C.J.—I agree.

Appeal allowed.

[1] *(1868) 19 L. T. 612.*

[2] *(1923) 5 Ceylon Law Recorder 17.*