

**JAYARATNA**  
**v.**  
**JAYARATNE AND ANOTHER**

COURT OF APPEAL  
AMARATUNGA, J. AND  
BALAPATABENDI, J.  
CALA NO. 362/2001 (LG)  
DC MT. LAVINIA NO. 2808/2000 D  
OCTOBER 22, 2002

*Divorce – Trial fixed – Amendment of answer sought – Cause of action based on adultery arose after answer was filed – Is it permissible?*

**Held :**

(1) The cause of action based on adultery has arisen after the defendant has filed his answer. It is a different and independent cause of action. Rights of parties are determined as at the date of plaint.

**APPLICATION** for leave to appeal with leave granted.

*Sunil F. A. Cooray with G. Rodrigo and Chithrananda Liyanage* for defendant-petitioner.

*Geoffrey Alagaratnam with N. Adamally* for respondent.

**Cases referred to :**

1. *Bednarz v. Bednarz* – (2002) 1 Sri LR 99 (Distinguished).
2. *Annachalan v. Mohamadu* – (1914) 17 NLR 251 (Distinguished).

*Cur. adv. vult.*

November 28, 2002

**GAMINI AMARATUNGA, J.**

On 22. 10. 2002, we have heard the learned counsel for the petitioner and the learned counsel for the respondent to decide whether the question of law raised in this application for leave to appeal is a question of law to be considered by this Court after granting leave to appeal. After we heard the submissions of both counsel we then and there granted leave to appeal. At that stage both parties informed us that they had filed written submissions relevant to the matter to be decided in the appeal and invited us to give our decision having considered the order of the learned District Judge (which is the subject-matter of this appeal) and the submissions made by both learned counsel and also the written submissions filed by both parties. <sup>01</sup>

On 05. 01. 2000 the plaintiff-respondent (the plaintiff) instituted this action against the defendant-petitioner (the defendant) for divorce on the ground of malicious desertion. After summons were issued and served on the defendant husband his answer had been filed on 20. 09. 2000. After some calling dates the trial was fixed for 22. 06. 2001. On the day fixed for trial, the counsel for the defendant was not available due to illness and the trial was re-fixed for 27. 09. 2001. <sup>10</sup>

On 25. 09. 2001, the draft of an amended answer was filed along with a motion seeking permission to amend the answer. The amended answer alleged that the plaintiff-respondent has committed adultery on or about 02. 06. 2001 with the co-respondent sought to be added. The date of alleged adultery is a date subsequent to the date on which the defendant filed his answer. <sup>20</sup>

The learned Judge after hearing both parties refused to permit the defendant to file amended answer. The cause of action based on adultery has arisen after the defendant had filed his answer. It is a different and independent cause of action. Rights of the parties are determined as at the date of the plaint. The appellant in his written submissions has cited the case of *Bednarz v. Bednarz*<sup>(1)</sup> in support <sup>30</sup>

of his appeal. But, on the facts of that case it appears that the cause of action based on adultery has accrued even before the plaint was filed and the question decided in that case was the manner in which the co-respondent is to be added. The appellant has also cited the case of *Arunachalam v. Mohamadu*<sup>(2)</sup> in support of the proposition that a defendant is entitled to claim in reconvention even on a cause of action which arose after the action was instituted. In that case the appellant sought to make a claim in reconvention on a cause of action which arose after the institution of the action. The learned District Judge disallowed the issues raised relating to the claim in reconvention holding that 'a claim in reconvention can only be allowed on the relative position of the parties as they were at the time of the institution of the action and not on any cause of action arising since. The claim in reconvention in that case was set up in view of the wrongful manner in which the plaintiff obtained a warrant of arrest against the appellant in the same case. The Supreme Court in appeal reversed the order of the learned District Judge holding that a claim in reconvention may be made in respect of a cause of action that accrued at anytime before the filing of the answer.

It appears that this decision has been based on the facts peculiar to that case and does not lay down a rule which operates as an exception to the general rule that the rights of the parties are to be determined as at the date of the plaint. On the other hand even if it is held that the decision in that case is not limited to the particular circumstances of that case but is applicable as a general rule, still it is not applicable to the present case as the cause of action based on adultery has arisen after the answer was filed.

For these reasons the order of the learned District Judge refusing to permit the defendant to file amended answer is affirmed and the appeal is dismissed without costs.

**BALAPATABENDI, J.** – I agree.

*Appeal dismissed.*