MUTHURANEE

v.

THURAISINGHAM

COURT OF APPEAL.
TAMBIAH, J. AND ABEYWARDENA, J.
C.A. 575/79(F) – D. C. MALLAKAM 2150/D.
FEBRUARY 28, 1984.

Divorce – Civil Procedure Code, section 608 (2) (b) – Separation a mensa et thoro of over seven years as a ground – Reckoning of seven years.

The respondent to this appeal filed this suit on 1.2.1978 seeking a divorce from his wife the appellant under section 608 (2) (b) of the Civil procedure Code on the ground of separation from her a mensa et thoro for a period of over seven years beginning February 1968. At the time the respondent filed this suit there was pending another suit filed by him on 10.6.1977 for a divorce from the appellant on the ground of malicious

desertion. On 22.9.1978 on the application of the respondent the earlier suit was dismissed without costs and without prejudice to the respondent's rights in the later suit and with the consent of the appellant.

The questions for determination were whether –

(1) the second suit was bad as it was filed during the pendency of the earlier divorce case and a party should not be vexed twice regarding the same matter.

(2) the period of seven years should be reckoned only prospectively from 15.12.77 which is the date on which the Civil Procedure Code was amended to bring in section 608 (2) (b).

(3) in addition to cessation of cohabitation for seven years, the conditions necessary to obtain a decree for judicial separation must also be established if reliance is being placed on section 608 (2) (b) of the Civil Procedure Code.

(4) the Court in the exercise of its discretion will refuse to grant a divorce in view of respondent's own adulterous conduct which he had admitted.

Held –

(1) The fact that one action is pending in respect of a cause of action is no bar to the institution of another action seeking the same relief against the same party especially on a different cause of action. There is no possibility of the appellant being vexed twice on the same matter as the first action was withdrawn and dismissed with her consent.

(2) The amendment introducing section 608 (2) (b) into the Civil Procedure Code created a new ground of divorce for the future and is in truth not retrospective. To hold that the period of seven years must be reckoned only from 15.12.1977 would in effect render the amendment a dead letter and sterile on the Statute book for a period of seven years from this date. Section 608 (2) (b) applies even to cases where parties have been separated a mensa et thoro for more than seven years prior to the subsection coming into operation.

(3) The expression "separation a mensa et thoro" in the subsection (2) (b) contemplates a physical situation of a separation from bed, board, cohabitation and goods and carries with it no connotation of matrimonial fault. If matrimonial fault is made a requirement of s. 608 (2) (b) then this subsection would be the same as s.608 (2) (a) with the period of separation extended to seven years when two years would suffice under s. 608 (2) (a). Section 608 (2) (b) aims at relief irrespective of fault where the marriage has broken down beyond repair unlike sections 597 (1), 608 (1) and 608 (1) (a) where relief is granted on the basis of matrimonial guilt and fault. All that an applicant for divorce under s. 608 (2) (b) need establish is a cessation of cohabitation for a period of seven years ; it is not necessary to prove the conditions necessary to obtain a decree of separation.

(4) The old proviso to s. 602 of the Civil Procedure Code having been removed, the question whether the Court would exercise its discretion in favour or against the plaintiff where there is misconduct on his part no longer arises. The adultery of the plaintiff

(respondent) is no longer a bar to his obtaining a decree for divorce, whether the application is based on fault under s. 597 (1) or on the ground that the marriage has broken down under s. 608 (2) (b) of the Civil Procedure Code.

Cases referred to:

(1) *Mudiyanse et al v. Appuhamy, (1937) 16 C.L. Rec. 254, 255.*

(2) *The Queen v. The Inhabitants of Christchurch, [1848] 12 Q.B. 149 ; 116 E.R. 823.*

(3) *Re A Solicitor's Clerk, [1957] 3 All ER 617.*

(4) *Keerthiratne v. Karunawathie, (1938) 39 N.L.R. 514, 516.*

(5) *Kuhn v. Karp, 1948 (4) SALR 825 (Transvaal Provincial Division).*

(6) *Seneviratne v. Panishamy, (1927) 29 N.L.R. 97.*

(7) *Hines v. Hines and Burdett, [1918] P. 364 (Probate Division).*

(8) *Abraham v. Alwis, (1941) 42 N.L.R. 373.*

(9) *Apted v. Apted & Bliss, [1930] P. 246 ; 46 TLR 456.*

(10) *Perera v. Mathupali, [1968] 71 N.L.R. 461.*

(11) *Sediris Singho v. Somawathy, [1978 – 79] 2 Sri LR 140.*

APPEAL from the District Court of Mallakam.

K. Kanag-Iswaran for appellant.

K. N. Choksy, P.C., with *A. Chinniah, Miss. I. R. Rajepakse* and *Nihal Fernando* for respondent.

Cur. adv. vult.

May 7, 1984.

TAMBIAH, J.

The appellant is the wife of the respondent. The parties were married on 9.9.1959 and lived as husband and wife until February 1968. They have one daughter by the said marriage who is now about 18 1/2 years old.

On 10.6.77, the husband, who is the respondent to this appeal, instituted Case No. 1765/D for divorce on the ground of malicious desertion by the wife. The appellant filed answer and denied she maliciously deserted the respondent ; it was her position that her husband maliciously deserted her and was living in open adultery with one Cecilia by whom he has two children. She prayed for a dismissal of the action. The case was fixed for trial for 12.5.78 and postponed for 22.9.78.

On 1.2.78, during the pendency of Case No. 1765/D, the respondent instituted the present proceedings – Case No. 2150/D – for a decree of dissolution of marriage, under s. 608 (2) (b) of the Civil Procedure Code, as they have been separated for a period of over seven years.

According to the appellant, the respondent fraudulently attempted to obtain an ex parte divorce on a false report of service of summons. She filed papers to set aside the Order Nisi entered. The matter came up for inquiry on 22.9.78 and of consent of parties, she was permitted to file a statement of objections to the application of the respondent under s. 608 (2) (b) of the Code. On the same date, the respondent moved to withdraw Case No. 1765/D as he had filed Case No. 2150/D. Of consent of parties, his application was allowed without prejudice to his rights in Case No. 2150/D, and Case No. 1765/D was dismissed without costs.

The appellant filed her statement of objections and prayed for a dismissal of the respondent's application. The present Case, 2150/D, came up for inquiry on 29.11.78. The respondent, at the inquiry, admitted that he was paying maintenance to his wife and child and further admitted that he was having a mistress and had two children by her. These admissions were recorded.

At the inquiry, learned Attorney for the appellant contended : (1) As the Civil Procedure Code came into operation in December 1977, the period of seven years should be reckoned from December 1977. (2) A guilty party cannot come under s. 608 (2) (b) of the Code. (3) As the respondent is paying maintenance, there is no separation a mensa et thoro.

The learned Judge overruled all three objections and entered decree nisi dissolving the marriage to be made absolute three months hence.

It is necessary to reproduce the entirety of s. 608 of the Code.

"608. (1). Application for a separation *a mensa et thoro on any ground* on which by the law applicable to Ceylon such separation may be granted, may be made by either husband or wife by plaint to the District Court, within the local limits of the jurisdiction of which he or she, as the case may be, resides, and the court, on being satisfied on due trial of the truth of the statements made in such plaint, and that there is no legal ground why the application should not be granted, may decree separation accordingly.

(2) Either spouse may –

(*a*) after the expiry of a period of two years from the entering of a decree of separation under subsection (1) by a District Court, whether entered before or after the relevant date, or

(*b*) notwithstanding that no application has been made under subsection (1) but where there has been a separation *a mensa et thoro* for a period of seven years,

apply to the District Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (*a*), or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (*b*), enter judgment accordingly :

Provided that no application under this subsection shall be entertained by the court pending the determination of any appeal taken from such decree of separation. The provisions of sections 604 and 605 shall apply to such a judgment.

In this sub-section "relevant date" means the date on which the Civil Courts Procedure (Special Provisions) Law, 1977, comes into operation."

The questions that arise for our determination in this appeal are :–

(1) Whether the present application for divorce is bad in law as it was filed during the pendency of Divorce Case No. 1765/D ?

(2) Whether the period of seven years is to be counted as from 15.12.77 ?

(3) Whether a spouse who applies for a decree of dissolution of marriage under s. 608 (2) (*b*) must prove the conditions necessary to obtain a decree for judicial separation in addition to cessation of cohabitation for seven years ?

(4) In any event, even if the respondent succeeded in proving that there has been a separation a mensa et thoro for a period of seven years, a Court in the exercise of its discretion will refuse him a divorce by reason of his adulterous conduct, which he has admitted at the inquiry.

It is the contention of learned Attorney for the appellant that the law does not permit a multiplicity of suits ; that a party cannot be vexed twice regarding the same matter.

In *Mudiyanse et al v. Appuhamy* (1) Soertsz, J. said (p.255) –

"So far as Courts in Ceylon are concerned there is the highest possible authority to support the view that the fact that one action is pending in respect of a cause of action is no bar to the institution of another action in respect of that same cause of action."

But, the cases, 1765/D and 2150/D, were instituted on two different causes of action : in the first action, the cause of action was malicious desertion while in the 2nd action, the cause of action was separation a mensa et thoro for a period of seven years. The issue in the second action is not the same as in the first. If, as ruled in the decided case, the fact that one case is pending is no bar to the institution of a second action in respect of the same cause of action, the more so, then, a pending case is no bar to the institution of a second action against the same party on a different cause of action, though the relief claimed in both cases is the same. Moreover, in this instance, there is no possibility of the appellant being vexed twice in regard to the same matter, as, with her consent, the respondent has withdrawn his first action and it has been dismissed.

The next question I have to decide is, whether the period of seven years of separation be counted as from 15.12.1977, when s. 608 (2) (*b*) was brought into operation by Law No. 20 of 1977 ?

Learned Attorney for the appellant cited the following passages from *Bindra (Interpretation of Statutes, 6th Edn.)* –

"If the Court is in doubt whether the statute was intended to operate retrospectively, it should resolve the doubt against such operation . . . . It is a general rule that Acts of Legislature will not be so construed as to make them operate retrospectively, unless the Legislature has explicitly declared its intention that they should so operate, or unless such intention appears by necessary implications from the nature and words of the Act so clearly as to leave no room for a reasonable doubt on the subject. The general rule is that a retrospective effect is not given to a stature. There is a presumption against retrospective effect." (p. 734).

"Statutes should be interpreted, if possible, so as to respect vested rights. It is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights." (p. 736).

Relying on these passages, he submitted that s. 608 (2) (*b*) has not been made retrospective in its operation ; that while s. 608 (2) (*a*) contains the words "before or after the relevant date" no such words are found in s. 608 (2) (*b*) ; that to take into consideration the period of separation before s. 608 (2) (*b*) came into operation, would be to make its operation retrospective ; that if in doubt, the Court will lean to an interpretation that the enactment is prospective in its operation ; that if s. 608 (2) (*b*) is held to be retrospective, it would affect the right of the appellant, in Case No. 1765/D to oppose the granting of a decree of divorce on the ground that the respondent is guilty of adultery, which adulterous conduct he has admitted in Court at the inquiry.

This last submission based on an alleged right, is untenable. The right to oppose a granting of a decree of divorce on the ground of the plaintiff's adultery could have accrued to the appellant only under the proviso to 602 of the old Code, which proviso has been left out in the new Code. To give retrospective effect to s. 608 (2) (*b*) will therefore not affect any existing right claimed by the appellant. Furthermore, Action No. 1765/D was withdrawn with the appellant's consent and has been dismissed. The occasion, therefore, will not arise for the exercise of such right.

Learned President's Counsel submitted that the question of retrospectivity does not arise. He cited a passage from Halsbury's Laws of England (Vol. 36 – 3rd ed., p. 423, para 643) which states :–

"A Statute is not retrospective merely because it affects existing rights ; nor is it retrospective merely because a *part of the requisites for its action is drawn from a time antecedent to its passing.*

It was his submission that when s. 608 (2) (*b*) came into operation on 15.12.77, it applied both to existing facts and to future facts, so that, where on 13.12.77, the existing fact in any particular case was that a husband had been living apart for seven years, sub-section (*b*) of s. 608 (2) would apply.

The Queen v. the Inhabitants of Christchurch (2) and *Re v. Solicitor's Clerk* (3) illustrate the principle stated by Halsbury.

In the former, an enactment in the Statute, which was passed on 26.8.1846 provided that no person shall be removed from the parish who shall have resided therein for five years. The proviso to the enactment stated that the time during which such person shall receive relief from any parish shall be excluded in the computation of the said five years. The pauper, a widow, had resided in the removing parish from 1839 till the order of removal in 1847. She had been receiving relief from 1843 to 1846. If the time during which she was so receiving relief, before the passing of the Act, was to be excluded in the computation of time of residence, she was removable from the parish. It was held that the proviso in the Statute, excluding from the computation of the five years residence the time during which a person shall receive relief from the parish, applies to cases where the relief has been given, before the passing of the Act. The order of removal was confirmed. Dealing with the argument that the application of the proviso to time past would make the Statute retrospective and the general presumption is against a Statute being intended to be retrospective, Lord Denman, C.J. said –

> " The second reason, viz, that there is a presumption against a retrospective statute being intended, is founded on a misconception. *The statute is prospective only* : its direct operation is only on removals ; after it has passed, it does not alter existing rights in respect of completed removals. A space of time is an essential ingredient in the case to which it applies : and *this space of time may consist in part of time passed before the statute passed,* as is the case with statutes in limitation and prescription : but they are not therefore classed with the retrospective statutes "

In the latter case, the Solicitor's Act, 1941, disqualified a person being employed as a solicitor's clerk if he had been convicted of fraudulent conversion of any money belonging to a solicitor. The amending Act of 1956 extended such disqualification irrespective of whether the fraudulent conversion was of money belonging to his employer or to one of his employer's clients. The appellant had been convicted in 1953 of fraudulent conversion of property which belonged neither to his employer nor to a client of his employer. The Disciplinary Committee of the Law Society in September, 1957, made

order that no solicitor should take the appellant into his employment without the written permission of the Law Society. In appeal the order of the Disciplinary Committee was confirmed. Dealing with the appellant's contention that to apply the provision of the Act of 1956 to a person convicted before that Act came into operation would be to make its operation retrospective, Lord Goddard, C. J. said (p. 619)

> " In all editions of *Maxwell on the Interpretation* of *Statutes* it is stated that it is a fundamental rule of English Law that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the act or arises by a necessary or distinct implication and this passage has received judicial approval by the Court of Appeal :. . . . . In my opinion, however, this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and *what happened in the past is the cause or reason for the making of the order* ; but the order has no retrospective effect."

Having regard to the principle stated by Halsbury and to the observations of Lord Denman, C. J. and Lord Goddard, C. J. it appears to me that s. 608 (2) (*b*) is not a retrospective enactment ; it is prospective only. It empowers a Court to grant decrees of divorce on a new ground, in the future. To obtain a decree of divorce under s. 608 (2) (*b*), the applicant must establish a separation for a period of seven years. For the operation of s. 608 (2) (*b*), this required period of time can be drawn from a time antecedent to the passing of Law No. 20 of 1977, which introduced s. 608 (2) (*b*). The respondent can therefore rely on the period of separation anterior to 15.12.77 to get a decree of divorce under s. 608 (2) (*b*).

The learned Judge in rejecting the submission that the period of seven years be reckoned from December 1977, observed that if this position were to be accepted, s. 608 (2) (*b*) would be made nugatory for seven years and this was not the intention of the Legislature. He is right. The object of s. 608 (2) (*b*) is to enable parties, whose marriages have broken down beyond repair and with no possible hope of reconciliation, to part from each other for good. The Legislature could not have intended that the subsection should remain a dead letter and sterile on the Statute Book for a period of seven years after 15.12.77. If this was the intention, I should think, the Legislature would have added the words " after the relevant date " at

the end of sub-section (2) (*b*). The absence of such words indicates that s. 608 (2) (*b*) also applies to cases where parties have been separated for seven years prior to the sub-section coming into operation.

The third question for decision is whether in addition to cessation of cohabitation for seven years, an applicant for a decree of divorce must also prove the conditions necessary to obtain a decree of separation.

The present s. 608 (1) is identical with s. 608 of the Civil Procedure Code, 1889. The original s. 608 had no subsections. The Administration of Justice (Amendment) Law, No. 25 of 1975, effected a change. S. 627 (1) enacted that a "husband or wife may institute an action praying for a judicial separation on any ground on which a divorce may be sought, and the Court upon being satisfied that such ground exists, may enter judgment accordingly. The Court may, however, at any time thereafter, upon the application of both spouses, discharge the decree of separation. s. 627 (2) further enacted that "either spouse may, after the expiry of a period of two years from the entering of decree of separation, apply to the Court by way of summary procedure to have such decree of separation converted into one of dissolution of marriage, and the Court may, upon being satisfied that the spouses have not resumed cohabitation, enter judgment accordingly."

The provisions of Law No. 25 of 1975 were repealed and the new Civil Procedure Code restored the old s. 608 and this section was re-numbered as s.608 (1). The new Code retained the provisions of s. 627 (2) of Law No. 25 of 1975 that after the expiry of two years from the entering of a decree for separation, a decree for divorce may be obtained by either spouse and added the words "whether (the decree of separation) was entered before or after the relevant date", i.e., 15.12.77. This provision was numbered s. 608 (2) (*a*). The new Code further enacted s. 608 (2) (*b*) in terms of which a separation *a mensa et thoro* for 7 years is sufficient to obtain a decree of divorce.

According to s. 608 (1) an application for a separation *a mensa et thoro* could be made "on any ground on which by the law applicable to Ceylon such separation may be granted." The grounds are the Roman-Dutch Law grounds for separation.

In *Keerthiratne v. Karunawathie* (4) Poyser, S. P. J. said (page 515, 516)–

> "Judicial separation may, therefore be decreed for adultery subsequent to marriage, and malicious desertion, and also when for other reasons the continuance of the cohabitation would become dangerous or insupportable. So that a judicial separation may be decreed on account of cruelty, or protracted differences, or for gross; dangerous and unsupportable conduct in either spouse."

The appellant's attorney therefore contends that an applicant for a decree of divorce under s. 608 (2) (*b*) in addition to separation for seven years, must prove the grounds or matters required to be proved under s. 608 (1) in order to obtain a decree of separation. In other words, he said, there must be proof of some matrimonial fault on the part of the wife, the appellant.

I am unable to accede to his request that I should read into s. 608 (2) (*b*), in addition to seven years separation, a further requirement, namely a matrimonial fault. The answer to this submission is found in the opening words in sub-section (2), "Either spouse may apply to the District Court," which expresion qualifies both (*a*) and (*b*). Let me take the case of a wife who applies for a decree of separation under s. 608 (1) on the ground of the husband's adultery and successfully obtains one. After two years, not only the guilty husband, but even the innocent wife is entitled to apply for a decree of divorce under s. 608 (2) (*a*). So too, under s. 608 (2) (*b*), where parties are separated for seven years, irrespective of who is responsible for the separation, either of the spouses can apply for a decree of divorce.

Sub-section 2 (*b*) says, "Notwithstanding that no application has been made under s. 608 (1)", either spouse may apply to Court for a decree of divorce and the Court, "upon proof of the matters stated in an application made under (*b*), may enter judgment accordingly."

What then, are the matters to be proved by the appellant? They are (1) a "separation *a mensa et thoro*", (2) such situation between the spouses existed for a period of seven years.

"Separation may be by the Court, or by consent in certain cases. The former of these is called divorce *a mensa et thoro,* i.e., a judicial separation from bed, board, cohabitation, and goods." (*per* Poyser, S P. J., citing *Thomson's Institutes of the Law of Ceylon* in *Keerthiratne's case, supra p. 515*)

The expression "separation *a mensa et thoro*", therefore, contemplates a physical situation of a separation from bed, board, cohabitation and goods" and carries with it no connotation of a matrimonial fault. S. 608 (2) (*b*) enables spouses to permanently end their marital relationship on the mere proof of a de facto separation for a period of seven years. The concept of a matrimonial fault is found only in s. 608 (1).

There is another important consideration which militates against the appellant's attorney's submission. To succeed under s. 608 (2) (*a*) the applicant should have first obtained a judicial decree of separation under s. 608 (1), and await a period of two years to expire from the entering of the decree. To obtain a decree of separation under s. 608 (1) he would have to successfully show, as Hahlo in his *South African Law of Husband and Wife* (p.235) broadly puts it–"that further cohabitation with the defendant has become dangerous or intolerable for him or her and that this state of affairs was brought about by the unlawful conduct of the defendant."

If, to succeed under s. 608 (2) (*b*) also the applicant has to prove this broad ground and show a separation for a period of seven years, then, the new Civil Procedure Code could have stopped at s. 608 (2) (*a*) and not further enacted (2) (*b*), for, there was no purpose in enacting it.

Why did the new Code enact sub-section (2) (*b*) and what was the objective ? Is it not to liberalise the divorce laws of this country and to permit a permanent termination of marital relationship, where the marriage has broken down completely, irrespective of which spouse was at fault, and irrespective ot the reasons which brought about the termination. The legislative developments in regard to this matter bear this out.

S. 597 of the old Code enabled any husband or wife to file an action in the District Court praying that his or her marriage be dissolved on any ground for which marriage may, by the law applicable in Ceylon, be dissolved. This section has been retained in the new Code and is numbered as s. 597 (1). The grounds are adultery subsequent to marriage, malicious desertion, and incurable impotency at the time of marriage (s. 19 (2) of the Marriage Registration Ordinance). These grounds of divorce, except incurable impotency, are based on the fault principle. There must be some matrimonial fault on the part of the defendant.

According to s. 608 of the Code, an application for a decree of separation could be made " on any ground on which by the law applicable to Ceylon such separation may be granted". Here again there must be some fault on the part of the defendant spouse. S. 627 (1) of Law No. 25 of 1975 effected an important change. It made it harder for a spouse to obtain a decree for separation by requiring the applicant to establish the grounds on which a divorce may be sought. But, it enacted a new ground of divorce by providing for the conversion of a decree of judicial separation into a decree of divorce after the lapse of two years (s. 627 (2)). The new Code restored the old position in regard to the requirements that an applicant must satisfy in order to obtain a decree of judicial separation ; it retained the provisions of s. 627 (2) of Law No. 25 of 1975 (s. 608 (2) (*a*)) and went further and enacted s. 608 (2) (*b*) in terms of which, a mere de facto separation *a mensa et thoro* for a period of seven years would suffice to obtain a decree of divorce. The new Code introduced into this subsection the theory of a broken down marriage, beyond repair So, in the new Code one finds two theories operating side by side – the theory of matrimonial guilt and fault (sections 597 (1), 608 (1) and 608 (2) (*a*)) and the theory of the irreparably broken down marriage (s. 608 (2) (*b*)). The new Code also retained the remedy of separation *a mensa et thoro* for those who prefer a judicial separation rather than a divorce, and want to give themselves an opportunity to reconcile their differences and come together.

Perhaps, the concept of a broken down marriage has been borrowed from England. According to the Matrimonial Causes Act 1973, the sole ground on which a petition for divorce may be presented to the Court by either party to a marriage is that the marriage has broken down irretrievably. The Court hearing the petition

for a divorce must not hold the marriage to have broken down unless the petitioner satisfies one or more of the following facts : (1) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent, (2) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (3) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition, (4) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted, (5) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. The Court inquiring into the facts, must grant a decree nisi for divorce, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably. (*See. Halsbury. 4th Edn. Vol. 13, paras 553, 554, 555).*

It would seem, therefore, that in England proof of an irretrievable breakdown of marriage is a prerequisite for the grant of a decree of divorce. There is no such requisite in s. 608 (2) (*b*).

In South Africa there are four grounds of divorce – adultery, malicious desertion, incurable insanity which has existed for not less than seven years, and imprisonment for five years after the defendant spouse has been declared a habitual criminal. The first two grounds are based on common law, the other two on Statute (*See,* Hahlo on *The South African Law of Husband and Wife. p. 295*). Commenting on this Hahlo states (pp. 296, 297)–

> "The statutory grounds of divorce are based on the idea that it is the function of divorce to dissolve the marriage tie when the consortium has been destroyed. The common law grounds of divorce are based on the guilt principle. Adultery and malicious desertion are offences against the fundamental obligations of marriage, for it is of the essence of the marriage relationship that spouses should live together and become spiritually as well as physically one flesh. . . . . "

But while there is a social interest in the preservation of marriage, there is also a social interest in not insisting on the continuance of a marriage which has hopelessly broken down. For this reason it is not

correct to say simply that because a contract aims at the dissolution of a marriage it is therefore void as being contrary to public policy. The upholding of the marriage state is only one of the several objects of public policy. Where a marriage has been wrecked beyond hope of salvage the argument of public policy loses much of its force. . . . . To keep the parties tied to one another in the bonds of a marriage which has become a sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

In *Kuhn v. Karp, (5)* the spouses had separated in 1935. In 1937 the wife obtained a decree of judicial separation. In 1947 the spouses entered into an agreement whereby it was agreed that the judicial separation should be set aside, that the wife would thereafter sue for a divorce, and that the husband would pay her, inter alia, certain monthly sums after divorce. A third party guaranteed the husband's financial obligations.

When subsequently the wife sued the third party under the guarantee, he raised the defence that the whole agreement was *contra bonos mores.* The Court, however, held that the agreement was not against public policy. A contract relating to divorce and which tended to induce a course of conduct inconsistent with the maintenance of the marriage tie was only against public policy, if it was likely to be harmful to the community as a whole. Here there had been no common home and no consortium for eleven years. The marriage was 'but a shell' and 'the bottom had dropped out of it'. There was no hope of reconciliation. In such circumstances, it can never be truly said that the situation in which the parties found themselves was one which, in the interests of society, had to be maintained.

All that an applicant for a divorce decree need establish under s. 608 (2) (*b*), is a cessation of cohabitation for a period of seven years ; it is not necessary to prove the conditions necessary to obtain a decree of separation.

I come to the final submission of learned Attorney for the appellant that in any event, the Court has a discretion in the matter and should refuse a decree of divorce to the husband, who, admittedly, is living in adultery with his mistress.

The proviso to section 602 of the old Code declared that the Court shall not be bound to pronounce a decree of divorce if it finds, *inter alia,* that the plaintiff has, during the marriage, been guilty of adultery. The plaintiff's misconduct was a discretionary bar to a divorce being granted.

In *Seneviratne v. Panishamy* (6) the husband brought an action for divorce on the ground of the wife's adultery. There was evidence in the case that the plaintiff himself was living in adultery. The trial Judge dismissed the action on the ground of plaintiff's own adultery. The plaintiff's appeal was dismissed. Garvin, J. cited with approval the English case of *Hines v. Hines* (7), which stated "that exceptional circumstances only will lead the Court to overlook the matrimonial default of a petitioner. . . . It is based on the general and cogent requirements of a public morality, and the resultant duty of the Court to vindicate a high standard of matrimonial obligation. The enforcement of this duty will create a standard which all may know and find it well to follow . . . ." Garvin, J. finally said – "He who seeks to be released from the matrimonial tie must himself be free from matrimonial offence. This rule may only be relaxed in exceptional cases and where the relief prayed for may be granted without prejudice to the interests of public morality."

In *Abraham v. Alwis* (8) the plaintiff sued his wife for a divorce on the ground of malicious desertion. The evidence established malicious desertion on the part of the wife. The plaintiff admitted adultery with a woman and this intimacy continued up to the date of action. The trial Judge followed the decision in *Seneviratne's* case and found that there were no exceptional circumstances to justify the exercise of discretion in plaintiff's favour. In appeal, the Supreme Court saw no reason for considering that the discretion of the trial Judge was improperly exercised. Moseley, J. cited with approval the principles laid down in *Apted v. Apted and Bliss* (9)–

> "In every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration. . . . . It is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality."

In *Perera v. Mathupali* (10) the husband sued the wife for divorce on the ground of malicious desertion. The defendant was living with a paramour by whom she had a child. The evidence disclosed that the husband too had a mistress by whom he had three children. The trial Judge answered the issue regarding malicious desertion against the plaintiff. In appeal, the Supreme Court held that the issue had been wrongly answered. It went on to consider whether the trial Judge had correctly exercised the discretion vested in him by the proviso to s. 602 against the plaintiff. Both Sirimane, J. and de Kretser, J. held that the discretion should have been exercised in favour of the plaintiff. The judgment of the District Court was set aside and a decree nisi was entered granting a divorce from the defendant.

Sirimane, J. said –

"It is quite clear from these facts that this marriage is quite dead now. The plaintiff lives with a woman whom he cannot marry and has 3 children, who are illegitimate. The defendant too lives with a man who can only be her paramour, and has a child who is illegitimate. . . . . On the facts of this case, it is apparent that this marriage too has completely broken down and with due regard to the sanctity of marriage, there is hardly a reason why the marriage tie should continue."

and de Kretser, J. said –

"The President in the case of *Apted v. Apted and Bliss* pointed out that 'in every exercise of discretion the interests of the community at large in maintaining the sanctions of honest matrimony is a governing consideration.' And undoubtedly it should be for the sanctity of the marriage tie and public morals must be safeguarded. But one must also, I think, be careful to see that the attempt to safeguard does not in fact cause further damage to them.

It is an incontrovertible fact that this marriage is at an end, and to convert to Unholy Deadlock what was once and is no longer Holy Wedlock by refusing to exercise a discretion vested in a judge so far from safeguarding the sanctity of marriage appears to me to make a mockery of it and is not in the public interest, for I think one must pay some heed to the change in the attitude of the society we live in in regard to 'the sanctions of honest matrimony'. In the days when the Civil Procedure Code was enacted–section 602 is in fact based

on section 31 of the Matrimonial Causes Act of 1857 – the man and woman who 'lived in sin' because they could not obtain freedom to marry, because they had matrimonial offences to their discredit were social lepers. Today, that is not the case, and that is largely due to the sympathy felt towards those who are unable to regularise such unions whether due to antiquated divorce law or the too stringent exercise of a discretion vested in a divorce judge. It appears to me that when a court is satisfied that the marriage between the parties is truly at an end it should exercise its discretion with a view to rehabilitate and not to punish. The exercise of discretion in a manner that would tend to regularise union in the interests of the parties and the innocent children born to them is in the public interest and in my opinion a correct use of the discretion vested in a judge. To so exercise it when one views the matter in its proper perspective does no damage to the sanctity of marriage and in fact enhances respect for the law."

In the above three cases, the Court was faced with the problem whether its discretion vested in it by the proviso to s. 602 should be exercised in favour or against the plaintiff on account of his matrimonial misconduct.

The Administration of Justice (Amendment) Law, No. 25 of 1975, did away with the proviso to s. 602 , and it has not been re-enacted in the new Civil Procedure Code.

In *Sedris Singho v. Somawathy* (11) the trial Judge having found that the defendant was guilty of malicious desertion and adultery, dismissed the plaintiff's action for a divorce on the ground that he himself had been living in adultery. Wimalaratne, J. with Atukorale. J. agreeing, set aside the judgment and entered a decree nisi dissolving the marriage Wimalaratne, J. said –

"Mr. Jayawardena has referred us to s. 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."

The present position, therefore, is that the adultery of the plaintiff is no longer a bar to his obtaining a decree for divorce, whether the application for a divorce is based on a fault based ground under s. 597 (1) or on the ground that the marriage has broken down under s. 606 (2) (*b*) of the Civil Procudure Code.

The final submission of appellant's attorney also fails.

I affirm the judgment of the learned Judge and dismiss the appeal, but, in all the circumstances of the case, order no costs.

ABEYWARDENA, J. – I agree.

Appeal dismissed.