1932 *Present:* **Garvin S.P.J. and Maartensz A.J.**

ANNAKEDDE *v.* MYAPPEN.

147—D. C. (Inty.) Nuwara Eliya, 1,211.

Divorce—Action by wife—Husband claims divorce on ground of adultery of wife—Adulterer should be made a party—Ceylon domicil.

Where in an action for dissolution of marriage brought by a wife on the ground of malicious desertion by the husband, the latter claimed a divorce on the ground of the adultery of the wife, the alleged adulterer should be made a party to the proceedings.

The nature of evidence required to establish a Ceylon domicil considered.

APPEAL from an order of the District Judge of Nuwara Eliya. The facts appear from the judgment.

H. V. Perera, for the plaintiff, appellant.

Choksy, for the defendant, respondent.

January 25, 1932. GARVIN S.P.J.—

This was a petition by a wife for a divorce a *vinculo matrimonii* on the ground of malicious desertion. The husband filed answer denying the marriage and stating incidentally in the course of his answer that the plaintiff had "misconducted" herself with one Nagen. In due course issues were framed and the trial took place on November 27, 1930. The evidence in the case was mainly directed to establish that the marriage was valid and lawful in view of the defendant's denial that there was such a marriage. The case was then postponed. In the interval the defendant moved to amend his answer. In the amendment which he proposed to make, he pleaded specifically that the plaintiff had committed adultery with one Nagen and added an alternative prayer praying the Court, should it find that a legal marriage had taken place between the parties, to grant the defendant a divorce a *vinculo matrimonii* on the ground of the alleged adultery. Nagen was not made a party. The failure on the part of the husband to do so was brought to the notice of the Court. Despite this, it was contended that the pleading was in order and the trial proceeded. At the conclusion of the evidence, judgment was reserved. It would seem that while he was considering his judgment the Learned District Judge's mind was affected with a doubt as to his jurisdiction to decree a divorce on the ground that there was no evidence that the husband was domiciled in Ceylon. He set down the case for hearing once again and a further trial took place on this question of domicile. The defendant appears to have identified himself with the view that he was not domiciled in Ceylon and finally the District Judge delivered a judgment holding that the husband was not domiciled in Ceylon but in India and accordingly dismissed the plaintiff's action. The first question for us is whether his decision on the question of jurisdiction is correct.

It is sufficient to say that so far as the law is concerned, there seems to be little doubt that the jurisdiction to grant a divorce a *vinculo matrimonii* depends upon the domicile of the husband. If, therefore. in this instance, the learned District Judge is correct in his finding upon the material before him that the husband's true domicile was India and not Ceylon he was right in holding that he had no jurisdiction. It has been urged, however, that upon the material before him the learned District Judge was wrong in his finding of fact.

The defendant was a motor car driver employed in Ceylon. He came to Ceylon when he was a child of about 6 years of age with his mother who apparently was employed upon a Ceylon estate. There he remained and it was there he received his education. He has never been to India. He married in Ceylon and in the twenty-two years of his life since his arrival here as a little child he has known no other home than Ceylon. In addition there is his own statement in a certain declaration made for the purpose of registration as a qualified voter that he had a Ceylon domicile. An endeavour has been made to discount the value of this declaration upon the ground that it was drawn up by a prospective candidate, but it would have served the purpose of this candidate equally well if he had claimed the right of registration on behalf of this would-be voter upon the ground of his residence in Ceylon.

There is no reason to suppose, having regard to the facts above stated by me, that the defendant did not claim to be domiciled in Ceylon, since it is quite obvious that he knew no other home. We have therefore his life history and in addition his own declaration at a time prior to this action that Ceylon was his domicile. Moreover, it is not altogether without significance that he himself never took the plea that the Court had no jurisdiction because he was not domiciled in Ceylon. As against this, we have a statement made by him in the course of the inquiry which was held when this point emerged that he wished some day to return to India and some general reference to interests in India. So far as one can judge from the specific evidence in the case, his every interest is in Ceylon.

Upon this evidence, I should have had no hesitation in holding that the husband's domicile is Ceylon. That being so the Court unquestionably had jurisdiction to entertain the wife's petition for a divorce and also the husband's cross-petition for a divorce upon the ground alleged of adultery by his wife.

It is to be noted that the defendant has entered no appeal from the order of the learned District Judge. His attitude, however, is that the findings of the learned District Judge, for he has found upon the other questions of fact on which the parties were at issue, should be accepted as correct and that relief should be given to him upon the assumption that these findings are correct. In an appropriate case it might have been possible perhaps to act in accordance with this suggestion upon suitable terms as to costs, but we are not satisfied that this is such a case. The whole history of the case, the various separate inquiries into which it has been broken up, and the determination of so important a question as the wife's adultery in the absence of Nagen are features in the case which do not stimulate confidence in the conclusions of fact

which have been arrived at. Nagen should unquestionably have been made a party in view of the husband's cross-petition for divorce and no decision upon the question can be considered satisfactory which has been arrived at in a proceeding to which he has not been made a party.

I refrain from further comment for the obvious reason that I am of opinion that the case should go back for a trial *de novo*. The one question which must be taken as settled is that the Court has jurisdiction to entertain the wife's petition as well as the husband's cross-petition for divorce. For the rest, the judgment and all the findings will be set aside and the whole matter set at large, so that all the questions at issue between the parties may be determined in the course of a trial, it being understood that Nagen should be made a party to the cross-petition and given due notice of the proceedings, so that he might if so advised present his answer to the Court.

The appellant is entitled to the costs of the appeal. There will be no order as to the costs of the abortive trial in the Court below.

MAARTENSZ A.J.—I agree.

Appeal allowed.