1941 *Present :* **Moseley S.P.J. and Keuneman J.**

ABRAHAM *v.* ALWIS.

94—D. C. Ratnapura, 6,619

Divorce—Plaintiff guilty of adultery—Refusal of Judge to exercise discretion in favour of plaintiff—Interference by the Supreme Court in Appeal—Civil Procedure Code, s. 602.

Where the District Judge refused to exercise his discretion under the proviso to section 602 of the Civil Procedure Code in favour of a guilty plaintiff in a matrimonial action, the Supreme Court in appeal will not interfere unless it feels that that discretion has not been properly exercised.

APPEAL from an order of the District Judge of Ratnapura.

N. E. Weerasooria, K.C. (with him *S. W. Jayasuriya*), for plaintiff, appellant.

U. A. Jayasundera (with him P. *Malalgoda*), for defendant, respondent.

Cur. adv. vult.

June 6, 1941. MOSELEY J.—

This is an appeal from the judgment of the District Court, Ratnapura, refusing to grant a divorce. The parties were married in 1923, and lived

[1] *(1916) C. P. D. 263, at p. 266.* [2] *33 N. L. R. 313.*

together until 1928, when the respondent, the wife, left the appellant and went to live with her parents. The learned District Judge was satisfied on the evidence before him that respondent maliciously deserted appellant. The latter, however, admitted adultery with a woman, Caroline Fonseka, in the year 1933 and indeed in 1937 swore an affidavit to the effect, *inter alia,* that he and she were then living together as husband and wife. The District Judge then asked himself the question whether he should exercise in favour of the appellant the discretion vested in him by section 602 of the Civil Procedure Code. The relevant portion of this section is as follows :—

> "Provided that the Court shall not be bound to pronounce such decree if it finds that the plaintiff has, during the marriage, been guilty of adultery, or if the plaintiff has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting the plaint . . . . . ".

It should be noted here that the wording of this proviso follows closely, if not verbatim, that of section 31 of the Matrimonial Causes Act, 1857, which was reproduced in section 178 (3) of the Judicature (Consolidation) Act, 1925.

It is necessary here to refer briefly to the incidents which followed the desertion of the appellant by the respondent in 1928. For five years the appellant appears to have been innocent of moral lapse. In 1933 he met and became intimate with Caroline Fonseka. This intimacy has continued up to the date of the plaint. In 1937 he appears to have formed a desire to marry Caroline Fonseka and, in order to avoid, as best he could, the penal consequences of a possibly bigamous marriage, he swore the affidavit to which I have already referred in which he swore that the whereabouts of the respondent had not been known to him for nine years and that he had not heard of her being alive within that time. He then went through a form of marriage with Caroline Fonseka. There was evidence that the appellant had taken some steps to ascertain the whereabouts of respondent, but the learned District Judge was of opinion that these were of a perfunctory nature. The appellant would appear to have omitted to follow the most obvious channel of inquiry, viz., through the respondent's father whose whereabouts as a police pensioner must have been easily ascertainable. The District Judge held that the appellant had committed adultery with a married woman, "knowing or having every reason to believe that his wife was alive". This may be putting the position somewhat strongly against the appellant, but there is some force in the observation. It was held, further, that the appellant when he instituted the action did not disclose the facts of his adultery and marriage with Caroline Fonseka. The learned District Judge saw no exceptional circumstances to justify the exercise of his discretion in favour of the appellant whose action therefore failed.

In arriving at this conclusion the District Judge considered the case of *Seneviratne v. Panishamy et al.*[1], which appears to have been the only authority cited to him on this point. It was in fact the only decision of

[1] *29 N. L. R. 97.*

this Court which was brought to our notice. In that case, decided in 1927, Garvin J, after considering the case of *Hines v. Hines* [1], expressed himself as follows :—

> "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 *Hines v. Hines* (*supra*) McCardie J., after reading all the cases in which the discretion of the Court had been exercised in favour of a guilty petitioner, held that he could not create new principles of divorce law administration, though he recognized that the Court had undoubtedly increased its willingness to grant relief in such cases. Nevertheless he appears to have felt himself bound by the limitations existing at the date of his judgment, that is to say, that the practice of the Court precluded the exercise of its discretion in favour of a guilty petitioner except in exceptional circumstances.

Although *Seneviratne v. Panishamy et al.* (*supra*) did not come before this Court until 1927, it does not appear that the Court had the advantage of considering *Wilson v. Wilson* [2]. In that case Sir Henry Duke, President, indicated that the attitude of the Courts had relaxed still more but the discretion he said was "not to be exercised eagerly or indeed readily but with some degree of stringency". In exercising his discretion in that case he took into consideration the following circumstances :—

(1) the position of the children to whose interest it was that they should have a home with the sanctions of decency and so far as may be, of the law ;
(2) the position of the woman with whom the petitioner was living for it was clearly desirable in her interest that she should be lawfully married ;
(3) the case of the respondent, as to whom there was no prospect that refusal of relief would have the effect of reconciling her with the petitioner ; and
(4) the case of the petitioner in whose interest it was that he should be able to marry and live respectably.

Since this decision it would seem that relief has not often been refused where the petitioner has made a frank disclosure of his guilt. That there must be complete frankness was reiterated by Hill J. in *Stuart v. Stuart and Holden* [3]. A few months later came what has been termed the "*classic*" case of *Apted v. Apted and Bliss* [4]. In this case all the authorities were reviewed as a result of which the learned president found that the following principles appeared :—

> "In every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration ; a strong affirmative case is necessary before a Judge is justified under the statues in negativing their conditional prohibitions ;

[1] *(1918) L. R. Probate Div. 364.*
[2] *(1920) L. R. Probate Div. 20.*
[3] *(1930) L. R. Probate Div. 77.*
[4] *(1930) 46 T. L. R. 456.*

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."

As a result of this decision a new rule of Court was instituted which requires a petitioner, who intends to ask that the discretion of the Court should be exercised in his behalf to include in his petition a prayer to that effect and to set forth all the facts which require the discretion to be exercised (*46 T. L. R. 464*). I would point out that at the present moment no such rule of Court has been promulgated in Ceylon.

It will be seen, then, that the attitude of the Judges of the Probate Division has undergone a considerable change since *Hines v. Hines* (*supra*) and Counsel for the appellant has contended that the present case is one in which, on the principles laid down in the English decisions, the appellant should have relief.

It would seem from *Wilkins v. Wilkins*[1], that appeals from the Divorce Division to the Court of Appeal are governed by the same rules as apply to appeals coming from the King's Bench Division. I do not think that we should consider ourselves subject to any further limitation in this respect. It is open to us to interfere in a case such as the present one if we feel that the discretion vested in the Court of first instance has not been properly exercised. It is inevitable that in cases where a discretion is allowed there will be anomalous decisions. That this would be so, in proportion as relaxation of the former more rigid rule increased, was foretold by Lord Penzance in *Morgan v. Morgan and Porter*[2]. "Two minds" he said "will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This Court, no doubt, will always be careful to avoid interference with the properly used discretion of a trial Judge merely for the reason that it would have given a different Judgment."

In the present case, as I have already observed, the learned District Judge has perhaps, in one or two instances, drawn conclusions unnecessarily harsh towards the appellant. There was, for instance, no requirement, as is the case in England, that he should disclose in the plaint the fact of his adultery with Caroline Fonseka. Even so the fact remains that there was considerable delay in bringing these proceedings and the efforts made by the appellant to ascertain if his wife was living have been, in my view, rightly described as perfunctory. He would, in fact, seem to have studiously avoided the one certain means of doing so. I can see no reason for considering that the discretion of the District Judge was improperly exercised. The appeal, as intimated at the conclusion of the argument, is dismissed with costs.

KEUNEMAN J.—I agree.

Appeal dismissed.

[1] *(1896) L. R. Probate Div. 108.*

[2] *(1869) L. R. Probate Div. 644.*