1968 *Present :* **Sirimane, J., and de Kretser, J.**

H. JOHN PERERA, Appellant, *and* H. MATHUPALI, Respondent

S. C. 164/67—D. C. Colombo, 6613/D.

Divorce—Suit by husband—Husband guilty of matrimonial offence—Delay in filing action—Circumstances when he may nevertheless be granted divorce—Discretion vested in the Court—Scope—Civil Procedure Code, proviso to s. 602.

Plaintiff-appellant sued his wife for divorce on the ground of malicious desertion. The parties were married on 7th July 1943, and from April 1949 the defendant was living with a paramour by whom she had a child. The plaintiff lived with a mistress from 1957 and had three illegitimate children by her. He gave reasonable excuses for delaying to file the present action.

Held, that, despite the plaintiff's matrimonial offence and his delay in filing the action, it was apparent that the marriage had completely broken down and, with due regard to the sanctity of marriage, there was hardly a reason why the marriage tie should continue. In the circumstances, the discretion vested in the Court by the proviso to section 602 of the Civil Procedure Code should be exercised in favour of the plaintiff, in the interests of the children, the woman who lived with him, and also in the interests of the defendant and her child.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria (Jnr.), for the Plaintiff-Appellant.

S. A. Marikar, for the Defendant-Respondent.

Cur. adv. vult.

December 14, 1968. SIRIMANE, J.—

This was an action for divorce filed by the plaintiff husband against his wife on the ground of malicious desertion. His evidence, which was uncontradicted, shows that the parties were married on 7th July, 1943 and that in April 1949, the defendant committed adultery, and thereafter continued to live with that man, by whom she has a child. The learned District Judge was clearly wrong in answering the issue relating to malicious desertion against the plaintiff-appellant.

The plaintiff gave his excuses for delaying to file his action, e.g., illness, several transfers to various places in the course of his employment, lack of funds and his inability to ascertain the whereabouts of the defendant. This evidence, as I said, was uncontradicted.

It also transpired in the course of his evidence that he had been injured in a motor-car accident and was disabled for about one and a half years. During that period, another woman had looked after him and he had taken her as his mistress. He has three children by her now.

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 three children, who are illegitimate. The defendant too lives with a man who can only be her paramour, and has a child who is illegitimate. The plaintiff said in cross-examination that he filed this divorce case as there was no future for his children in the present state of affairs.

The proviso to section 602 of the Civil Procedure Code enacts that the Court shall not be bound to pronounce a decree for divorce if it finds that the plaintiff himself has been guilty of adultery, or of unreasonable delay in coming to Court, or cruelty towards the other party, or if he has wilfully separated himself or wilfully neglected the other party which led to that party committing adultery.

In *Abraham v. Alwis* [1], this Court held that it should not interfere with the discretion exercised by a trial Judge under section 602 of the Civil Procedure Code unless it feels that the discretion has not been properly exercised. The learned District Judge in that case relied strongly on the words of Garvin, J. in *Seneviratne v. Panis Hamy* [2] where he said " He who seeks to be released from matrimonial tie must himself be free from matrimonial offence. This rule can only be relaxed in exceptional cases and where the relief prayed may be granted without

[1] *42 N. L. R. 373.* [2] *29 N. L. R. 97.*

prejudice to the interests of public morality ". Moseley, J. in that case referred to four circumstances which should be taken into consideration in exercising the discretion under section 602. They are—

(*a*) the position of the children to whose interests it was that they should have a home with the sanctions of decency and, so far as may be, of the law ;

(*b*) the position of the woman with whom the petitioner was living, for it was clearly desirable in her interests that she should be lawfully married ;

(*c*) 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

(*d*) the case of the petitioner, in whose interests it was that he should be able to marry and live respectably.

In *Becker v. Becker* [1] the parties were married in 1935 in Poland. They separated in 1939 when the husband was called up for service in the Polish Army. After the war, he wrote to his wife to join him in Italy and later in England but she refused to do so. He filed a petition for divorce in 1965. The petition was dismissed on the ground of unreasonable delay in presenting it. In appeal, the order was reversed and it was held that delay in desertion cases was not, on the face of it, to be regarded as a reason for refusing a decree ; that as the marriage was as dead as it could be and a reason for divorce had been given, the husband's delay in presenting the petition should not be regarded as a bar. In that case, the husband petitioner had also committed adultery. Lord Denning, M.R., said " There is the further question of the discretion statement. This man has over the years had associations with more than one woman. In view of the long separation from his wife, I do not think it should be taken too much against him—at all events not to the extent of refusing a decree ".

In *Lawry v. Lawry* [2], the husband filed a petition for divorce in 1965. (The parties were married in 1928.) The facts proved were that the husband had deserted his wife in 1946. In 1956 he returned to his matrimonial home " in order to keep his eye on the youngest child ". But though he and his wife lived under the same roof, they lived separate lives. The separation was by mutual consent. Between 1953 and 1956, the wife was guilty of cruelty. (She frustrated the efforts of her husband to sleep during the day by working noisily after he had been on duty at night.) The husband had formed an adulterous association which continued from 1961 to 1964. He sued for a divorce on the ground of cruelty and desertion and asked the Court to exercise its discretion in his favour. The wife counter-sued for a judicial separation. The President granted the husband's petition and dismissed the wife's claim. The decision was upheld in appeal and Willmer, L.J. referring

[1] *(1966) 1 Weekly Law Reports, 423.* [2] *(1967) 1 W. L. R. 789*

to the President's order, said at page 791 "He had to balance the consideration of respect for the sanctity of marriage (which is of particular importance in the present case in view of the wife's conscientious objections to divorce) against the public interest which is involved in the question whether it is right to keep in being a marriage which has so obviously and so hopelessly and completely broken down".

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.

In the circumstances of this case, I think that the discretion should have been exercised in favour of the plaintiff-appellant, in the interests of the children, the woman who lives with him, and also in the interests of the defendant and her child. The order of the learned District Judge is set aside and I direct that a decree *nisi* be entered granting the plaintiff a divorce from the defendant.

DE KRETSER, J.—

The facts are set out in the judgment of Sirimane, J., which I have had the advantage of perusing and with which I agree. 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, and of course the fact that this court would have given a different judgment if it was the trial court is no reason to interfere with a properly used discretion of a trial judge. In the instant case the trial judge (Mr. Corbett Jayewardene) does not appear to have considered whether this was not a case in which he should exercise the discretion vested in him despite the long delay in coming to court and the admitted offence on the part of the plaintiff. He has not considered why these things happened, before he held that owing to them he was unwilling to exercise his discretion in favour of the plaintiff. It appears to me, therefore, that the door is wide open for me to consider whether this is not a fit case for the exercise of the discretion.

In regard to delay the facts given by the plaintiff are not contradicted and in the situation the plaintiff found himself in 1949 the reasons appear genuine and adequate. It was not until 1957 that he committed matrimonial offence and the circumstances under which he took a mistress are frankly admitted and in the circumstances he found himself in, quite understandable.

The President in the case of *Apted v. Apted and Bliss* [1] 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 safe-guarded. But one must also, I think, be careful to see that the attempt to safeguard does not in fact cause further damage to them.

[1] *(1930) 46 T. L. R. 456.*

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 laregly 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.

I agree with the order made by Sirimane, J., in regard to this appeal.

Appeal allowed.