

1948 Present : Nagalingam and Basnayake JJ.

JASLINE NONA, Appellant, and SAMARANAYAKE, Respondent.

S. C. 80—D. C. Matara, 15,497.

Civil Procedure Code—Action for divorce—Adultery—Adulterer not made a defendant—No application for excuse—Provisions imperative—Sections 598 and 599.

The provisions of sections 598 and 599 of the Civil Procedure Code are imperative. Where, therefore, a plaintiff sues for divorce on the ground of adultery but does not make the alleged adulterer a defendant nor apply for an excuse in terms of section 599 the plaint should be rejected.

A PPEAL from a judgment of the District Judge, Matara.

E. A. G. de Silva, for the defendant, appellant.

No appearance for the plaintiff, respondent.

Cur. adv. vult.

May 10, 1948. BASNAYAKE J.—

This is an action for divorce *a vinculo matrimonii* instituted in August, 1943, by the husband of the defendant on the ground of adultery. In his plaint the plaintiff alleges adultery with one R. B. Soman in 1935

who he states is now dead, one Hendrick Appu, and several other unnamed persons; but he does not make any of the adulterers a co-defendant as he is required to do by section 598 of the Civil Procedure Code.

On the date fixed for the trial, counsel for the defendant raised the following issue among others:—

“(6) Can the plaintiff have and maintain this action as at present constituted?”

In the argument that followed over this issue, counsel for the plaintiff stated that the adulterer Hendrick Appu was also dead although it was not mentioned in the plaint, and that the other adulterers were too numerous to be mentioned as the defendant was living the life of a prostitute. The learned District Judge then made order excusing the plaintiff from complying with the provisions of section 598 of the Civil Procedure Code, which require that the plaintiff shall make the alleged adulterer a co-defendant, and proceeded with the trial on the other issues. The plaintiff gave evidence and called two witnesses including the village headman. At the close of the plaintiff's case, counsel for the defendant stated that he was not calling any evidence and submitted that the plaintiff's action should be dismissed under sections 601 and 602 of the Civil Procedure Code. The learned District Judge held that the defendant committed adultery with the R. B. Soman and Hendrick Appu mentioned in the plaint and that the plaintiff was entitled to a divorce. This appeal is from that order.

The appellant in her petition of appeal canvasses the validity of the order of the learned District Judge excusing the plaintiff from making any of the alleged adulterers a co-defendant, and learned counsel for the appellant submits on the authority of the case of *Ziegan v. Ziegan et al*¹ that the proceedings in this case are bad and should be quashed.

Section 598 and 599 of the Civil Procedure Code which are reproduced here are quite clear as to the procedure to be adopted:

“598. Upon any such plaint presented by a husband, in which the adultery of the wife is the cause or part of the cause of action, the plaintiff shall make the alleged adulterer a co-defendant to the said action, unless he is excused from so doing on one of the following grounds to be allowed by the court upon an application for the purpose:—

- (1) that the defendant is leading the life of a prostitute, and that the plaintiff knows of no person with whom the adultery has been committed:
- (2) that the name of the alleged adulterer is unknown to the plaintiff, although he has made due efforts to discover it:
- (3) that the alleged adulterer is dead:

and it shall be lawful in any such plaint to include a claim for pecuniary damages against such co-defendant.

“599. The prayer to be excused from making the alleged adulterer a co-defendant and the allegations of fact upon which it is founded, supported by affidavit of fact or other sufficient evidence, shall be embodied in the plaint”.

¹ (1891) 1 S. C. R. 3.

Section 598 makes it imperative that the adulterer shall be made a co-defendant to an action in which adultery of the wife is the cause or part of the cause of action, unless the plaintiff is excused from doing so on any one of the grounds mentioned therein. The application for excuse must be embodied in the plaint wherein there must be special prayer in that behalf. The allegations of fact upon which the application is founded must be supported by an affidavit or affidavits or other sufficient evidence.

In the present case none of these requirements has been complied with. Enactments regulating procedure in courts are usually imperative and not merely directory¹. In the present instance, especially in view of the fact that the sections regulate the institution of divorce proceedings, the provisions of section 598 and 599 must be regarded as imperative. The learned District Judge was wrong in excusing the plaintiff when he had not complied with the requirements of section 599. In consequence all the proceedings from setting the case down for hearing are nullities, as has been held in the case cited. In this case the learned District Judge should have rejected the plaint because even the alleged adulterer, Hendrick, who on the face of the plaint appeared to be alive, has not been named as a co-defendant.

For the above reasons, the appeal is allowed with costs and the judgment of the learned District Judge is set aside and the plaintiff's action dismissed with costs with liberty if he is so minded to institute a fresh action in conformity with the provisions of the Civil Procedure Code.

NAGALINGAM J.—I agree.

Appeal allowed.
