1945 *Present:* **Keuneman S.P.J. and Rose J.**

NAVARATNAM, Appellant, *and* NAVARATNAM, Respondent.

356—D. C. Jaffna, 72.

Divorce—Appeal—Requirement of notice of tendering security—Immunity of wife, when appellant—Sufficiency of notice to dispense with security—Husband's suit for declaration that marriage was void—Husband domiciled in Ceylon—Wife of Indian domicil and continuously resident in India—Jurisdiction of Ceylon Court—Prescription—Plaintiff's delay in filing action—Right of Court not to pronounce judgment in favour of plaintiff—Civil Procedure Code, ss. 597, 602, 604, 607, 756—Prescription Ordinance, s. 15.

Where, in a matrimonial action, petition of appeal was filed and on the same day the defendant-appellant by written notice moved that security for costs be dispensed with as she was the wife of the plaintiff-respondent,—

Held, that the appellant had not contravened the provisions of section 756 of the Civil Procedure Code relating to notice of tender of security. The requirement in section 756 of the Civil Procedure Code that the appellant must give notice of tender of security does not preclude him or her from giving notice that security should be dispensed with under some rule of law or established practice.

The plaintiff, who was of Ceylon domicil, sued the defendant, who until her marriage had an Indian domicil, for a declaration that the marriage solemnized between them on March 12, 1936, was null and void on the ground that the defendant gave birth to a child about three months after the marriage and that the plaintiff was unaware that the defendant was pregnant and that the plaintiff before the marriage never had access to the defendant.

The marriage took place in India and the defendant remained in India and never came to Ceylon.

The action was instituted in the District Court of Jaffna on August 17, 1943.

Held, (i.) that the Ceylon Court had jurisdiction in the action as the marriage, which was voidable and not void in nature, should be regarded as good until a decree for nullity was entered, and the domicil of the wife should be regarded as the domicil of the husband up to the date of decree;

(ii.) that the plaintiff's action was not prescribed as it was an action for "divorce", within the meaning of section 15 of the Prescription Ordinance (Cap. 55);

(iii.) that the action was in substance an action for dissolution of marriage within the terms of section 597 of the Civil Procedure Code and therefore the Court had discretion, under section 602 of the Civil Procedure Code, not to pronounce judgment in favour of the plaintiff if he had been guilty of unreasonable delay in presenting his plaint.

APPEAL from a judgment of the District Judge of Jaffna. The facts are stated in the head-note. The District Judge gave judgment for the plaintiff. It was contended for the defendant, in appeal, (1) that

as this was an action for nullity of marriage the defendant could not be regarded as having acquired the Ceylon domicil of her husband and the Ceylon Court, therefore, had no jurisdiction, (2) that the plaintiff's action was prescribed under section 10 of the Prescription Ordinance (Cap. 55), (3) that as the plaintiff had been guilty of unreasonable delay in presenting his plaint the Court should not have pronounced judgment in his favour.

H. V. Perera, K.C. (with him *H. W. Thambiah* and *V. Arulambalam*), for the plaintiff, respondent, took a preliminary objection to the hearing of the appeal on the ground that no notice of security had been given " forthwith ".—With the petition of appeal a notice was tendered and subsequently served on the respondent stating that the appellant would ask the court to exempt her from giving security for costs. So far from being a notice that she would be tendering security for costs it directly stated the contrary. The settlement subsequently arrived at as to the security to be given could not affect the question, as an appeal that had abated could not be revived by consent or agreement of parties. The giving of notice of tendering security was an essential requirement and the failure to do so was fatal. Vide *De Silva v. Seenathumma et al.* [1].

N. Nadarajah, K.C. (with him *N. Kumarasingham* and *G. T. Samarawickreme*), for the defendant, appellant.—There are certain classes of persons who are exempt from the duty to give security for costs of appeal. They are insolvents, paupers, and wives who are parties to matrimonial actions. Section 756 of the Civil Procedure Code has no application to them. The rule that a wife who is a party to a divorce suit need not give security for costs of appeal is a corollary to the rule that a husband is liable to provide the costs of contest for his wife—*Silva v. Silva* [2]; *Abeygunasekera v. Abeygunasekera* [3]. In the case of *Joseph v. Elizabeth* [4] the objection that the wife had not given security for costs of appeal was taken and over-ruled.

H. V. Perera, K.C., in reply.—The cases cited by Counsel for appellant deal with giving security for costs and do not touch the question of giving notice of tendering security. An imperative provision of statute law must be obeyed unless exemption is conferred by some other provision of statute law. A mere rule of court would not have that effect.

N. Nadarajah, K.C., for the defendant, appellant.—In regard to the merits of the appeal the District Court of Jaffna had no jurisdiction to hear this case. The appellant was never resident within its jurisdiction and was before the marriage domiciled in India. As the respondent alleges the marriage was void he cannot be heard to say that by that marriage she attracted to herself a Ceylon domicil. Under Roman Dutch law a declaration of nullity on the ground of ante-nuptial *stuprum* is given on the footing that there never was a legal marriage at all—*Van Zyl's Judicial Practice, Vol. II., p. 695; Nel v. Nel* [5]. There is in that system of law no difference between a marriage that is absolutely prohibited and therefore void and that which is void because of previous

[1] *(1940) 41 N. L. R. 241.*
[2] *(1905) 8 N. L. R. 280.*
[3] *(1909) 12 N. L. R. 95.*
[4] *(1925) 28 N. L. R. 411.*
[5] *(1841) 1 Menzies Reports 274.*

stuprum—Nathan's Common Law of S. Africa, Vol. I., pp. 100, 282. The same difficulty has arisen in England and has been considered—*Cheshire's Private International Law, p. 253; Niboyet v. Niboyet* [1]; *Easterbrook v. Easterbrook* [2]; *Salvesen v. Administrator of Austrian Property* [3].

The respondent has been guilty of undue delay in bringing the action and is on that ground not entitled to a decree. *Vide* section 602 of Civil Procedure Code. The marriage took place in March, 1936, and the action was brought in August, 1943. He was cross-examined as to the reason for the delay and his explanation will not bear scrutiny.

Further, the action was barred by prescription. Section 10 of the Prescription Ordinance would apply and the action would be barred on the expiration of three years after the cause of action arose. The respondent states that he was aware of all the facts by July, 1936. Section 15 exempts from the operation of the Ordinance proceedings in suits for divorce. This is not such a suit, but one for nullity. Distinction is drawn in section 596, Civil Procedure Code, between various kinds of matrimonial actions.

H. V. Perera, K.C., for the plaintiff, respondent.—In the Roman-Dutch law the term void includes both void and voidable. A marriage that may be declared null and void on account of previous *stuprum* is not entirely void as the husband may condone or overlook the offence. The marriage remains good till the husband seeks dissolution of it. Such a case is on a par with suits for nullity on the ground of impotence. In such cases the English Courts have held that resort must be had to the courts of the domicil. Vide *Salvesen v. Administrator of Austrian Property* (*supra*).

Prescription does not apply to suits for nullity. The term " divorce " in section 15 is used in a wide sense and includes suits for nullity. It is an Ordinance of 1872 and at that time the word divorce was used with a wide meaning. Vide *Stephen's Commentaries, Bk. 3, p. 296.* It was only by the Divorce Act of 1857 that dissolution of marriage was permitted on grounds that arose after the marriage. Before that the term divorce was applied to actions of divorce *a mensa et thoro* and suits for nullity. Even in 1872 the term " divorce " was used in a wide sense and not restricted to any particular class of action.

As to undue delay, the issues raised the question whether it was a fatal bar and would rightly be answered in the negative. At the most it would be a discretionary bar. Section 602 has no application to actions for nullity. The scheme of the chapter shows that the sections immediately following section 597 are only applicable to actions for divorce *a vinculo*. Undue delay is, therefore, no ground for refusing a declaration of nullity. Should a husband condone a previous *stuprum* he would be refused a decree because of the substantive Roman-Dutch law. The Court would not need to call in aid a procedural section.

N. Kumarasingham replied.

Cur. adv. vult.

[1] *L. R. (1878—9) 4 Probate p. 1 at p. 9.*
[2] *170 L. T. p. 26.*
[3] *1927 A. C. 641.*

August 31, 1945. KEUNEMAN S.P.J.—

The plaintiff brought this action against the defendant for a declaration that the marriage solemnized between them on March 12, 1936, was null and void, on the ground that the defendant gave birth to a child about three months after the marriage and that the plaintiff was unaware that the defendant was pregnant and that the plantiff before the marriage never had access to the defendant. After trial the District Judge entered judgment for the plaintiff, and the defendant appeals. A preliminary objection was raised against the appeal, to the effect that the defendant had failed to give notice forthwith after the appeal that she would tender security for the appeal. What actually happened is as follows:

In the proceedings before trial the defendant moved that the plaintiff be ordered to deposit a sum of money as costs to enable the defendant to conduct her case. On March 28, 1944, the District Judge ordered plaintiff to pay Rs. 150 as costs to the defendant, and this sum was duly deposited in court on April 3, 1944. After the trial judgment was entered on September 26, 1944. The petition of appeal was filed on October 9, 1944, and on the same day the defendant by her written notice moved that security for costs be dispensed with as the defendant, appellant, was the wife of the plaintiff, respondent. As regards this latter application the District Judge ordered notice for October 17, 1944. On that date parties were represented and a settlement was arrived at. Of consent it was ordered that the appellant should give security in Rs. 50 for costs.

Mr. Perera for the respondent argued that in the motion the defendant, appellant, did not give notice that she would tender security but merely moved that security be dispensed with. He contended that there had been a failure to comply with a positive requirement of section 756 of the Civil Procedure Code, and that the appeal must accordingly be dismissed.

Mr. Nadarajah for the appellant, depended on the principles enunciated in the cases of *Silva v. Silva* [1], *Abeygunasekera v. Abeygunasekera* [2] and *Joseph v. Alexander Elizabeth* [3]. In the first of these cases it was held that " The English rule must be followed. . . . . The rule is that the husband, besides being generally liable to pay his own costs, is also as a general rule, whether the wife be successful or not and whether she be petitioner or respondent, liable to pay his wife's costs . . . and he is also liable to pay into court or give security for an amount fixed by the Registrar as sufficient in his judgment to cover the wife's costs in connection with the hearing of the case ". The reason for the liability was stated to be that under the old law " the marriage gave all the property to the husband and the wife had no other means of obtaining justice ".

The second of the cases mentioned adopted this same view, in spite of the fact that there was no statutory authority to this effect in Ceylon. In the third of these cases the matter was carried one stage further and it was held that " a court in these proceedings could not insist upon

[1] *8 N. L. R. 280.* [2] *12 N. L. R. 95.*

[3] *28 N. L. R. 411.*

the wife giving security for the husband's costs in appeal ". An objection taken to the appeal on the ground that the wife had not given security for the husband's costs in appeal was dismissed.

Mr. Nadarajah further argued that the previous order made in the present case, that the husband should deposit the wife's costs of the trial, showed that the wife was qualified to claim exemption from giving security in appeal.

Mr. Perera did not dispute the authority of these cases, but he insisted that in any event the wife was required by section 756 to give notice that she will tender security, and that she was not permitted to omit that notice although she could at the same time claim exemption from giving security in appeal. Such a construction, to my mind, appears artificial and unreasonable, and I do not think the requirement in section 756 that the appellant must give notice that he will tender security precludes him from giving notice that security should be dispensed with under some rule of law or established practice. In this case the notice to dispense with security was given forthwith, and I do not agree that the appellant has contravened the provisions of section 756 of the Civil Procedure Code. The case of *Joseph v. Alexander Elizabeth (supra)* is in my opinion an authority to the contrary. The preliminary objection is accordingly dismissed.

As regards the merits of the appeal, it has not been argued that the plaintiff was not entitled to obtain a decree on the grounds set out in his plaint. The case of *Sivakolunthu v. Rasamma* [1] has been accepted as laying down the correct law applicable to Ceylon. The facts are also not in dispute in this appeal.

Mr. Nadarajah for the appellant, however, raised three matters before us.

(1) The plaintiff in this case admittedly has a Ceylon domicil. The defendant, at any rate until her marriage, had an Indian domicil. The marriage took place in India. On the facts it has been held that the plaintiff had reason to suspect the pregnancy of the defendant on the wedding night, and almost immediately after plaintiff left the defendant and returned to Ceylon while the defendant remained in India ever since and never came to Ceylon. Mr. Nadarajah argued that as this is an action for nullity of marriage, the defendant cannot be regarded as having acquired the domicil of her husband, viz., a Ceylon domicil. He contended that no action for nullity can be maintained in the Ceylon Courts.

In my opinion the answer to this argument is to be found in the case of *Inverclyde v. Inverclyde* [2] which was based upon dicta of the House of Lords in *Salvesen v. Administrator of Austrian Property* [3]. The case had reference to a decree annulling a marriage on the ground of impotence. It was held that such a decree dealt with a marriage which till the date of the decree was voidable only and not void. In substance it was a

[1] *24 N. L. R. 89.*

[2] *L. R. 1931 Probate 29.*

[3] *L. R. 1927 A. C. 641.*

decree for the dissolution of the marriage, and was thus to be distinguished from decrees annulling marriages for illegality or informality. In his judgment Bateson J. said—

"The argument for the respondent was this :—

A suit for nullity on the ground of impotence is quite different from other suits for nullity. *e.g.*, on the ground of informality or illegality such as bigamy, absence of parental consent, or some requirement in the ceremony. Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it. The marriage is voidable and not void, as in other cases of nullity. The marriage remains a marriage until one of the spouses seeks to get rid of the tie. In other cases such as bigamy there has never been a marriage at all. Domicil of the parties, at any rate since 1895, has been an essential of jurisdiction in a suit to dissolve a marriage in divorce and must equally be so in a nullity suit to dissolve a marriage on the ground of impotence . . . . The Court of the domicil is the only competent court to grant a decree affecting status. . . . . Again the marriage cannot be impeached after the death of one of the spouses. Nullity for impotence is a matter in which the spouses alone are concerned . . . . This is the argument for the respondent and in my judgment it is sound."

Bateson J. was of opinion that the House of Lords in *Salvesen v. Administrator of Austrian Property* (*supra*) has put the matter beyond doubt, and the dicta quoted by him support his conclusion that the court of the domicil has at least a competent, if not an exclusive jurisdiction.

There can, I think, be no doubt that the claim in the present action for a decree of nullity is in its nature akin to the claim for nullity on the ground of impotence, and not to a claim for nullity on the ground of bigamy. In my opinion the marriage must be regarded as good until the decree for nullity is entered, and the domicil of the wife must be regarded as the domicil of the husband up to the date of the decree. The Ceylon Court, therefore, had jurisdiction in the action. Mr. Nadarajah's argument on this point fails.

His further argument that the evidence does not establish that the plaintiff was resident within the jurisdiction of the District Court of Jaffna was not persisted in. There is sufficient evidence to establish that fact, and whether section 597 or 607 of the Civil Procedure Code applies the Jaffna Court had jurisdiction in the matter.

(2) Mr. Nadarajah next argued that the plaintiff's action was prescribed under the Prescription Ordinance, Cap. 55, section 10. At the latest the plaintiff was aware in July, 1936, of the birth of the child to the defendant. The present action was not instituted till August 17, 1943, more than 7 years after, and if prescription runs there is no question that the action is prescribed. Under section 15, however, it is laid down that nothing contained in the Ordinance "shall be taken to apply to any proceedings in any action for divorce". The question, therefore, arises as to whether the present action can be regarded as an action

for " divorce ". In this connection it has to be remembered that the Prescription Ordinance was enacted in 1871 and section 16 of that Ordinance is in the same terms as section 15 of the present Ordinance. In my judgment we must investigate the meaning of the word " divorce " as it was understood in 1871. In interpreting the term " divorce " I think we may consider the meaning of that term in England in 1871. I quote from *Stephen's Commentaries, Bk 3, p. 296*: " We are next to consider the manner in which a marriage may be dissolved or declared to be a nullity. Dissolution may be either by death or divorce. Prior to the Divorce Act (20 and 21 Vict c 85) passed in the year 1857 there were two kinds of divorce obtainable by suit in the Ecclesiastical Courts; the one *a mensa et thoro*, the other *a vinculo matrimonii*. The first species, or separation from bed and board, was pronounced in cases where there was no illegality in the union in the commencement but where from some supervenient cause it has become improper for the parties to live together, as for the cause of intolerable cruelty in the husband, adultery in either of the parties, and in some other cases mentioned in the books . . . . The sentence for this divorce though it effected a judicial separation did not bastardize the issue of the marriage, or enable either of the parties to contract a fresh union . . . .

As for divorce *a vinculo*, this was a declaration by the Ecclesiastical Court that the marriage was a nullity, as having been absolutely unlawful from the beginning. It consequently bastardized the issue and enabled the parties severally to contract another marriage at their pleasure. It was always founded on some *canonical* disability and it could never be pronounced for any cause whatever supervenient to the marriage, not even for adultery itself."

But though divorce *a vinculo* for adultery could not be obtained in the regular course of law either in the ecclesiastical or the secular courts, yet it was very frequently granted by a private Act of Parliament to a husband but not to a wife.

Prior to 1857 then the term " divorce " was applicable to suits for separation *a mensa et thoro* and also to suits for nullity of marriage.

The Act of 1857 made several changes. The jurisdiction of the Ecclesiastical Court was removed and the jurisdiction formerly exercised by that court was vested in the Court for Divorce and Matrimonial Purposes. Under section 7 no decree thereafter could be entered for divorce *a mensa et thoro* but that was replaced by a decree for a judicial separation. Under section 27 it was open to a husband to present a petition praying that his marriage be dissolved on the ground that his wife has been guilty of adultery. It was also open to a wife to bring a similar action where the adultery of the husband had been accompanied by certain other matters.

In my opinion the term " divorce " was after 1857 still applicable to actions for nullity of marriage as well as to the new type of action based on causes which arose after the marriage. It may be (I do not say it is) a matter of doubt whether the term " divorce " applied to suits for judicial separation after 1857. But in my opinion the term

" divorce " in section 15 of the Prescription Ordinance applied to cases where a decree of nullity of marriage was prayed for. The side note to that section " This Ordinance not to affect Crown or causes matrimonial " appears to support this view. It is interesting to note that the phrase " causes suits and matters matrimonial " appears to apply to the jurisdiction of the Ecclesiastical Court before 1857 (see section 6 of the Act of 1857).

Our attention has been directed to section 596 of our Civil Procedure Code where a distinction appears to be drawn between actions for divorce *a vinculo matrimonii* and actions for separation *a mensa et thoro* or declaration of nullity of marriage. But the Civil Procedure Code was first enacted in 1889, and I do not think we can take it into account in interpreting the Prescription Ordinance of 1871 or Chapter 55. For these reasons I hold that the Prescription Ordinance does not apply to the present action.

(3) Mr. Nadarajah next argued that the plaintiff had been guilty of unreasonable delay in presenting his plaint and that the Court should not have pronounced judgment in his favour. He depended on section 602 of the Code. Unfortunately in this case the only issue framed in respect of this matter runs as follows:—

" 5. Is the plaintiff's delay in bringing the action a fatal bar to this suit? " The District Judge has correctly answered that issue in the negative but has not considered the question whether in his discretion he should refuse to pronounce judgment in favour of the plaintiff because of unreasonable delay in presenting the plaint. The defendant cannot avoid blame for having left the issue in this form.

Mr. Perera for the respondent argued that section 602 has no application to an action for a declaration of nullity of marriage. He pointed out that under section 597 of the Code of Civil Procedure a husband or wife may present a plaint " praying that his or her marriage may be dissolved on any ground for which marriage may, by the law applicable in this Island to his or her case, be dissolved ". There follow immediately after serveral sections including section 602 which are applicable to that type of action. Thereafter follows section 607 which relates to a plaint praying that the marriage may be declared null and void: and there is nothing specific in the Code which makes section 602 applicable to actions for nullity of marriage under section 607. Mr. Perera argues that section 597 relates only to actions for dissolution on the ground of adultery or other cause which supervenes after the marriage, and that the section does not apply where it is claimed that the marriage was bad *ab initio*. At first sight this argument appears convincing, but I do not think upon examination it can be sustained. Section 597 uses very wide language, viz., " any ground for which the marriage . . . . may be dissolved ". Can this action be regarded as an action for the dissolution of the marriage? I think it can. The decision in the case of *Inverclyde v. Inverclyde* (*supra*) indicates that this type of action is in substance an action for dissolution, and that the marriage will be regarded as subsisting until a declaration of nullity is entered. There are no doubt other actions, *e.g.*, those based on bigamy, where it may

be taken that the marriage never subsisted, and different considerations may apply to those actions for nullity: see *White otherwise Bennett v. White*[1]. I hold that the present action may be regarded as coming within the terms of section 597 of the Code, and that section 602 applies to this action.

I may add in this connection that section 602 is the section which gives statutory authority to the Court to deny a decree to the plaintiff when it has been found that the plaintiff had been an accessory to or has connived at the conduct of the defendant, or has condoned the same, or where the plaint has been presented in collusion with the defendant. The proviso to the section goes further and gives the Court a discretion to refuse a decree on various grounds, including the ground of unreasonable delay in presenting or prosecuting the plaint. In an action of the kind we are dealing with here, I think a finding of connivance or condonation or collusion is essentially a ground on which the decree should be denied to the plaintiff, and the grounds stated in the proviso are grounds on which the Court may well exercise its discretion against the plaintiff. I think this supports the contention that the present action falls within the scope of section 597 of the Code and that the following sections are applicable to this kind of action.

I do not think it is necessary in this case to consider the argument that in any event section 602 and the subsequent sections may impliedly be made applicable to actions falling under section 607 only and not under section 597.

It follows from this holding that section 604 also applies to this action and that the decree entered should have been a decree *nisi* not to be made absolute till after the expiration of not less than three months from the pronouncing thereof. The District Judge has, however, entered decree absolute in the first instance. This in my opinion is incorrect.

The facts which relate to this matter are as follows:

The plaintiff in July, 1936, when he knew of the birth of the child had no employment. He secured employment for the first time in September, 1937, and was till then unable to take steps. He wrote to the Bangalore Church for a certificate of marriage but received a reply that no such marriage was registered. Till 1941 he could not get the marriage certificate. Later, on the advice of a firm of lawyers in Madras, he applied to the Registrar-General of Births, Deaths and Marriages, Madras, and after a long delay he obtained the marriage certificate on March 5, 1943.

It is true that this explanation is not very satisfactory and shows a surprising lack of initiative on the part of the plaintiff. But at the same time the District Judge was not invited to regard this delay as unreasonable, and has in fact not done so, and I do not think it is possible for us to hold that the delay was in fact unreasonable and, further, that the District Judge was bound to exercise his discretion against the granting of the decree. I do not think any useful purpose will be served by sending the case back to the District Judge in respect of this matter.

[1] *1937 Prob. 111.*

In the circumstances I hold that the defendant has failed to show that the decree should be refused to the plaintiff on the ground of unreasonable delay.

The appeal accordingly fails. I, however, alter the decree entered into a decree *nisi* not to be made absolute until the expiration of not less than three months after the date of this judgment. In all the circumstances I do not think there should be any order for costs in this action. I delete the order that the defendant should pay the plaintiff the costs of the action. There will be no order in respect of the costs of appeal.

ROSE J.—I agree.

Appeal dismissed.