1955 *Present :* **K. D. de Silva, J., and H. N. G. Fernando, J.**

VISVAVERNI, Appellant, *and* MURUGIAH, Respondent

S. C. (F) 520 with S. C. (Inty.) 197-198—D. C. Trincomalee, 4,140

Divorce—Action for declaration of nullity of marriage—Pregnancy prior to marriage—Proof—"Condonation"—Civil Procedure Code, ss. 600, 602 (2).

Plaintiff sued for a declaration of nullity of marriage on the ground that the defendant wife was pregnant by another man at the time of marriage and that she concealed the fact of pregnancy from the plaintiff. The marriage was

solemnized on January 18, 1951, and a child was born to the defendant on June 18, 1951. There was no evidence indicating that the child was anything other than normal.

Held, that, in the circumstances, the plaintiff was entitled to judgment in his favour.

Held further, that, assuming that section 600 of the Civil Procedure Code applies even in an action for declaration of nullity of marriage, pre-nuptial stuprum of which the husband becomes aware only after marriage can be condoned only in the same way as adultery can be condoned under section 602 (2).

APPEAL from a judgment of the District Court, Trincomalee.

A. C. M. Uvais, for the defendant-appellant.

H. W. Tambiah, with *A. Nagendra*, for the plaintiff-respondent.

Cur. adv. vult.

August 3, 1955. H. N. G. FERNANDO, J.—

This was an action by a husband for a declaration of nullity of marriage on the ground that the defendant wife was pregnant by another man at the time of marriage and that she concealed the fact of pregnancy from the plaintiff. The religious ceremony took place on 18th January, 1951, and the marriage was registered on 21st January, 1951. It is a matter beyond dispute that the parties did not have sexual relations with one another prior to the solemnization of the marriage and that sexual relations first took place only on January 18th or January 19th.

The defendant gave birth to a child on 18th June, 1951, at the Negombo Hospital. The bed head ticket (P1) contains an entry to the effect that the weight of the child at birth was 6 lbs. but the learned District Judge rightly took no account of this entry because the person who made it was not called as a witness. The only admissible material in the ticket was the entry indicating that the defendant was discharged from hospital on 23rd June. There was therefore no evidence from any independent source to establish the maturity or otherwise of the child. The plaintiff said that the child had hair on its head and looked normal, and that suspicion first arose in his mind when he saw the child. According to him the child died a week after the discharge of the defendant from the hospital. This was obviously incorrect since the death was registered on 27th June, 1951, as having taken place on the same day. It was clear therefore that the child did live for 5 days and it was probable that the child was alive altogether for between 5 and 9 days. The only medical evidence was that of a doctor who did not attend on the delivery or see the child after birth. The doctor's opinion, supported by text books, was that a child delivered at the end of the 5th month of pregnancy would weigh only about half a pound and that the weight would be one and a half pounds at the end of the 6th month ; that a child born before the 6th month would normally die and would not live for 9 days ;

that such a child would have hardly any hair on the head and would have a wrinkled but not a smooth red skin and that a child born within 175 days would not be a mature child.

The defendant merely said that the child was small and weak and did not give any description of the child in keeping with the description which the child would have had according to the doctor if delivery took place only at the end of the 6th month.

In spite of the paucity of the technical evidence, the Judge has chosen to believe the evidence of the plaintiff as to the fact that the child was normal, and that evidence, considered together with the medical evidence to which I have referred, does establish that conception must necessarily have taken place well prior to the marriage.

The defendant has in appeal relied on the case of *Clark v. Clark*[1], where the earliest material date on which marital intercourse could have taken place was 174 days before the birth of the child. The Court there held that, although the case was of a most remarkable nature, it had been established that the husband was the father and that a viable child had been delivered within the period of 174 days. The case is, however, of no assistance to the defendant, because there was convincing evidence to show that the birth was extremely premature and that the child had survived only through treatment and nursing of a most devoted character. There is in the case before us, no evidence indicating that the child born to the defendant was anything other than normal.

The plaintiff also attempted to prove that the defendant had subsequently admitted that she had been unchaste. He relied for this purpose on a number of letters written to him by the defendant both before and after the institution of the action. Although the Judge did not construe the statements in these letters as constituting an admission, there was at least in one of them (P11) a remark which was ridiculous if it was not an admission. The learned Judge in accepting the defendant's explanation of her reasons for using particular expressions in her letters failed to realise that she did not even attempt to explain the remark to which I refer. If he did so he would without difficulty have concluded that the defendant had admitted her guilt. It is clear therefore that the Judge has rightly held on the facts that the child was conceived before marriage, and therefore to a stranger and not to the plaintiff.

It has been argued in appeal that there has been condonation and that the plaintiff's action must fail on this ground. Reliance has been placed upon letters written by the plaintiff subsequent to the separation of the parties, which undoubtedly indicate that the plaintiff was not entirely averse to a reconciliation. But it is common ground that cohabitation, even in its limited sense of mere living together, was never resumed after the death of the child. It was argued on the authority of *Navaratnam v. Navaratnam*[2] that section 600 of the Code applies even in an action for declaration of nullity and that therefore it was the duty of the Judge, despite the absence of a plea of condonation, to inquire and decide whether or not there had been condonation. The arrangement of Chapter 21

[1] *(1939) Probate 228.* [2] *(1945) 46 N. L. R. 361.*

of the Code is such that it is not at all clear that section 600 is applicable in a nullity suit. But even if that section and the other sections which depend on it are applicable, the only guide as to the meaning of condonation is to be found in sub-section 2 of section 602 :—

> "No adultery shall be deemed to have been condoned within the meaning of this Chapter unless where conjugal cohabitation has been resumed or continued."

If adultery can be condoned only by resumption of conjugal cohabitation, it would seem to follow that pre-marital stuprum of which the husband becomes aware only after marriage can also be condoned only in the same way.

In *Jayasinghe v. Jayasinghe*[1] Gratiaen J. expressed the view that conjugal cohabitation can be resumed without a resumption of sexual intercourse after reconciliation. He also referred to the South African case of *Niemand v. Niemand*[2] where it was held that "a decree for divorce should not be granted at the suit of a husband who, knowing of his wife's adultery, continued to live under the same roof with her . . . *under circumstances which would justify the belief that a reconciliation has taken place*". Assuming these statements of the law to be correct, I think that where sexual intercourse is not actually resumed there should be strong evidence of the fact of reconciliation. If, as in the present case, the spouses do not spend even a single day together after the separation, there must not only be convincing proof of a reconciliation but also a clear explanation for the continued separation of the parties. Neither of these matters has been established by the evidence in this case. Even therefore if the Judge had been bound to consider the question of condonation, he could not have held in favour of the defendant on that question. I would therefore dismiss the defendant's main appeal and affirm the decree entered by the District Judge.

The defendant has also appealed (S. C. No. 197 of 1954) against the order by which she was denied alimony for the period subsequent to the entry of the decree. Counsel for the plaintiff in appeal did not seek to support that order. It must therefore be set aside and the defendant will be entitled to alimony at the rate of Rs. 75/- per month for the period commencing on 1st March, 1954, and ending on the date of the decree to be entered in this Court.

The defendant's appeal (S. C. No. 198 of 1954) has not been seriously pressed and is dismissed.

In the circumstances I would make no order for costs in any of the appeals.

DE SILVA, J.—I agree.

Appeal dismissed.

[1] *(1954) 55 N. L. R. 410.*

[2] *(1898) 15 S. C. 217.*