

1922.

*Present: Ennis and Schneider JJ.*SILVA *v.* CARLINAHAMY *et al.*

364—D. C. Galle, 18,344.

Divorce—Wife leaving husband without reasonable cause—Absence for eight months—Malicious desertion—Decree for divorce in the event of wife not returning to husband within a period fixed in decree.

Where a wife without reasonable cause left her husband and lived separately for eight months, a decree for divorce was entered on the ground of malicious desertion.

It is not competent to the Court to enter a conditional decree for divorce in the event of the wife not returning to her husband within a period fixed in the decree.

THE facts are set out in the judgment of the District Judge (T. B. Russell, Esq.) :—

Plaintiff sues first defendant, his wife, for divorce on the ground of malicious desertion and adultery with the second defendant. Defendants have both filed answer and deny the adultery. First defendant also denies the desertion, and alleges adultery against the plaintiff.

It is difficult on the evidence to arrive at the truth. The witnesses whom the plaintiff has called to prove defendant's adultery are not entitled to any credit. Plaintiff, who is an influential man in the village, could have induced any number of this sort to give similar evidence. The fact that he never at any time made any charge of adultery against the first defendant until he instituted this case is pretty clear evidence that he suspected none. It looks as if the charge has been worked up simply as a foundation for the present case, which the plaintiff has been apparently forced to take owing to the defendant having sued him in the Police Court for maintenance. In that case according to the record he expressed his willingness to take the defendant back. He would hardly have done this if he had even suspected her at the time with having committed adultery. First defendant's counter-charge against the plaintiff of adultery, though not apparently such an afterthought like the plaintiff's, for she mentioned it first to the police in May (P 2), is also not proved. There is, in the first place, only the defendant's own evidence on the point. There is no question that the defendant did leave the plaintiff. She admits it in her answer, but that it was on account of his adultery with the servant, Jane, I am by no means satisfied First defendant is a young woman, and the plaintiff is an old man of 70. Plaintiff states that the defendant became indifferent to him, and left him for this reason. Whether this was the real reason or not it is impossible to say, but it is just as likely as the reason given by the defendant. In any case, it is doubtful if an old man like the plaintiff would fail to find satisfaction with the first defendant and misbehave himself with the servant.

Neither party having made out its charge of adultery against the other, the result is that the plaintiff has to fall back on his charge of malicious desertion, and that the defendant, who alleges no other reason for her desertion except the plaintiff's adultery, has proved no sufficient reason for her having left him. She has followed this up by

refusing to return to him in the maintenance case. Plaintiff seems to me to have proved malicious desertion on the part of the first defendant, and I accordingly allow him a divorce on this ground. His action against the second defendant fails. He will, therefore, pay second defendant his costs.

1922.

Silva v. Cardinal

Pereira, K.C. (with him *Bartholomeusz*), for the appellant.

Jayawardene, K.C. (with him *Soertsz*), for the respondent.

April 11, 1922. ENNIS J.—

In this action a husband prayed for divorce against his wife on the ground of malicious desertion and adultery. He claimed also damages against the co-defendant. The learned Judge found that the allegation of adultery was unfounded, but that the wife had maliciously deserted her husband. He granted a divorce on that ground. The first defendant appeals from the decree, and the plaintiff has filed a statement of objections apparently against the second defendant. Counsel for the plaintiff-respondent has admitted that he cannot support the cross-objections, as the second defendant was not a party respondent to the appeal by the first defendant. The cross-objection, therefore, is dismissed.

With regard to the appeal, it has been strongly urged that the learned Judge was wrong in finding, as a fact, that the desertion was malicious. Apparently a long absence without returning will constitute a malicious desertion. In the present case there has been an absence of about eight months, and it appears that in the course of a maintenance case instituted by the wife the husband had offered to take her back, and that she had definitely refused to go. There is no suggestion anywhere on the record or in the petition of appeal that the wife even now desires to go back to the husband. As the learned Judge has found that the absence of the wife was without reasonable cause, the desertion is malicious. It was suggested that the decree should have left a way open for reconciliation between the parties by fixing a time within which the wife could return. This appears to have been an order made in a case—*D. C. Colombo, No. 55,353*.¹ Since that date, however, the Civil Procedure Code has been passed, and under that Code the only decree which can be given in a divorce suit is the decree specified in section 604, and that decree can be set aside only on certain grounds mentioned in the section. An allowance of time as that suggested is not one of those grounds. Any application of this sort should have been made before the decree was passed. I see no reason to interfere with the decree appealed from, and would dismiss the appeal, with costs.

SCHEIDT J.—I agree.

Appeal dismissed.

¹ *Vand. 237.*