

DE ALWIS
v.
WICKREMASINGHE AND OTHERS

COURT OF APPEAL.
DE SILVA, J.,
WEERASURIYA, J.
CA 376/96.
D.C. KANDY 971/D.
19TH MAY, 1999.
29TH JUNE, 1999.
14TH OCTOBER, 1999.
29TH NOVEMBER, 1999.

Matrimonial Action - Divorce granted - Alimony and damages awarded - Appeal lodged - Respondent dies - Testamentary proceedings - Executor claimed the sum as part of the estate of the deceased.

The Plaintiff Petitioner sought a Divorce from his wife the Defendant Respondent on the ground of constructive malicious desertion. The Defendant Respondent (wife) filed answer alleging adultery and stated that the Petitioner was living in open adultery with the 2nd Respondent and counter sued for divorce on the ground of adultery and desertion. She claimed permanent alimony, damages and several other reliefs.

After trial the Defendant Respondent was granted the Divorce, and was awarded Rs. 100,000/= as permanent alimony, Rs. 500,000/= on account of the 1st Defendant's house which the Plaintiff Petitioner had sold and taken the money; the Plaintiff Petitioner was also asked to return Rs. 30,000/= the dowry money with accrued interest and a sum of Rs. 1,000,000/= has been awarded as damages against the 2nd Defendant.

The Plaintiff Petitioner and the 2nd Defendant appealed against the said Judgment, and while the appeals were pending, the 1st Defendant - Respondent died, and the appeals were abated.

While the said appeals were pending the 1st Defendant (wife) made an application to the District Court of Kandy for sequestration of a sum of Rs. 1,618,709.46 out of Rs. 4,00000/= which the plaintiff Petitioner had deposited with a Finance Company. The said sum was seized and

brought to the credit of the case. After the death of the 1st Respondent (wife) the Plaintiff Petitioner made an application seeking an order that the said sum of Rs. 1,618,709.46 should be released to the Petitioner. The Executor intervened and resisted. The District Court held that the Executor could not intervene in the Divorce case.

The District Court held that the said sum had become part of the estate of the deceased. However Court directed the Executor to obtain an order in the Testamentary case to have the money credited within one month.

On Appeal -

Held :

(1) Where one of the spouses dies after a decree of divorce has been entered and while the appeal against the decree is pending, the appeal falls away and the decree stands, but the surviving spouse or the executor may continue the appeal if this is necessary in order to have the property rights of the spouses and their heirs determined.

(2) In this case, a decree for divorce and a decree for payment of money were made against the Petitioner. The decree for money is under several heads - permanent alimony, monies taken from the 1st Defendant's Savings Account, payment in respect of 1st Defendant's house, which had been sold and money taken by the Petitioner.

(3) Where alimony is concerned, it is purely a personal right which subsists only so far as the wife is entitled to support. It ceases on her demise. The claim to alimony being of a personal nature extinguishes with the death of the wife, and the decree for alimony ceased to be executable.

(4) Apart from the alimony ordered the rest of the money forms part of the estate of the deceased and should be remitted to the testamentary case.

APPLICATION in Revision against the order of the District Court of Kandy.

Faiz Musthapha P.C., with *H. Withanachchi* for Petitioner.

P.A.D. Samarasekera, P.C., with *Ms K. Wijetunge* for the Respondent.

Cur. adv. vult.

February 25, 2000.

DE SILVA, J.

This is an application to revise two orders dated 22. 03. 1996 and 23. 05. 1996 made by the Learned Additional District Judge Kandy wherein she has held that the sum deposited in the divorce case had become part of the estate of the deceased now being administered in the District Court of Galle. She further held that the executor, Srinath Asoka Wickremasinghe, could not intervene in the divorce case and unless the executor took steps to obtain an order in the testamentary action to have the money credited within one month, the petitioner would be entitled to withdraw the same.

The petitioner filed action bearing D.C. Kandy No. 971/D to obtain a divorce from his wife Shanthilini Jayashri de Alwis (nee Wickramasinghe) and seeking custody of two children of the marriage. The basis of the said action was that the wife treated the petitioner with such contempt and cruelty that he was compelled to leave the matrimonial home. The wife (who will be referred to as the 1st defendant) filed answer alleging that the said plaintiff had committed adultery and was living in open adultery with one Carolyne Rainer who was added as the 2nd defendant in the divorce case and counter sued the petitioner for divorce both on the ground of adultery and desertion. She also claimed permanent alimony in a sum of Rs. 1,000,000/= and several other reliefs. She also claimed damages in a sum of Rs. 1,000,000/= from the added defendant.

After trial the learned Additional District Judge delivered judgment on 29. 03. 1993 holding that adultery on the part of the petitioner had been established and awarded the 1st defendant a sum of Rs. 1,000,000/= as permanent alimony and further sum of Rs. 500,000/= on account of the 1st defendant's house which the petitioner has sold and taken money. The petitioner was also ordered to return the dowry

money of Rs. 30,000/= with accrued interest which the petitioner had withdrawn from her savings account. Thus the aggregated sum that was ordered against the petitioner was Rs. 1,618,709.46/=. A sum of Rs. 1,000,000/= had also been awarded as damages against the 2nd defendant.

The petitioner and the 2nd defendant appealed against the said judgment to this Court. While the aforesaid appeals bearing Nos. CA.212/93(7) and CA.213/93(7) were pending before this Court the 1st defendant was affected by a terminal illness and at her instance, the hearing of the above appeals were accelerated by this Court. On 30. 11. 1994 the case was taken up on top of the list and the argument commenced but could not be concluded on that day. The 1st defendant succumbed to her illness and died on 01. 12. 1994 the very next day. Thereafter on 02. 05. 1995 the petitioner's counsel informed Court that no substitution would be effected in respect of the deceased 1st defendant and consequently the said appeals were abated.

Whilst the said appeals were pending the 1st defendant made application to the District Court of Kandy, purportedly under section 653 of the Civil Procedure Code for sequestration of a sum of Rs. 1,618,709.64/= out of Rs. 4,000,000/= which the petitioner had deposited with Sinhaphuthra Finance Company Ltd. and the said sum was seized and brought to the credit of this case.

After the death of the 1st defendant, the petitioner made an application to the District Court on 31. 07. 1995 seeking an order that the said sum of Rs. 1,618,709.46/= should be released to the petitioner on the basis that the rights of the 1st defendant, which were personal in nature had been extinguished by her death.

The 1st respondent, by virtue of his appointment as the Executor of the 1st defendant, intervened, and claimed that the said sum was part of the estate of the deceased. The

1st respondent, further sought to be substituted as the judgment creditor of the case.

The petitioner filed objections to the said application of the 1st respondent and maintained that whatever personal rights possessed by the 1st defendant had ceased to exist with her death.

By order dated 22. 03. 1996 the learned Additional District Judge held, *inter alia*, that the said sum had become part of the estate of the deceased now being administered in the District Court of Galle.

The learned Additional District Judge further held that the aforesaid Executor of the 1st defendant could not intervene in the divorce case and that unless the Executor took steps to obtain an order in the testamentary action to have the money credited within one month the petitioner would be entitled to withdraw same.

The petitioner, being aggrieved by the said order, duly gave Notice of Appeal and thereafter the Petition of Appeal was filed in the District Court.

In the meantime the respondent, as the Executor of the 1st defendant, had tendered a deposit note on 17. 04. 1996 issued by the District Court of Galle. The petitioner objected to the said money being transferred to the testamentary action in view of the failure on the part of the respondent to obtain an order within one month under and in terms of the previous order of the Court.

The learned Additional District Judge, by her order dated 23. 05. 1996 directed the respondent to obtain an order in the testamentary action for the credit of the said sum within one month and gave an opportunity for the petitioner to move this Court for a stay of the transfer of the said money.

The present dispute relates only to the fate of the monies so seized and brought to the credit of the case in satisfaction of the money decree which the 1st defendant has obtained against the petitioner.

At the hearing of this application the learned President's counsel for the petitioner sought to revise the impugned orders of the Additional District Judge broadly upon two grounds, namely that,

- (a) The death of the defendant terminated the marriage and consequently all proceedings in the divorce action and
- (b) In any event the respondent has not complied with the order dated 22. 03. 1996 and for that reason the petitioner should be permitted to withdraw the sums deposited in Court.

In support of the first submission counsel relied on the following authorities "Aspects of Actio Injuriarum in the Roman Dutch Law" by Dr. C.F. Amerasinghe and "The Law of Delict in Ceylon" by E.B. Wikramanayaka.

It was further submitted by Mr. Mustapha P.C. that any appeal that may lie for the termination of the marriage would be abated by the supervening death of a party to the marriage and any payments made on the basis of the order of the original decree of divorce, which is the subject matter of an appeal will revert back to the party making payment *in as much as* the cause of action in a divorce proceedings is extinguished with the death of a party to a marriage.

Mr. Samarasekara P.C. submitted that upon the death of either party to the *actio injuriarum* the cause of action lapses, the maxim *actio personalis moritur cum persona* applies, unless the action has reached the stage of *litis contestatio*, in

which event the action passes to the executor of the wronged person or persists against the executor of the wrongdoer as the case may be. He relied on Wille - Principles of South African Law 5th Edition page 530 and Law of Delict by Wikramanayake page 125.

Mr. Samarasekara P.C. cited South African Law of Husband and Wife by Hahlo 5th Edition at page 419 where he says "a divorce suit is essentially a personal action. It comes automatically to an end if one of the spouses dies before a decree of divorce is pronounced. Where one of the spouses dies after a decree of divorce has been entered and while the appeal against the decree is pending, the appeal falls away and the decree stands, but it is submitted that the surviving spouse or the executors of the deceased spouse may continue the appeal if this is necessary in order to have the property rights of the spouses and their heirs (or, possibly as to costs) determined. On the other hand where an appeal had been lodged against a judgment refusing a divorce and one of the spouses dies the matter is at an end."

In the instant case from the facts and circumstances it is clear that the case is now over. The appeal that was filed against the decree of the District Court is no longer pending. The appeals have been abated and the decree of the District Court stands.

In this case there was a decree for divorce and a decree for payment of money made against the petitioner. The decree of money is under several heads, such as permanent alimony, monies taken from the 1st defendant's Saving Bank Account, payment in respect of 1st defendant's house at Galle which had been sold and money taken by the petitioner.

The only question that has to be considered at this point is whether the decree so entered by the District Judge has come to an end in regard to the payment of alimony.

In Blacks Law Dictionary 6th Edition, at page 73, alimony is defined as follows:

“Alimony comes from Latin “*alimonai*” meaning sustenance, and means, therefore, the sustenance or support of the wife by her divorced husband and stems from the common law right of the wife to support by her husband. Allowances which husband or wife by court order pays other spouse for maintenance while they are separated, or after they are divorced (permanent alimony), or temporarily, pending a suit for divorce (*pendente lite*). Generally, it is restricted to money unless otherwise authorized by statute. But it may be allowance out of the spouse’s estate . . .”

Likewise, in Wharton’s Law Lexicon 14th Edition at page 51, Alimony is defined as:

“Alimony (fr. *Alimonia*. Lat.), the allowance made to a wife out of her husband’s estate for her support, either during a matrimonial suit or at its termination, when she proves herself entitled to a separate maintenance, and the fact of a marriage is established. But she is not entitled to it if she elopes with an adulterer, or wilfully leave her husband without any just cause for so doing.”

From the above citations it is quite clear that alimony is a purely personal right which subsists only so far as the wife is entitled to support. It ceases on her demise. The claim to alimony being of personal nature extinguishes with the death of the wife, and the decree for alimony ceases to be executable.

In these circumstances we hold that apart from the alimony ordered the rest of the money forms part of the estate of the deceased and should be remitted to the testamentary case filed in Galle.

In view of the above findings the time limit given by the Additional District Judge in her order dated 22. 03. 1996 is unwarranted. We set aside that order.

The application bearing No. C.A.L.A. 128/96 filed in this Court stands dismissed in view of the order made in this case. We make no order with regard to costs.

WEERASURIYA, J. - I agree.

Application partly allowed.