

EDIRIPPULI
v.
WICKRAMASINGHE

COURT OF APPEAL.

S. N. SILVA, J. (P/CA)

RANARAJA, J.

C.A. NO. 92/95

D.C. COLOMBO CASE NO. 16487/D

MARCH 7, 1995.

Matrimonial Action – Divorce – Alimony pendente lite and costs – Matrimonial fault – Civil Procedure Code, SS. 614, 614(1), 614(3).

Plaintiff-petitioner filed action for divorce on the ground of malicious desertion. The defendant-respondent, prior to filing answer, made an application under Section 614 for Alimony *Pendente Lite* and costs, by way of summary Procedure. Order *Nisi* issued was made absolute directing the plaintiff petitioner to pay Rs. 30,000/- as Alimony *Pendente Lite* and Rs. 50,000/- as costs.

Held:

(1) An application made under Section 614 for alimony and costs is made in the course of the action for divorce and pertains only to a matter of procedure.

(2) The merits of the action and the question of matrimonial fault are not gone into and do not arise at an inquiry under S. 614.

(3) The only matters at issue are, the need for financial support, on the part of the applicant spouse, that stems from the lack of his or her income and the income of the respondent spouse.

APPLICATION for Revision of the Order of the District Court of Colombo.

G. Alagaratnam with N. Buhari for petitioner.

Derick Fernando with Miss S. N. Rajakaruna for respondent.

Cur. adv. vult.

March 07, 1995.

S. N. SILVA, J. (P/CA)

This is an application in revision from the order dated 09.01.95. By that order learned Additional District Judge directed the petitioner to pay a sum of Rs. 30,000/- per month as alimony *pendente lite* and a sum of Rs. 50,000/- as costs.

The plaintiff-petitioner filed the above action for divorce against the defendant on the ground of malicious desertion. The defendant prior to filing answer, made an application in terms of section 614 of the Civil Procedure Code for alimony *pendente lite* and for costs. The application has been made as provided for by law, by way of summary procedure. In her petition and affidavit she has stated that she has no means of income and that the petitioner who is residing in the U.K. is in receipt of wages amounting to Rs. 150,000/- per month (P2 and P3). Order *nisi* was made on the basis of this application directing that the petitioner should show cause as to why an order for alimony *pendente lite* should not be made in a sum of Rs. 50,000/- per month and costs should not be awarded in a sum of Rs. 50,000/-. A statement of objections supported by an affidavit and 2 documents were filed by the petitioner to oppose the order *nisi*.

At the inquiry which was held, the Learned Judge has come to a finding that she cannot accept the affidavit since it is not in compliance with the provisions of section 181 of the Civil Procedure Code. The affidavit has been deposed to by a person holding the power of attorney of the petitioner. That person does not have a personal knowledge of the matters stated in the affidavit. Since the objections were not supported by evidence Learned Judge entered

order absolute, directing the petitioner to pay a sum of Rs. 30,000/- as alimony *pendente lite* and Rs. 50,000/- as costs.

The petitioner is not seeking to canvass the correctness of the order of the learned District Judge in rejecting the affidavit. The only ground now urged is that the defendant is at fault according to the plaint and that no defence has been set up in relation to that fault in the petition and affidavit claiming alimony *pendente lite* and costs. It is submitted that an applicant for alimony and costs should establish, *prima facie* that such applicant is not at fault.

We have considered the submissions of Learned Counsel. We are of the view that an application under section 614 for alimony and costs is made in the course of the action for divorce and pertains only to a matter of procedure. The merits of the action and the question of matrimonial fault are not gone into at an inquiry into an application for alimony and costs made under Section 614. If the merits are gone into at this stage it would result in the question of matrimonial fault being determined prior to even the pleadings are completed. The only matters at issue in an application for alimony *pendente lite* are the need for financial support on the part of the applicant spouse, that stems from the lack of his or her income and income of the respondent spouse. This is made very clear by the proviso to section 614(1) which state that the alimony ordered shall not be less than 1/5 of the respondent spouse's average income for the 3 years preceding the date of the order. Similarly in an application for costs the only matters at issue in terms of section 614(3) are insufficiency of income or means of the applicant spouse to defray the cost of litigation and the income or means of the respondent spouse. Thus the merits of the action in relation to matrimonial fault, being the subject-matter of the action, does not arise for consideration at an inquiry for alimony *pendente lite* and costs. In the circumstances, we see no basis to issue notice of this application. Accordingly we make order dismissing the application.

RANARAJA, J. – I agree.

Application dismissed.