

ABEYSINGHE**v.****PERERA**

COURT OF APPEAL

ISMAIL, J. (P/CA)

TILAKAWARDANE, J.

C.A. NO. 207/97

D.C. COLOMBO NO. 17702/D

DECEMBER 15, 1998

Divorce – Civil Procedure Code s. 614 (3) – Cost of litigation – Public Policy and Public Interest – Quantum – Earning capacity.

Held:

1. The Judge has sole discretion to prescribe an amount that is deemed reasonable in all the alternate circumstances to defray the cost of litigation and in awarding same has also to consider whether the other spouse is possessed of "sufficient means of income to pay the amount".
2. Husband's obligation to contribute towards his wife's matrimonial costs is based on his duty to support.
3. Just as support for maintenance must be rendered on a scale commensurate with the social position, life-style, and financial resources of the parties, similarly litigation costs must be ordered at a level commensurate with the resources of the spouses.

LEAVE to appeal from the judgment of the District Court of Colombo.

Cases referred to:

1. *Abeygoonesekera v. Abeygoonesekera* – (1910) 12 NLR 95.
2. *Chamani* – 1979 (4) SA 804 (W).
3. *Van Oudenhove de St. Sery v. Gruber* – 1981 (3) E. CD.
4. *Van Rippen* – 1949 (4) SA 634.

W. Dayaratne for the petitioner.

Kalinga Indatissa for the respondent.

Cur. adv. vult.

January 29, 1999.

SHIRANEE TILAKAWARDANE, J.

The plaintiff-respondent-petitioner has instituted this application for Leave to Appeal against the order of the District Judge dated 21. 10. 97. In terms of the said order a sum of Rs. 45,000 has been awarded as costs of the action to the defendant-petitioner-respondent.

During the pendency of a divorce action instituted by the plaintiff-respondent-petitioner, an application had been preferred in terms of section 614 (3) of the Civil Procedure Code, seeking a sum of Rs. 100,000 on account of costs.

This section empowers a District Judge to make an appropriate order, in circumstances where one of the spouses is not possessed of sufficient income or means to defray the costs of litigation such order could be made at any stage of the litigation, and the spouse who is possessed of sufficient income or means to pay to the other spouse such sum on account of costs as the court may consider reasonable. The Judge has therefore the sole discretion to prescribe an amount that is deemed reasonable in all the attenuate circumstances, to defray the cost of litigation and in awarding the same has also to consider whether the other spouse is possessed of "sufficient means or income" to pay the amount.

The fact that the defendant-petitioner-respondent had no income of her own was not disputed. At the subsequent inquiry the only witness to give evidence was the defendant-petitioner-respondent herself, and she produced the documents P1, P2 and P3 in proof of her testimony. Other than to formally challenge her evidence, the cross-examination of her testimony was restricted to the credibility of her testimony pertaining to the earned income of her estranged spouse. Her testimony as regard the sum of Rs. 5,000 received as rental from a semi-luxury apartment in Homagama was not challenged either directly or indirectly. The plaintiff-respondent-petitioner who was present at the inquiry admittedly chose not to place any evidence either by way of his testimony or the testimony of any other witnesses before the court.

The order of the District Judge indicates that where a discrepancy in the earned income pertaining to salary has arisen, he has acted only on the amount that was corroborated by the documentary evidence placed in court. The counsel in this application has submitted to this court that he has no complaints as regard the emoluments received as salary. His grievance was that the sum of Rs. 5,000 as rental should not have been considered by the Judge. However, in his carefully evaluated order the Judge has explained his reason for the inclusion of this amount. He has adverted to the fact that this portion of the evidence was not challenged in any manner whatsoever. No questions were put in cross-examination regarding the fact of the ownership of the premises or the rental received. The spouse who was present in court did not either challenge it by his own testimony, nor by any other oral or any other documentary evidence. The matter was not even adverted to in the oral submissions at the end of the inquiry.

The District Judge has therefore gone on the basis that since there was no challenge of the evidence regarding the rental, received, this was uncontradicted evidence and has therefore accepted and he has acted on the testimony of the defendant-petitioner-respondent regarding the receipt of a rental of Rs. 5,000 per month. We see no reason to interfere with this finding.

On a consideration of the reasonableness of the sum of Rs. 45,000/- it is important to analyze the rationale of such payment.

The payment of costs of an action was recognized to be a matter of public policy, the assumption being that it was clearly in the public interest, that the needy spouse had access to court (*Abeygooneskera v. Abeygooneskera*⁽¹⁾).

In 1979, Nestadt, J. in *Chaman*⁽²⁾ stated that there was no doubt that a husband's obligation to contribute towards his wife's matrimonial costs is based on his duty to support. This was subsequently confirmed in the case of *Van Oudenhove de St. Sery v. Gruber*⁽³⁾.

The law as it stands today is that the purpose of this award of costs is for the wife, who has no income of her own to "be able to

present her case adequately before the court"—*Van Rippet*⁽⁴⁾. The accepted rationale is that if a reasonable financial viability is not afforded to the spouse without an income, undue restrictions in presenting his or her case may facilitate a divorce on unjustifiable grounds.

In assessing the quantum of the award, the resources of the respondent spouse and the *scale on which he or she is likely to litigate* are relevant considerations. It is relevant in assessing the quantum that, already, even before the trial has commenced, the case has been taken up on 22 dates of court hearing. This does not include the drafting and the filing of the papers. The connected application for maintenance by the defendant-petitioner-respondent had resulted in an order, against which the plaintiff spouse had preferred an appeal which was subsequently withdrawn. So the likelihood of long-drawn litigation in this case is a probable likelihood.

Furthermore, just as support for maintenance must be rendered on a scale commensurate with the social position, lifestyle and financial resources of the parties, similarly, litigation costs must be ordered at a level commensurate with the resources of the spouses. The fact of the total lack of any earning capacity of one spouse and the earned income of the other are both relevant and important considerations for the court.

In this context, as has already been set out in the earlier part of this judgment, a fair and considered determination has been made by the District Judge in making a reasonable order for payment in a sum of Rs. 45,000/-. We see no basis whatsoever to interfere with this order.

The leave to appeal is refused, with costs.

ISMAIL, J. (P/CA) – I agree.

Application refused.