

**MENDIS
v
MENDIS**

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 190/2003
DC HOMAGAMA 5758/D
OCTOBER 22, 2004
NOVEMBER 11, 2004

Civil Procedure Code – section 93(2), section 603 – Amendment of pleadings – Cause of action based on adultery – Could it be allowed. - Has a trial Judge in a matrimonial action a wider discretion than he has under section 93(2)?

The plaintiff-respondent instituted divorce action against the defendant-petitioner on the ground of malicious desertion. The defendant-petitioner prayed for a dismissal of the action and averred that the plaintiff deserted the defendant maliciously and premeditatedly to be able to carry on her intimacy with 'X' (party sought to be added). After the plaintiff's evidence was taken, the defendant-petitioner moved to amend the answer by adding X – this was disallowed by the District Judge.

It was contended by the defendant-petitioner that he had no knowledge of sexual intercourse between the plaintiff and X at the time of filing the answer.

Held:

- (1) The defendant did not seek a divorce in the answer, he only prayed for dismissal of the plaintiff's action. This would have been the reason for

not making X a party. It was due to the same reason the defendant intentionally avoided making an allegation of adultery against the plaintiff.

The averments in the answer lead to one conclusion that is, the plaintiff was having an adulterous relationship with X.

The defendant knew about the adulterous conduct of the plaintiff with X-at the time of filing of answer.

Held further:

Per Eric Basnayake, J.

"Section 93 is in relation to amendment of pleadings. This solitary section is dealt with under Cap XV of the Code. I am of the view that this section is applicable to the procedure involving all the sections of the Code. Section 603 makes provision to grant any husband or wife the same relief in the same action. This section enables Court to allow the defendant to proceed with her claim in reconvention for divorce – section 603 does not relate to amendment of pleadings".

- (2) The question whether an action filed by the wife of X alleging adultery committed between the plaintiff and X – the mere fact that an action is filed on the basis of adultery will have no evidentiary value and therefore would be shut out.

APPLICATION for leave to appeal with leave being granted.

Cases referred to:

- (1) *Ebert v Ebert* 22 NLR 310 at 312.
- (2) *Allen v Allen and Bell* 1894 1R CA 248 at 251-252.
- (3) *Luhi Balakumar v Balasingham Bala Kumar* – BASL 1997 Vol 11 Part 1-22.
- (4) *Nihal Ignatious Perera v Ajantha Perera nee Seneviratne* 1991 1Sri LR 331.
- (5) *Bednarz v Bednarz* – 2992 1 Sri LR 11.
- (6) *Kurupparatchi v Andreas* 1996 – 2 ri LR 11.

A.R. Surendran, PC with K.V.S. Gawsharaja for defendant-petitioner.

Ranjan Suwardaratna with Asha Ratnayake and Mahinda Nanayakkara for plaintiff-respondent

Cur.adv.vult.

March 5, 2007

ERIC BASNAYAKE, J.

This is a leave to appeal application filed by the defendant-petitioner (Hereinafter referred to as the defendant) on 9.6.2003 seeking to have the order of the learned District Judge of Homagama dated 21.5.2003 set aside. By this order the District Judge had rejected the amended answer. Having considered the submissions of the Counsel, Amaratunga, J. on 17.6.2004 granted leave to appeal on the following questions namely:

- (1) Whether the learned trial Judge's conclusion that, in view of the averments set out in the defendant's answer regarding the plaintiff's intimate relationship with the co-respondent sought to be added, the defendant had knowledge about the adulterous relationship between the plaintiff and the co-respondent sought to be added, was a correct conclusion to be drawn from the averments?
- (2) In view of the provisions of section 603 of the Civil Procedure Code, whether a trial Judge has in a matrimonial action, a wider discretion than he has under section 93(2) with regard to the amendment of pleadings?
- (3) Whether the mere fact that in another action filed by the wife of the co-respondent, sought to be added to this action, had alleged adultery between the plaintiff-respondent to this action and the co-respondent sought to be added to this action, is sufficient to raise an allegation of adultery in this action against the plaintiff-respondent and the co-respondent sought to be added?

The first question

The plaintiff-respondent (hereinafter referred to as the plaintiff) was married to the defendant in 1983. On 30.11.2000 the plaintiff had left the matrimonial house. On 15.6.2001 she had filed this divorce action against the defendant on the ground of constructive malicious desertion. The defendant filed answer on 30.10.2001 praying for a dismissal. In the answer filed, the defendant specifically averred (paragraph 11) that the plaintiff deserted the defendant maliciously and premeditatedly to be able to carry on her intimacy with X (the party sought to be added as co-respondent). In

paragraphs 10a, b, c, c^o & d he had given vast information with regard to an affair the plaintiff was having with X. Some of that information is as below:

"He becomes more intimate with the plaintiff. The plaintiff was being given lifts to office by X in a clandestine manner A deeper intimacy developed between the plaintiff and X which turned in to infatuation and the plaintiff became neglectful of her marital obligations ... When she was confronted she admitted it ... The defendant questioned X who first denied and later admitted and apologized and promised not to repeat such conduct ... X's wife on 21.1.2000 publicly reprovved the plaintiff for "hanging on" to her husband. The flame of intimacy between the plaintiff and X became more intense and did not abate but grew in to a stronger conflagration resulting in the plaintiff coming late home in the night and allegedly leaving for work on public holidays and leaving home more frequently without informing the defendant ..."

The trial was first fixed for 20.2.2002 on which date the issues were framed. The plaintiff's evidence was taken on 12.6.2002. On 2.1.2003 the defendant moved to amend the answer. The plaintiff objected and after inquiry the learned District Judge made order disallowing the amended answer which is the subject matter of this application.

Submission of the Counsel for the defendant

The learned President's Counsel submitted that the information given in the answer was short of sexual intercourse between the parties. He contended that the defendant had no knowledge of sexual intercourse between the plaintiff and X at the time of filing the answer.

In the case of *Ebert v Ebert*⁽¹⁾ at 312 Schneider, J. quotes Lopes, J. in the case of *Allen v Allen and Bell*⁽²⁾ at 251-252.

"It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because to use the words of Sir William Scott in *Loveden v Loveden* if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact

of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights". To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery is impossible. Each case must depend on its own particular circumstances. It would be impractical to enumerate the infinite variety of circumstances. It would be impractical to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of guilt of the party sought to be implicated.

The defendant in paragraph 5 of the petition states thus "further, for the sake of the child the defendant petitioner did not seek divorce on the basis of malicious desertion either on the part of the plaintiff respondent". The defendant did not seek a divorce in the answer filed. He only prayed for a dismissal of the plaintiff's action. This would have been the reason for not making X a party. It was due to the same reason the defendant intentionally avoided making an allegation of adultery against the plaintiff. The averments in the answer lead to one conclusion, that is that the plaintiff was having an adulterous relationship with X. I am of the view the learned District Judge rightly concluded that the defendant at the time of filing the answer knew about the adulterous conduct of the plaintiff with X. The question is therefore answered in the affirmative.

The second question

Section 603 of the Civil Procedure Code is as follows:

"In any action instituted for dissolution of marriage, if the defendant opposes the relief sought on any ground which would have enabled him or her to sue as plaintiff for such

dissolution, the Court may in such action give to the defendant on his or her application the same relief to which he or she would have been entitled in case he or she had presented a plaint seeking such relief."

The learned President's Counsel placed reliance on the judgment in *Lulu Balakumar v Balasingham Balakumar*⁽³⁾ with regard to the interpretation of section 603 of the Civil Procedure Code. The headnote to this case reads as follows: "section 603 of the Civil Procedure Code gives the trial Judge in a matrimonial action a wider discretion than he has under section 93(2) of the Code". This headnote I find is misleading. There is no such decision arrived at in this case. The question for decision was whether the defendant in that case was guilty of laches. Fernando, J. held that "In this case there was a delay of four months, which in the context of Sri Lanka is by no means unusual although undesirable and not to be encouraged The need for amendment arose unexpectedly It was not unreasonable for the defendant to have been content to obtain a dismissal of the plaintiff's action, in order later to pursue his claim against his wife and the alleged adulterer in the Gampola action". Fernando, J. thereafter reproduced another submission of the Counsel as follows:

"Learned Counsel for the defendant also drew our attention to section 603, the effect of which is that, since the defendant had opposed the relief sought by the plaintiff on the ground of adultery, the Court had the discretion to give the defendant, on his application the same relief to which he would have been entitled if he had presented a plaint seeking relief on the ground of adultery. He submitted that in exercising that discretion the Court would be justified in permitting appropriate amendments to the answer, and that section 603 did not restrict the stage at which this discretion could be exercised; section 603 thus gave the trial Judge a wider discretion than he had under section 93(2).

Fernando, J. having summarised the submission of the Counsel stated thus "taking all those matters in to consideration I am of the view that the defendant was not guilty of laches...

Section 93 is relating to the amendments of pleadings. This solitary section is dealt with under chapter XV of the Civil Procedure Code. I am of the view that this section is applicable to the procedure involving all the sections of the Code. Section 603 make provision to grant any husband or wife the same relief in the same action. This section enables court to allow the defendant to proceed with her claim in reconvention for divorce (*Nihal Ignatious Perera v Ajantha Perera nee Seneviratne*⁽⁴⁾). Although a defendant had in his answer referred to it as a claim in reconvention, in fact he was counter suing for divorce as provided for by section 603 of the Civil Procedure Code (*Bednarz v Bednarz*⁽⁵⁾). Thus this section does not relate to amendment of pleadings. The question is answered in the negative.

The third question

The question is whether an action filed by the wife of X alleging adultery committed between the plaintiff and X is sufficient to raise an allegation of adultery in this case? The learned Counsel for plaintiff submitted that the action referred to is concluded. However judgment had not been entered on the ground of adultery. If the learned Counsel for the defendant is seeking to bring some evidence, he may have to bring that evidence in terms of the provisions of the Evidence Ordinance. The mere fact that an action is filed on the basis of adultery will have no evidentiary value and therefore would be shut out. The answer to this question is in the negative.

The facts in *Kuruppuarachchi v Andreas*⁽⁶⁾ are almost identical to the present case. G.P.S. de Silva, C.J. with Kulatunga, J. and Ramanathan, J. agreeing held that at 13 "The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the undue postponement of trial by placing a significant restriction on the power of the court to permit amendment of pleadings on or after the day first fixed for the trial of the action ... the defendant was well aware of the fact that the plaintiff was living in adultery at the time the answer was filed, but she has chosen not to rely on that ground in her answer. After the second date of trial, she is seeking to amend the answer by including a cause of action based on adultery. In these circumstances, the conclusion of the Court of

Appeal, that the defendant is guilty of laches and that the amended answer has to be rejected in terms of section 93(2) (as amended) must be affirmed".

This application is therefore dismissed. On the facts I award no costs.

WIMALACHANDRA, J. - I agree.

Appeal dismissed.