

MALLIKA DE SILVA
v.
GAMINI DE SILVA

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
C.A. NO. 579/98
D.C. MORATUWA NO. 129/D
NOVEMBER 6, 12, 1998

Matrimonial action – Divorce – interim relief – to prevent one party from alienating, mortgaging matrimonial home – No claim in reconvention – Judicature Act S. 54 (1) (2) Applicability – Exceptional Circumstances – Order ex-facie bad in law – Does revision lie?

The plaintiff-petitioner filed action against the defendant-respondent praying *inter alia* for a decree of divorce and for interim relief in the form of an injunction preventing the respondent from entering the matrimonial home owned by the petitioner. The answer did not contain a claim in reconvention, but only prayed for a dismissal of the plaint, though the defendant-respondent conceded that the matrimonial home was purchased by the petitioner. The Court granted the interim injunction.

Held:

1. S. 54 (1) Judicature Act permits only 'plaintiff' to seek an interim injunction. S. 54 (2) permits a defendant to seek an interim injunction only where the 'defendant' has set up a claim in reconvention and has demanded an affirmative judgment. The respondent cannot have recourse to S. 54 (2).

Per de Silva, J.

"Interim Injunction is a relief that cannot be granted solely or independently without any final or substantive relief. The respondent who had not sought any substantive relief has no right in law to seek an interim injunction, as it cannot be a relief by itself but is only a mechanism to assist and protect final relief".

2. Where the Order of Court is wrong *ex facie* it would be quashed by way of revision even though an appeal may lie against such order.

APPLICATION in Revision from the Order of the learned District Judge of Moratuwa.

Cases referred to:

1. *Rasheed Ali v. Mohamed Ali* – 1981 2 SLLR 35.
2. *Navaratnasingha v. Arumugam* – 1980 – 2 SLR 1.
3. *Rustom v. Hapangama & Company* – (1978-79) 2 SLR 226.
4. *Atukorale v. Samyantha* – 41 NLR 165.
5. *Lebbaythamby v. AG* – 70 CLW 53.
6. *Ranasinghe v. Henry* – 1 NLR 303.
7. *Sabapathy v. Dunlop* – 37 NLR 113.

Geoff Alagaratnam with M. Adamaly and Ms. N. Buhary for petitioner-petitioner.

Anil Silva for defendant-respondent.

Cur. adv. vult.

December 18, 1998.

DE SILVA, J.

This is an application in revision to set aside the order dated 13. 05. 1998 by which order the learned District Judge granted an interim injunction to the defendant-petitioner-respondent.

The plaintiff-respondent-petitioner (hereinafter referred to as the petitioner) filed action against the defendant-petitioner-respondent (hereinafter referred to as the respondent) in the District Court of Moratuwa praying *inter alia* for a decree of divorce and for interim relief in the form of an injunction preventing the respondent from entering the matrimonial home which was owned by the petitioner.

Court granted an enjoining order as prayed for, but the matter of the interim injunction was settled upon the respondent giving an undertaking to the court that he would not enter the matrimonial home.

In the answer tendered by the respondent, he conceded that the matrimonial home was purchased by the petitioner with the money

provided by the petitioner's father. The answer did not contain a claim in reconvention, but only prayed for a dismissal of the plaint with costs.

The trial commenced in 1994, and petitioner gave evidence. Half way through the trial on the 21st of August, 1997, the respondent made an application to the same court by way of petition an affidavit and claimed that the matrimonial home was held by the petitioner in trust for him and sought an enjoining order and interim injunction preventing the petitioner from selling, mortgaging, leasing or otherwise dealing with the matrimonial home. Court granted the enjoining order as prayed for and issued notice of interim injunction. At the interim injunction inquiry it was agreed that the matter be resolved on written submissions and accordingly the parties filed their written submissions. The learned District Judge by order dated 13. 05. 98 granted the interim injunction. This revision application is to revise the said order of the learned District Judge.

At the hearing of this application counsel for the petitioner submitted that the District Judge's order is erroneous and contrary to the applicable law.

The legal principles governing the grant of an interim injunction are clearly set out in section 54 of the Judicature Act, No. 2 of 1978. Section 54 (1) permits only a "plaintiff" to seek an interim injunction. Section 54 (2) permits a defendant to seek an interim injunction only where the "defendant" has set up any claim in reconvention and has demanded an affirmative judgment.

As pointed out by counsel for the petitioner the respondent in this case has set up no counter claim or claim in reconvention and has only moved for dismissal of the plaint which amounts to a demand of a negative judgment. Therefore the respondent cannot have recourse to section 54 (2) of the Judicature Act. I agree with this submission of the learned counsel for the petitioner.

The principles embodied in section 54 of the Judicature Act are fundamental. Any party seeking an injunction should demonstrate that he has a *prima facie* case against the other party. In the answer filed in the District Court the respondent has not set up any claim.

It is also clear from the provisions of section 54 of the Judicature Act that interim injunction is a relief that cannot be granted solely or independently without any final or substantive relief. The respondent who had not sought any substantive relief has no right in law to seek an interim injunction as an interim injunction cannot be a relief by itself but is only a mechanism to assist and protect final relief.

The respondent by his petition and affidavit dated 21. 08. 1997 attempted to make out that the petitioner holds the property in trust for him, ie nearly 3 1/2 years after the plaint was filed. The plaint is dated 23. 03. 94. The respondent filed the answer on 17. 06. 94. By this answer the respondent conceded that the property in question was bought by the money provided by the father of the petitioner. There is no trust pleaded or claimed. The respondent not having set up a counter claim in his answer of 17. 06. 94 is now not entitled to claim a trust by petition and affidavit since he has not moved to amend the answer.

Learned counsel for the respondent submitted that as the petitioner has not filed a leave to appeal application the extraordinary powers in revision should not be exercised in favour of the petitioner as she has not shown any exceptional circumstances. He cited the following Judgments in favour of his contention. *Rasheed Ali v. Mohamed Ali*⁽¹⁾; *Navaratnasingha v. Arumugam*⁽²⁾; *Rustom v. Hapangama and Company*⁽³⁾.

Learned counsel submitted that the powers of revision conferred on the Court of Appeal are very wide and the court has the discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However the discretionary remedy can be invoked only where there are "exceptional circumstances" warranting

intervention of court. His contention was that the petitioner has not established any exceptional circumstances to invoke the jurisdiction of this court.

In the case of *Rasheed Ali v. Mohamed Ali (supra)* which decision the counsel for the respondent relied on too recognizes several situations which could be considered as exceptional circumstances. It had been held that where an appeal would take time to come up on hearing and the ensuing delay would render the ultimate decision nugatory then that would be an exceptional circumstance calling for interference of the court by way of revision. *Athukorala v. Samyanatha*⁽⁴⁾; *Lebbaythamby v. AG*⁽⁵⁾. Where the order of court is wrong *ex facie* it would be quashed by way of revision even though no appeal may lie against such order *Ranasinghe v. Henry*⁽⁶⁾. Where the interests of justice demand then the court would not hesitate to act in revision. *Sabapathy v. Dunlop*⁽⁷⁾.

In the instant case the trial Judge's order is *ex facie* wrong in that he failed to consider the respondents application for an injunction was contrary to sections 54 (1) and 54 (2) of the Judicature Act. In the circumstances we set aside the order of the District Judge dated 13. 05. 1998 and allow the application.

WEERASURIYA, J. – I agree.

Application allowed.