

BEDNARZ
v.
BEDNARZ

SUPREME COURT
FERNANDO, J.,
EDUSSURIYA, J. AND
WIGNESWARAN, J
SC APPEAL NO. 21/2000
CA LEAVE TO APPEAL NO. 07/99
DC MT LAVINIA NO. 1458/96/D
MAY 2, 2001 AND JUNE 14, 2001

Matrimonial action – Divorce – Counter claim for divorce on the ground of adultery by plaintiff – Procedure – Section 598 read with section 603 of the Civil Procedure Code.

The plaintiff sued her husband (the defendant) for a divorce on the ground of constructive malicious desertion. The defendant filed answer to the plaint and proceeded to plead under the heading "claim in reconvention" that the plaintiff had committed adultery with one Geethaka Bandara and, it was necessary to make the said Geethaka Bandara a co-respondent and also to amend the caption accordingly; and prayed for (a) dismissal of the plaintiff's action (b) a divorce on the ground of adultery by the plaintiff (c) damages in a sum of Rs. 5,000,000 from the plaintiff in respect of mental distress caused to him and (d) damages in a sum of Rs. 5,000,000 from the co-respondent.

On the same day as the answer was filed, the defendant by way of motion moved the Court to add the said Geethaka Bandara as co-respondent and to issue summons on him.

The plaintiff sought dismissal of the defendant's claim *in limine* for alleged failure to comply with section 75 (e) of the Civil Procedure Code relating to claims in reconvention. It was urged that in particular the defendant had failed to name the co-respondent in the caption to the answer and hence he had not availed himself of the provisions of section 603 of the Civil Procedure Code; and that the correct procedure was to have added the co-respondent under section 18 of the Civil Procedure Code after due inquiry, viz after giving him an opportunity to be heard.

Held:

- (1) Although the claim for damages against the plaintiff may perhaps be a "claim in reconvention", the claim against the alleged adulterer is a new claim falling within the scope of section 598 read with section 603 of the Civil Procedure Code. The defendant had had in his pleadings set out his cause for a divorce and the need to make Geethaka Bandara a co-respondent.
- (2) The defendant had sufficiently complied with the requirements of section 598 and section 603 of the Code; and that in a claim for divorce on the ground of adultery the alleged adulterer is not entitled to notice or hearing before he is made a party.
- (3) It is not open to the defendant filing answer to amend the caption given in the plaint. Such amendment must be made by Court or with the permission of Court; and in this instance this is precisely what the defendant sought when he said that it was necessary to make the said Geethaka Bandara a co-respondent. He also moved Court on the same day to add Geethaka Bandara as a co-respondent and issue summons.

Case referred to:

Karunatileke v. Karunatileke 52 NLR 3000, distinguished.

APPEAL from the judgment of the Court of Appeal.

S. C. B. Walgampaya with *W. A. N. Jayanath* and *S. A. D. S. Suraweera* for defendant-appellant.

Miss Maureen Seneviratne, PC with *Hilton Seneviratne* and *Gamini Senanayake* for plaintiff-respondent.

Cur. adv. vult.

October 05, 2001

EDUSSURIYA, J.

In this case, the plaintiff-respondent, sued the defendant-appellant 1 for a divorce on the ground of constructive malicious desertion.

The defendant-appellant filed answer replying the various averments in the plaint and proceeded to plead under the heading "claim in reconvention" that the plaintiff-respondent had committed adultery with one Geethaka Bandara and that "it has become necessary to make the said Geethaka Bandara a co-respondent and also amend the caption accordingly", and prayed for (a) a dismissal of the plaintiff's action; (b) a divorce on the ground of adultery by the plaintiff; (c) damages in a sum of Rs. 5,000,000 from the plaintiff in respect of mental distress caused to him; and (d) damages in a sum of Rs. 5,000,000 from the co-respondent. ¹⁰

On the same day answer was filed, the defendant-appellant by way of a motion moved the Court to add the said Geethaka Bandara as co-respondent and to issue summons on him. The plaintiff-respondent filed replication and amongst other things pleaded that the claim in reconvention should be dismissed *in limine* as the defendant had failed to comply with the mandatory requirements of section 75 (e) of the Civil Procedure Code relating to claims in reconvention.

At the hearing of this appeal it was urged that the defendant was, in fact, counter suing for divorce on the ground of the plaintiff's adultery and seeking relief as provided for in section 603 of the Civil Procedure Code although such averments had been pleaded under the heading "claim in reconvention". ²⁰

It was contended by learned President's Counsel for the respondent that the defendant-appellant had not availed himself of the provisions of section 603 but had clearly made a claim in reconvention under section 75 (e) inasmuch as he had pleaded that (1) he was making a claim in reconvention (2) he had not named the person with whom the plaintiff is alleged to have committed adultery a co-respondent in the caption to the answer and (3) he had not prayed in the answer that the person with whom the plaintiff is alleged to have committed adultery be named as a co-respondent and as such, the person with whom the plaintiff is alleged to have committed adultery must be added ³⁰

under the provisions of section 18 of the Civil Procedure Code after due inquiry and such person be given an opportunity to be heard.

Counsel for the plaintiff-respondent also urged that where a defendant in a divorce case counter sues for a divorce it cannot be a claim reconvention. To support the contention that where a defendant in a divorce action seeks a divorce on the ground of adultery it should be done under the provisions of sections 597 and 598 read with section 603 of the Civil Procedure Code and that it cannot be done by way of a claim in reconvention, learned President's Counsel for the plaintiff-respondent referred the Court to the decision in *Karunatilleke v. Karunatilleke*⁽¹⁾ where Basnayake, J. (as he then was) stated in the course of his judgment that : "The principle of reconventional claims is well-known to Roman Dutch Law and is discussed by Voet at length, and has no application to a case where a defendant husband to an action for dissolution of marriage asks for a decree for divorce in his favour. Such claim can be made by a defendant husband only by virtue of section 603 of the Code".

In *Karunatilleke v. Karunatilleke (supra)* the defendant husband whilst suing the plaintiff wife for a divorce on the ground of adultery with X had also stated in his answer that the plaintiff wife had also committed adultery with three other persons prior to that, and the question for decision was whether the other three persons against whom judgment had not been asked for should have been made parties, and it was held that the law does not permit a party to obtain a decree for divorce on the ground of his wife's adultery with any person whom he does not bring in as a party to the action except in the circumstances stated in section 598 of the Code. It was held that the defendant had not made the adultery of his wife with the other three persons the cause of action, a part of the cause of action and was under no obligation to make them parties.

In this case the defendant-appellant has in his answer pleaded that the plaintiff had committed adultery with one Geethaka Bandara

and has also pleaded that it has become necessary to "make" the said Geethaka Bandara a co-respondent and also amend the caption.

It is not open to a defendant filing answer to amend the caption that is given in the *plaint*. Any amendments must be made by Court or with permission of Court and in this instance this is precisely what the defendant has sought to do by his averments in paragraph 23 of the answer, even though the defendant has not sought an order of Court to that end in the prayer. Then it must also be noted that having pleaded that it was necessary to make the said Geethaka Bandara a co-respondent and having also pleaded that the caption should necessarily be amended, the defendant has prayed for damages against the said Geethaka Bandara. In addition, it must also be borne in mind that along with the answer the defendant had moved Court on the same day to add the said Geethaka Bandara as a co-respondent and issue summons. So that even though the defendant had in his answer referred to it as a claim in reconvention, in fact he was counter suing for a divorce as provided for by section 603 of the Civil Procedure Code and it is my view that the defendant had sufficiently complied with the requirements of sections 598 and 603 of the Civil Procedure Code. Besides, if we were to, in these circumstances, hold that an inquiry must be held giving the said Geethaka Bandara an opportunity to be heard before he is named a co-respondent, merely because the answer contained the description "claim in reconvention" we would be creating a new procedure whereby the defendant's claim for relief under the provisions of section 603 will be virtually heard before the plaintiff's claim and that too prior to commencement of the trial. It seems to me that while the counter claim against the plaintiff may perhaps be a "claim in reconvention", it is not a claim in reconvention against the alleged adulterer but a new claim falling within the scope of section 598 read with section 603.

As stated above the facts averred and pleaded in the answer are sufficient to bring the answer within the scope of section 603 of the Code although described as a claim in reconvention.

As to whether the alleged adulterer should be noticed and heard before he is made a party, it is very clear that when a plaintiff sues for divorce on the ground of adultery the alleged adulterer is not entitled to notice or a hearing before he is made a party. When a defendant in such an action alleges adultery against the plaintiff, to hold that the alleged adulterer must be noticed and heard would place the parties on an unequal footing. Besides, such notice and hearing would serve no purpose – the Court is not required to determine whether the allegation of adultery is true, or credible, or plausible. The mere fact that there is such an allegation is sufficient: the Court¹¹⁰ must amend the caption, as requested by the defendant, and add the alleged adulterer.

For the above-mentioned reasons, the judgment of the Court of Appeal is set aside and the appeal allowed with costs fixed at Rs. 10,500.

FERNANDO, J. – I agree.

WIGNESWARAN, J. – I agree.

Appeal allowed.