

AJITH KULATUNGA
v.
SHIROMALA

COURT OF APPEAL.
WIGNESWARAN, J.
TILAKAWARDANE, J.
C.A. NO. 651/98(F)
D.C. Embilipitiya 4966/D
October 31, 2000

Matrimonial Action - Nullity - Breakdown of the marriage - Non consummation of the marriage - Divorce on the ground of desertion not pleaded as a cause of action - Can the Court of Appeal grant a Divorce?

The Plaintiff - Appellant filed action for ~~de~~clarat~~ion~~ of nullity and for the dissolution of the Marriage. The Defendant - Respondent moved for the dismissal of the action. The District Court dismissed the Plaintiff's action.

On appeal, it was contended that -

- (a) That the Trial Judge had considered only the prayer relating to nullity but not the application for dissolution of marriage;
- (b) The Trial Judge failed to consider the complete breakdown of the marriage;
- (c) The Trial Judge failed to consider the fact of non-consummation of the marriage;
- (e) That the Court had a discretion to grant a divorce;

Held :

- (1) There was evidence placed before the original court that there were adequate grounds to grant a divorce, if divorce on the ground of malicious desertion, constructive or otherwise was pleaded as a cause of action; superficially there is in fact a prayer for the grant of a divorce.
- (2)
 1. It appears that there had been a complete breakdown of the marriage after registration.
 2. Except for the signing of the certificate of marriage parties had not lived together.
 3. The amended plaint had not placed alternative causes of action, the averments dealt with nullity only. However the second prayer in the amended plaint dealt with the granting of a Divorce.

4. The parties are desirous to end their marital bond with no possibility of reconciliation whatsoever in sight.

Appeal from the Judgment of the District Court of Embilipitiya.

Cases referred to :

1. *H. John Perera vs H. Mathupali* - 71 NLR 461
2. *Lawry vs Lawry* - 1967 - 1 WLR 789 at 791

Jayatissa Herath for Plaintiff - Appellant
W. Dayaratne for Defendant - Respondent.

Cur. adv. vult.

October 31, 2000.

WIGNESWARAN, J.

The Plaintiff-Appellant filed this action for declaration of nullity and for the dissolution of the marriage entered on 23.01.1992 between the Plaintiff and the Defendant.

The Defendant-Respondent moved for the dismissal of the action and for costs of action.

By judgment dated 23.07.1998 the District Judge, Embilipitiya dismissed the Plaintiff's action awarding costs of action to the Defendant-Respondent.

This was an appeal against the said judgment dated 23.07.1998.

On 19.06.2000 a settlement was reached between parties wherein the Plaintiff-Appellant and Defendant-Respondent together with their respective Attorneys-at-Law signed a document containing terms of settlement consenting to a declaration of nullity and waiving costs of action ordered in the judgment dated 23.07.1998.

This Court rejected the said settlement.

Thereafter written submissions have been filed by the learned Counsel for Plaintiff-Appellant wherein he has submitted as follows:-

- (i) The learned District Judge had considered only prayer relating to nullity but not the application for dissolution of marriage.
- (ii) The learned District Judge had failed to consider the complete breakdown of the marriage between parties.
- (iii) The learned District Judge had failed to consider the fact that there had been no consummation of the marriage.
- (iv) The Defendant did not give evidence and she did not contradict the fact of the breakdown of the marriage and non-consummation of the marriage.
- (v) Court had discretion in cases of this nature to grant a divorce. *H. John Perera Vs. H. Mathupali*,⁽¹⁾ referred to.

- No written submissions were filed by the Counsel for the Defendant-Respondent contradicting the viewpoints of the Counsel for the Plaintiff-Appellant.

The abovesaid submissions of Counsel for the Plaintiff-Appellant would now be examined.

The learned District Judge has found that there had been a valid marriage. But there is no doubt that there had been a complete breakdown of the marriage after registration.

The amended plaint had not placed alternative causes of action. The averments in the plaint dealt with nullity only. (vide paragraph 7 of the amended plaint). Yet the second prayer in the amended plaint deals with the granting of a divorce. Possibly it was inserted on a misunderstanding by the learned Attorney-at-Law for the plaintiff that a formal granting of a divorce was necessary after declaration of nullity. A declara-

tion of nullity would mean the contract of marriage was ab initio void. A divorce would presuppose the existence of a valid marriage.

It is the insertion of a prayer for divorce in the amended plaint which has given rise to the abovesaid submissions of the learned Counsel for the Plaintiff-Appellant.

It is easy to brush the submissions of the learned Counsel for the Plaintiff-Appellant aside on the basis that no cause of action for divorce was pleaded in the amended plaint except for nullity.

But it is useful to remember the dictum of Justice de Kretser in *H. John Perera Vs. H. Mathupali* (supra) at 465 which reads as follows:

"It appears to me that when a Court is satisfied that the marriage between the parties is truly at an end it should exercise its discretion with a view to rehabilitate and not to punish."

The following reasons mentioned by the learned Counsel for the Plaintiff-Appellant no doubt appear as valid grounds which could have prompted a Court of First Instance to grant a divorce in a case where a valid marriage has been established:-

- (i) Except for the signing of the Certificate of Marriage, parties had not lived together.
- (ii) There had been no consummation of the marriage.
- (iii) The Defendant did not choose to contradict the evidence led by the Plaintiff on the above two matters. She did not give evidence nor lead any evidence on her behalf.

Added to these grounds, the parties, we find are desirous to end their marital bond with no possibility of reconciliation whatsoever in sight.

Willmer L.J. said in *Lawry Vs. Lawry*⁽²⁾ at 791 referring to the order of the Original Court Judge "He had to balance the consideration of respect for the sanctity of marriage (which is of particular importance in the present case in view of the

wife's conscientious objections to divorce) against the public interest which is involved in the question whether it is right to keep in being, a marriage which has so obviously and so hopelessly and completely broken down.

To refuse a divorce in this instance merely because a cause of action had not been specifically pleaded on a ground of divorce would be to inflict much punishment mentally as well as financially on the parties.

We are no doubt satisfied on the evidence placed before the Original Court that there were adequate grounds to grant a divorce if divorce on the ground of malicious desertion, constructive or otherwise, was pleaded as a cause of action. Superficially there is in fact a ~~prayer~~ (prayer "b") for the granting of a divorce.

We therefore confirm the judgment of the learned District Judge in coming to a finding that there were no grounds established for nullity but set aside his order dismissing the Plaintiff-Appellant's action and granting costs in a sum of Rs. 2500/= to the Defendant-Respondent. Instead we order that adequate grounds having been adduced the marriage entered upon between the parties on 23.01.1992 be set aside and decree nisi be entered by the learned District Judge, Embilipitiya granting the Plaintiff-Appellant a divorce from the Defendant-Respondent on the ground of constructive malicious desertion.

Parties shall bear their own costs. Registrar shall forward original record to the District Court of Embilipitiya without delay.

Judgment that there were no grounds established for nullity confirmed. But order dismissing Plaintiffs action set aside. Decrees Nisi be entered granting the plaintiff-Appellant a divorce.

TILAKAWARDANE, J.

1 agree

*Appeal allowed
Divorce granted*