

ASOKAN NEE KANDASAMY
v.
ASOKAN

COURT OF APPEAL.

PALAKINDNAR, J. (P/CA) &

DR. ANANDA GRERO, J.

C.A. REVISION APPLICATION NO. 495/95

D.C. COLOMBO NO. 15715/D

NOVEMBER 30TH, 1993.

Divorce – Jurisdiction – Marriage contracted abroad – Defendant (husband) resident abroad.

The marriage of the plaintiff (Maheswari Asokan nee Kandasamy) and defendant (Krishnan Asokan) took place in India. The parties lived in India but the plaintiff wife had to quit the matrimonial home owing to the matrimonial fault (constructive malicious desertion) of the defendant husband. A divorce suit was filed in the District Court of Colombo where the plaintiff wife now lives.

Held :

- 01 the plaintiff wife is entitled to present a plaint in the District Court of Colombo as she resides within the jurisdiction of this Court in terms of section 597 of the Civil Procedure Code.
- 02 Malicious desertion (constructive) is a valid ground for dissolution of marriage according to the law applicable in Sri Lanka as set out in Section 91 of the Marriages (General) Ordinance. Jurisdiction is not affected by the fact that the malicious desertion took place in India and the fact that the husband is domiciled in India.
- 03 Section 19 of the Marriages (General) Ordinance read with section 24 of the Judicature Act and also with section 3 of the Judicature (Amendment) Act No. 71 of 1981 reveals that divorce jurisdiction is exercisable by the District Court irrespective of where the marriage was contracted. The case of *Le Mesurier v. Le Mesurier* (1 NLR 160) is not applicable as the law stands today. The law applicable when the *Le Mesurier* case was decided was the Registration (Marriages, Births & Deaths) Ordinance No. 6 of 1847 which gave jurisdiction to the District Court only in respect of a marriage contracted locally. *Le Mesurier v. Le Mesurier* 01 NLR 160 distinguished.

APPLICATION for revision from the order of the District Court of Colombo.

R. K. W. Gunasekara for petitioner.

Respondent absent and unrepresented.

Cur adv vult.

January 19th, 1994.

ANANDA GRERO J.

This is an application for Revision to set aside the judgment of the learned Additional District Judge of Colombo dated 4.5.93, whereby the plaint of Plaintiff-petitioner was dismissed on the ground that the District Court has no jurisdiction to hear and determine the action for divorce.

The plaintiff-petitioner instituted an action for divorce against her husband in the District Court of Colombo on the ground of malicious desertion (constructive) and also claimed the custody of the two children born as result of the marriage.

The marriage in question took place in India, and parties lived in Madras till such time the petitioner had to quit the matrimonial home owing to matrimonial fault of the husband.

She came to her parental home in Colombo in the year 1990 with her two children.

Thereafter she instituted the aforesaid action and summons had been served on the defendant through a solicitor residing in Madras and also through the Ministry of Justice via Sri Lanka Consular in Madras. The defendant did not appear at all to defend the action.

The case proceeded to trial *ex parte* and the plaintiff-petitioner gave evidence to establish her case. The learned Additional District Judge reserved her judgment and on 4.3.93 she dismissed the action of the plaintiff-petitioner.

It appears that the learned Additional District Judge dismissed the action on the following grounds:

- (i) That the constructive malicious desertion took place in Madras, and the cause of action did not arise in Sri Lanka.
- (ii) The matrimonial home was outside Sri Lanka.
- (iii) That Section 597 of the Civil Procedure Code is not applicable, as the marriage was contracted in Madras.
- (iv) The Court has no jurisdiction in the case of marriage contracted outside Sri Lanka.
- (v) It is the Court of the husband's domicile that has the jurisdiction to grant a divorce.
- (vi) Plaintiff-petitioner has failed to prove that she is not subject to the law applicable to her husband.

At the time she instituted this action she was a resident of Colombo, in Sri Lanka. Section 597 of the Civil Procedure Code states as follows:

"Any husband or wife may present a plaint to District Court within the local limits of the jurisdiction of which he or she, as the case may be resides, praying that his or her marriage be dissolved on any ground for which marriage may, by the law applicable in Sri Lanka to his or her case, be dissolved".

In terms of the above stated section, the plaintiff-petitioner who resides in Colombo is entitled to present a plaint to the District Court of Colombo. The ground upon which she prayed for divorce was malicious desertion (constructive) which is a valid ground according to the law applicable in Sri Lanka to dissolve the marriage in question. Nowhere in the said section is it stated, that only a marriage

contracted within Sri Lanka can be dissolved, by filing a plaint as contemplated in that section. In other words this section does not preclude a marriage contracted outside Sri Lanka to be dissolved on any ground, by law applicable in Sri Lanka under Section 19 of the Marriage (General) Ordinance. An analysis of the said section reveals that no restriction is imposed to the effect that only adultery or malicious desertion, or incurable impotency at the time of marriage should be a ground that took place in Sri Lanka in order that a party be entitled to get a divorce on one of such grounds. If a party succeeds in establishing one of such grounds, then he or she is entitled to get a divorce from Court.

Section 19 of the Marriage (General) Ordinance read with Section 24 of Judicature Act, and also with Section 3 of the Judicature (Amendment) Act No. 71 of 1981 reveals that divorce jurisdiction is exercisable by the District Court irrespective of where the marriage was contracted.

Section 597 of the Civil Procedure Code does not prohibit a court from entertaining a plaint where malicious desertion took place outside Sri Lanka. This section read with section 19 of the Marriages (General) Ordinance does not preclude a competent District Court to entertain a plaint where it appears from the plaint that the party resides within its local jurisdiction and alleges a ground for divorce as contemplated in Section 19 of the Marriages (General) Ordinance.

The learned Additional District Judge was of the opinion that a wife's domicile is, that of the husband, and it is a court of the husband's domicile that has jurisdiction to grant a divorce. She was attracted by the decision of *Le Mesurier v. Le Mesurier*⁽¹⁾

As rightly submitted by the learned Counsel for the plaintiff-petitioner in his written submissions, the matrimonial law has undergone several changes since the decision of the aforesaid case. As contended by the learned Counsel for the plaintiff-petitioner the

Supreme Court in the above stated case held that the District Court of Matara had no jurisdiction notwithstanding Chapter 42 of the Civil Procedure Code, because the law, Registration (Marriages, Birth & Deaths) Ordinance No. 6 of 1847 gave **divorce jurisdiction to the District Court only to a marriage contracted locally**. But it is not so as the law stands today. In the result the decision of the *Le Mesurier* case has no application to the marriage contracted by the plaintiff-petitioner in the present case.

The learned Judge has gone on the basis that the law applicable is the law applicable to her husband. We are of the view, considering the present matrimonial laws prevailing in Sri Lanka (after the decision of *Le Mesurier's case* and a few other cases cited by the learned Judge) and the written submissions of the learned Counsel that the view held by the learned Judge is incorrect.

If the petitioner is able to prove the provisions of section 597 – of the Civil Procedure Code and section 19 of the General (Marriages) Ordinance, and also comes within the provisions of section 24 of the Judicature Act, then she is entitled to get a divorce from the District Court of Colombo.

We are of the view that for the aforesaid reasons, we cannot allow the judgment of the learned Additional District Judge to stand. In the circumstances, we set aside the judgment and direct the learned Judge to enter a decree on the ground of constructive malicious desertion and grant other reliefs claimed by the plaintiff-petitioner, and thereafter to act according to the provisions of the Civil Procedure Code dealing with matrimonial actions.

We order no costs.

K. PALAKIDNAR J. – I agree.

Appeal allowed.

Case remitted to District Court to enter decree of divorce and other relief according to law .