SAMARASINGHE
v.
SAMARASINGHE

COURT OF APPEAL
P.R.P. PERERA, J. AND WIJEYARATNE, J.
C.A. APPLICATION No. 587/89
D.C. COLOMBO 12599/D
NOVEMBER 06, 1989.

Divorce – Forfeiture of benefits – Who can claim it and when – Civil Procedure Code, s.615(1)

The words "upon pronouncing a decree of divorce or separation" in the new section 615(1) of the Civil Procedure Code imply that issues relating to forfeiture of benefits by the guilty spouse could be raised in an action for divorce or separation.

As forfeiture of benefits can be ordered only against a guilty spouse on proof of matrimonial fault in this particular case as the defendant wife had not counterclaimed for a divorce or separation, it is not open to her to raise such issues.

Senadhipathi v Senadhipathi 43 NLR 272 not followed.

Cases referred to :

1. *Senadhipathi vs. Senadhipathi* 43 N.L.R. 272
2. *Fernando vs. Fernando* 63 N.L.R.416
3. *Karunanayake v Karunanayake* 39 NLR 275, 280
4. *Cooray v Leili de Silva* S.C. 80/73(F) – D.C. Panadura No. 12356/M. S.C. Minutes of 15.8.1978
5. *Abeyratne v. Nanda Wickremaratne* C.A.(S.C.) 131/73(F) – D.C. Colombo 70204/M – S.C. Minutes of 31.7.1980
6. *Grace de Alwis vs. Walter de Alwis* 76 N.L.R. 444

APPLICATION for revision of order of District Court of Colombo.

I.G.N. Jacolyn Seneviratne with *F.C. Perera* and *Miss. Damayanthi de Silva* for defendant-petitioner.

Romesh de Silva, P.C. with *Ian Fernando* and *Geethaka Goonewardena* for plaintiff-respondent.

Cur adv. vult.

December 13, 1989.

WIJEYARATNE, J.

The plaintiff-respondent (husband) filed this action on 7.11.1984 against the defendant-petitioner (wife) for a decree of separation on

the grounds set out in the plaint. The defendant-petitioner filed answer denying that any cause of action has accrued to the plaintiff-respondent to sue her, and prayed that the plaintiff-respondent's action be dismissed.

The defendant-petitioner further averred that she is entitled to a declaration –

(a) that the legal title of the matrimonial home, 66/7, Ananda Coomaraswamy Mawatha (Green Path), Colombo 3, was in her and that she is entitled to the beneficial interest therein;

(b) that she is entitled to the movables set out in paragraph 29 of the answer and the schedule, or the value thereof;

(c) that she is entitled to judgment in a sum of Rs. 30,000/-, being the dowry provided at the time of the marriage.

On 19.7.1987, when the trial was resumed, learned counsel for the defendant-petitioner raised issues 4 to 13. Learned counsel for the plaintiff-respondent raised objections to issues 9 to 13, which are as follows :-

9. (a) As set out in paragraphs 9 and 11(a) of the answer, did the defendant spend monies for the purchase of the land, construction and improvement of the buildings standing on premises No.66/7, Green Path?

   (b) If so, is the defendant entitled to a declaration that the said property is held in trust for the benefit of the defendant?

10. (a) From 1970 to 1984 were all monies earned by the defendant spent for the purchase of the said land, construction of the house on the said land and for effecting improvements thereon?

    (b) Did the defendant directly or indirectly or in any other way contribute for the purchase of the said property?

    (c) If issues 10(a) and 10(b) are answered in the affirmative, is the said property held in trust by the plaintiff for the benefit of the defendant?

11. In any event is the defendant entitled to the return of the dowry of Rs.30,000/-?

12. Is the defendant entitled to the return of the movables mentioned in paragraph 3 of the answer and the schedule

thereto, or the value thereof?

13. (a) Are premises No.66/7, Green Path, Colombo 3, the matrimonial home of parties?

(b) If so, is the defendant entitled to the rights of residence therein?

Learned counsel for the plaintiff-respondent objected to the issues on the ground that they cannot be set up in a divorce action or in an action for judicial separation.

The learned Additional District Judge held that these reliefs can be sought only after the decree absolute has been entered and that section 618 of the Civil Procedure Code does not permit these matters to be raised in this action.

The learned Additional District Judge relied on the decision of *Senadipathi vs. Senadhipathi* (1) and by her order dated 21.7.1989 disallowed the said issues.

Being dissatisfied, the defendant-petitioner has filed this application in revision.

The defendant-petitioner has also filed an application for leave to appeal from this order (bearing No.83/89) and counsel agreed that the order in the leave to appeal application will abide the order in this case.

I have considered the submissions made by Mr I.G.N. Jacolyn Seneviratne for the defendant-petitioner and Mr Romesh de Silva, President's Counsel, for the defendant-respondent.

The practice of giving dowry on behalf of a woman has long been prevalent among the indigenous people of this country (and also in the adjoining Indian sub-continent). The origin is lost in the dim past.

Hayley in his Treatise on the Laws and Customs of the Sinhalese (Kandyan Law) – 1923 Edn. at page 333 – says, "among the Sinhalese the dowry is an important part of marriage which is still a matter of arrangement between the bride's parents and the bride-groom or his family". This is in reference to the Kandyan Sinhalese.

The same observation applies to the Low Country Sinhalese. The practice prevails even more strongly among the Tamil population of this country. (See sections 1 to 6 of the Thesawalamai Code, which

is generally applicable to the Tamils of the Northern Province. In section 1 dowry is referred to as "Chidenam"). Among the Muslims there is "Kaikuli" which is a dowry given by the bride's parents to the groom, while "Mahr" is given by the groom to the wife. The practice is so well recognised that a daughter's share in the parental inheritance is thereby affected as this is an alternative method of providing for her. (See also section 35 of the Matrimonial Rights and Inheritance Ordinance, No.18 of 1876, relating to hotchpot or collation).

In Roman-Dutch Law (which is the common law of this country applicable to the Low Country Sinhalese and others not governed in this matter by their own special laws as set out above) there was "dos" and "donatio propter nuptias". "Dos" (or dowry) is described by Voet as "property which is given by a woman or someone else on her behalf to a husband so that he may bear the burden of the marriage" – (23.3.2).

"Donatio propter nuptias" (or donation on account of marriage) is given from the side of the husband to the wife by way of return and as security for the dowry. (Voet 23.3.21). We are not concerned with that aspect here in this case.

In Roman-Dutch Law, community of property prevails between the spouses and was part of our common law until its abolition by the Matrimonial Rights and Inheritance Ordinance, No.18 of 1876 (section 7).

"Dos" (or dowry) could be excluded from the community by ante-nuptial contract.

Hahlo in his book "The South African Law of Husband and Wife" – 1953, 1st Edition, at page 174, says that an ante-nuptial contract is an agreement between intending spouses as to the terms and conditions by which their marriage is to be governed.

Hahlo in the same book at page 203 states that in modern law there is, to all intents and purposes, only one form of ante-nuptial contract and that it is one which excludes community of property and profit and loss and the marital power of the husband. As ante-nuptial contract could also deal with marriage settlements which are given in consideration of marriage.

These are the variable consequences of marriage in contrast to other consequences which could not be varied even by agreement, such as the reciprocal duties of cohabitation, fidelity and support.

Professor R.W.Lee in his book "An Introduction to Roman-Dutch Law" – 5th Edn. – 1953, in Appendix "A" at page 414, gives the form of such an ante-nuptial contract in South Africa signed before a notary public and two attesting witnesses by a man and a woman about to enter matrimony.

Thus a gift like "dos" (or dowry) could be excluded from the community of property by a settlement under such an ante-nuptial contract. It is necessary to understand this historical background as our Civil Procedure Code refers to settlements of property, ante-nuptial settlements and post-nuptial settlements.

Since community of property of spouses is no longer a part of our law, there is no necessity for spouses normally to enter into such ante-nuptial contract; but there could be ante-nuptial settlements or post-nuptial settlements of property.

Giving of dowry is such a marriage settlement. Dowry is a marriage portion where movable or immovable property is given by a parent or a third party to a woman in consideration of marriage.

The fact that this gift is given in contemplation of marriage distinguishes it from an ordinary free will gift. A dowry is a gift created for the marriage. If this dowry or any portion thereof is given to the woman and remains her own separate property, then no problem can arise if and when a divorce does take place. (See Fernando vs. Fernando, (2).

In this country, for example, a woman can be given cash, jewellery, a parcel of land, a house, furniture, a motor vehicle, stocks, bonds and company shares as dowry. If these remain in her name and are so registered, then there is no problem in the event of a divorce. They remain her own separate property.

Section 5(1) of the Married Women's Property Ordinance, No. 18 of 1923, lays down that a married woman shall be capable of acquiring, holding or disposing by will or otherwise any movable or immovable property as her separate property as if she were a *femme-sole*.

Section 7 lays down that a married woman shall be entitled to have and to hold as her separate property and to so dispose movable and immovable property which shall belong to her at the time of marriage or which is acquired by her or devolves upon her after marriage, including earnings and property gained or acquired by her in any employment, trade or occupation or by the exercise of any literary,

artistic or scientific skill.

Section 13 makes similar provision in the case of bank deposits, shares, stocks, debentures or other interests in any corporation, company, public body or society.

However, when this dowry or any portion thereof (given on behalf of a wife) is actually given or used by the husband, or if the husband has already derived any benefits therefrom or will derive in the future any benefits by reason of that marriage, then if the marriage is dissolved due to the fault of the husband, he has to forfeit those benefits.

In an action for judicial separation too, it would appear that an order for forfeiture of accrued benefits (but not future benefits) could be obtained. (See Hahlo in the same book at 248 and 363). In respect of such property the wife has the right to recover such property even if the dominium has passed to the husband. The character of dowry property does not change merely because the property given as dowry is used or invested in some other form of property.

The Roman-Dutch Law rule that a guilty party forfeits the benefits derived from the marriage has long been part of our law and has been recognised as such by many decisions of the Supreme Court over the years.

Hahlo in the same book at page 362 says –

> "The effect of a divorce on the property rights of the spouses depends upon whether they were married in or out of community of property. It further depends upon whether or not an order for forfeiture of benefits was made against the defendant.
>
> Since the law considers that a spouse should not be allowed to benefit financially from a marriage which has been wrecked through his (or her) fault, the plaintiff, in an action for divorce on the grounds of adultery or malicious desertion, may claim as against the defendant the forfeiture of all financial benefits, past and future, which the latter has derived from the marriage or is to derive from the marriage in future, whether by way of community of property or under an antenuptial contract. An order for forfeiture of benefits will not be made by the court unless it is claimed by the plaintiff, but if it is claimed and a

divorce is granted, the court has no discretion to withhold the order."

I might mention that some changes have been effected since then in South African law by the enactment in that country of the Divorce Act, No.70 of 1979 (section 9).

For example, in this country, a husband could be given by way of dowry from or on behalf of the wife a house or a parcel of land or cash. With the cash he may have bought a house or a motor vehicle in his name. During the marriage the wife may have contributed her earnings for a similar purpose by the husband. The wife may have even contributed her money for the building of a house by the husband. Then if the marriage is dissolved owing to the fault of the husband he is liable to forfeit those benefits.

Then the next question that arises is in what form such relief should be claimed in an action. It seems to me that this could be done in one of the following ways :–

(1) For the restitution of dotal property on the basis that it belongs to the wife and that the husband had only the usufruct thereof. (See the observations of Maartenz, J., in *Karunanayake vs. Karunanayake* (3), and the unreported case of *Cooray vs. Leili de Silva* (4).

(2) Where the dominium has passed to the husband, it could be re-claimed on the basis of forfeiture of benefits.

(3) On the basis that the husband holds such property in trust for the wife. This is on the basis that though the legal title is in the husband, the wife is entitled to the beneficial interest therein. Section 83 of the Trusts Ordinance is relevant and applicable. In this case issues 9(b) and 10 are on the basis of a trust.

See the judgment of Wimalaratne, J., in the case of *Abeyratne vs. Nanda Wickremaratne* (5), where it was held that the money given to the husband and which was used by him to purchase a car was held in trust for the benefit of the wife.

(4) Where cash is given to or expended on his behalf by the wife, the wife can ask for return of same on the basis of forfeiture of benefits. (See the decision in *Grace de Alwis vs. Walter de Alwis* (6)).

It is precisely for this type of forfeiture of benefits that issues Nos.9 to 13 have been framed in this case on behalf of the defendant wife.

In the case of *Fernando vs. Fernando* (2) it was held that the

statutory provisions in sections 617 and 618 of the former Civil Procedure Code have not abrogated the remedies available under the common law and that the parties should elect to claim either the remedy under the common law or those available under the Civil Procedure Code.

It is also appropriate to add at this stage that section 23(1) of the Married Women's Property Ordinance, No.18 of 1923, provides that in any question between husband and wife as to the title or possession of property, either party or any such bank, corporation, company, public body or society as aforesaid, in whose books any stocks, funds or shares by either party may be standing, may apply by petition by way of summary procedure to the District Court and the District Judge may make such order as he thinks fit after inquiry. It is doubtful whether this section can be used where the husband and the wife have been divorced.

Then the important question arises whether those matters covered by issues 9 to 13 can be set up in a divorce action or an action for judicial separation.

The learned Additional District Judge followed the decision in *Senadhipathi vs. Senadhipathi* (1) and held that they cannot be set up in the present case. In that case where the plaintiff (wife) sued the defendant (husband) for a divorce on the ground of malicious desertion and adultery, and the defendant counter-claimed for a divorce on the ground of plaintiff's adultery and in his answer claimed similar reliefs as covered by issues 9 to 13. Soertsz, J., held that these matters cannot be introduced into the trial of a divorce case.

The main question to be decided in that case related to the amount of stamp duty for the appeal. For the purpose of that decision Soertsz, J., (with Hearne, J., agreeing) held that these matters cannot be introduced into the trial of a divorce action. He carefully analysed sections 597, 607 and 608 of the Civil Procedure Code and held that these sections did not contemplate any other kind of relief, and also held that section 36 of the Civil Procedure Code did not apply to matrimonial action.

Wijeyewardene, J., (as he then was) in a dissenting judgment held that section 598 of the Civil Procedure Code merely enlarges the rights of a party with regard to joinder of causes of action and does not have the effect of preventing a plaintiff from joining several

causes of action as contemplated by section 36 of the Civil Procedure Code. He stated, "I am, therefore, of opinion that in the case contemplated by me, the wife could in accordance with law make a claim in respect of movable property, subject of course to the right of the court under section 36 to order a separate trial."

However, since then, by amending Law, No. 20 of 1977, some of these sections have been amended or repealed.

Sections 597, 607 and 608 of the Civil Procedure Code in force now leave these sections unchanged except that sections 597 and 608 have been sub-divided and new subsections have been added, which are numbered as 597(2) and 608(2) respectively.

Sections 597(2) lays down that the Conciliation Board Act shall not apply to matrimonial actions. Section 608(2) provides that under certain circumstances a decree of separation could lead to a decree of dissolution of marriage.

The old section 615 has been replaced with a new section 615. The new section 615(1) reads as follows :-

Sec. 615(1) new: "The court may, if it thinks fit, *upon pronouncing a decree of divorce or separation,* order for the benefit of either spouse or of the children of the marriage or of both, that the other spouse shall do any one or more of the following :-

(a) make such conveyance or settlement as the court thinks reasonable of such property or any part thereof as he may be entitled to;

(b) pay a gross sum of money;

(c) pay annually or monthly such sums of money as the court thinks reasonable;

(d) Secure the payment of such sums of money as may be ordered under paragraph (b) or paragraph (c) by the hypothecation of immovable property or by the execution of a bond with or without sureties, or by the purchase of a policy or annuity in an insurance company or other institution approved by court."

Sections 616 and 617 have been repealed (the latter section gives the court power to order the settlement of property belonging to an adulterous wife in favour of her husband or children).

Section 618 remains unchanged, but under this section orders relating to application of the property settled can be made only *after* decree for divorce or separation.

How then can a court make an order under the new section 615(1) in respect of property which a party is entitled to or order the payment of sums of money as the court thinks reasonable except by going into these matters at the main trial itself. In my opinion the words "upon pronouncing a decree or divorce or separation" imply that these questions which can relate to forfeiture of benefits by the guilty spouse could be put in issue at a trial for divorce or separation. Though it can embarrass the trial of the main issues by introducing a whole volume of other evidence, nevertheless it has the following advantages :–

(a) The parties are already before court and it is convenient to go into these matters in the same case itself.

(b) If a separate action is filed for forfeiture of benefits (as has been done in the cases cited above except in the case of *Karunanayake vs. Karunanayake* (3), there will be a lot of delay and expense to be incurred by the parties.

In *Karunanayake's* case a claim for the return of the dowry was made by the plaintiff wife in the divorce action against her husband. At the hearing in appeal, learned counsel for the defendant-appellant had argued that the court having matrimonial jurisdiction cannot try a claim for damages for breach of trust. In this case it was held that the wife was not entitled to recover Rs.5,000/- given as dowry as movable property vested in the husband under section 17 of the Matrimonial Rights and Inheritance Ordinance, No.18 of 1876, (under which Ordinance the parties were married).

(c) It could be argued that sections 34 and 207 of the Civil Procedure Code oblige a party to set up every kind of relief which could be set up. Thereby a multiplicity of actions is avoided.

What is most important is the wording of the new section 615(1) of the Civil Procedure Code which strongly suggests that reliefs by way of forfeiture of benefits could be claimed in an action for divorce or separation, upon pronouncing the decree.

I am therefore of the view that these issues 9 to 13 could be raised in an action for divorce of judicial separation. However in this particular case before us there are two very good reasons why the

matters covered by issues 9 to 13 cannot be raised in the present action. They are –

(1) The defendant-petitioner in her answer has not counter-claimed for a divorce or separation on the ground of any matrimonial fault on the part of the plaintiff-respondent, but has merely asked for the dismissal of the plaintiff's action. To obtain the kind of relief claimed in issues 9 to 13, it must be shown that there was some matrimonial fault on the part of the plaintiff-respondent by which he forfeits these benefits. For this purpose the defendant-petitioner must pray for a divorce or separation, which she has not done.

If the defendant succeeds in this action, the plaintiff's action will be dismissed and she will not be entitled to the reliefs claimed by her.

If the plaintiff succeeds in the action, then he will obtain judicial separation on account of some matrimonial fault on the part of the defendant.

Therefore the defendant in this case is on the horns of a dilemma. Whatever the result of the case will be, she cannot get the reliefs set up in issues 9 to 13. Hence on this ground these issues cannot be allowed.

(2) Case No.ZL/4940 of the District Court of Colombo has been filed by the plaintiff-respondent against the defendant-petitioner, the case heard and the judgment is reserved in the case. Several of the issues framed in that case (for instance issues 7, 9, 10 and 12) are identical or almost identical with issues 9 to 13 in the present case.

Any court has an inherent power to stay an action in one court where another action on the same subject-matter is pending in another court. Here only the judgment remains to be delivered in the other case. For this reason too issues 9 to 13 cannot be allowed in the present action.

Therefore, for these reasons I am of opinion that issues 9 to 13 cannot be allowed in this case and I affirm the order of the Additional District Judge dated 21.7.1989 rejecting these issues.

The application of the defendant-petitioner is dismissed with costs payable to the plaintiff-respondent.

As it was agreed by counsel that the leave to appeal application No. 83/89 will abide the decision in this case, that application also stands dismissed.

P.R.P. PERERA, J. – I agree.

Application dismissed.