

JAYEWARDENE v. JAYEWARDENE *nee* PEREIRA

COURT OF APPEAL

ABDUL CADER, J. & VICTOR PERERA, J.

S.C. (C.A.) 370/69 (F) D.C. COLOMBO 1211/spl

FEBRUARY 13, 1980

Matrimonial Property – Married Women's Property Ordinance No. 18 of 1923, Section 23 – Meaning of "in any question ... as to the title or possession of property" – Section 17 of the Married Women's Property Act of 1882 (U.K.) – Summary procedure under chapter XXIV of the Civil Procedure Code.

An application was made to the District Court by way of summary procedure under section 23 of the Married Women's Property Ordinance by the wife against her husband in respect of a sum of money said to have been given to her by her mother as dowry a part of which she alleged was spent by her husband for his sole use and benefit. The husband denied having received this money and further took objection that his wife was not entitled to claim the said sum under section 23 of that Ordinance for the reason that the section is confined only to any question as to "title or possession of property" and not to any dispute where the question has first to be decided whether in fact a dowry in that sum was given.

Held:

The claim of the wife was only a chose in action, a debt which she has to prove before she can succeed and therefore not an identifiable definite property in terms of section 23(1) of the Ordinance. It is title or possession of property that the section is concerned with and therefore the property must be definite identifiable property before the court can be called upon to decide a question of title or possession and therefore the action should fail.

Cases referred to:

- (1) *Tunstall v. Tunstall* (1953) 2 AER 311 at 312.
- (2) *Rimmer v. Rimmer* (1952) w AER 863.
- (3) *Crystall v. Crystall* (1963) 2 AER 332 at 334.
- (4) *Camkin and Another v. Seager* (1957) 1 AER 71.
- (5) *Williams v. Williams* (1962) 3 AER 441.
- (6) *Hine v. Hine* (1962) 3 AER 347.

APPEAL from the Order of the District Court of Colombo.

H. W. Jayewardene, Q.C. with *A. B. Desmond Fernando* for the appellant.

R. Guneratne for the respondent.

Cur adv vult.

13th March, 1980

ABDUL CADER, J.

This was an application under section 23 of the Married Women's Property Ordinance by the wife of the respondent stating that "the mother of the petitioner gifted to the petitioner as dowry the sum of Rs. 10,000/-" and that "the respondent has spent out of the said sum a sum of Rs. 9000/- for his sole use and benefit." The respondent denied having received this money and took objection that the petitioner was not entitled to claim this sum under section 23 of this Ordinance for the reason that that section is confined only to any question as to "title or possession of property" and not to any dispute where the question has first to be decided whether, in fact, a dowry of Rs. 10,000/- was given.

At the inquiry, 7 issues were framed of which issue No. 1 raised the question whether the sum of Rs. 10,000/- was paid to the petitioner as dowry; issue No. 4 whether the respondent spent a sum of Rs. 9000/- for his sole use and benefit and issue No. 6 whether the petitioner could recover this sum of money under section 23 of the Married Women's Property Act. The learned District Judge answered the issues to the effect that the mother of the petitioner gave the petitioner the sum of Rs. 10,000/- which was entrusted to the respondent and that the respondent had used a sum of Rs. 9000/- for his sole use and benefit and he held that this action could be maintained under section 23.

Before us, Counsel for the respondent urged that the learned District Judge had misdirected himself as regards his findings on facts on the question whether this sum was, in fact, handed over to the respondent, but he contented himself with the preliminary objection raised by issue No. 6 as regards whether this action could be maintained under section 23. He relied on the case cited to the learned District Judge. *Tunstall v. Tunstall*.⁽¹⁾ The learned District Judge accepted the correctness of the finding of that Court that there should be a property in dispute traceable or identifiable before the Court could make an order under section 17 of the English Act. But he distinguished that case for the reason that there is in section 17 of the English Act, a clause "with respect to the property in dispute" which is not present in our Section 23. It is, therefore, necessary to quote the two relevant sections. Section 17 of the English Act reads as follows:—

"... may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time

to time, and inquiry touching the matters in question to be made in such manner as he shall think fit." (quoted in *Tunstall v. Tunstall*)

Section 13 of the Married Women's Property Ordinance reads as follows:-

(1) "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 of either party may be standing, may apply by petition in a summary way as provided for in Chapter XXIV of the Civil Procedure Code, to the District Court of the district in which either party resides."

(2) "The District Judge may make such order, direct or make such inquiry, and award such costs as he shall think fit."

The two sections are similar except that in the English Act, the Court is empowered to make order with respect to "the property in dispute." It is this clause "with respect to the property in dispute" on which the learned District Judge has relied to make a distinction. Section 23(1) refers to "title or possession of the property." Therefore, a District Judge in terms of subsection (2) can make an order only in respect of the question before the District Judge as to "title or possession of property." Obviously, (1) refers to property that is in dispute for the reason that it is because there is a dispute over that property that the petitioner moves the Court for relief. Therefore, in effect, in terms of section 23(1) and (2), the District Judge is required to make an order as regards the title or possession of the property which is in dispute. Looked at from this point of view, we see no distinction between the two sections. The words "as he thinks fit" are common to both Ordinances. With respect, we do not find it possible to make a distinction between the two Acts for the reason that the words "with respect to property in dispute" appears in the English Act. Several authorities have been cited to us which, if cited to the learned District Judge, would have, in our opinion, helped him to decide this matter differently.

In the case of *Tunstall v. Tunstall*⁽¹⁾ referred to above, Lord Goddard C.J. stated as follows:-

"If, when he was about to sell it, the wife had taken proceedings claiming a share in the proceeds of sale, a **particular fund**, those proceedings might have been appropriate." (The emphasis is mine) "But the husband, having had the money for

two years, has been living on it. ... apparently, he has been using this money..."

in this case before us, too, there is no definite identifiable fund which could be attached, Lord Goddard, C.J., went on to say:-

"In the case of chattel, or stock and shares (which are specially mentioned) the judge could, no doubt, order that "that piece of property is to be handed over by the husband" or "these shares standing at present in the husband's name in part or in whole are to be transferred to the wife", and, no doubt, a husband refusing to obey that order could be attached. But I can see nothing in this section which empowers the court to give what is equivalent to a judgment for a sum of money."

He went on further to say:-

"The court desires to say that in *Rimmer v. Rimmer*⁽²⁾ the court was expressly dealing with a **fund which was in existence**. No question like this was raised there. There was a fund. The court was deciding how the parties were to share in the fund and the court divided it equally, and I suppose that on that account the judge and master thought in this case it was also right to divide it equally. But, there being no fund here, there is nothing on which this order could operate, and, therefore, it must be discharged."

In the later case of *Crystall v. Crystall*⁽³⁾ Willmer, L.J. stated as follows:-

"The husband, no doubt, is under a liability to repay the loan; but that is not a matter which can be dealt with as a question of property within the jurisdiction of a court acting under s.17 of the Married Women's Property Act, 1882 Nor does the Matrimonial Causes (Property and Maintenance) Act, 1958. make it any more possible to bring that matter within the purview of these proceedings. For the application of that Act (I refer to s.7 is restricted to cases where there is a question between husband and wife as to the title to, or possession of, property. That Act is therefore no more directed to the right to recover loans as between husband and wife than was the original Act of 1882. It seems to me that that is the beginning and the end of this matter. If this was a loan, the property in the money which the wife handed over to the husband passed to the husband, subject to his contractual liability to repay. It is in my judgment quite impossible to say, as the registrar sought to say, that it formed any part of the property in dispute."

Harman, L.J. agreed and stated as follows:-

"The dispute between husband and wife for the purposes of that section must be a dispute about some property which belongs either to the one or to the other, and about which they are in dispute. There is no such property here. There is a **chose in action**, a debt, if the wife is right;" (The emphasis is mine). ... She says she has a claim against him in debt, and that is not a matter which can be agitated under s.17."

This case clearly demonstrates that the claim the petitioner in this case has against the respondent is only a **chose in action**, a debt which she has to prove before she can succeed and, therefore, not an identifiable, definite property in terms of section 23 (1) of the Ordinance. It is a title or possession of property that the section is concerned with and, therefore, the property must be definite, identifiable property before the Court can be called upon to decide a question of title or possession.

In the case of *Camkin and Another v. Seager*⁽⁴⁾ Wynn-Parry, J. stated as follows:-

"... I ruled that I was not prepared to make any order on questions 7, 8 and 9 as they stood, because in each case the claim, whether by the applicants or the respondent, was a mere money claim and involved, not merely a decision who was entitled to possession of property such as a fund shown to be in existence, but, as a preliminary, a search in the nature of an inquiry whether property existed on which the decision could operate. If a fund be shown to exist, no doubt the court will pronounce on the rights of the parties, as in *Rimmer v. Rimmer*⁽²⁾ but where there is no property or identifiable fund on which the order under s.17 could operate, proceedings under that section are inappropriate (see *Tunstall v. Tunstall*⁽¹⁾) In my judgment on an application under s.17, the court has no jurisdiction to conduct an inquiry with a view to finding out whether or not property exists. Its jurisdiction is confined to deciding questions relating to property which, on the evidence before it, is shown to exist. Further, in my view, the court has no jurisdiction to entertain questions which, it resolved in favour of the party raising them, will only result in showing that a debt is owed to that party by the other party to the summons."

Counsel for the petitioner cited several authorities. His contention was that it would be sufficient if the property was a definite entity at the time the money was paid to the respondent. We are unable to

accept this contention for the reason that section 23 of the Ordinance refers to the property in dispute at the time the dispute is brought to Court. Obviously, there could not have been a dispute at the time the money was handed over to the respondent when the parties were expecting to live a happy, married life.

Counsel then made a distinction between disputes governed by intention of the parties and cited the case of *Williams v. Williams*⁽⁵⁾. We are of the opinion that this question of intention has no relevance to the dispute before us. It is important to note that in that case, too, there was a definite fund of 1,001 pounds in the bank which was the subject-matter of the dispute. In the case of *Hine v. Hine*⁽⁶⁾, cited to us by Counsel for the petitioner, once again it may be noted that there was a definite matrimonial home which the parties had at 131, Westfield Avenue, Watford which was to be sold and the question before Court was how the proceeds of the sale of that property was to be divided.

Another case cited by Counsel for the petitioner was the case of *Rimmer v. Rimmer*⁽²⁾, referred to earlier where there was a definite sum of 2,117 pounds in dispute.

In the case before us, the Court was called upon to decide first whether, in fact, there was a sum of Rs. 10,000/- due from the respondent to the petitioner and, secondly, according to the petitioner, a sum of Rs. 9000/- had been spent. We are of the opinion that section 23 of our Ordinance is not available to the petitioner. Counsel for the respondent – appellant drew our attention to section 18 of the same Ordinance. While section 23 affords relief under summary procedure, section 18 requires parties to seek relief by regular procedure. This distinction is important. The Court cannot grant relief to the petitioner under summary procedure when the Ordinance requires her to take steps under regular procedure. The appeal is allowed and the petition in the D.C. is, therefore, dismissed.

In all the circumstances of this case, we do not order costs.

Parties will bear their own costs in both courts.

VICTOR PERERA, J. – I agree.

Appeal allowed.