

**NIHAL IGNATIUS PERERA
V.
AJANTHA PERERA nee SENEVIRATNE**

COURT OF APPEAL.
W.N.D. PERERA, J., AND WIJEYARATNE, J.
CA. APPLICATION NO. 547/91
WITH C.A./L.A. NO. 116/91
D.C. MOUNT LAVINIA
CASE NO. 4067/D
12 September, 1991

Matrimonial action - Divorce - Withdrawal - Proceeding with counter suit for divorce.

Held:

Where the plaintiff (husband) sued the defendant (wife) for divorce and the defendant counter-claimed a divorce and the plaintiff being unable to pay the costs and alimony *pendente lite* ordered by court moved to withdraw the action, it was competent for the court under sec. 603 of the Civil Procedure Code, while permitting the plaintiff to withdraw his action and accordingly dismissing the same, to allow the defendant to proceed with her claim in reconvention for divorce.

Cases referred to

1. *Karunatileke v. Karunatileke* 52 NLR 300

APPLICATION in revision of orders of the District Court of Mount Lavinia.

H.L. de Silva, P.C. with *Herman J.C. Perera* for plaintiff -

Faiz Mustapha, P.C. with *K. Balapatabendi* for defendant-respondent.

Cur. adv. vult.

02 October 1991

WIJEYARATNE, J.

The plaintiff-petitioner filed this action on 25.4.90 against the defendant-respondent (his wife) for a divorce on the ground of malicious desertion. After the service of summons the defendant-

respondent filed a petition and affidavit praying for a sum of Rs.25,000/- by way of costs to defend the action and Rs. 5,000/- per month as alimony *pendente lite*, to which application the plaintiff-respondent filed objections.

After inquiry the learned Additional District Judge made order dated 23.1.91 that the plaintiff-petitioner do pay Rs. 15,000/- by way of costs and Rs. 3,000/- per month as alimony *pendente lite*.

On 23.1.91 the Attorney-at-law for the plaintiff-petitioner filed a motion (with a copy to the Attorney-at-Law for the defendant-respondent) to withdraw the action as he was unable to comply with the payments in the said order. An order was made by the learned Additional District Judge to support this motion on 27.2.91.

According to the proceedings of 27.2.91 (which have been produced) the plaintiff had been absent and the defendant had been present. Both parties were represented by counsel.

After hearing the submissions made by counsel on both sides, the learned Additional District Judge has made the following order:-

ORDER

"While dismissing the plaintiff's action under section 406(2) on the application of the plaintiff's counsel, I fix the case for trial regarding the claims in the defendant's answer that the marriage between the plaintiff and the defendant be dissolved.

While giving permission to the plaintiff to withdraw the action, I order the plaintiff to pay Rs. 1,500/- as costs to the defendant and direct that this amount be paid before the plaintiff files a replication to the defendant's answer. If this amount is not paid to the defendant before this date, parties agree that the defendant will be entitled to all the reliefs prayed for."

On 3.5.91 learned counsel for the plaintiff-petitioner had submitted that the learned Additional District Judge could not make an order for payment of costs and alimony *pendente lite* in view of the fact that the plaintiff-petitioner had moved to withdraw this action. After

submissions (including written submissions) had been made, the learned Additional District Judge made order dated 11.6.91 overruling the objection and granted a date for the plaintiff to file replication and fixed the trial for 29.7.91.

In his order dated 11.6.91 the learned Additional District Judge has stated that on 27.2.91, on the plaintiff's application, he was permitted to withdraw his action on payment of Rs. 1,500/- as costs and the matter was fixed for adjudication regarding the defendant's claim in reconvention.

The learned Additional District Judge stated that he has jurisdiction to consider the defendant's claim in reconvention as he could consider the defendant as a plaintiff under section 18 of the Civil Procedure Code. He has also held that the court has power under section 603 of the Civil Procedure Code to adjudicate upon the defendant's claim in reconvention. He also referred to the case of *Karunatillake v. Karunatillake* (1)

This application has been filed to revise the orders of the learned Additional District Judge dated 27.2.91 and 11.6.91. It is urged in the revision application that the learned Additional District Judge should not have entertained the answer of the defendant-respondent as the plaintiff-petitioner had moved to withdraw his action and this was allowed.

To this application objections dated 26.8.91 have been filed by the defendant-respondent. Among other grounds, it is stated that there has been a delay in making this application and also that there has been suppression of material facts.

There is also a connected leave to appeal application bearing No. C.A.116/91 to set aside the said orders.

At the hearing learned counsel for the plaintiff-petitioner Mr. H.L.de Silva, P.C., submitted that the foundation of any action was the plaint and that when the plaintiff moved to withdraw the action, and when the application was allowed and the action accordingly dismissed, the court had no jurisdiction to make any order thereafter. He further submitted that the answer was accepted after the action was dismissed. He also submitted that the acquiescence by the plaintiff-petitioner in the proceedings thereafter does not confer jurisdiction.

Mr. Faiz Mustapha, P.C., for the defendant-respondent, on the other hand, submitted that there was acquiescence and that the plaintiff-petitioner filed a replication on 3.5.91.

On a perusal of the proceedings it is clear that by order dated 27.2.91 the learned Additional District Judge permitted the plaintiff to withdraw the action and accordingly he dismissed the plaintiff's action *and at the same time* accepted the defendant's answer and permitted the plaintiff to file a replication. It should be kept in mind that there is specific provision made for this type of situation in section 603 which lays down that if the defendant in a divorce action opposes the reliefs sought on any ground which would have enabled her to sue as plaintiff for dissolution of marriage, court may give to the defendant on her application the same relief to which she would have been entitled in case she has presented a plaint seeking such reliefs. Therefore, as the defendant in this case has counter-claimed for divorce, the learned Additional district Judge is entitled, on her application, to treat her as a plaintiff and allow her to proceed with her counter-claim for divorce even though the plaintiff has withdrawn his action. Both the application by the plaintiff to withdraw the action and the application by the defendant to pursue her counter-claim for divorce were made and allowed on the same day, namely 27.2.91. The matter is fully covered by section 603 and the procedure followed is permissible under this section.

I therefore affirm the orders dated 27.2.91 and 11.6.91 and dismiss this application with costs payable by the plaintiff-petitioner to the defendant-respondent.

The connected Leave to Appeal Application No. 116/91 too stands dismissed.

W.N.D. PERERA, J. - I agree.

Application dismissed.