PATHMANAYAKY
v
MAHENTHIRAN

COURT OF APPEAL
TILAKAWARDENA, J. (P/CA)
WIJAYARATNE, J.
CA 125/84(F)
D.C. PT. PEDRO (FAMILY COURT) 290/FC
AUGUST 15, 2003

Civil Procedure Code – Section 602 and 608(2)b, General Marriages Ordinance – section 19(2) – Divorce under section 608(2) – Can a Divorce be granted – Establish matrimonial fault – Wilful Non consummation of Marriage – Is it a matrimonial offence? – Breakdown of marriage.

The petitioner invoked the jurisdiction of the Family Court on the ground that his marriage to the respondent was not consummated, the parties never cohabited, they lived separately from the date of registration upto date of filing action. The petitioner also averred that the separation was over a period of 7 years and prayed that the decree for the dissolution of marriage in terms of section 608(2)b be entered. The respondent-appellant resisted the application claiming that the petitioner is not entitled to seek a divorce in terms of section 608(2).

The Trial Court granted the divorce as prayed for.

ON APPEAL

Held :

(i) It is imcumbent on a spouse seeking a divorce under section 608(2) Civil Procedure Code on the ground of separation for a period of seven years to establish matrimonial fault.

(ii) In the present case parties have lived away from each other since the registration of marriage and both parties agree that there was no co-habitation of the spouses.

(iii) It is apparent that the non consummation of the marriage was owing to the wilful refusal of the husband to copulate, since he left the marriage ceremony immediately after the registration and continues to live away from the defendant-appellant.

(iv) Plaintiff-respondent who wilfully refused to copulate is guilty of matrimonial offence of malicious dereliction, malicious refusal of carnal intercourse, the wilful refusal of the husband to copulate is sufficient ground for dissolution of marriage.

Per Wijeyaratne, J.
"Although the plaintiff has sued for divorce on the ground of separation for over a period of 7 years, the evidence on record unequivocally establishes the complete breakdown of the marriage."

APPLICATION under section 769 of the Civil Procedure Code.

Cases referred to :

1. *Muthuranee* v *Thuraisingham* 1984 1 Sri LR 381
2. *Tennakoon* v *Somawathie Perera* alias *Tennakoon* 1986 1 Sri LR 90
3. *Wijeratne* v *Wijeratne* 47 NLR 324
4. *H.John Perera* v *H. Mathupali* 71 NLR 461
5. *Seneviratne* v *Ran Hamy* 29 NLR 97

Muthukrishna for respondent-appellant

P. Nagendra, P.C. with *A. Chinnaiah* for petitioner-respondent.

Cur.adv.vult

September 30, 2003.

WIJAYARATNE, J.

This is an appeal preferred from the judgment and decree dated 01
10.02.84 entered of record in the Family Court of Point Pedro, Case No.290/Divorce. The judgment is given in favour of the petitioner granting divorce a *Vinculo Matrimonii* from the respondent-appellant and ordering payment of permanent alimony in a sum of Rs. 25,000/= or a monthly payment of Rs.250/- by way of alimony.

The petitioner invoked the jurisdiction of the Family Court (District Court) of Point Pedro on 28.10.1981 on the grounds that his marriage to the respondent as evidenced by the marriage certificate marked P1 dated 08.04.1974, though duly registered, was 10
not consummated. It was stated that marriage was confined to reg-

istration only and there was no ceremony gone through. The parties, who never cohabited, lived separately from such date of registration unto date of filing action. The petitioner who averred that their separation was over a period of seven years, prayed that decree for the dissolution of marriage in terms of section 608(2)(b), be entered. The petitioner also averred in the course of his petition that the respondent-appellant had filed maintenance proceedings before Magistrate wherein he was ordered to pay Rs.100/- monthly and the respondent-appellant filed action in the District Court of Point Pedro for the recovery of dowry money in a sum of Rs. 10,000/- which he paid with interests due.

The respondent-appellant answered the petition admitting that her marriage to the petitioner was confined to mere registration and marriage ceremony was not celebrated nor was there any consummation of marriage. She also admitted the facts of her being paid monthly a sum of Rs.100/- by way of maintenance and that she received such dowry money with interests consequent to her filing action for the recovery of the same. It was also admitted that earlier action filed by the petitioner seeking declaration of nullity of this marriage was dismissed. However, the respondent-appellant resisted the application for the dissolution of their marriage claiming that she was prepared to "regularise" the marriage and the petitioner is not entitled to seek a divorce in terms of section 608(2) of the Civil Procedure Code. The respondent claimed alimony either as a monthly payment or as lump sum payment; in the event of a divorce being granted.

The trial proceeded on six issues suggested by parties and testimony of the petitioner, his witnesses and the respondent. The learned District Judge having considered the evidence and the submissions made by the parties answered all issues except issue No.5 in the affirmative and granted divorce and ordered payment of alimony in a lesser sum than claimed by the respondent-appellant.

The respondent-appellant appealed from this judgment and the main thrust of the appeal is that :

(i) Provisions of section 608(2)(b) which became operative only on 15.12.1977 has no retrospective effect and hence any period of separation prior to such date cannot be counted for the application of such provisions,

(ii) Section 608(2)(b) cannot have any application independent of section 19(2) of the Marriages (General) Ordinance.

(iii)When there is no consummation of marriage there cannot be a separation as envisaged under section 608(2)(b) of the Civil Procedure Code.

The question whether the provisions of Section 608(2)(b) has retrospective effect is decided by this court in *Muthuranee* v *Thuraisingham*[1]. It was held,

> (2) The amendment introducing section 608(2)(b) into Civil Procedure Code created new ground for divorce for the future and is in truth not retrospective. To hold that the period of seven years must be reckoned only from 15.12.1977 would in effect render the amendment a dead letter and sterile on the statute book for a period of seven years from this date. Section 608(2)(b) applies even to cases where parties have been separated a *mensa et thoro* for more than seven years prior to the subsection coming into operation".

Accordingly the application of the petitioner made to court on 28.10.1981 alleging separation since the date of marriage of 08.04.1974 is within the ambit of the aforesaid provisions of law.

The decision of the case of *Tennakone* v *Somawathie Perera* alias *Tennekone*[2] held,

> "It is incumbent on a spouse seeking a divorce under section 608(2) of the Civil Procedure Code on the ground of separation for a period of seven years to establish matrimonial fault. Only a procedural change enabling summary procedure to be used instead of a regular action was effected by section 608(2) of the Civil Procedure Code".

This decision of the Supreme court overruled the decision of *Muthuranee* v *Thuraisingham (supra)* in so far as the same ruled that,

"All that an applicant for divorce decree need establish under section 608(2)(b) is a cessation of cohabitation for a period of seven years; it is not necessary to prove the conditions necessary to obtain a decree of separation".

In overruling that point only of the above rule, Sharvananda, CJ, with other three Judges agreeing stated,

> "The view of Atukorale, J. in the present case is preferable to that of Tambiah, J. in *Muthuranee* v *Thuraisingham (supra)* and hence the latter should be overruled on this point. The correct legal position is that only a spouse who has lived in separation a *mensa et thoro* for seven years and who can estalish a *mensa et thoro* on any ground on which by our law such separation may be granted can avail himself/herself of the procedure set out in section 608(2)(b) of the Civil Procedure Code to obtain a decree of dissolution of marriage under that section."

In the present case parties have lived away from each other since the registration of marriage and both parties agree that there was no cohabitation of the spouses. This position has continued up to the date of trial. In fact the plaintiff-respondent had sought though unsuccessfully to have the registration of the marriage annulled as far back as 1978, the defendant-appellant had expressed her willingness to cohabit with the plaintiff-respondent but there is no evidence to the effect that she has made any serious attempt to live together with the plaintiff-respondent. On the contrary she had admittedly resorted to legal action for the recovery of the dowry given and for obtaining maintenance from the plaintiff-respondent. There is no evidence in the present case to the effect that even before the learned Magistrate inquiring into the application for maintenance, the defendant-appellant did make any serious attempt to end the separation. All actions taken on her part too indicate that there was no serious effort to continue this marriage, and it appears from all the material evidence available that neither party is serious in cohabiting. It is apparent that the non consummation of the marriage was owing to the willful refusal of the husband to copulate, since he left the marriage ceremony immediately after the registration and continued to live away from this defendant-appellant.

Thus it may he said that the plaintiff-respondent who willfully refused to copulate, is guilty of matrimonial offence of malicious desertion. In the case of *Wijeratne* v *Wijeratne*[3] it was held, "that the desertion being a willful..... Malicious refusal of carnal intercourse the willful refusal of the husband to copulate is sufficient ground for dissolution of marriage"

In the case of *H. John Perera* v *H. Mattupali*[4], it was held that "despite the plaintiff's matrimonial offence and his delay in filing the action, it was apparent that the marriage had completely broken down and with due regard to the sanctity of marriage, there was hardly a reason why the marriage tie should continue. In the circumstances the discretion vested in the court by the proviso to section 602 of the Civil Procedure Code should be exercised in favour of the plaintiff....."

The above rule eminently fits the facts of the present case. The plaintiff-respondent's willful and persistent refusal to copulate had completely broken down the marriage between the parties and there is no reason why the marriage tie should continue. Although the plaintiff has sued for divorce on the ground of separation for over a period of seven years, the evidence on record unequivocally establish the complete break down of the marriage. It is in the interest of respondent-appellant to dissolve the marriage as,

"The case of the respondent-appellant as to whom there was no prospect that refusal of relief (divorce) would have the effect of reconciling her with the petitioner" *Vide Seneviratne* v *Panishamy*[5]

The learned trial Judge in the course of his judgment has considered the fact that "evidence led in this court also shows that apart from the seven years period (of separation) he has grounds for divorce. Although he has not specified such grounds, the evidence of both petitioner and the respondent unequivocally established that there was non consummation of the marriage since 1971 even as at the date of the trial in 1984 amounting to malicious desertion on the part of petitioner who willfully refused to copulate.

That is sufficient ground to dissolve a marriage and the learned trial judge is correct in granting divorce. We see no reason to interfere with the finding of the learned trial Judge.

Accordingly the appeal is dismissed without costs.

TILAKAWARDENA, J. (P/CA) - I agree

Appeal dismissed.