IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Appeal No. 122/2011
WP/HCCA/Col/51/07(F)
D.C Colombo Case No. 19725/D

Mangalika De Silva (nee Hemachandra)
No. 378, Nawala Road,
Rajagiriya.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Prabhath Joseph De Silva
Jambo Restaurant
No. 86/A-2, Negombo Road,
Thudella, Ja-ela.

DEFENDANT-APPELLAN-RESPONDENT

Pushpa Kumari Jayawardena
No. 72A, Kaleliya Road,
Kapuwatta, Ja-ela.

CO-DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Eva Wanasundera P.C., J.
Sisira J. de Abrew J. &
Anil Gooneratne J.

COUNSEL: Nihal Fernando P.C., with Rohan Dunuwila
for Plaintiff-Respondent-Petitioner

M.U.M. Ali Sabry P.C with Nuwan Bopage for
Defendant-Appellant-Respondent

ARGUED ON: 16.03.2015

DECIDED ON: 26.06.2015

GOONERATNE J.

This was a divorce suit filed in the District Court of Colombo. The learned Additional District Judge by his judgment of 16.1.2007 granted a divorce to the wife on grounds of malicious desertion and adultery, of the husband (Defendant-Appellant-Respondent). The trial Judge having granted relief as aforesaid proceeded also to make an order in terms of Section 615(1) of the Civil Procedure Code and ordered the Defendant-Appellant-Respondent to transfer an undivided half share belonging to him in the matrimonial house to his wife.

Defendant-Respondent-Appellant appealed to the High Court, and the learned High Court Judge by judgment of 02.08.2010 vacated the judgment of the learned District Judge and directed that trial de novo be held. Appeal to this Court is from the judgment of the High Court by the wife, Plaintiff-Respondent-Petitioner. Supreme Court granted Leave to Appeal from the judgment of the High Court on 29.08.2011 limited to a question of law as follows.

"Whether the learned Judge was correct in law in directing that the Defendant-Respondent-Respondent shall transfer his ½ share of the matrimonial property to the Plaintiff-Respondent-Respondent"(wife). It is recorded in the proceedings/journal entry of 29.08.2011 that both parties do not wish to go for re-trial with regard to the entire matter relating to the divorce and both parties are satisfied with the Decree of Divorce granted by the learned District Judge. As such the only issue to be decided is whether the direction given by the learned District judge to transfer ½ share of the matrimonial home is legally acceptable and correct in law. In fact this appeal is only limited to that question.

The attention of this court was drawn by learned President's Counsel on either side to the provisions contained in Section 615(1) of the Civil Procedure Code and more particularly to Section 615(1)(a) of same.

It may be important initially to discuss the law on this subject since the judgment of the Apex Court in this case may have far reaching consequences which would have a bearing on the life style of either spouse irrespective of one or both of them are guilty of a matrimonial offence. Whatever views could be expressed, the case in hand fall within the ambit of family law. 'Family' is a recognized unit all over the globe. In Huang Vs. Secretary of State for the Home Department (2007) UKHL 11; (2007) 2AC 167 para 18, House of Lords emphasized, thus:

"Human beings are social animals. They depend on others. Their family or extended family , is a group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives". I wish to comment on another aspect, pertaining to family law. Will the family law fall into a crisis with so many divorce suits and separations being filed in our courts due to change in patterns of life style among the Sri Lankan communities, may be due to the influence of the western society. When spouses divorce or separate, what happens to their property on separation? Whilst parties are married the law does very little to interfere in the property interest of parties. By contrast, on separation, the law is

willing to intervene to ensure that the spouses or civil partners financial interest are adequately protected. The law in the process of doing so may cause some ill feelings among the spouses or hardship to one of them. Duty of court is to pronounce very reasonable understanding orders to minimize hardship to at least some extent. No doubt difficulties arise to divide property on divorce and dissolution. There is wide spread perception that divorce would cause financial ruin for a wealthy spouse.

Let us now look at the applicable statutory provisions. Section 615 of the Civil Procedure Code reads thus:

(1) 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 of annuity in an insurance company or other institution approved by court.

(2) The court may at any stage discharge, modify, temporarily suspend and revive or enhance an order made under subsection (1).

The said section was introduced to the Code by Amendment Act No. 20 of 1977. Old Section 615 of the Code had been replaced by Section 615 introduced by Act No. 20 of 1977. Section 616 and 617 of the old code has been repealed. However Section 618 remains unchanged. There is an area of discretion vested with the court as per Section 615(1). An order under this section could be made "if it thinks fit". Section 615 (1)(a) could be resorted to, if the court thinks it be ' reasonable' to make a conveyance of property. Much emphasis has to be placed on the words "if it thinks fit" and 'reasonableness'. If the court wish to act in terms of Section 615(1)(a) it could do so if it thinks fit and make a reasonable order. This would not attract any kind of order to favour one of the two spouses. What is contemplated is the reasonableness to make an order having considered the entitlement to property of each spouse. Further such an order could be made upon pronouncing a decree for divorce or separation. As such court necessarily has to make an order for divorce on the available grounds for divorce, and thereafter decide to make such conveyance or settlement which is reasonable. It

is my view that the grounds of divorce should not influence the trial Judge if he decides to act under Section 615(1)(a).

It could be argued that on one hand statutory provisions introduced to the Civil Procedure Code in this regard may cause some difficulty when reallocations of property rights between spouses are to be considered. No doubt whilst examining the decided cases the consensus of judicial opinion appears to favour the view that although express statutory provisions the common law principles of forfeiture of benefits continue to apply. Let me examine some of the cases which showed reluctance to reject the common law principles.

In Dondris Vs. Kudatchi (1902) 7 NLR 107 court held that a wife divorced from her husband on the grounds of adultery, forfeits for the benefit of the innocent spouse everything which according to common law or by antenuptial contract or otherwise, would have been acquired by her out of his property. What must be noted, in this connection is that the offending spouse forfeited not his or her own property but only the benefits derived from the marriage either under common law or by antenuptial contracts. De Silva Vs. De Silva (1925) 27 NLR 289 at pg. 304. As such the benefits derived by either of the spouses seems to be the deciding factor. i.e if the wife had transferred the property to the husband as an

absolute and outright transfer during subsistence of marriage. Husband subsequently is at fault for matrimonial misconduct, then the husband is bound to restore the property to the wife, if it was a benefit derived on account of marriage.

There is also authority to the effect that if the wife retained separate ownership over her dotal property, then even if she would be held responsible for destruction of marriage, she would not lose her rights over her property as it is not a benefit she derived from marriage. (Savithri Gunasekera "Recovery of Dowry and Other Property on a Dissolution of Marriage" The Colombo Law Reports (vol. 3 Col. 1972) Pg. 1 at 6/7)

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"This common law remedy was not abrogated as a result for the enactment of these sections (sections 617 and 618 of the Civil Procedure Code), but rather remedies envisaged by these sections are complementary to the action available under the common law. However … the parties cannot have the benefit of both remedies but should elect to claim either the remedy under the common law or those available under the Civil Procedure Code.

Under the common law the rule of forfeiture of benefits as between spouses does not apply to the separate property of the offending spouse.

Two months prior to the marriage between the plaintiff-appellant and the defendant-respondent (wife and husband respectively) the plaintiff's brothers donated certain property to the plaintiff and defendant in equal shares 'as a token of mental pleasure and for their future prosperity" which the donors had "towards the marriage of the said donees". After dissolution of marriage on the ground of malicious desertion by the plaintiff, the plaintiff and the defendant claimed in the present action each other's share of the donated property. The trial Judge allowed the claim of the defendant and dismissed that of the plaintiff.

Held, that the defendant, while he was entitled to retain the share which had been donated to him, was not entitled to the share of the plaintiff, despite the fact that the plaintiff was the offending spouse. It could not be said that the share which vested in the plaintiff under the deed of donation was as a result of an ante-nuptial contract. Nor could it be said that the share which the plaintiff received was a benefit she derived from her spouse by marriage. She was already vested with title when she married and, therefore, this was her separate property and, as such, it was not subject to forfeiture.

In a more recent case namely P. Samarasinghe Vs. L. Samarasinghe (this is a Court of Appeal judgment and this court is not bound by the said judgment) 1990 (1) SLR 31 it was held.

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 married woman is capable of acquiring, holding or disposing by will or otherwise any movable or immovable property as her separate property as if she were a feme-sole.

When dowry or any portion thereof given on behalf of a wife is actually given to or used by the husband or if the husband has already derived any benefits there from or will derive in the future any benefits by reason of that marriage, them 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 accused benefits. (but not future benefits) could be obtained.

If the marriage is dissolved owing to the fault of the husband he is liable to forfeit those benefits. This could be done in one of the following ways:-

(1) Restitution of total property on the basis that it belongs to the wife and that the husband had only the usufruct thereof;

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

(3) On the basis that the husband holds such property in trust for 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.

Under section 618 of the civil Procedure Code the Court may, if it thinks fit, upon pronouncing a decree of divorce or separation, after going into these matters (i.e matters which relate to the forfeiture of benefits) at the main trial itself, order the settlement of property. Questions which can relate to forfeiture of benefits by the guilty spouse could be put in issue at a trial for divorce or separation.

On a perusal of all above authorities emerging from the statute and common law, tends to safeguard all property which does not bring in benefits derived from marriage. The principle of forfeiture of benefits under common law would not interfere with separate property of the offending spouse. In brief property of the innocent party which is actually given to the offending party who has benefitted or would benefit in the future on accounts of marriage, then the offending party is liable to forfeit those benefits. There is no doubt an element of reasonableness to a great extent that touch the root of the problem which is separate from grounds of divorce or separation, has to be considered and kept in mind if a decision has to be made in this regard.

At this point of the judgment it is desirable to look at other jurisdictions especially the English Law on distribution of property on dissolution of marriage.

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Pg. 210…

Proceedings for financial orders on divorce is a controversial issue. There is a wide range of competing policies that the law seeks to hold together. There is a desire to ensure that on divorce a fair redistribution of the property takes place so that one party is not unduly disadvantaged by the divorce. On the other hand, there is the desire to enable the parties to achieve truly independent lives after the divorce. As the Law Commission put it:

> The reality of divorce means that former spouses should not be tied to each other for life, the law gives them freedom to re-marry and take on new responsibilities, and this is hampered if the financial commitment of a former relationship is unnecessarily prolonged. For the economically weaker party, dependence means vulnerability to another's employment, health and willingness to pay.

At 212/213….

Why should there be any redistribution?

Partnership. The view here is that marriage should be regarded as analogous to a partnership. The husband and wife co-operate together as a couple as part of a joint economic enterprise. It may be that one spouse is employed and the other works at home, but they work together for common benefits. Therefore, on divorce each spouse should be entitled to their share, normally argued to be half each. Lord Nicholls in **Miller v Miller** accepted the validity of what he called the 'equal sharing' principle. He put the argument this way:

> (in marriage) the parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less,

But the partnership model does not necessarily lead to an equal division, John Eekelaar suggests;

> At the end of the relationship the investment which each party has put into the marriage is assessed on one side of the balance sheet and set against the value of the assets which each is taking out of it and also the earning power which each has at that time. If there is a disparity between the parties with regard to what was put in and what is being taken out, an adjustment will be made to equalize the position between them. Marriages is a joint enterprise in a capitalist society demanding, at least prima facie, equal rewards for effort.

I have also prior to making up my mind, although sufficient material had to be gathered from various jurisdictions, very important and relevant comments of legal consequences of separations and divorce are discussed in the text of, law and the marriage relationship in Sri Lanka 2nd Ed by Professor Shirani Ponnambalam. At pgs. 436 & 437 of same useful observations and a guide to the problem is discussed.

At 436 ….

> While the Sri Lankan law continues to apportion blame on one party thereby holding one spouse entirely responsible for the dissolution of the marriage, the statute also recognizes a divorce on proof of separation a *mensa et thoro* for seven years. In the light of these fault and non-fault based grounds for divorced it is difficult to determine the extent to which the conduct of the parties should influence our courts in the ancillary question of property rights subsequent to a divorce. For instance, if a divorce is obtained under the Marriage Registration Ordinance will the court invariably deny or reduce the "guilty" spouse's right to a beneficial interest or title to property? While there is evidence of this policy in the early Sri Lankan law it is submitted that a rule such as this loses sight of the fact that a final repudiation of the marital tie is most often the culmination of a slow process of deterioration of a relationship brought about by the blameworthy conduct of both parties. In other words, husband and wife together share, though sometimes unequally, the responsibility for a breakdown of the marriage. In circumstances such as this, to impose a sanction on one spouse, who is ostensibly "guilty' of blameworthy conduct, is indeed unfair and ought to be discouraged. However, the exception accepted in the English law, of taking into consideration conduct which is so reprehensible that "to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice" may be usefully adopted by our courts.

At 436/437…

> It would appear then that in our legal system the spouses have a choice of two widely divergent and mutually exclusive remedies when seeking redistribution of assets on divorce. While the application of the common law rule of forfeiture of benefits requires an allocation of fault, the statutory provision may be applied irrespective of the guilt of the parties. The salient merit of the rule of forfeiture is that it leaves undisturbed property rights in the hands of the spouses and affects only benefits obtained by a spouse during the tenure of the marriage. In other words, legal title to property determines the question of ownership and if a spouse had transferred property to the other and if the donee spouse was responsible for terminating the marriage, the property transferred would revert to the transferor because, according to the rule of forfeiture of benefits, a spouse is not allowed to enjoy a benefit derived as a consequence of a marriage which he is responsible for wrecking.

The judgment of the High Court refer to certain important details derived from the judgment of the learned District Judge. I find at pgs 4 and 5 of same with sub paras (a) to (g) being focused at the learned trial Judge's views, on which has influenced the learned trial Judge to grant relief as described as final conclusion of the learned trial Judge in his judgment dated 16.01.2007. That last portion of the trial Judge's judgment focus on the several relief as (1) to (4)

granted by him inclusive of transfer of ½ share of the matrimonial house owned by the husband to be transferred to the wife. The above (a) to (g) in a gist refer to the following

(a) children born to the co-defendant due to the relationship between the Defendant-Appellant-Respondent and the co-defendant, being taken very lightly by the Defendant-Appellant-Respondent.
(b) During the pendency of the marriage, two other children born due to an illicit affair with the co-defendant.
(c) due to the fact that there were no children born during lawful wedlock and the husband was not in favour of adoption of a child, is no reason to commit adultery which is illegal.
(d) Appellant's conduct of arriving at the matrimonial home very late in the evening and on many occasions after consuming liquor and causing disturbances in the house.
(e) After 1994 Defendant-Appellant regularly consumed liquor.
(f) Position of the Defendant-Appellant regarding payment of permanent alimony and transfer of property unacceptable to court.
(g) Desertion of the wife (Plaintiff-Respondent) due to the fact that there were no children from the marriage has no justification.

The learned High Court Judge emphasis the fact that the trial Judge's views inter alia contained in (a) to (g) above has prejudiced the trial judge and had influenced him to make an order against the Defendant-Appellant to transfer ½

share of the property in question to the wife the Plaintiff-Respondent. Even if I am not fully convinced of the above, I have to observe that the High Court Judge was more or less correct in arriving at that conclusion as there is much emphasis by the learned trial Judge as regards (a) to (g) of his judgment. As such I endorse the view of the learned High Court Judge that as per Section 615(1) of the Civil Procedure Code, the learned trial Judge has erred to the extent of making an order to transfer ½ share of the property in question in favour of the wife. In this regard I would also incorporate an extract from the judgment of the trial Judge, more particularly referred to in the judgment of the learned High Court Judge as follows:

"පැමිණිලිකාරිය දැනට පත්ව ඇති අසීරු තත්ත්වය මා දැනටමත් විග්‍රහ කර ඇත. එය විත්තිකරු විසින් ද පිළිගෙන ඇත. එකී වාතාවරණය යටතේ පැමිණිලිකාරිය දැනට පදිංචි නිවස ඇතුලත් අංක 378 නාවල පාර, රාජගිරිය, පිහිටි පරිවස් 27.3 ක් විශාල පැමිණිලිකාරිය නොබෙදූ, භාගයක හවුල් අයිතිය දරණ ඉඩමේ විත්තිකරු විසින් පැමිණිලිකාරියට පවරාදීමට කරනු ලබන ඉල්ලීම මෙම නඩුවේ සියලුම සිද්ධිමය කරුණු අනුව හැම අතින්ම සාධාරණ ඉල්ලීමකි. එය කුමන දෘෂ්ඨිකෝණයකින් බැලුවද අසාධාරණ නොවේ. එබැවින් විත්තිකරු විසින් එකී දේපලේ ඔහුට ඇති නොබෙදූ, 1/2 ක අයිතිය පැමිණිලිකාරියහට පවරා දිය යුතු බවට මා නියෝග කරමි. එසේ විත්තිකරු

නොකරන්නේ නම් විත්තිකරුට නොතිසි සහිතව එය අධිකරණයේ රෙජිස්ට්‍රාර් මගින් කර ගැනීමේ අයිතිය පැමිණිලිකාරියට ඇත.”

There is no dispute that the property in question was purchased for Eight Hundred and Fifty Thousand rupees (Rs. 8½ lakhs) in the name of both parties. Evidence also reveal that property in question (deed No. 1123) was purchased subject to a mortgage and monthly instalements paid by the husband the Defendant-Appellant, from his Bank account for a period of 15 years. There is also some evidence that after the breakdown of the marriage relationship Plaintiff paid the remaining balance. As such both parties had contributed to purchase the property in question.

My attention has been drawn to certain items of evidence at pgs. 282, 280, 152, 284 & 172. Perusal of same gives some indication as to how the property in question was purchased. It is evident that a loan had been obtained and the Defendant-Appellant had taken steps to repay the loan in monthly instalements and he was involved in business which was doing well at a certain stage during the pendency of the marriage. It is not possible to ascertain the position as to disbursements of money by each party and arrive at a conclusion based on a balance sheet. The gist of the evidence indicates that all recognizable steps to initiate and purchase the property had been taken and done by the

husband, and the wife had also a share in it and made a fair contribution to achieve the purpose. At the point of breakdown of the marriage, parties tend to exaggerate and blame each other, which would not have been in their contemplation during better times of their relationship. I also note that evidence had been placed before the trial court that the property in question is worth about 90 million rupees. Evidence of the Defendant-Appellant husband, was that a perch could be valued at 6 to 7 million rupees. (This evidence had transpired/in/June 2006).

I also note that both parties tend to demonstrate by way of evidence that each ones contribution is more than the other. In fact in the written submissions filed on behalf of the Plaintiff-Respondent (wife) state that 86.30% of the purchase price of the property was paid by the wife, though the deed in question is written in favour of both parties. The Plaintiff-Respondent had also obtained certain financial assistance from her father and on request the father had readily extended a helping hand not only to purchase the property but for their other needs. The wife admittedly born rich, and her family gave necessary financial assistance at various stages, of her life. The husband's beginning may have been very simple but picked up in business and acquired certain wealth but the business had a lean period.

In all the above facts and circumstances this court is strongly of the view that it would be unreasonable to make such conveyance or settlement of the property in favour of the wife (Plaintiff-Respondent) and deprive the Defendant-Appellant-Respondent of his ½ share to the property. Irrespective of each parties contribution to the property, both have enjoyed and derived benefits from the property as long as the marriage subsisted. It is not possible to get a fair assessment of each ones contribution to the property in question. To give the entirety of the property to the wife alone would be unfair as it is necessary in terms of our statute law to make a reasonable order. In the circumstances and in the context of the case it is necessary at the end to view the situation with Section 615 of the Civil Procedure Code in mind and to view the situation broadly in a reasonable manner and see if the proposal (relief claimed by the wife) meet the justice of the case. As I have already observed earlier in this judgment, matrimonial faults or offences committed cannot form the basis of a settlement to give effect to the provisions contained in Section 615 of the Civil Procedure Code. I have discussed in this judgment that the influence of the common law of deriving benefits from marriage should be sacrificed but not to the extent of giving up the each other's half share to the disputed property. The position would have been different if the wife alone had purchased the property and conveyed

the entirety to the defendant-Appellant-Respondent. If that was so, an order by this court to re-convey the entire property to the wife is reasonable and justifiable. It is not the case. Principles applicable to grant a divorce (i.e adultery, malicious desertion etc.) is one thing and distribution of assets after divorce or dissolution of marriage is another. The two aspects cannot be so closely connected to give a benefit to a spouse which enable court to re-distribute property, unless in limited situations recognized by law and as discussed above.

Therefore I affirm the order of the learned High Court Judge only in so far as setting aside the judgment of the learned District Judge, wherein the learned District Judge directed the Defendant-Respondent-Appellant to transfer ½ share of his entitlement of the matrimonial house at No. 378, Nawala Road, Rajagiriya to the wife the Plaintiff-Respondent-Petitioner. I hold that the Defendant-Respondent-Appellant is entitled to ½ share of the matrimonial house at 378, Nawala Road, Rajagiriya.

As such I answer the only question of law referred to in the proceedings/journal entry of 29.08.2011 in the negative. The house and property remains co-owned by the Appellant and the Respondent. Parties have indicated to court that they do not wish to go for a re-trial as ordered by the High Court and would abide by the ruling of the learned District Judge granting a divorce to the

wife on the ground of malicious desertion and adultery. This court affirms that part of the judgment of the learned District Judge. The trial Judge had not ordered permanent alimony as order was made to transfer ½ share of the matrimonial house. The learned District Judge has also allowed taxed costs payable in favour of the wife and damages in a sum of Rs. 15 lakhs payable by the co-defendant. This court observes that, only those orders of the learned District Judge granting a divorce and the order against the co-defendant and payment of taxed cost would be enforceable, and would remain unaltered. However the innocent party was the Plaintiff-Respondent-Petitioner and she would be entitled

to an order in her favour for permanent alimony. Accordingly order is made to pay a sum of Rs. 3 million as permanent alimony to the wife.

Subject to the above variations this appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

Eva Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT