

**SOMAWATHIE**

**v.**

**SIMON PERERA**

COURT OF APPEAL.

G. P. S. DE SILVA, J. and L.H.DE ALWIS, J.

C.A.(S.C.) 948/75(F). - D.C.MT.LAVINIA-13328/L.

DECEMBER 13, 1983.

*Action for recovery of property gifted as dowry—Whether action maintainable by guilty spouse after dissolution of marriage.*

The parents of the plaintiff gifted the land and property in suit to the defendant by way of dowry. The marriage was subsequently dissolved on the ground of malicious desertion on the part of the plaintiff. The plaintiff thereafter instituted this action for the recovery of the dowry property and the District Judge dismissed her action on the basis that she could not claim a re-transfer of the property since she was the guilty spouse. The plaintiff appealed.

Held—

(1) Under the Roman Dutch Law, the wife has a right to sue for the restitution of her dotal property upon the dissolution of a marriage. However she forfeits this right if the divorce has been granted on grounds of her misconduct.

(2) Since the plaintiff was guilty of maliciously deserting the defendant and was therefore the offending spouse she has, under the Roman Dutch Law, forfeited her right to recover the premises in suit.

Cases referred to

(1) *Fernando v. Fernando*, (1962) 63 N.L.R. 416

(2) *Karunanayake v. Karunanayake*, (1938) 39 N.L.R. 275

APPEAL from an order of the District Court of Mt. Lavinia.

*D. R. P. Goonetilleke* with *K. Kanag-Iswaran* for the plaintiff-appellant.

*L. F. Ekanayake* for the defendant-respondent.

February 2, 1984.

*Cur. adv. vult.*

**G. P. S. DE SILVA, J.**

The plaintiff married the defendant on 15.12.52. Prior to their marriage on 06.11.52, the parents of the plaintiff, gifted by way of dowry, the land and premises in suit to the defendant, " the intended son-in-law" . The deed of gift (P 1) is subject to the condition that it is to be operative " after the solemnization of the marriage ". The gift was accepted by the defendant, as set out in P 1.

It was not disputed that the marriage between the plaintiff and the defendant was dissolved on 8.11.66 on the ground of malicious desertion on the part of the plaintiff. The present action was instituted on 14.02.72 for the recovery of the property gifted on P 1. The defendant in his answer, specifically pleaded that the action could not be maintained as the plaintiff was the offending spouse, found to have been guilty of malicious desertion. The

defendant prayed not only for the dismissal of the plaintiff's action but also sought a declaration that he be declared entitled to the premises and that the plaintiff be ejected therefrom.

At the trial, the important issue raised on behalf of the plaintiff and which is relevant for the purposes of this appeal, reads thus :—

“Is the defendant liable to re-transfer the property to the plaintiff ?”

The main issue relied on by the defendant was as follows :—

“Can the plaintiff have and maintain this action as the plaintiff was guilty of malicious desertion in respect of the marriage ?”

After trial, the District Judge dismissed the plaintiff's action and entered judgement for the defendant as prayed for. The plaintiff has now appealed against this judgment and decree.

The basis for holding against the plaintiff is stated by the District Judge in the following terms :—

“There is no dispute in this case that P 1 was a gift to the defendant in consideration of marriage of the plaintiff. The marriage was dissolved on the ground of malicious desertion on the part of the plaintiff. The plaintiff is, therefore, not entitled to claim a re-transfer of the property in suit. The defendant is entitled to retain the property in suit. Vide 63 N.L.R. 416.”

At the hearing before us, and in his subsequent written submissions Mr. D.R.P. Goonetilleke, Counsel for the plaintiff-appellant, strenuously contended that under the Roman Dutch Law, an action lies for the recovery of property given as dowry upon the dissolution of the marriage. Mr. Goonetilleke further submitted that the decision reported in 63 N.L.R. 416, relied on by the Trial Judge, is not an authority for the proposition that the guilty spouse is not entitled to the recovery of property gifted by way dowry on the occasion of the marriage.

I shall, first, consider the case of *Fernando v. Fernando* (1) relied on by the District Judge. This was a case where, two months prior to the marriage between the plaintiff (wife) and the defendant (husband), the brothers of the plaintiff donated a half-share of the property to the plaintiff and the 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". The marriage was dissolved on the ground of malicious desertion by the plaintiff and thereafter, the plaintiff brought this action, claiming the defendant's share of the property. The defendant denied the plaintiff's right to this relief and claimed by way of reconvention, the plaintiff's share of the property on the ground that the plaintiff was the offending spouse. After trial, the District Judge dismissed the plaintiff's action and allowed the defendant's claim in reconvention. In appeal, Tambiah, J. held that while the defendant was entitled to retain the share donated to him, he was not entitled to the share donated to the plaintiff, despite the fact that the plaintiff was the offending spouse. Having considered the Roman-Dutch authorities and certain South African cases, Tambiah, J. expressed the view that under the common law, the rule of forfeiture of benefits as between spouses, does not apply to the separate property of the offending spouse. Tambiah, J. reasoned thus :-

"It cannot be said that the share which the plaintiff received by virtue of deed No. 10264 is 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 is not subject to forfeiture." (The emphasis is mine.)

As regards the plaintiff's claim to the share of the land already vested in the defendant, Tambiah, J. agreed with the finding of the District Judge that the plaintiff had no cause of action to ask for a reconveyance of the defendant's share of the land to her.

In the present appeal before us, title to the premises in suit, had vested in the defendant by virtue of the deed of gift P 1. The marriage contemplated in P 1 had taken place; there was no failure of consideration nor was there a breach of any condition stipulated in P 1. In this connection, the following passage in Nathan's Common Law of South Africa, Vol. I, 2nd Edition, pages 266 and 267, is relevant :-

"Dowry or dowry consists of the property which is given by a wife or by some other person on behalf of the wife, to the husband, for the purpose of sustaining the burdens of the marriage. If the marriage does not take place, the giving of the dowry is null and

void. If it takes place, the giving of the dowry is irrevocable, if the contract relating to it is entered into by the person who gives it with the intent that it shall always remain with the husband."

Thus, the plaintiff has no cause of action to sue the defendant and to that limited extent, the decision in *Fernando v. Fernando* (*supra*) is of assistance to the defendant.

Mr. Goonetilleke, made the further submission that the District Judge has overlooked the principle of the Roman Dutch Law that enables the wife to sue for the recovery of the dowry. Mr. Goonetilleke is right in his submission, that under the Roman Dutch Law, "upon the dissolution of a marriage, the wife might sue for restitution of her dotal property (by an action known as the *actio ex stipulatu*, which was a bona fide and privileged action). . . . The dowry can only be reclaimed by the wife or her heirs, if it was actually paid over or transferred to the husband. . . ." (Common Law of South Africa by Nathan, Vol. 1, 2nd Edition, pages 314 and 315.) This principle is referred to by Maartensz, J. in the case of *Karunanayake v. Karunanayake* (2) cited by Mr. Goonetilleke.

But what is important for the purposes of the instant case is the qualification to this principle, namely, that the right of the wife to claim restitution of the dowry, may be forfeited if the husband obtains a divorce by reason of the misconduct on the part of the wife. "But the right to claim dowry, falls away on various causes (i) . . . . (ii) . . . (iii) . . . (iv) If a divorce has taken place through the fault of the woman." (Voet 24.3.19. Gane's translation)

Admittedly, the plaintiff was the offending spouse as she was guilty of maliciously deserting the defendant. She therefore has, under the Roman Dutch Law, forfeited her right to recover the premises in suit and her action has to fail. I accordingly affirm the judgment of the learned Judge entered in favour of the defendant.

The District Judge has also allowed the defendant's claim for ejectment of the plaintiff from the premises in suit. According to the defendant himself, the plaintiff has been in occupation of these premises since August 1953. There is an averment in P 2 (the plaint in the divorce action), that the desertion took place in August 1953. The plaintiff in her evidence stated that she has no other properties. She is, therefore, faced with the grave peril of

immediate ejection from her residing house, where she had lived for the last thirty years. This house once belonged to her parents and was gifted to the defendant presumably to enable the new couple to establish their matrimonial home. As for the plaintiff, the search for alternative suitable accommodation would very probably be a long and painful process, in the context of the prevailing housing shortage. In these circumstances, it would be inequitable to place the plaintiff in the evening of her life, in a situation where she would have no roof over her head. We accordingly direct writ of ejection not to issue till 1st August, 1985. Subject to this variation in the decree, the appeal is dismissed with costs.

L. H. DE ALWIS, J.—I agree.

*Appeal dismissed.*

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