TENNAKOON
v.
TENNAKOON

COURT OF APPEAL.
ATUKORALE, J. (PRESIDENT), AND T. D. J. DE ALWIS, J.
C A No 287/79 (F), D.C. COLOMBO No 10740/D.
JULY 2 AND 3, 1984

Divorce – Civil Procedure Code, section 608 (2) (b) – Whether separation a mensa et thoro for seven years by itself is a ground for divorce.

The respondent obtained a decree for dissolution of marriage under section 608(2) (*b*) of the Civil Procedure Code on proof that he and the appellant had been living in separation for over seven years prior to the institution of the action. The District Judge held that on proof of such separation the court was obliged to grant a divorce at the instance of either spouse and that it was unnecessary to decide whether the spouse suing for a divorce was the innocent or guilty party.

Held

The primary objective of section 608 (2) of the Code is to make provision for a quicker and cheaper procedure for obtaining relief in matrimonial cases and not to alter the substantive law upon which marriages can be dissolved. To entitle a petitioner to judgment dissolving a marriage an application made under section 608 (2) must contain a statement of matters that are required to be set out in terms of section 374 (*d*) of the Civil Procedure Code, namely, a plain and concise statement of the facts constituting the ground of the application and its circumstances upon proof of which the petitioner is entitled to the relief or order prayed for. A spouse seeking a divorce by summary procedure must not only justify the procedure invoked by him or her but must further plead and prove to the satisfaction of court that he or she is entitled to a dissolution of the marriage upon any ground which by the law applicable to his or her marriage such dissolution may be decreed.

In the instant case the husband could not have succeeded in his claim for a divorce by mere proof of a seven year separation a mensa et thoro but it was incumbent on him to establish further one of the three grounds of divorce prescribed in section 19 of the Marriage Registration Ordinance.

Cases referred to :

(1) *Chapman v. Chapman [1972] 3 All ER 1039*
(2) *Muthuranee v. Thuraisingham [1984] 1 Sri L. R 381*

Prins Gunasekera with *R. K. Suresh Chandra* and *Wimalachandra* for the defendant-appellant.

D. R. P. Goonetilake with *D. Vithanage* for the plaintiff-respondent.

Cur. adv. vult.

September 5, 1984

ATUKORALE J.

This is an appeal by the wife (the appellant) against the judgment of the learned District Judge of Colombo granting her husband (the respondent) a decree for divorce under s.608 (2) of the Civil Procedure Code. The action was one instituted by the husband by way of summary procedure against his wife praying for a divorce a vinculo matrimonii on the sole ground that they had been living in separation a mensa et thoro for a period of over 7 years prior to the institution of the action. The wife denied that they lived in separation but the learned trial judge rejected her evidence and reached the finding that the parties had been living in separation a mensa et thoro for a period of 7 years prior to the filing of the action, as averred by the husband. He also held that on proof of such separation for such a period the court was obliged to grant a divorce at the instance of either spouse under s. 608 (2) of the Civil Procedure Code and that it was unnecessary for him to decide whether the spouse suing for a divorce was the innocent or guilty party. Learned counsel appearing for the wife before us whilst not seeking to challenge the factual finding of separation by the learned judge strenuously contended that the learned judge erred in law in granting a divorce firstly because s 608 (2) did not empower a court to grant a decree for the dissolution of marriage upon the sole ground of a separation a mensa et thoro for a period of 7 years prior to the institution of the action and, secondly, because in any event even if it did empower a court to enter such a decree the guilty spouse is not entitled to seek or obtain any relief under s. 608 (2) from court.

Admittedly the marriage between the parties was one that was contracted and registered under the provisions of the Marriage Registration Ordinance, (Cap. 112) It was the contention of learned counsel for the appellant-wife that the only grounds upon which such a

marriage could in law be dissolved are those that are set out in s. 19 of the said Ordinance, namely, on the grounds of adultery subsequent to the marriage or of malicious desertion or of incurable impotency at the time of marriage. He maintained that Chapter XLII of the Code only regulated the procedure that had to be followed in matrimonial actions and that s. 608 which is one of the sections of this Chapter did not and was never intended to amend or alter the substantive law relating to the grounds of dissolution of marriage as set out in S. 19 of the Marriage Registration Ordinance. He submitted that s. 608 (2) which was introduced by the Civil Procedure Code (Amendment) Law, No. 20 of 1977 with effect from 15.12.1977, prescribed nothing more than a summary procedure to which an innocent spouse may have recourse in circumstances where there had been a separation a mensa et thoro between the parties for a period of 7 years prior to the institution of the application for a divorce. In other words his contention was that such a separation by itself did not constitute a legal ground for dissolution of the marriage but only entitled the innocent spouse to institute, by way of summary procedure, an application for a decree dissolving the marriage upon any of the grounds on which the marriage may by the law applicable to such marriage be dissolved. His contention, if I understood him correctly, was thus two-fold, firstly that factual separation for 7 years did not warrant the grant of a decree for divorce under s. 608(2) and secondly that even if it did, such decree could only be granted at the instance of the innocent spouse.

Learned counsel for the respondent, on the other hand, submitted that the judge was correct in holding that s. 608 (2) entitled him to grant either spouse a decree for divorce if it was established by either spouse to his satisfaction that the parties to the marriage had been living in separation a mensa et thoro for a period of 7 years prior to the institution of the application by way of summary procedure. He contended that this was the plain meaning of this section and that the court cannot and must not inquire into whose fault it was that the marriage had broken down. In his written submissions he has referred us to the Divorce Reform Act of 1969 in England according to the provisions of which a separation for a 5 year period constituted an additional ground for a dissolution of marriage in that country, vide *Chapman v. Chapman* (1), in which Lord Denning MR held that in 5 year cases the court should not inquire into whose fault it was that the marriage has broken down. Learned counsel also relied on the

decision of this court in the case of *Muthuranee v. Eliyathamby Thuraisingham (2)* which he submitted was a decision on the identical point that arose for consideration in this appeal.

The main question that arises for our determination in the instant appeal is whether s. 608 (2) warrants the grant of a decree for divorce upon proof of a 7 year period of separation between the parties to the marriage. As urged by learned counsel for the appellant, in approaching this legal question one has to keep in mind that the Civil Procedure Code, as the preamble denotes, is an enactment which consolidated and amended the law relating to the procedure of the civil courts in the Island, that is of courts in which civil actions (including matrimonial actions) are brought. The Code is primarily a procedural enactment prescribing the procedure that has to be followed in a civil court in the adjudication and enforcement of substantive rights between parties to a civil suit. S. 7 stipulates that the procedure of an action may be either regular or summary. S. 8 provides that every action shall commence and proceed by a course of regular procedure save and except actions in which it is specially provided by the Code that the proceedings may be by way of summary procedure. Part I of the Code sets out the procedure to be followed in an ordinary regular action. Part II contains provisions relating to summary procedure. Part III lays down the procedure to be followed in certain incidental matters including the continuation of an action after alteration of a party's status, withdrawal and adjustment of an action, payment of money into court and the issue of commissions by court. Part IV consists of special provisions touching the procedure governing particular cases including actions by and against the Crown, actions by and against corporations and companies, actions by and against trustees, executors and administrators, testamentary actions, matrimonial actions and interpleader actions. Part V prescribes the procedure relating to the grant of provisional remedies such as arrest and sequestration before judgment, injunctions, interim orders and the appointment of receivers. Part VI lays down the procedure in regard to special proceedings such as arbitration, agreements of parties and actions on liquid claims. Similarly Part VIII deals with the procedure relating to appeals. Part IV aforementioned contains a special Chapter – Chapter XLII – setting out procedural provisions relating to matrimonial actions. S. 596 (the first section of this Chapter) enacts that pleadings in a divorce action or an action for judicial separation or for declaration of nullity of marriage shall be by way of plaint and answer

as in an ordinary civil action and the procedure generally shall be that prescribed with respect to ordinary civil actions subject, however, to the provisions contained in that Chapter. S. 597 stipulates that any husband or wife (i.e. either spouse) may present a plaint to the appropriate District Court praying that his or her marriage may be dissolved on any ground for which marriage may, by the law applicable in Ceylon to his or her marriage, be dissolved. S. 602 states that where the court is satisfied that the plaintiff has proved his or her case, the court shall pronounce a decree declaring the marriage to be dissolved. Similarly s.607 makes provision for either spouse to present a plaint praying that his or her marriage be declared null and void on any ground which renders the marriage contract between the parties void by the law applicable to Ceylon. S. 608 (1) provides for either spouse to apply by way of plaint for a judicial separation to the appropriate District Court which if satisfied after due trial of the truth of the statements in the plaint may grant a decree for separation. Thus it would seem that prior to the enactment of s. 608 (2) by Law No. 20 of 1977 either spouse could institute an action for dissolution of the marriage or for declaration that the marriage was void or for a judicial separation on any ground upon which by the law applicable to Ceylon such relief could have been obtained by the spouse instituting the action. The institution of the action was by way of a plaint. Thus it appears to me that at least in so far as an action for the dissolution of a marriage was concerned, the spouse suing had to plead and establish a matrimonial fault or offence on the part of the spouse sued, the matrimonial fault or offence constituting the cause of action upon which was founded the plaintiff's claim for relief by way of a dissolution of the marriage. Thus it was only the innocent spouse who could in law have obtained a decree for divorce and that too (in so far as is applicable to the instant case) upon one or more of the three grounds specified in s. 19 of the Marriage Registration Ordinance. The question that arises for our determination is whether s. 608 (2) enacted on 15.12.1977 by Law No. 20 of 1977 has altered this legal position. The relevant portion of this subsection reads as follows :–

"(2) Either spouse may–

(*a*) after the expiry of a period of two years from the entering of a decree of separation under subsection (I). . . . . or

(*b*) notwithstanding that no application has been made under subsection (I) but where there has been a separation a mensa et thoro for a period of seven years,

apply. . . . . by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (*a*), or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (*b*), enter judgment accordingly :"

This subsection enabled, for the first time, either spouse to apply to the appropriate District Court by way of summary procedure for a decree of dissolution of the marriage without proceeding by way ot plaint in the course of regular procedure. It also prescribed in paragraphs (*a*) and (*b*) aforesaid the circumstances under which such an application by way of summary procedure may be made by either spouse. The circumstances specified in paragraph (*a*) or (*b*) must be shown to pre-exist before a spouse can have recourse to summary procedure for the dissolution of his or her marriage. In the instant case the circumstances set out in paragraph (*b*) have been established to exist prior to the respondent's application for a decree for divorce. The crucial and decisive words in so far as the instant case is concerned are therefore the following : "the court may. . . . . upon the proof of the matters stated in the application made under the circumstances referred to in paragraph (*b*), enter judgment accordingly." What then are the matters that are required to be stated in such an application and which have to be proved to entitle the petitioner to judgment dissolving the marriage ? Learned counsel for the respondent maintained in effect that they refer to the fact of marriage and the fact that the spouses had been living in separation a mensa et thoro for a period of 7 years prior to the application. If these are proved, the court, learned counsel urged, is obliged to enter judgment dissolving the marriage. I cannot agree. As set out by me above proof of the matters specified in paragraph (*b*) above would only warrant recourse to summary procedure which is a speedy and inexpensive form of procuring relief. The matters stated in the application are in my view a reference to the matters that have to be set out in terms of s. 374 (*d*) of the Code, namely, a plain and concise statement of the facts constituting the ground of the application and its circumstances upon proof of which the petitioner is entitled to the relief or order prayed for

In my opinion a spouse seeking a divorce by way of summary procedure must not only justify the procedure invoked by him or her but must further plead and prove to the satisfaction of court that he or she is entitled to a dissolution of the marriage upon any ground which by the law applicable to his or her marriage such dissolution may be decreed. In the instant case therefore the husband could not have succeeded in his claim for a divorce by mere proof of a seven year separation a mensa et thoro but it was incumbent on him to establish further one of the three grounds of divorce prescribed in s. 19 of the Marriage Registration Ordinance. It is my view that the primary objective of s. 608 (2) of the Code is to make provision for a quicker and cheaper procedure for obtaining relief in matrimonial cases and not to alter the substantive law upon which marriages can be dissolved. I do not think that English decisions or the Divorce Reform Act of England are of any assistance in construing s. 608 (2) of our Code. It is relevant to note that the Divorce Reform Act of 1969 is a substantive piece of legislation which made provision for the dissolution of marriages which had broken down irretrievably.

I now turn to the decision of this court in the case of *Muthuranee v. Thuraisingham* (supra) relied upon by learned counsel for the respondent. There too one spouse sought a dissolution of the marriage on the ground of a separation a mensa et thoro for a period of 7 years prior to the institution of the action. The application was made under s. 608 (2) of the Civil Procedure Code. The spouse who was sued took up the objection that a guilty spouse cannot in the circumstances set out in paragraph (*b*) of the above subsection maintain a claim for a divorce. The objection raised was that in addition to cessation of cohabitation for 7 years, the spouse petitioning for a divorce must further prove the conditions necessary to obtain a decree for separation. In other words, it was contended that the petitioner must establish a matrimonial fault on the part of the respondent spouse. The nature of the objection raised by the opposing spouse in that case shows that it was conceded therein that a 7 year separation did constitute a valid ground for a divorce. Thus it would appear that the question of law arising for our determination in the instant case did not arise for consideration of court in that case. Learned counsel for the respondent cannot therefore derive much assistance from the decision in that case. For the above reasons I make order allowing this appeal and dismissing the application of the respondent husband with costs in both courts. However in view of the

importance of the question of law involved in this case I grant the respondent leave to appeal to the Supreme Court on the following substantial questions of law :–

(i) whether separation a mensa et thoro for a period of 7 years constitutes a valid ground for a divorce under s. 608 (2) of the Civil Procedure Code ;

(ii) if so, whether it is incumbent on the petitioner seeking a divorce under that subsection on such ground to establish a matrimonial fault on the part of the respondent to such application.

T.D.G. DE ALWIS, J. – I agree.
Appeal allowed.