BUDDHADASA KALUARACHCHI
v.
NILAMANI WIJEWICKRAMA AND ANOTHER

COURT OF APPEAL.
S. N. SILVA ,J. AND H. W. SENANAYAKE ,J.
C. A. 486/69 - D.C. COLOMBO 11651/D.
OCTOBER 26, 1989.

Divorce- Decree nisi - Decree absolute - Custody of child-Revision – Civil Procedure Code sections 604, 605, 615, 772(1) 758 (e) and (i) - Article 139 of the Constitution.

The plaintiff-petitioner Buddadasa Kaluarachchi sued his wife Nilamani Wijewickrama the 1st defendant-respondent for a divorce on the ground of malicious desertion and custody of the child Nilani. The 1st defendant filed answer alleging constructive malicious desertion of her by the plaintiff and adultery with the 2nd defendent and prayed for a divorce. She too prayed for the custody of the child. The District Judge delivered judgment on 12.05.88 dismissing plaintiff's action but on 1st defendant's prayer he entered a decree nisi granting a divorce on the ground of constructive malicious desertion only but rejected the ground of adultery and the claim for damages against the 2nd defendant. In terms of s. 615 of the CPC the plaintiff petitioner was directed to pay the 1st defendant respondent a sum of Rs. 1500/= as permanent alimony per month and maintenance for the child Nilani in a sum of Rs. 1000/= per month. Custody of the child was awarded to the 1st defendant.

The plaintiff appealed only against the order for alimony and custody of the child but not against the order granting a divorce on the prayer of the 1st defendant. The 1st defendant filed no appeal. On 12.10.88 the plaintiff's attorney filed an application to make decree nisi absolute.

On 01. 11. 88 the plaintiff's attorney filed a motion for the case to be called for entering decree absolute. The matter was supported on 16. 11. 88 and the 1st defendant's attorney took notice. On 20. 11. 88 in terms of the provisions of s. 772 (c) of the CPC the 1st defendant prayed that issues on the question of adultery answered not proved be now answered in her favour and decree for divorce be granted on the ground of plaintiff's adultery with the 2nd defendant. After hearing the parties the Court on 25. 05. 89 made order dismissing plaintiff-petitioner's application to make decree absolute. The plaintiff petitioner moved in revision.

Held:

(1) In terms of section 605 of the Civil Procedure Code as there was no objection nor sufficient cause shown why the decree nisi should not be made absolute there was a duty cast on court to make the decree nisi absolute at the expiry of the three months.

(2) An application to make decree nisi absolute can be made by the innocent party or the guilty party - the question whether or not the marriage should be dissolved being no longer in issue. There is no residuary discretion vested in the court to decline it if any party moves to have the decree nisi made absolute.

(3) The Court can make subsidiary orders relating to permanent alimony, custody of the children and other settlements in terms of section 615 of the Civil Procedure Code. These orders as stated in section 615 (2) can be discharged, modified, temporarily suspended and revived or enhanced. These orders are not part of the decree nisi.

(4) As there was no appeal from the decree for dissolution of the marriage the Court will not grant any relief the parties have not asked for.

(5) The Court of Appeal has the power to act in revision, even though the procedure by way of appeal is available, in appropriate cases.

(6) The action for divorce was filed so far back as 1982 and it had taken nearly 7 years for the District Court to conclude the trial. An appeal from the judgment dated 25. 05. 89 with the present backlog of cases in the appellate cases in the Appellate Court would be considerably delayed . Hence this is an apt case for the Appellate Court to excerize its revisionary powers.

Cases referred to:

(1) *Hulme King v. De Silva 29 NLR 63 PC.*
(2) *Silva v. Silva 20 NLR 378.*
(3) *Atukorale v. Samyanathan 41 NLR 165.*
(4) *Rustom v. Hapangama & Co. [1978-79] 2 Sri LR 225.*
(5) *Sumanathangam v. Meeramohideen 60 NLR 394.*

APPLICATION for revision of the order the District Judge of Colombo.

H. L. de Silva , P. C. with *Mahanama Silva* for plaintiff -petitioner.

E. B. Wickramanayake with *I. G. N. de Jacolyn Seneviratne* for 1st defendant-respondent.

Cur. adv. vult.

January 11, 1990

H. W. SENANAYAKE, J.

The plaintiff-petitioner filed this application for revision in respect of the order dated 25.5.89 made by the learned District Judge in case No. 11651/D in the District Court of Colombo. By the said order the learned District Judge refused the application of the plaintiff-petitioner to make the 'Decree Nisi' granting the defendant-respondent a dissolution of marriage on the grounds of constructive malicious desertion on the part of the plaintiff-petitioner a decree absolute in terms of the provisions of section 605 of the Civil Procedure Code.

The plaintiff instituted this action against the first defendant-respondent praying inter-alia for–

(*a*) a decree of dissolution of marriage a vinculo matrimoni on the grounds of actual and constructive malicious desertion; and
(*b*) for the custody of the child Nilani.

The first defendant-respondent in her amended answer alleged that from about 1977 the plaintiff-petitioner treated her with cruelty and made it impossible for her to continue to live with the petitioner, that he compelled the first defendant-respondent to leave the matrimonial home on the 8th of February, 1981. She also alleged that the plaintiff-petitioner was living in adultery with the second respondent since September 1982. She prayed —

(*a*) that the plaintiff-petitioner's action be dismissed;
(*b*) that she be granted a dissolution of marriage a vinculo matrimoni on the grounds of constructive malicious desertion and or adultery on the part of the plaintiff-petitioner.
(*c*) Rs. 300,000/= as damages from the 2nd defendant-respondent;
(*d*) the custody of the child Nilani;
(*e*) further reliefs in terms of the provisions of section 615(*a*) (*b*) (*c*) & (*d*) of the Civil Procedure Code.

After trial the learned District Judge delivered judgment on 12.5.1988,

(*a*) dismissing the plaintiff-petitioner's action against the first defendant-respondent with costs;
(*b*) granting the first defendant a dissolution of the marriage on the ground of constructive malicious desertion ;
(*c*) dismissing without costs the first defendant-respondent's action for dissolution of marriage on the gound of the petitioner committing adultery with the second defendant-respondent and the claim for damages from the second defendant-respondent. The Court in terms of the provisions of section 615 of the Civil Procedure Code directed the petitioner to pay the first defendant-respondent a sum of Rs. 1,500/- as permanent alimony per month and maintenance for the child Nilani in a sum of Rs. 1,000/= per month.

The court also granted the custody of the child Nilani to the first defendant-respondent.

The plaintiff-petitioner did not appeal against the said judgment granting a dissolution of marriage and the decree Nisi. But however appealed against the two orders on the basis –

(*a*) that the alimony granted to the first defendant-respondent is excessive and disproportionate to the income of the plaintiff-appellant.

(*b*) the granting of the custody of the child Nilani to the first defendant-respondent was unreasonable and contrary to the principles of law applicable in relation to the custody of the children.

The first defendant-respondent did not appeal against the said judgment nor had she appealed against the said orders. But the first defendant-respondent filed her statement of objection on 20.11.88 in terms of the provisions of section 772(*c*) of the Civil Procedure Code. She had prayed that that part of the judgment and decree answering issues 6(c) and 6(4) "as not proved" be answered in her favour and that she be granted a dissolution of marriage a vincule matrimoni on the ground of plaintiff-petitioner living in adultery with the second defendant-respondent.

The learned District Judge had delivered the judgment on 12.5.88 and pronounced decree nisi in terms of the provisions of section 603 and 604 of the Civil Procedure Code.

As there was no objection to the decree nisi as envisaged in the provisions of section 605 of the Civil Procedure Code, the attorney of the plaintiff-petitioner tendered a draft decree absolute to court on 12.10.1968. On 1.11.1988 the petitioner's attorney filed a motion to call the said case for the purpose of entering decree absolute. When the matter was supported on 16.11.88 the attorney of the first defendant-respondent took notice of the said application and the court made order that the case be called on 30.11.88 and on that day the court fixed the matter for inquiry on 31.10.89. The first defendant-respondent's counsel objected to the decree nisi being made absolute and after considering the written submissions, the learned District Judge on 25.5.89 made an order dismissing the petitioner's application to make the decree nisi a decree absolute.

It was submitted by the learned counsel for the plaintiff-petitioner that neither this plaintiff-petitioner nor the first defendant-respondent have appealed against the judgment of the learned trial judge granting the divorce. In terms of the provisions of section 605 of the Civil Procedure Code as there was no objection nor sufficient cause shown why the decree nisi should not be made absolute, there was a duty cast on court to make the decree nisi absolute at the expiry of the three months.

The learned Counsel also submitted that as there is no appeal against the dissolution of the marriage except in the cross objection filed on 28.11.88 in terms of the provisions of section 772(1) of the Civil Procedure Code which too was a result of the application made on 1.11.88, to have the decree nisi made absolute. When the first defendant-respondent prayed for a finding also on the grounds of adultery of the plaintiff-petitioner with the 2nd defendant-respondent, this relief even if granted by the court of appeal, the dissolution of marriage, would only be strengthened by the additional ground of adultery. Section 605 of the Civil Procedure Code is as follows :—

> " Whenever a decree nisi has been made and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited, such decree nisi shall on the expiration of such time be made absolute ".

Section 604 envisages the minimum period necessary to be three months for a decree nisi to be made a decree absolute unless the court had prescribed a longer period.

In the instant case there was no specific period prescribed by court. Therefore in terms of the provisions of section 605 of the Civil Procedure Code on an application made by either party whether it is the guilty or the innocent party the court should have entered the decree absolute. It was held in *Hulme King v. De Silva* (1) " There is nothing either in law or practice to prevent an application under section 604 & 605 of the Civil Procedure Code for the making of a decree absolute, being made by the innocent or by the guilty spouse. "

In the instant case there was no appeal against " the dissolution of marriage ", as Garvin, J. stated in *Silva v. Silva* (2) " the question as to whether or not the marriage should be dissolved is no longer in issue ". The appeal cannot in any way affect the question of the dissolution of the marriage between the parties. The provisions relating to matrimonial action seem to indicate that in the case of an action for a dissolution of marriage, the order directing such marriage to be dissolved should be embodied in a decree nisi. At the expiration of the three months, in the absence of any objections the court is required to make the decree so entered absolute. I respectfully agree with the view expressed by Garvin, J. This is further strengthened when one considers " Form 97 of the schedule ". The essence is a decree for a Divorce a Vinculo Matrimonii ".

The chapter under Matrimonial Actions contemplates the making of subsidiary orders relating to permanent alimony, custody of the children, and other settlements in terms of the provisions of section 615 of the Civil Procedure Code. These orders as stated in section 615(2) can be discharged, modified, temporarily suspended and revived or enhanced. Therefore I agree with the submission of the petitioner's learned Counsel that these orders could be varied at any time and it was not a part of the decree nisi ". It is my view that a permanent alimony order, or any sum ordered for the maintenance of a child, or an order for the custody of a child could be varied at any subsequent stage as the circumstances of the parties change. On a decline in the pecuniary condition of a party an application could be made successfully to reduce the quantum of alimony granted. If a party who is given the custody of a child subsequently leads the life of a common prostitute, the court considering the paramount importance of the welfare of the child could vary its own order. It is my view that these orders are not entered as a part of the decree nisi. I see no reason therefore why the decree nisi declaring a dissolution of marriage should not be declared absolute. Section 605 of the Civil Procedure Code states "such decree nisi shall on the expiration of such time be made absolute". I am of the view that there is no residuary discretion vested in the court to decline it if any party moves to have the decree nisi made absolute.

The learned Judge erred in his order when he considered the possibility of the appellate court setting aside his judgment even on the issue of malicious desertion and thereby the decree for dissolution of the marriage. But the parties in the instant case have not appealed from the decree for dissolution of the marriage. Therefore the Appellate Court will not grant any relief which the parties have not asked for. Section 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka states as follows :—

> " The Court of Appeal may in the exercise of its jurisdiction affirm, reverse, correct or modify any order, judgment, decree or sentence according to law, or it may give directions to such court of first instance, tribunal or other institutions or order a new trial or further hearing upon such terms as the court of appeal shall think fit.
>
> (2) The Court of Appeal may further receive and admit new evidence additional to or supplementary of, the evidence already taken in the court of first instance touching the matters at issue in any original case, suit, prosecution or action as the justice of the case may require. "

The section empowers the appellate court with wide powers.

Similar powers are envisaged in section 773 of the Civil Procedure Code.

But the appellate court will be guided by the provisions of section 758 (*e*) & (*f*). The appellate court would in law have to consider the demand or the form of relief claimed. If there is no relief claimed to set aside the judgment and decree for the dissolution of marriage by either party, I am of the view that the appellate court would not grant a relief which no party had prayed for. However wide the jurisdiction of the court of appeal may be it can only exercise it in a properly constituted appeal from judgment presented to it by an aggrieved party.

It was submitted by the learned Counsel for the first defendant-respondent that there are no exceptional circumstances for the petitioner to come by way of revision, as the plaintiff-petitioner had appealed from the order of the Trial Judge dated 25.5.89. This is an action for divorce filed as far back as on 27.8.82 and it had taken nearly 7 years for the District Court to conclude the trial. An appeal from the judgment dated 25.5.89 with the present backlog of cases in the appellate court would be considerably delayed, even if application is made to accelerate the appeal, for final determination in my view would be considerably prolonged. In the circumstances I am of the view, this is an apt case to exercise the revisionary powers of the court. It was held in *Atukorale v. Samyanathan* (3): "The powers given to the Supreme Court by way of revision are wide enough to give it the right to revise any order made by an original court whether an appeal has been taken against it or not".

The trend of recent decisions is that the Court of Appeal has the power to act in revision even though the procedure by way of appeal is available in appropriate cases. In *Rustom v. Hapangama & Co.* (4) it was held that the powers by way of revision conferred on the appellate court are very wide and can be exercised whether an appeal has been taken against an order of the original court or not. However such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exeptionable circumstances are, is dependant on the facts of each case.

Vythialingam, J. stated in *Rustom v. Hapangama & Co.* (supra) "where an order is palpably wrong and affects the rights of a party also, this court would exercise its powers of revision to set aside the wrong irrespective of whether an appeal was taken or was available."

In *Sinnathangam v. Meeramohideen* (5) T. S. Fernando, J. said "We do not entertain any doubt that this court possesses the power to set aside an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated. It only remains for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this court".

I am of the view that this is an appropriate case for us to exercise the powers of revision considering the time already taken in the District Court to enter a decree of dissolution of the marriage.

I am in respectful and full agreement with the view expressed. It must take some time for the appeal to be heard. In this circumstance I am of the view that the court should exercise its revisionary powers.

In the circumstances I set aside the order of the learned District Judge dated 3.5.89 and direct the court to enter decree absolute. I allow the application of petitioner with costs.

The Registrar is directed to forward a copy of the order to the Registrar of District Court, Colombo to be filed of record in D.C. 11651/D Colombo.

S. N. SILVA, J. — I agree.

Appeal allowed.