

DIAS
v.
KODITHUWAKKU

COURT OF APPEAL
ISMAIL, J. (P/CA),
TILAKAWARDENA, J.
C.A.L.A. NO. 225/98.
D.C. MT. LAVINIA NO. 2043/98/D.
FEBRUARY 2, 1999.

Judicature Act, No. 2 of 1978 – S. 54 – 54 (1) b (1) c – Injunctive reliefs – Applicability to matrimonial actions – Entitlement of wife to matrimonial home until dissolution of marriage.

The District Court granted an interim injunction preventing the defendant-petitioner (husband) from alienating 'the matrimonial house'. On leave being sought –

Held:

- (1) The granting of injunctions in matrimonial actions is a civil law remedy, which legally has no basis to be excluded in matrimonial actions.
- (2) The wife is entitled to be provided with a matrimonial house until the dissolution of the marriage by a Court of Law.

Per Thilakawardena, J.

"There is an obligation on the husband to maintain the wife and the obligation includes the provision of a home and if he deserts her, she is entitled to take steps to protect her position."

APPLICATION for leave to Appeal from the order of the District Court of Mt. Lavinia.

Cases referred to:

1. *Bendall v. McWhirter* – 1952 2 QB 466.
2. *Boulton v. Prentice* – 1 Selw N.P. 13th ed. 233.
3. *Manby v. Scott* – 2 Smiths Leadings Law 13th ed. 456, 469.

4. *Lee v. Lee* – 1952 2 QB 480.
5. *Alwis v. Kulatunga* – 73 NLR 337.
6. *Canekaratne v. Canekaratne* – 71 NLR 522.

D. R. P. Goonetilleke with *S. A. D. S. Suraweera* for 1st defendant-appellant-petitioner.

Manohara R. de Silva for plaintiff-respondent.

Cur. adv. vult.

February 19, 1999.

SHIRANI THILAKAWARDENA, J.

An action for divorce was instituted by the plaintiff-respondent against the 1st defendant-appellant-petitioner on the grounds that he had deserted her and was living in adultery with the co-defendant-respondent.

Pending the hearing of the action for divorce, an application was made by the 1st defendant-appellant-petitioner to sell the property described in the schedules to the plaint on the basis that he was unable to be in employment and to repay the loans and/or redeem the mortgages obtained in favour of the two properties. It had been agreed by both parties that the matter relating to the interim injunction would be resolved on the written submissions filed by both parties. The order was delivered on 9.9.98.

In this order, the District Judge has granted an interim injunction preventing the 1st defendant-petitioner from alienating the property described in the 1st and 2nd schedule to the plaint. The 1st defendant-petitioner has preferred this application against this order.

Counsel for the 1st defendant-appellant-petitioner submitted that the District Judge had erred in granting the interim injunction, as he should have permitted the alienation of the property for the purpose

of the settlement of the commitments to the bank, and also contended that in any event the District Court had no power to grant interim injunctions in matrimonial actions.

In his order, the District Judge has considered that the plaintiff-respondent has sought damages in a sum of Rs. 500,000, and permanent alimony in a sum of Rs. 3,000,000, and that the alienation of this property before the matters between the parties are resolved, could render unenforceable any order made in that regard.

He has also considered the fact that the alienation of the property, one on which was the matrimonial home, would necessarily result in the plaintiff wife having to leave the matrimonial home and be left without accommodation.

The right to dispose of the property relating to the matrimonial home by an estranged spouse has been considered in several cases.

It was held, in the case of *Bendall v. McWhirter*⁽¹⁾ that "a deserted wife acquired on desertion a right to reside in what is then the matrimonial home as against the husband which the husband cannot terminate at pleasure even though he may have the whole legal and whole equitable title in himself".

Referring to the judgments of *Boulton v. Prentice*⁽²⁾, and *Manby v. Scott*⁽³⁾ Denning, L.J. in the case of *Bendall v. McWhirter*, stated that "one of the most obvious necessities of a wife is a roof over her head; and if we apply the old rule to modern conditions it seems only reasonable to hold that (even) when the husband is a tenant of the matrimonial home, the wife should have the irrevocable authority to continue the tenancy on his credit; and that when he is the owner of it she should have the irrevocable authority to stay there. This authority, like the old one, is based on an irrebuttable presumption of law".

The underlying principle was that there is an obligation on the husband to maintain his wife and the obligation includes the provision of a home and if he deserts her, she is entitled to take steps to protect her position. *Lee v. Lee*⁽⁴⁾. In this case Somerville, LJ. held that an order restraining the husband from selling the house over his wife's head was a fit and proper order, in order to forestall the prejudice to the wife, and the judge had the jurisdiction to make the order.

These decisions were followed in the case of *Alwis v. Kulatunge*⁽⁵⁾. In his judgment Alles, J. held that one of the propositions emerging from the English law, was that the wife was entitled to be provided with a matrimonial home until the dissolution of the marriage by a Court of competent jurisdiction.

In the same case in a separate judgment referring to the Roman Dutch law principles Justice H. N. G. Fernando also held that, "the right of the wife to be supported by her husband and thereby to provide her with accommodation, food, clothing, medical attention and what she reasonably requires".

This was followed in the case of *Canekeratne v. Canekeratne*⁽⁶⁾, where T. S. Fernando, J. held that "a wife who has been deserted by her husband is not liable to be ejected by her husband from the matrimonial home. (Unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her).

It is evident that these principles have gained recognition In Sri Lanka, and that the defendant-respondent and her 3 children had a right not to be ejected from the matrimonial home.

The next issue is whether an injunction could be issued in matrimonial matters relating to family law.

Section 54 of the Judicature Act, No. 2 of 1978, interprets the circumstances under which the District Court, the High Court and the family Court could grant injunctions restraining any defendant from removing or disposing of property, where the defendant during the

pendency of an action is about to remove or dispose of his property. In this context the provisions of both 54 (1)*b* and 54 (1)*c* are relevant. Consequently in circumstances of threatened harm by an act which would render the judgment ineffectual such a remedy could clearly be resorted to.

According to English law the Injunctive Procedure has been recognised and the English Courts issue molestation injunctions and ouster injunctions regularly in order to control the domestic violence and to further the best interest of the child. (Principles of Family Law by Stephen M. Cretney 4th ed – Sweet and Maxwell page 238-243).

The granting of injunctions in matrimonial actions is a civil law remedy, which legally has no basis to be excluded in matrimonial actions.

In these circumstances we see no reason to interfere with the order of the District Court Judge and the application for leave to appeal is dismissed with costs.

ISMAIL, J. (P/CA) – I agree.

Application refused.