

**VARUNA JAYASURIYA
VS
KRISHANJINI JAYASURIYA**

COURT OF APPEAL
WIMALACHANDRA, J.
CA 1201/2004 (REV)
DC COLOMBO 22047/D
NOVEMBER 8, 2004
DECEMBER 7, 2004

Civil Procedure Code – section 76 - Decree of Divorce prayed for – which Court has jurisdiction – defendant’s position that a Divorce has already been granted by a foreign court – Raising same as a preliminary issue – Proper procedure to be followed – domicile of the Parties – Jurisdiction – Foreign Decree – Validity – Miscarriage of Justice – Powers of Revision – Jurisdiction not denied in the answer – Fatal?

The plaintiff petitioner (husband) instituted action in Colombo on 15.03.2004 praying for a decree of divorce on the ground of malicious desertion. The defendant respondent (wife) filed answer on 2.1. 2003 counter suing for a decree on divorce on the ground that she had filed a divorce action in Canada against the plaintiff petitioner and the said action is still pending. On the first date of trial the defendant respondent raised the issue that as the Canadian Court on 15.11. 2003 has granted a divorce, the District Court, Colombo has no jurisdiction and wanted this issue to be tried first. This was objected to by the plaintiff petitioner but the trial court decided the issue in favor of the defendant respondent and dismissed the action.

The plaintiff petitioner moved in revision.

Held:

- (1) in the instant case the question arises as to the validity or the recognition of the Foreign Decree. The jurisdiction of the Foreign Court to dissolve a marriage between a Sri Lanka citizen and a lady born in Sri Lanka who has obtained the citizenship of Canada is in issue.

The only Court which has jurisdiction to entertain an action for divorce is the Court in whose area the parties are domiciled at the time of institution of proceedings. The marriage of the defendant respondent to the plaintiff petitioner took place in Colombo and therefore the

question arises whether it is only the District Court of Colombo that has jurisdiction. The wife acquires the domicile of the husband up to date of decree in a matrimonial action.

- (2) If the question of law is combined or interwoven with questions of fact, the issue cannot and ought not to be tried as a preliminary issue.
- (4) The defendant has not specifically traversed the averments in the plaint as to the jurisdiction of the Court – section 76. Civil Procedure Code. Issues relating to the fundamental jurisdiction of the Court cannot be raised in oblique or veiled manner but must be expressly set out in the answer.
- (5) The impugned order is wrong *ex facie* and it amounts to positive miscarriage of justice due to a violation of a fundamental rule of procedure.

APPLICATION in Revision from an order of the District Court of Colombo
Cases referred to :

1. *Navaratnam vs. Navaratnam* 46 NLR 361
2. *Annekada vs. Myappan* 33 NLR 198
3. *Morris vs. Morris* 40 NLR 246
4. *Julaldĳeen vs. Rajaratnam (1986)* 2 Sri LR 201
5. *Soya vs. Silva (2000)* 2 Sri LR 235

Romesh de Silva, PC with *Hiran de Alwis* for plaintiff petitioner.
Defendant respondent absent and unrepresented

Cur. adv. vult.

June 28, 2005

WIMALACHANDRA, J.

This is an application in revision from the order of the Additional District Judge of Colombo dated 29.03. 2004. By that order the learned Judge answered the following issue raised by the counsel for the defendant respondent respondent (defendant) in the negative, and dismissed the plaintiffs action.

The said issue reads as follows:

"Does this Court have jurisdiction to hear this case in view of the judgment dated 15. 11. 2003 in case No. 500/12/2514/91/001 filed by the defendant against the plaintiff in Montreal, in the Province of Quebec, in Canada.?"

The plaintiff - petitioner (the plaintiff) instituted this action against the defendant in the District Court of Colombo on 15. 03. 2002 and prayed for a Decree of Divorce, a *vinculo matrimon*, on the grounds of malicious desertion and/or constructive malicious desertion by his wife, the defendant, and for the custody of the child of the marriage. The plaintiff averred in his plaint that on or about March 1998 the defendant, without any notice, left Sri Lanka for Canada and only thereafter notified the plaintiff by registered letter. Accordingly, the plaintiff avers that on or about March 1998 the defendant deserted the plaintiff with a view to ending the marriage. The defendant filed answer on 2. 1. 2003 and counter sued and prayed for a decree of divorce against the plaintiff, on the ground that she had filed a divorce action in Canada against the plaintiff and had made the plaintiff of the present action as the defendant of that action and that action is still pending. The defendant admits that the plaintiff and the defendant were married on 7.9.1989 and there is one child from the marriage.

On the fourth date of trial on 3.2.2004, the counsel for the defendant raised the aforesaid issue on the basis that the judgment in the aforesaid action filed in Canada has been pronounced on 15. 11. 2003 and a divorce has been granted in favour of the defendant and moved that the said issue be tried as a preliminary issue. The counsel for the plaintiff objected to this application and stated that said issue involves a mixed question of fact and law and as such it cannot be taken as preliminary issue. Thereafter the Court directed the parties to tender written submissions. The learned judge by his order dated 29. 03. 2004 held that in view of the judgment in case No. 500/12/2514/91/001 referred to in the said issue, the plaintiff cannot maintain the action, and dismissed the same. It is against this order the plaintiff has filed this application in revision.

K. D. P. Wickramasinghe in his book 'Civil Procedure in Ceylon', 1971 edition, at pages 179 and 180 citing the authorities on this question has stated thus:

"It has been held that when an issue of law arises, and if it appears that the case can be disposed of on that issue only, the Judge has the power to try that issue first, postponing the settlement of the issues of fact until he has disposed of the issue of law",

If the question of law is combined or interwoven with questions of fact, the issue cannot and ought not to be tried as preliminary issue of law.

In the instant case the question arises as to the validity of the judgment entered in the matrimonial Court in the Province of Quebec in Canada, dissolving the marriage of the plaintiff and the defendant, and the recognition of the decree so entered by a Canadian Court. The defendant is residing in Canada and the plaintiff is a citizen of Sri Lanka living in Colombo. Accordingly, the jurisdiction of the Canadian Court in the province of Quebec to dissolve a marriage between a Sri Lankan citizen and a lady born in Sri Lanka, who is supposed to have obtained the citizenship of Canada is in issue. Admittedly, the marriage had been registered in Sri Lanka and the spouses had lived in Sri Lanka. At the time the plaintiff instituted this action in the District Court of Colombo, the defendant was living in Canada and according to her, she had obtained the citizenship of Canada. The plaintiff has taken the position that the Canadian Court has no jurisdiction to entertain the action filed by the defendant in the province of Quebec in Canada.

The domicile of a married woman is the same as, and changes with, the domicile of her husband. According to the common law, the only Court which has jurisdiction to entertain an action for divorce is the Court in whose area the parties are domiciled at the time of the institution of proceedings ('The Law and the Marriage Relationship in Sri Lanka' by Shirani Ponnambalam, 2nd edition at page 370). The wife acquires the domicile of the husband up to the date of the decree in a matrimonial action. (*Navaratnam vs. Nawaratnam*⁽¹⁾ Jurisdiction to grant a divorce depends upon the domicile of the husband (*Annekade Vs. Myappan*⁽²⁾). However in *Morris Vs. Morris*³ petitioner was a native and a permanent resident of Ceylon while her husband was an European, domiciled in England, and the Supreme Court of Ceylon was held to have jurisdiction to entertain the petition for divorce.

Another important factor in this case is that the marriage between the plaintiff and the defendant was solemnised and registered in Colombo on 7. 9. 1989, (Paragraphs 2 and 3 of the plaint) The defendant in her answer admitted paragraphs 2 and 3 of the plaint. The action has to be instituted in the Court within whose territorial jurisdiction the marriage contract was made. In the instant case the marriage of the defendant to the plaintiff took place in Colombo, and therefore the question arises whether it is only the District Court of Colombo that has jurisdiction in the matter.

The learned President's Counsel for the plaintiff also brought to the notice of Court in his submissions that the defendant had counter - sued in her answer for divorce and by this act the defendant had submitted herself to the jurisdiction of the District Court and thereby accepted the jurisdiction of Court. Moreover the defendant has not specifically traversed the averment in the plaint as to the jurisdiction of the Court. Section 76 of the Civil Procedure Code states that if the defendant intends to dispute the averment in the plaint as to the jurisdiction of the Court, he must do so by a separate and distinct plea, expressly traversing such averments. It is to be observed that the defendant has raised the aforesaid issue on the basis that in view of the judgment in the case of the matrimonial action No. 500/12/2514/91/001 in the matrimonial Court in Quebec, Canada, against the plaintiff, the District Court of Colombo has no jurisdiction to determine this action filed by the plaintiff against the defendant. Accordingly, the defendant has challenged the jurisdiction of the District Court to hear and determine this action by raising this issue. However, the defendant has not taken an objection with regard to jurisdiction in her answer at the earliest opportunity. Relating to the fundamental jurisdiction of the Court cannot be raised in oblique or veiled manner but must be expressly set out in the answer (vide *Jalaldeen Vs. Rajaranam*)⁴

The aforesaid issue involved the jurisdiction of the Canadian Court, and in this case where the wife is a resident of Canada, she could not obtain relief in Canada when husband was domiciled abroad.

Another issue is the recognition of foreign decrees. Following the principle that jurisdiction in divorce is based on domicile, Courts recognise a decree if it is obtained in the country in which the parties were domiciled at the time of the institution of the action. Accordingly, the recognition of a foreign decree is also an issue before Court. There are cases where

Court has a discretion to refuse recognition. For instance, divorce obtained outside the country, if it is recognised, would be contrary to public policy.

In the circumstances I am of the view that the aforesaid matters are questions of fact involved with the aforesaid issue and in view of that, the said issue ceased to be a preliminary issue of law. For a case to be disposed of on a preliminary issue, it should be pure question of law which goes to root of case. Moreover it appears to me to decide the said issue several documentary evidence have to be considered at he trial. It is my further view that the said issue cannot be decided on written submissions without taking evidence.

Considering the facts and circumstances of this case, the impugned order made by the learned Judge is wrong ex - facie and it amounts to a positive miscarriage of justice due to a fundamental rule of procedure being violated. It was held in the case of *Soysa Vs. Silva*⁵ that the power given to the Superior Courts by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due administration of justice and correction of errors, sometime committed by the Court itself, in order to avoid miscarriage of justice.

I am of the view that non - interference by this Court will cause denial of justice and irremediable harm to the defendant. Therefore, there are special circumstances for this Court to exercise its powers of revision.

For these reasons, I hold that the learned additional District Judge erred in answering the above mentioned issue in the negative against the plaintiff and dismissing the plaintiff's action. Accordingly, I set aside the order made by the learned Judge dated 29. 03. 2004 and allow the plaintiff's application in revision. The learned Judge is directed to go through the trial and answer all issues at the conclusion of the trial.

The plaintiff is entitled to the costs of this application.

Application allowed.

District Judge directed to go through the trial and answer all issues.