IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Sattambiralalage Don Felix Pinsiri Chandana Aresecularatne

"Frankfurt", Galle Road,

Maggona.

PLAINTIFF

C.A. Case No. 572/2000 (F)

D.C. Kalutara No. 6403/P

-Vs-

1. Madanakonda Achiralalage Don Lucian Anthony Aresecularatne,

   "Felixton", Galle Road,

   Maggona.

2. Thusecooray Mohotti Gurunnaselage Stella Catherine Sybli Fernando,

   "Bustrich", Galle Road,

   Maggona.

3. Madanakonda Achiralalage Felix Didacus Aresecularatne (Deceased),

   No. 21, Uyana Road,

   Moratuwa.

4. Madanakonda Achiralalage Milroy Fernando

   Kaduwakanda Road,

   Maggona.

5. Madanakonda Achiralalage Margaert Fernando

   Gurugalamulla,

   Maggona.

6. Beruwala Totage Lorenz Fernando
   Galle Road,
   Maggona.
7. Siddha Marakkalage Philip Jayantha Silva
   Gurugalamullawatta,
   Maggona.
8. Magodage Don Tillekeratne
   Munhena,
   Maggona.

   DEFENDANTS

AND NOW BETWEEN

Sattambiralalage Don Felix Pinsiri Chandana Aresecularatne
"Frankfurt", Galle Road,
Maggona.

PLAINTIFF-APPELLANT

-Vs-

1 & 3A. Madanakonda Achiralalage Don Lucian Anthony Aresecularatne (Deceased),
"Felixton", Galle Road,
Maggona.

1A & 3B. Madanakonda Achiralalage Don Romesh Lushantha Aresecularatne
No. 22A, Jaya Mawatha,
3rd Lane, Ratmalana.

DEFENDANT-RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Dr. Sunil Coorey for the Plaintiff-Appellant. Chandana Prematilake for the 1A and 3B Defendant-Respondents. S. Karunatilake for the 2A Substituted-Defendant-Respondent.
Decided on	:	28.10.2016

A.H.M.D. Nawaz, J.

A perusal of the pedigree filed by the Plaintiff will succinctly make the issues crystal clear. The subject-matter originally belonged to one Madanakondaraatchige Don Thusew Aresecularatne-see Admission 3 recorded at the trial on 1.10.1996. Arsekularatne had six children-see Admission 3 recorded on his interests had devolved on his six children namely Duminga, Fransciscu, Daniel, Simon, Agida and Veronica. Agida had 2 children Catherina and Eprojina. Having inherited 1/6th share, it would appear that Agida would pass on 1/12th share each to her daughters Catherina and Eprojina. Catherina married one H.D. Marcelinu in community of property and for a debt of Marcelinu (the husband), Catherina's 1/12th share had been seized and sold on a fiscal conveyance to one Don Jusenis Arsecularatne. This fiscal conveyance bearing No.10804 took place on 23.05.1861 conveying the title to 1/12th share to the said Jusenis Arsekularatne-see the plaintiff's pedigree at page 80 of the brief, the fiscal conveyance marked as P22 and the testimony of Anthony Sri Lal Indra Arsekularatne at pages 250 and 262 of the brief. It is through Jusenis that the Plaintiff derived title to the 1/12th share. The Roman Dutch Law doctrine of community of property permitted this to occur.

But the gravamen of the complaint of Dr. Sunil Coorey was that the learned District Judge failed to appreciate the Roman Dutch Law doctrine of community of property

that comingled the properties of both spouses into joint property. He contended that thought the evidence on the fiscal sale (P22) was led before the Court, the learned District Judge misdirected himself both on the facts and law in allotting the said 1/12th share to the 6th Defendant in the case, though in effect the allotment must be for the Plaintiff. At page 17 of the judgment dated 03.08.2000, the learned District Judge of Kalutara has allotted the aforesaid 1/12th share to the 6th Defendant-vide page 321 of the Appeal Brief and in fact if one applies the Roman Dutch Law doctrine of community of property, the 1/12th share of Catherina (Agida's Daughter) becomes chargeable with the debt of her husband, Marcelinu and it was in those circumstances that the share was sold on the fiscal conveyance to Jusenis Arsecularatne who passed it on to the Plaintiff. This mode of devolution to the Plaintiff is seen on the Plaintiff's pedigree too-vide page 80 of the appeal brief.

The question then arises how the learned District Judge of Kalutara came to allot the 1/12th share to the 6th Defendant. It is not in contention that the said Catherina who was the owner of the 1/12th share married Marcelinu in community and both of them died leaving one child named Maria who married Peduru and it is this union that sired the 6th Defendant Lorenz. The learned District Judge had followed this devolution to allot to 6th Defendant, the said 1/12th share, but as Dr. Coorey contended, it is apparent that Catherine had no 1/12th share to transmit to her child Lucia, after the 1/12th share had been disposed of at the fiscal's conveyance in 1861. In fact, the contents of the fiscal's conveyance, which is contained in an old deed of 1861, designate Kalutara as Caltura and the contents of the deed were read out to Court by Dr. Coorey so skillfully as he was possessed of a clear copy and this conveyance **P22** refers to Marcelinu as the debtor for whose borrowing the 1/12th share was sold. As I said before, Marcelinu had married Catherina in community of property and when the fiscal sale took place by way of **P22** in 1861, the entire interests of Catherina passed to Jusenis Arsekularatne and there was nothing that remained to be inherited by Maria (Catherina's daughter) from whom the 6th Defendant claims. Therefore, the

learned District Judge of Kalutara could not have allotted the 1/12th share to the 6th Defendant.

It has to be recalled that the Roman Dutch Law doctrine of community of property has not been borne in mind though this figured in the trial and it is worthy of note that this doctrine applied in this country in 1861 when the fiscal conveyance took place.

A community of debts is the corollary of community property. By virtue of this principle all antenuptial and postnuptial debts become charges on the joint estate-see ***Liquidators of Union Bank v. Kives*** (1899) 8 S.C 145 and must be discharged by the husband as administrator of the community. In fact Dr. Coorey alluded to James Cecil Walter Pereira on the Laws of Ceylon -2nd Edition (1913) wherein the learned author points out that the wife becomes chargeable not only with the debts of the husband, but even with the liabilities which he has incurred. Walter Pereira points out that liability of the wife for the debts contracted by the husband *stante matrominio* exists independently of either species of community, and is a consequence of marital power-see page 244 of the 2nd Edition of Walter Pereira on the Laws of Ceylon.

It has been held in South Africa that contractual debts incurred by the husband as the administrator of the common estate are binding on both spouses and must be discharged out of the common estate-see ***Thom v. Worthman*** No.1962(4) S.A 83N.

Prior to 1876, the proprietary rights of the spouses were governed by the Roman Dutch common law. Consequently, in the absence of an antenuptial contract excluding community of property and of profit and loss, all their assets and liabilities of the spouses at the time of marriage were merged in a common estate or fund. Therefore, irrespective of the nature of the property and the manner in which it was acquired, all property belonging to the spouses at the time of marriage, together with all property acquired *stante matrimonio* formed the common estate-See Grotius 2.11.8: 3.21.10: Voet 24.2.65. This universal partnership of the spouses took place by operation of law immediately on the solemnization of the marriage, and continued

until such time as the marriage was terminated by death or divorce, or on the annulment of the voidable marriage, or when an order of *boedelscheiding* (partition of the estate) was made -see H.U. Hahlo - the South African law of husband and wife Chap 14.

There is authority in Sri Lanka to the effect that the whole community was liable to be sold in satisfaction of a contractual debt incurred by the husband when he had misappropriated funds entrusted to him in the course of his employment-see ***Selesteen Odear Santiagopulle v. John William De Neise*** (1886-1889) 8 S.C.C 27.

Burnside C.J and Clarence J. held in this case that the obligation incurred by the husband by his misappropriation of moneys belonging to the government was an obligation arising *ex contractu*, notwithstanding that the husband might have been criminally prosecuted for embezzlement; and that, consequently, the wife's share of the common estate was liable to be sold in satisfaction of such obligation. It has to be pointed out that Dias J. held a dissentient view to the effect that the debt was incurred by the husband by reason of a *delictum* amounting to a crime.

The Sri Lankan courts have taken the view that the joint estate was not liable for the delictual debts of one spouse. It was in those circumstances that Dias J. excluded the wife's half of the property from liability though the majority enforced the liability of the wife's property as they were of the view that the husband's debt to the government was contractual.

En passant it is worthy of note that the Matrimonial Rights and Inheritance Ordinance No.15 of 1876 introduced the concept of separate property in place of the Roman Dutch concept of community of property and Section 8 abolished community of goods between husband and wife in respect of marriages contracted after the proclamation of the Ordinance. Section 5 of the Ordinance clearly provided that the Ordinance was not to affect rights acquired under marriages solemnized before the proclamation of the Ordinance and thus such marriages were governed by the law which applied at the time these marriages were contracted. A discussion of the

developments *post* the Matrimonial Rights and Inheritance Ordinance No.15 of 1876 and the Married Women's Property Ordinance No.18 of 1923 is not germane to the issue before this Court as the concept of community of property applies *strict sensu* to the facts of this case and it is quite clear that Maria-the daughter of Catherina did not inherit 1/12th share of her mother as it had been seized and sold in satisfaction of her father's debt pursuant to the concept of community of property. Catherina could not therefore have passed any dominium of the share to Maria and so 6th Defendant could not have become the owner thereof.

The allotment of the aforesaid 1/12th share to the 6th Defendant is thus erroneous and I proceed to set aside this allotment and in lieu thereof this Court orders that the Plaintiff be allotted the 1/12th share of Catherina. In the circumstances the learned District Judge of Kalutara is directed to vary the summary of allotment at page 321 of the appeal brief.

Apart from the above Dr. Coorey made two other complaints about the judgment dated 03.08.2000 in this partition action. The first revolves around the finding of the learned District Judge that one of the parties namely the 1st Defendant should be able to draw water from the well depicted as "O" in the preliminary plan X. The contention was that the purpose and effect of a partition is to put an end to the inconvenience of co-ownership. This effect would be nullified when one finds that the location of the well is almost within the house of the Plaintiff and thus a grant of servitutal right to the 1st Defendant to draw water from this well is impractical and causes inconvenience to the Plaintiff. It is apparent from the perusal of the proceedings that the public water supply that is available along Colombo-Galle Road, at Maggona where the land is situated has catered to the needs of the 1st Defendant who had amply used this water supply.

Mr. Chandana Prematilaka who appeared for the substituted 1A Defendant quite correctly submitted that the Defendant was prepared to give up the servitutal right awarded in the judgment. Accordingly the answer to issue No.18 must be varied and

the well is declared to be for the exclusive use of the Plaintiff. So the learned District Judge is directed to allot the well only to the Plaintiff.

The other complaint that was urged before this Court is that the learned District Judge erred in allotting improvements marked as I and J in Lot 3 (referred to as Lot 1 in the judgment) to the 4th Defendant as admittedly the 4th Defendant does not enjoy soil rights and this allotment to the said Defendant is all the more erroneous having regard to the fact that an admission was recorded at the trial that improvements and plantations should be allotted as claimed before the surveyor-see the admission at page 228 of the brief. At item 3 of his report (X1) at page 123, the surveyor has reported that the improvements I and J which are contiguous were claimed by the Plaintiff and the 4th Defendant never put forward a claim in respect of them. As nobody had counterclaimed before the surveyor, the learned District Judge should have given I and J to the Plaintiff as he was the only one to have staked a claim to the constructions before the surveyor. I therefore set aside the allotment of I and J to the 4th Defendant and order the District Judge to allot them to the Plaintiff.

Subject to the above variations namely the allotments of the 1/12th share of Catherina, the well and I and J to the Plaintiff, which I allow in favor of the Plaintiff, I proceed to affirm the judgment of the District Judge dated 03.08.2000. The learned District Judge is directed to enter judgment and decree accordingly subject to the aforesaid variations.

The appeal is allowed to the extent of the aforesaid variations.

JUDGE OF THE COURT OF APPEAL