

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

Merengnage Marina Vass
No.315, Modera Street,
Colombo 15.

PLAINTIFF

C.A. Case No. 849/2000 (F)

D.C. Colombo Case No.
4921/SPL

-Vs-

Dodamwalage Lakshman Rathnasiri Perera
No.441/4D, Himbutana Lane,
Mulleriyawa New Town.

DEFENDANT

AND

Dodamwalage Lakshman Rathnasiri Perera
No.441/4D, Himbutana Lane,
Mulleriyawa New Town.

DEFENDANT-APPELLANT

-Vs-

Merengnage Marina Vass
No.315, Modera Street,
Colombo 15.

PLAINTIFF-RESPONDENT

BEFORE :

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

COUNSEL :

Lasith Chaminda for the Defendant-Appellant
Gamini Jayasinghe with P.P. de Silva and Rizana
Hassan for the Plaintiff-Respondent

Decided on :

11.06.2018

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

This appeal raises the question whether a married woman enjoys the substantive right to institute an action against her husband to vindicate her proprietary rights. In other words, the question before this Court is whether, whilst the marriage between the parties subsists, the wife will have the substantive right to sue the husband for restitution of property which she alleges to be in his possession.

This was a case where the wife (the Plaintiff-Respondent who will be hereinafter sometimes called "the Plaintiff") instituted this action for restitution of moneys and property held in trust by the husband (the Defendant-Appellant or hereinafter sometimes called "the Defendant") and for recovery of the jewellery of the Plaintiff that was in the matrimonial home and wrongfully held by the Defendant. The learned District Judge of *Colombo* has held with the Plaintiff affirmatively stating that the wife, during the existence of the marriage, does possess the right to sue the husband for recovery of her movable and immovable property.

Whether she can institute such an action against the husband for restitution of property, whilst conjugal rights are still in existence, was raised as Issue No. 41, which has been answered in the affirmative by the learned District Judge of *Colombo*. When this appeal came on for argument, the learned Counsel for the Defendant-husband stated before this Court that he would confine the appeal to only one question and that question alone—namely, the existence of a proprietary right in the wife to sue her spouse for restitution of property during the subsistence of marriage.

At the very outset, I must state that the Plaintiff sought a declaration of trust in respect of four items of property and as regards the fifth item, it was a vindication of a right to movable property. No divorce, or judicial separation had been sought as a remedy in the plaint. In other words, this was no matrimonial action but the plaint contained independent causes of action rooted in trust and declaration of title pleaded in regard to moveable property. So the obvious defence was taken in the answer. A forfeiture of property cannot be granted except upon in a matrimonial action which should pray for a divorce or a judicial separation. No suit for recovery of property will otherwise lie at

the instance of the wife outside Chapter XLII of the Civil Procedure Code (CPC). In fact, the Counsel for the Defendant mounted an argument that it is Section 615 of the CPC which provides for settlement of property, upon divorce, or judicial separation and apart from this remedy, there cannot be an independent cause of action available to the wife. If at all she has to obtain her remedies in the matrimonial action. This was the first argument of Mr. Lasith Chaminda, Counsel for the Defendant-husband. But the learned Additional District Judge of *Colombo* in her judgment dated 27.09.2000 answered Issue No. 41 in favour of the Plaintiff-wife and declared the right of the Plaintiff to sue her husband on the basis of causes of action of trust and declaration of title. The reasoning of the learned Additional District Judge of *Colombo* is found at page 6 of the judgment dated 27.09.2000 wherein she states that the standing of a married woman to sue must be protected since she is a *feme sole*. The judgment further states that the Defendant was not able to show any legal basis to the contrary.

In this appeal against the aforesaid decision of the District Court, the learned Counsel for the Defendant-Appellant also put forward an alternative argument. For the first time in appeal, the Counsel raised the argument that if at all a substantive right exists for the wife to sue the husband during the pendency of an existing marriage, that right is qualified by Section 23(1) of the Married Women's Property Ordinance No. 18 of 1923 which prescribes a summary procedure to be adopted in the case of a suit. Here the wife did not adopt that procedure. She sought her remedies of trust and declaration of title by way of regular procedure. Of course this was not an argument taken before the learned Additional District Judge but before this Court and if all this argument were to succeed here, it must be based on the usual gravamen that the District Court suffered from what Spencer Bower in the 1st edition of his book titled **the Law Relating to Estoppel** (1923) called a *defectus jurisdictionis*, which was described by Tennekoon, C.J in *Beatrice Perera v. Commissioner of National Housing* as a 'patent' or 'total' want of jurisdiction-see (1974) 77 N.L.R 361 at p.366-367. Of course His Lordship the Chief Justice alluded to the

2nd edition of the book (1966). I must say at the outset that no such defect taints the proceedings in the court *a quo*.

So the argument of the Defendant-Appellant (the husband) is twofold. In order to vindicate her proprietary rights against her husband, a married woman must institute a divorce action or an action for judicial separation. This was the issue on which the case went to trial but the learned Additional District Judge disagreed on this issue with the Defendant. The further argument that was taken before this Court was that if at all, the married woman had a right to sue the husband for a proprietary decree, she must come to court by way of a petition and affidavit, which is prescribed in Section 23(1) of the Married Women's Property Ordinance No. 18 of 1923.

Each of these arguments would be gone into presently.

PART-IV: SETTLEMENT OF PROPERTIES

The 1st argument related to Section 615 of the CPC. Section 615(1) of the Civil Procedure Code (CPC) provides that the Court may make order, if it thinks fit, upon pronouncing a decree of divorce or separation, for the benefit of either spouse or of the children of the marriage or of both spouses, that the other spouse shall do any one or more of the following:-

- a) property settlement by conveyance either wholly or in part;
- b) pay a gross sum of money;
- c) pay annually or monthly such sums of money;
- d) secure the payment of the sums of money so ordered above in (b) and (c) by the hypothecation of immovable property or by execution of a bond or purchase of insurance policy etc.

The learned Counsel for the Defendant contended that the issue whether a wife could institute an action against her husband to vindicate claims to property has been settled in the case of *Samarasinghe v. Samarasinghe*, which has been reported twice-see *Samarasinghe v. Samarasinghe* (1989) 2 Sri L.R. 180; sub nomine *Premanie Samarasinghe v. Leelaraja Samarasinghe* (1990) 1 Sri L.R. 31.

The case indulges into a history of legislative changes on settlement of property on divorce and deals more particularly with forfeiture of property.

The argument of Counsel for the Defendant was that it is in a matrimonial action such as divorce or judicial separation that the wife could obtain rights to her separate property. In fact in this case the wife (the Plaintiff) sued her husband (the Defendant) on five causes of action, which were all in relation to property. In order to understand her action, it has to be remembered that while the marriage was subsisting, she sought restitution of the following property:-

- 1) her contribution to construct the matrimonial house;
- 2) a van purchased with her money remitted from Saudi Arabia;
- 3) money appropriated out of remittances sent for purchasing shops;
- 4) a sum of Rs.175,000/- held in trust

Whilst the aforesaid four claims were based on trust, the 5th claim was in respect of goods which the Plaintiff had brought from abroad. The plaintiff alleged that as the Defendant retained these goods she was therefore seeking a declaration that these movable properties belonged to her. The argument on behalf of the Defendant was that the Plaintiff could seek both a declaration of trust and title only in a case of divorce or judicial separation. Since Section 615 of the CPC provides for settlement of property, she would be able to secure her remedies only in a divorce action or judicial separation.

The Counsel for the Defendant also drew the attention of this Court to Section 23 of the Married Women's Property Ordinance, which reads thus:-

1. In any question between husband and wife as to the title or possession of property, either party, or any such bank, corporation, company, public body, or society, as aforesaid, in whose books any stocks, funds, or shares of either party may be standing, *may apply* by petition in a summary way as provided for in Chapter XXIV of the Civil Procedure Code, to the Family Court of the district in which either party resides.

2. The Judge of the Family Court may make such order, direct or make such inquiry, and award such costs as he shall think fit.
3. The Judge of the Family Court may, if either party so requires, hear the application in his private room.
4. Any order so made shall be subject to appeal to the Court of Appeal, and for the purposes of such appeal shall be regarded as an interlocutory order of the Family Court.
5. Any such bank, corporation, company, public body, or society as aforesaid shall, in the matter of such application for the purposes of costs or otherwise, be treated as a stakeholder only.
6. Every such petition shall bear a stamp of ten rupees and no more.

Cumulatively, Sections 23(1) and 23(2) of the Married Women's Property Ordinance provide that when any question arises between husband and wife as to the title or possession of property either party may apply by summary procedure to the District Court of the area. The District Judge may make an order that he "shall think fit".

The learned Counsel for the Defendant argued that apart from Section 615 of the CPC and Section 23 of the Married Women's Property Ordinance, a wife is not entitled to invoke an independent and separate cause of action to sue her husband for a declaration of trust and title, as the Plaintiff-wife in this case has done; the learned Counsel pointed to Section 4 of the CPC, which he said buttresses his argument.

His argument was that Section 4 authorizes only Section 615 to be used, or Section 23 and no other procedure could be adopted by a spouse.

The learned District Judge has held with the Plaintiff-wife and declared that the Plaintiff enjoys sufficient *locus* to institute this action. It is this finding and finding alone that was impugned in the appeal before me.

Mr. Gamini Jayasinghe, the Counsel for the Plaintiff strenuously contended that on the question of Section 615 of the CPC, which was relied upon by the Counsel for the Defendant, a spouse need not wait till a divorce or judicial separation is filed to sue

another spouse in order to claim a proprietary decree. Since Section 615 applies only in relation to a matrimonial action, it would have no application to the instant Plaintiff who was seeking a declaration of trust and title against her husband, long before divorce action ensued between them. Having thus set out the respective arguments let me evaluate these arguments to appraise the propriety of the judgment of the learned Additional District Judge.

Argument based on Section 615 of the CPC

Under the old Civil Procedure Code (i.e., the Code before it was amended by law No.20 of 1977), the wording of Section 615 was as follows:-

“The court may....on any decree absolute.....order, that the husband shall secure to the wife such gross sum of money etc....”

In the new CPC Section 615(1) reads as follows:-

“The Court may if it thinks upon pronouncing a decree of divorce, or separation, order...that the other spouse shall do any of the following.”

This section applies only at the conclusion of a divorce action or judicial separation. Section 615, as Mr. Gamini Jayasinghe contended, presupposes a pre-condition namely- there must be a divorce action or a case filed for judicial separation. At the end of the case the District Judge is empowered to make such orders as are prescribed in Section 615 (1) of the CPC at the time of pronouncing a decree of divorce or judicial separation. The Court need not wait, to make these orders, till the decree is made absolute.

I must say that in the case of a married woman who has not sought divorce or judicial separation Section 615 has no application. If a married woman seeks to vindicate title to her separate property against her husband, is she confined to Section 615 alone? I am afraid that the CPC does not impose any such restraints. If the argument of the Counsel for the Defendant-Appellant has to be accepted, a married woman could perforce be driven to file an action for divorce or judicial separation in order to seek even a declaration of trust.

In my view, the very question before this Court is not *res integra* but is covered by authority. In *Emelda Fernando v. Elaris Fernando* 63 N.L.R. 416, H.W. Tambiah, J. (with H.N.G. Fernando, J. agreeing) stated at p.418-419:-

“This question was adverted to by Schneider J. in De Silva v. De Silva (1925) 27 N. L. R. 289 at 305-306). He stated: “The effect of Sections 617 and 618 might be regarded either as repealing the Common Law on the subject dealt with in them or of introducing new provisions which are to stand side by side with the provisions of Common Law, not being opposed to one another, but only alternative each to the other”. The learned Judge, however, did not venture to express his opinion on this matter as the Court was only dealing with an application under Section 617 of the Civil Procedure Code and consequently it was not necessary to decide this point.”

Having said thus, Tambiah, J. made some pertinent observations at page 418:-

After a careful consideration of the authorities, we are of the opinion that the common law remedy was not abrogated as a result of the enactment of these sections, but rather the remedies envisaged by these sections are complementary to the action available under the common law.

*However, as pointed out by Schneider J, in De Silva’s case (supra at page 306), **the parties cannot have the benefit of both remedies but should elect to claim either the remedy under the Common Law or those available under the Civil Procedure Code.** In the instant case, as the parties have not claimed any proprietary reliefs under Sections 617 or 618 of the Civil Procedure Code, but have elected to reserve their rights to bring separate actions, their rights under the commonlaw to bring separate actions have been preserved.”*

So the upshot of the reasoning is that the common law remedies exist side by side with Section 615 of the CPC. However, the caveat is that either spouse must elect to sue the other either under the common law or the chapter on matrimonial actions. The wife in this case has availed herself of the right existing in common law to sue her husband and so there is no necessity for her to resort to Section 615 of the CPC.

I take the view that she has *locus standi in judicio* in relation to these five causes of action. Merely because Section 615 is an incidental section which provides for settlement of property upon the conclusion of a divorce case or judicial separation, it is a preposterous

proposition to contend that Section 615 takes away the common law right of a married woman to sue her husband for restitution of property which she claims to be her own. The only qualification is that she cannot enjoy both rights. She must opt for one or the other. In the case of the Plaintiff-wife before me, there was no Hobson's choice for her, as she had not moved towards a divorce action or judicial separation by the time she resorted to the common law action. Therefore she was within her right to have instituted this common law action.

I must observe that Wijeyaratne, J. was not unmindful of this proposition when he decided (with P.R.P. Perera, J. agreeing) *Samarasinghe v. Samarasinghe* (*supra*). In fact in the case reported sub nom in (1990) 1 Sri L.R. 31 at p.39, His Lordship Wijeyaratne, J. adopts with approval the dicta of Tambiah, J. in *Fernando v. Fernando* (*supra*) thus:-

"In the case of Fernando v. Fernando (supra) it was held that the statutory provisions in section 617 and 618 of the former Civil Procedure Code have not abrogated the remedies available under the common law and that the parties should elect to claim either the remedy under the common law or those available under the Civil Procedure Code."

Samarasinghe v. Samarasinghe (*supra*) was a revision application arising from an action filed by the husband for a decree of judicial separation. The wife (the Defendant in the case) sought forfeiture of property but she had not claimed a dissolution of marriage. It was in those circumstances that the Court of Appeal made the observation that a forfeiture of benefits can be ordered only against a guilty spouse on proof of matrimonial fault. In this particular case as the Defendant wife had not counterclaimed for a divorce or a separation, it was not open to her to raise issues on forfeiture.

The ratio of *Samarasinghe v. Samarasinghe* (*supra*) would not apply to the case before me since this is not a divorce action nor is it an action for judicial separation.

In any event, the learned Judges in *Samarasinghe v. Samarasinghe* (*supra*) did not differ from *Emelda Fernando v. Elaris Fernando* (*supra*), which preserved the common law right of a married women to sue her husband for restitution

It could thus be observed that the learned Judges in *Samarasinghe v. Samaasinghe* (*supra*) have not differed from *Fernando v. Fernando* (*supra*). So much for the common law-the judge made law on this issue.

Next I get on to advert to a stronger argument, which is founded in statute to afford *locus standi* to a married woman.

Section 18 of the Married Women's Property Ordinance, No 18 of 1923

Section 18 of the Married Women's Property Ordinance states as follows:-

"Every woman, whether married before or after this Ordinance, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme-sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

A stronger case for affording a married woman legal standing to sue her husband lies in Section 18 (1) of the Married Women's Property Ordinance which accords her *locus standi in judicio* in relation to civil remedies except a suit in delict.

It must be remembered that when the Plaintiff instituted this action against the husband in trust and declaration of title to movable property, the case was based on equitable title (trust) and common law title (declaration of title to movable property). The words "civil remedies" in Section 18 of the Married Women's Property Ordinance would include both an equitable relief such as trust and common law relief such as declaration of title.

I would recall the words of Tambiah, J. in *Emelda Fernando v. Elaris Fernando* (*supra*) where the learned Judge commented that the common law remedy of suing the husband at the instance of the wife has not been abrogated by the enactment of statutory provisions such as Section 617, and 618 of the old Civil Procedure Code.

In my view, Tambiah, J. must be taken to have had in mind even a remedy for trust in the words "common law remedies". In any event, as I said before, Section 18 of the Married

Women's Property Ordinance of 1923 which refers to civil remedies would encompass all civil remedies, one could conceive of including a cause of action based on trust.

Thus I conclude that Section 18 expressly permits a married woman to sue her husband for civil remedies notwithstanding the fact that they remain married to each other and the learned Additional District Judge was not in error when she answered Issue No. 41 in the affirmative and stated that the Plaintiff in this case had validly instituted this case against her husband on the five causes of action.

Section 23 (1) of the Married Women's Property Ordinance

Section 23 (1) was invoked by the Counsel for the Defendant-Appellant for the 1st time in appeal to contend that the Plaintiff must have moved court by way of summary procedure. Instead she initiated the action by plaint.

In *Jayewardene v. Jayewardene nee Pereira* (1980) 2 Sri L.R 114 the Court of Appeal considered the question whether a claim could be maintained under Section 23 of the Married Women's Property Ordinance to recover a dowry of Rs.10,000/- which was alleged to have been handed over to the Petitioner-wife at the time of her marriage and spent by the Respondent-husband during the marriage. The husband denied having received this money and the Counsel for the Respondent husband raised the preliminary objection that the wife was not entitled to claim the said sum under Section 23 of the Ordinance for the reason that the section is confined only to any question as to "title or possession of property" and not to any dispute where the question has first to be decided whether in fact a dowry in that sum was given. In other words the objection was that an action could be maintained under section 23 only if the property in dispute was traceable or identifiable.

Abdul Cader, J. (with Victor Perera, J. agreeing) citing cases decided under the corresponding English Law provision namely Section 17 of Married Women's Property Act 1882 held that the property in dispute should be identifiable or traceable before the Court makes an order.

The Court however did not express a view on the ambit of Section 23 of the Married Women's Property Ordinance. Is the District Judge's power to make such orders as "*he shall think fit*" completely unfettered? In the English courts two views have been expressed on the ambit of the corresponding section.

The first view is that the jurisdiction of the court over family assets is discretionary and transcends all rights whether legal or equitable and enables the court to make such orders as it thinks fit-see *Hine v. Hine* (1962) 3 All E.R. 345. This view was expressed clearly in *Jansen v. Jansen* (1965) 3 W.L.R. 875 when Lord Denning stated that the section "gives right where none before existed and gives a remedy where before there was none"- at p.882.

The view that has been found acceptable in the House of Lords, however, is the second view which is that the section does not give a judge the power to vary existing property rights but merely gives him the power to deal in a summary way with disputes relating to title and possession. The substance of this view is that section 17 is a purely procedural section which does not enable a court to confer any new substantive rights on either of the spouses. It merely provided a summary method of determining questions of title and possession between husband and wife-see *National Provincial Bank v Ainsworth* (1965) 2 All ER 472; (1965) 3 WLR 1; (1965) A.C.1175.

It is felt that the first view, though attractive because it vests in the court the kind of power which would enable it to effect a just and equitable solution in relation to property rights arising between husband and wife, cannot be supported for two reasons. Firstly it is difficult to contemplate that a court would have been vested with the power to alter existing property rights in summary proceedings. Secondly, if this view is accepted it makes a drastic inroad into the Common Law rights of property. Under well established principles of construction, an interpretation which has this effect ought not to be adopted unless the enactment clearly bears that meaning-see *Tarr v. Tarr* (1972) 2 All E.R. 295.

In any event the power given under Section 23 cannot be exclusive. A summary procedure may be incapable of resolving equitable disputes such as a plea for a

declaration of trust and in the circumstances as the Section itself states, it is only permissive in that a party is at liberty to choose this procedure at his election, because the section contains these words “.....*may apply by petition*.....”. This shows that Section 23 is not an exclusive avenue for vindicating title and possession. Even the Court of Appeal has asserted that this procedure is not available when the property sought to be vindicated has lost its identity- *Jayewardene v. Jayewardene nee Pereira* (supra). It is noteworthy that some causes of action of the Plaintiff were based on recovery of money which were not traceable and identifiable proceeds. Therefore the argument of Counsel for the Defendant that the Plaintiff must have used only summary procedure fails. The adoption of a regular procedure raises no jurisdictional issue and one need not go into the question of a patent or latent want of jurisdiction which I referred to at an anterior part of this judgment.

So in a nutshell I would hold that a married woman enjoys *locus standi in judicio* to sue her husband in four ways in order to obtain a proprietary decree.

1. She enjoys the common law right to institute action against him-see *Emelda Fernando v. Elaris Fernando* 63 N.L.R 416-Tambiah, J; *Premanie Samarasinghe v. Leelaraja Samarasinghe* (1990) 1 Sri L.R. 31.
2. Section 18 of the Married Women’s Property Ordinance gives a statutory right to a married woman to sue anyone including her husband.
3. Section 615 of the CPC enables a married woman to claim restitution of property but the relief would be granted only in a divorce action or judicial separation.
4. Section 23 (1) of the Married Women’s Property Ordinance enables a married woman to move Court by way of a summary procedure. But this presupposes the existence of an identifiable and traceable property. This is however not an exclusive procedure.

All these modes of vindication are alternative in that it is open to a married woman to choose anyone of them to reclaim her property subject of course to the caveat that as

between (1) and (3) there has to be an election on her part as to which remedy would be sought.

In the circumstances I hold that the learned Additional District Judge of Colombo arrived at the right determination when she concluded that the Plaintiff in this case enjoyed the standing to institute this action against her husband during the subsistence of the marriage, as the sources of that jurisdiction on the facts and circumstances of this case lie in common law and statute namely Section 18 of the Married Women's Property Ordinance. This was the only question of law around which this appeal was argued and while affirming the judgment of the District Court of Colombo dated 27.09.2000, I proceed to dismiss the appeal.

JUDGE OF THE COURT OF APPEAL