BASL NEWS

APRIL, 1991

NEWSLETTER OF THE BAR ASSOCIATION OF SRI LANKA

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PROPOSED REFORMS TO THE LAW . . .

DIVORCE AND RELATED ISSUES

Justice Ministry seeks BASL views on Committee Recommendations

We publish in this issue the proposed reforms to the law relating to divorce and related issues as recommended to the Government by a Committee consisting of Prof. Mrs. Savithri Goonesekera, Dean of the Faculty of Humanities and Social Sciences, Open University, Mrs. Dhara S. Wijayatilake, Secretary to the Minister of Legal & Prisons Reform, Ms. Sharya de Soyza, Dean of the Faculty of Law, University of Colombo, Ms. Dilhara Amerasinghe, Assistant Secretary, Office of the Minister of Legal & Prisons Reform. The proposals were forwarded to the Bar Association of Sri Lanka by the Secretary, Ministry of Justice, inviting our views. The BASL, in turn, invites the views of its members, which should be sent to the Secretary, BASL before 31st May, 1991. We give below the Committee's recommendations :

DIVORCE

1. Grounds for Divorce

The Government has decided to introduce legislation that will recognise seven years' separation of the spouses as a ground for divorce under the General Law. This decision is a response to the Supreme Court ruling in *Tennekoon* v. *Tennekoon* (1986) 1 Sri. L. R. 90. The Supreme Court decided that an amendment to section 608 (2) (b) of the Civil Procedure Code did not introduce this ground as an additional ground for divorce.

The present grounds for divorce as contained in section 19 of the Marriage Registration Ordinance are founded on the concept of matrimonial 'fault', i.e. matrimonial relief in the form of divorce is granted on the basis of the matrimonial fault of one party. This concept is not indigenous to Sri Lanka and was received into our legal system from Roman Dutch Law. It has been rejected or modified many years ago in Western European legal systems where divorce laws had been greatly influenced by this concept.

The ground of seven years' separation of the spouses that government seeks to introduce is not a condition dependant on the fault of the spouses but a condition consequent to the 'irretrievable breakdown' of a marriage. Several legal systems in other countries do recognise the concept of irretrievable breakdown of marriage in defining the grounds on which a marriage can be dissolved. The concept of breakdown of marriage moreover is not one which is alien to our law, for the indigenous law pertaining to divorce applicable in the pre-colonial period (now referred to as Kandyan Law) permitted dissolution of marriage *inter alia* by mutual consent. Early legislation enancted in 1870 recognised mutual consent and 'inability to live happily together as evidenced by one year's separation' as grounds for divorce. These grounds are recognized even today. The Muslim law too permits divorce by consent. It is not considered advisable to retain in our law a mixture of grounds based on the matrimonial fault concept while introducing a new ground based on the breakdown of the marriage concept since it is well recognised that these two concepts represent conflicting philosophies in regard to the basis of divorce.

One proposal for reform is that the grounds of divorce be founded on the marriage breakdown concept and the present matrimonial fault grounds be recognised as **evidence** of the breakdown of the marriage. A similar approach has been adopted by the modern English law and certain other legal systems, that have moved from the Western European matrimonial fault concept to the marriage breakdown concept.

Therefore the sole ground for divorce should be irretrievable breakdown of the marriage as evidenced by :

(a) adultery,
(b) malicious desertion,
(c) two years' continuous separation of the spouses with mutual consent to dissolve the marital relationship,
(d) five years' separation.*

*(It is considered that a period of five years' separation is sufficient evidence of the breakdown of the marriage).

Another proposal for reform is that mutual consent should be recognised as an alternative method of obtaining divorce (i.e. without a period of separation). This view is based on discussions with N.G.O. groups and family counsellors working with spouses with marital problems as well as women lawyers with a family law practice. It is felt that such a ground will meet the equities of a case where a marriage has irretrievably broken down and parties wish to dissolve the marriage (for reasons such as homosexuality of the man, deception etc.) without a waiting period. The present emphasis on a waiting period would prevent that, and continue to encourage filing of a plaint on false grounds e.g. (a) & (b), and result in corruption in the initiation of adversarial divorce proceedings. This would undermine respect for the law.

Statistics on the Kandyan Law on divorce do not suggest that mutual consent and the ground of one year's separation has undermined the marriage relationship in the Kandyan Provinces. This factor was also surfaced in the Marriage and Divorce Commission Report (1959).

2. Welfare of Children and Spouses

The shift in the law towards the breakdown concept would necessitate certain supportive provisions to ensure justice and equitable treatment for the individuals who belonged to the original family unit. It is imperative that the legal system strives to cushion them from the adverse effects of a situation where an existing family unit is dissolved.

(i) Custody of Minor Children

Where the custody of children is in issue a court order on custody and the access rights of the non-custodian parent should be **mandatory** for the granting of a divorce. The sole criterion for award of

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OBITUARIES

We report with regret the death of the following member and offer our sympathies to his family :

Mr. G. T. Samarawickrema, *Q.C.*
((Retired Judge of the Supreme Court).

ANNOUNCEMENTS

LIFE MEMBERSHIP IN INSTALMENTS

The Constitution of the Bar Association of Sri Lanka was amended at a SPECIAL GENERAL MEETING OF THE BAR COUNCIL held on Saturday the 16th of March 1991 at the BASL Conference Hall. The following Resolution proposed by Mr. Desmond Fernando, then President of the BASL was unanimously passed.

Resolution 1:- proposed from the Chair by the President on behalf of the Executive Committee (on the recommendation of the Constitutional Amendments Committee).

"THIS HOUSE RESOLVES that the Constitution of the Bar Association of Sri Lanka be amended as follows:-

(1) LIFE.MEMBERSHIP

The following provisio be added to Article 3:2(2)(b):-

PROVIDED that any member paying on or after the 1st October 1990 the subscription fixed for a life member (ordinary) by an initial payment of not less than twice the annual subscription or fee payable by an ordinary member and the balance by monthly instalments of not less than Rs. 200/= each payable on or before the 15th day of every month commencing the 15th day of the next month shall be deemed to have paid in full such subscription for a life member (ordinary) on completion of the said payments.

PROVIDED FURTHER that if any such member having commenced paying the instalments makes any default in due payment of any one of the said instalments, the payments made by him shall be set off against the annual subscriptions or fees payable by him as an ordinary member and shall forfeit the benefit of the concession granted to pay the subscription of a life member (ordinary) by instalments.

PROVIDED ALSO that any member paying the initial payment shall be exempt from the payment of Annual Subscription or fee during the period of payment of such instalments and shall be entitled to all the rights and privileges of any ordinary member if he is not in arrears of subscription.

(2) ORDINARY MEMBERSHIP - No subscription if Oaths taken after 30th September. The following provisio be added to Article 5:1:-

"PROVIDED that an Attorney-at-Law enrolled on or after the 30th September of any calendar year paying an annual subscription or fee for the next year on or before the 15th day of December of that calendar year shall be deemed to have paid the annual subscription or fee for that calendar year and also for the succeeding year for all purposes."

Resolution 2:- was to be proposed by the Kandy Bar Association in respect of PROVINCIAL BAR FORUM but at the request of the President the Kandy Bar withdrew the same as it needed careful consideration by all the Branches.

IBA Section on Business Law 10th Biennial Conference in HK from 29.9.1991 to 4.10.1991

The 10th Biennial Conference organised by the International Bar Association Section on Business Law will be held in Hong Kong from the 30th September to 4th October 1991.

If you register with IBA London office before 1st July 1991 the registration fee will be -

for SBL Members - £ 375

For IBA Members - £ 400

For IBA Members with reduced membership fees - £ 320

For a non member - £ 450

For a Guest - £ 75

SBL Committees and sub-Committees presenting programmes at this conference include the following :-

(1) Procedure for settling disputes

(2) Banking Law

(3) Business Organisations

(4) Insurance

(5) Investment Companies, Funds and Trusts

(6) Intellectual Property and Entertainment

(7) Taxes

(8) Labour Law

(9) International Computer and Technology Law

For further details please contact the BASL.

Mr. Desmond Fernando, *P.C.*, Deputy Secretary-General of IBA, when contacted by *BASL News*, said that Sri Lanka is one of the countries with reduced membership fees.

Mr. Fernando also has some good and pleasant news for juniors in his own 'Santa Claus' style :

About 10 members of the BASL who are below the age of 35 and who specialise in Commercial Law may get free passage to Hong Kong for SBL Conference in September/October 1991. The Sri Lanka Bar is fortunate to have a leader like Mr. Desmond Fernando, *P.C.* who, having worked hard for the BASL for the last 2 years, has now moved to the international level to help our members.

Young learned members of the Bar are invited to send in their applications. If you were not lucky to win two air tickets at the Law Dinner Dance, why not try your luck now?

FOR YOUR DIARY

The Bar Council of the BASL has fixed the following dates for the monthly **Bar Council** Meetings :-

04th May 1991
29th June
27th July
31st August
28th September
26th October
30th November
14th December
25th January 1992
29th February 1992
28th March 1992

The **Executive Committee** will be meeting at 6.00 p.m. on the following dates:-

10th May 1991
14th June
12th July
16th August
06th September
11th October
15th November
06th December
17th January 1992
14th February
13th March.

LAW GAZETTE

Please send early your subscription of Rs. 250/- for the next five issues.

Your contributions, by way of articles, are *also* welcome!

*

JUDGEMENTS TO BE CITED

1. INDUSTRIAL LAW - 1

C.A. No. 519/87

L.T. No. 1/22565/83

Quantum of compensation and gratuity which can be awarded by a Labour Tribunal - circumstances which entitle an order for interest on those awards.

Rajes Perera v. Sri Lanka Cement Corporation

Decided on 08.02.1991.

The Employer filed this appeal against the order dated 25-11-1987 made by the learned President of the Labour Tribunal. By that order the learned President held that the termination of the services of the Workman-Respondent was baseless and unjustified. He awarded ten years' salary as compensation and a gratuity of one month's salary for each year of service. The compensation and gratuity awarded are to be computed on the terminal monthly salary of the Workman-Respondent.

S. N. Silva, J. who decided the appeal held as follows :-

". . . The Workman-Respondent in giving evidence before the Labour Tribunal stated that she was not seeking reinstatement but was claiming compensation as an alternative to reinstatement of seven years' salary. She further stated that she was making this claim on the basis of the decision of the Supreme Court in the case of *Cyril Anthony* v. *Ceylon Fisheries Corporation* - S.C. 57/1985, S.C. minutes of 6-3-1986. In that case the Labour Tribunal dismissed the application after inquiry. This Court set aside the order and held that the termination was not justified. An order was made by this Court awarding one year's salary as compensation. In appeal the Supreme Court held that the compensation awarded is "grossly inadequate" and ordered the employer to pay seven years' salary. The employer was also ordered to pay half month's salary for each year of service as gratuity.

"The Workman-Respondent in her evidence claimed back wages for a period of nine years. The separate claim made for back wages in addition to compensation is clearly untenable. Soza, J. in the case of *Associated Newspapers of Ceylon Ltd.* v. *Jayasinghe* 1982 2 S.L.R. p.595 (at p.600) held that a Labour Tribunal is not entitled to make a separate award of back wages in addition to compensation. Therefore the learned President has acted correctly when he refrained from making a separate award for back wages.

"The Workman-Respondent in her evidence also claimed a gratuity at the rate of half month's salary for each year of service.

"Thus it is seen that the compensation and gratuity ordered by the learned President is in excess of even the amounts claimed by the Workman-Respondent. In the case of *Ceylon Transport Board* v. *Wijayaratne*, 77 N.L.R. (p.481) Vythalingam, J. made an exhaustive analysis of the previous decisions with regard to the award of compensation in Sri Lanka and in other jurisdictions. Upon this analysis His Lordship set down certain important observations with regard to the criteria that should guide an award of compensation.

". . . It appears that the said judgment of Vythalingam J. was not cited in the later case of *Cyril Anthony* v. *Ceylon Fisheries Corporation* (Supra) relied upon by the Workman-Respondent. If it was cited the matter would have been considered further before awarding compensation of seven years' salary, being more than twice the maximum as stated by Vythalingam, J. A consideration of the two judgments of the Supreme Court referred above and the several judgments cited by Vythalingam, J. clearly demonstrate the need for legislative intervention in this regard. It would be most useful to Labour Tribunals and the Appellate Courts if the maximum that may be awarded as compensation is laid down by statute in relation to easily discernible criteria such as years of service and monthly salary.

"In view of the later judgment of the Supreme Court relied upon by the Workman-Respondent I cannot hold that the maximum that could be awarded as compensation should be three years' salary as observed by Vythalingam, J. There is a clear precedent for an award of seven years' salary as compensation. . ."

". . . I am of the view that the appropriate compensation should be in the region of five years' salary. However, considering that she was under interdiction from 14th November, 1977 until the letter of termination was sent on 5th November, 1982, I am of the view that further amount of two years' salary should be added to the amount to be awarded as compensation. In the result the amount awarded as compensation should be seven years of the terminal salary of the Workman-Respondent.

"The learned President of the Labour Tribunal has ordered a gratuity of one month's salary for each year of service, which is in excess of the claim of the Workman-Respondent. The Workman-Respondent, as noted above, has claimed only half month's salary for every year of service as gratuity. This claim is in accord with the amount normally ordered as gratuity and is also consistent with the rate prescribed in section 6 of the Payment of Gratuity Act No. 12 of 1983.

"For the reasons stated above I affirm the finding of the learned President of the Labour Tribunal that the termination of the services of the Workman-Respondent is unjustified. However, I set aside the orders for compensation and gratuity. I substitute therefor the following orders:

(i) For compensation to be paid by the Appellant to the Workman-Respondent of seven years' salary.

Rs. 2,380 x 12 x 7 = Rs. 199,920/-.

(ii) For gratuity at the rate of half month's salary for every year of service.

Rs. 1,190 x 14 = Rs. 16,660/-.

"In the written submissions filed on behalf of the Workman-Respondent a claim has been made that interest be ordered on the compensation and gratuity awarded. The judgment of this Court in the case of *Somerville & Co. Ltd.* v. *O. F. Bakelman*, C.A. 170/83- *Minutes of 27.11.1987 has been cited in* support. In that case the Court ordered the payment of interest at 12% per annum on the amount awarded as gratuity. The gratuity and the interest was to be paid to the widow of the workman. The workman had died on the day the appeal was filed and the widow was substituted as the respondent. There is no statutory provision which entitles a workman in whose favour an appeal is decided to the receipt of interest on the amounts awarded.

"In my view the payment of interest should be ordered only if it is found that the appeal has been filed without any basis for the purpose of delaying payment. Interest may also be ordered against an employer-appellant who has failed to show due diligence in prosecuting his appeal. In this case it could not be said that the appeal has been filed without any basis. The amounts awarded as compensation and gratuity have been reduced by this judgment. In the circumstances I refuse the claim for interest. . . "

(A copy of this judgment can be obtained on payment of Rs. 30.00, quoting ref: 1/4/91).

2. INDUSTRIAL LAW - 2

The termination of employment of an employee who had an immense responsibility to obtain the best results economically for his employer and who fails to do so is justified.

Back wages cannot be awarded separately when reinstatement is refused but back wages can be taken into account for computing the compensation.

C.A. Appeal No. 521/81

L.T. 17/5612 - 17/1726

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JUDGEMENTS TO BE CITED

Pfizer Limited v. Thevathasan

Decided on 28.3.1991.

Thevathasan the Applicant-Respondent was employed in a managerial position under the Employer-Appellant (Pfizer Ltd.) His services were terminated on 5.8.1976. After an inquiry the learned President Labour Tribunal made order refusing reinstatement but held that the termination was unjustified and awarded backwages for three years, compensation, gratuity and costs.

The Employer-Appellant had laid serious charges against the Respondent on the footing that he was incompetent and grossly negligent in the performance of his duties.

The Employer had complained that he showed special favours to a particular printer and violated the basis of fair competition among those dealing with the company. Specifically it was sought to prove that he had caused financial loss to the company by his deliberate selection of tenders on unfavourable terms to the detriment of the company.

The learned President in his order has sought to exculpate the respondent from the charge of accepting unfavourable tenders of the particular Press on the footing that he had exercised his discretion. Having observed that the procedure adopted was not the most economical to the appellant, he however laid the blame on the weak procedure adopted at the acceptance of tenders.

Palakidnar, J. who heard this appeal decided as follows:-

". . . It was strenuously urged in appeal that the learned President has misdirected himself on the law primarily in shifting the onus of proof on the employer to disprove the facts which in fact should have been proved by the applicant himself. . .

"The applicant's duties called for the exercise of a wise discretion in the making of purchases to obtain the maximum benefit to the company in a competitive market. A high degree of trust and confidence was reposed in him. Letter R24 from the administrative director contained observations with regard to tender procedure and acceptance by the applicant. They were a clear indictment on the use of his discretion. Letter R24 was a further indictment that proper care was not taken in purchasing procedure.

"R25 and R26 reveal the findings of the domestic inquiry wherein the applicant was found guilty of charges set out therein. In R26 the managing director had stated that they had no longer any confidence in the applicant. A detailed investigation by accountant Nagarajah borne out by his evidence reveals that there was fraudulent and dishonest conduct on the part of the applicant.

"On the question of these lapses it is notable that the learned President has taken an ambivalent attitude. Having considered the evidence in detail he comes to the conclusion that the applicant has undoubtedly given special preference to Mortlake Press but there is insufficient evidence to decide that he did so intentionally without any reason.

"I cannot agree that the learned President has correctly valued the implication of the manner in which the applicant handled the tenders. Having observed that he was so weak that he was unable to make independent decisions, he adopts his own reasoning, which is very difficult to accept, as a proper evaluation of the applicant's eligibility for continued service in the responsible position that he held.

"The learned President himself in not ordering reinstatement has rightly taken the view that he did not qualify for such relief. A person in the position of the applicant had an immense responsibility to obtain the best results economically for his firm. This clearly has not been done. In the circumstances I hold the view that the termination was justified.

"I was referred to the case of *Boston Deep Sea Fishing Ice Company* v. *Ansel,* 39 LR Chancery Division 339. . . Frindman in *Modern Law of Employment,* page 482, said that as long as the employee's conduct is justifiable his motive in so acting is immaterial.

"*Halsbury's Laws of England* Vol. 16 4th Edition 439 states that if good ground existed, justification for dismissal can be shown by proof of facts subsequent to dismissal. Loss of confidence has been held to justify termination in varied situation. In *Jubilee Mills* v. *Bacorao Chintaman* 1954(1) LIT 807 it was held that where employees were reasonably suspected of being responsible for the shortages, permission was granted to dismiss them.

"With regard to the award of backwages it was held that compensation could be taken into account for backwages lost but the Tribunal is not entitled to make a separate award where reinstatement has been refused. *Associated News Papers of Ceylon* v. *Jayasinghe* (1982) 2 S.L.R. 595.

"I therefore hold that the amount awarded as backwages should be deleted. In the circumstances of this case I hold the view that an *ex-gratia* payment of Rs. 50,000/- would meet the ends of justice. All other amounts are therefore deleted. The appeal is allowed and the order is set aside and the sum of Rs. 50,000/- is to be paid to the Employee-Respondent in full settlement of all claims. There will be no costs of this appeal."

(A copy of this judgment can be obtained on payment of Rs. 20.00, quoting ref : 2/4/91).

2 A. INDUSTRIAL LAW - 3.

Holding a second disciplinary inquiry when the Disciplinary Rules do not provide for that -

Pl. see (6) below.

3. INHERENT POWERS OF COURTS

When there is no express provision in the Civil Procedure Code the court has inherent power to adopt such procedure as if necessary. It can invent a procedure as may do substantial justice and shorten needless litigation.

C.A. Application No. 180/90 (Rev.)

D. C. Colombo No. 14697/L

Naomi Christine De Silva v. Manik De Silva

Decided on 23.01.1991.

The plaintiff-respondent to this petition filed an action in the District Court of Colombo for declaration of right to possession of lots 4, 5, and 6 of an estate. She also prayed that her husband M. S. de Silva should be prevented from entering the said lots by an injunction. The learned trial Judge made order enjoining the defendant's husband to desist from entering the said lots.

The defendant sought to have this enjoining order vacated and also filed answer to the plaint. The defendant claimed to be in possession of the said lots on behalf of his mother and his wife the plaintiff. He did not have any titular right to these lots which were vested in the plaintiff and her mother-in-law by the Land Reform Commission.

Palakidnar, J. (with Senanayake, J. agreeing) held as follows:-

"Learned Counsel for the petitioner submitted that the enjoining order had the effect of granting the relief asked for in the plaint by an *ex parte* order of Court. The question of the defendant's right to be in possession as agent was also tendered for consideration. But the scope of this petition is limited to a review of order marked 'P' dated 18.01.1990 made by the trial Court fixing the inquiry and trial together on 13.03.1990. It would be pertinent to note that this decision to do so was acquiesced by the defendant as borne out by three journal entries successively prior to the order complained of. On 18.01.1990 the issues were settled showing that the learned trial Judge took a course which in his view could expeditiously dispose of the whole matter in dispute. If the inquiry was taken up first then substantially the same matter would be inquired into on the points of dispute raised.

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JUDGEMENTS TO BE CITED

"We do not think that any prejudice would be caused to the petitioner by the course adopted by the Court. In fact it would be an effective and expeditious method of disposal of the whole matter which should be the proper manner to decide the dispute between the parties.

"Justice Thambiah in *Seneviratne* v. *Abeykoon* 2 S.L.R. 86 page 1 cites with approval the comment of Sarker Code of Civil Procedure (Volume I at page 842) stating *"where a contingency happens which has not been anticipated by the power of the Civil Procedure Code and therefore no express provision has been made in that behalf the Court has inherent power to adopt such procedure, if necessary to invent a procedure as may do substantial justice and shorten needless litigation."*

"It should be the aim of trial Judges to "invent" if need be procedures to effectively and conclusively decide contentious matters. If the petitioner's plea were to be allowed it would undoubtedly lead to a duplication both expensive and protracted of the same matter for inquiry and trial.

"Having regard to the scope and ambit of the dispute we are of the view that the learned trial Judge has adopted the proper course in the circumstances and dismiss the petition with costs fixed at Rs. 1050/-".

(A copy of this judgment can be obtained on payment of Rs. 18.00, quoting ref: 3/4/91).

4. LAST WILL

It is only where the propounder of the Last Will discharges his burden that the onus is thrown on those who oppose the Will.

C.A. Application No. 375/88 (Rev.)

D.C. Colombo No. 29797/NT.

F. F. Shahul Hameed v. M. N. Deen and others

Decided on 31.1.1991.

This is an application by way of Revision to Revise the judgment of the learned District Judge of Colombo dated 10.02.1987, refusing the Petitioner's application to add her as a party to the proceedings and making the Order Nisi Absolute, thus granting Probate of the Last Will in favour of the Respondents.

Being aggrieved by the said judgment, the Petitioner appealed to the Court of Appeal, but the notice of appeal and the petition of the appeal were signed by the Petitioner and not by her Registered Attorney-at-Law. The appeal was rejected on the ground that the appeal (Notice and Petition) were not signed by the Attorney-at-Law.

The Petitioner had therefore come to this Court by this application for Revision of the said judgment of the learned District Judge, on the ground that the learned District Judge did not act in terms of Sections 533 and 534 of the Civil Procedure Code.

Anandacoomaraswamy, J. decided the matter as follows:-

". . . The learned Counsel for Respondents submitted that the learned District Judge rightly entered Order Absolute in terms of Sections 533 and 534 of the Civil Procedure Code on the basis that there were no grounds of objection to the application for the Court to frame issues and to try them, and that the *prima facie* proof of the material allegation of the petition had not been rebutted. I do not agree. When a will is challenged, the burden of proof is on the party who propounds it.

"The learned Counsel for the Petitioner relied on the decision in the case of *De Silva* v. *Seneviratne* reported in (1981) 2 Sri Lanka Law Reports page 7, where the Court of Appeal (Ranasinghe, J. with Victor Perera, J. agreeing) held *inter alia* "The propounder of a Last Will must prove that the document in question is the act and deed of a free and capable testator; that the testator was not only aware of, but also approved of, the contents of the said document; that the testator intended the document to be his Last Will; that the said document had been duly executed according to law.

"If there exists facts and circumstances which arouse the suspicion of the Court in regard to any matter which has to be proved by the propounder then it is the duty of the propounder to remove all such doubts and prove affirmatively the various elements which must be proved by him and the Court should then scrutinize the evidence led by the propounder with jealousy and should pronounce the alleged Last Will to be valid only if its conscience is satisfied in regard to the said matters. As to whether the evidence so placed before the Court is such as to satisfy the conscience of the Court is ultimately a question of fact for the trial Judge.

"It is only where the propounder of the Will discharges his burden that the onus is thrown on those who oppose the Will. In the case of *Meenadchipillai* v. *Karthigesu* reported in (1957) 61 New Law Reports page 320, the Supreme Court (Sansoni, J. with Weerasooriya, J. agreeing) held *inter alia "where an application for probate of a Will is resisted and circumstances exist which excite the suspicion of the Court, whatever their nature may be, it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the documents, and it is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the Will."*

"The Petitioners-Respondents have not discharged their burden and therefore the learned District Judge was clearly wrong in making the Order Nisi Absolute.

"For the foregoing reasons I set aside the judgment of the learned District Judge dated 10.02.1987 and send this case back to the District Court, Colombo, for proper inquiry in terms of Sections 533 and 534 of the Civil Procedure Code, before another District Judge.

"The application of the Intervenient-Petitioner-Petitioner is accordingly allowed with costs."

(A copy of this judgment can be obtained on payment of Rs. 22.00 be quoting ref: 4/4/91)

5. TENANCY

Ejectment decree entered against the husband of the tenant - the tenant cannot seek any order until the resistance to the Fiscal executing the Writ.

C.A. Application No. 233/89

D.C. Mount Lavinia No. 593/ZL

Suranganie de Zoysa v. N. H. Gunawardene and another.

Decided on 15.2.1991.

This is an application by way of Revision to Revise the order of the learned District Judge Mount Lavinia dated 16th March, 1989, refusing to hold an inquiry and refusing to permit the Petitioner an opportunity to lead evidence to establish that she was in fact a tenant.

Due to serious matrimonial problems between the Petitioner and the Defendant, the Defendant instituted an action for divorce against the Petitioner in the District Court of Mount Lavinia case No. 1926/D.

The action by the Plaintiff against the Defendant was filed on or about 25th August, 1981 and the consent judgment was entered on 3rd November, 1983. On or about 24th May, 1984 the Plaintiff applied for a Writ to eject the Defendant. The Petitioner knew about it and made an application on the 7th August, 1985 to be added as a party and the learned District Judge on or about 25th August, 1986 added her as a party and fixed the subject matter of the Petitioner's affidavit dated 7th August, 1985, for inquiry. On 21st January, 1988 the learned District Judge made an order holding *inter alia* that the Court was entitled to inquire into the main application set out in the petition of the Petitioner. On 23rd Septem-

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ber, 1988 the learned District Judge made an order and re-fixed the matter for further inquiry. On an objection by the Defendant no inquiry was held and no evidence was led. It is from this order that the Petitioner filed this application praying that the said order be revised/vacated/set aside.

Anandacoomaraswamy, J. (with Wijetunga, J. agreeing) held:-

". . . The main ground on which this application is based is that she is the tenant of the premises in suit and that she is not bound by the decree entered in favour of the Plaintiff against the Defendant and that she should not be ejected from the premises in suit.

"This action between the Plaintiff and the Defendant is on the basis of the possession of the premises in suit by a non-occupying tenant. The Plaintiff prayed *inter alia* for the ejectment of the Defendant and to restore possession to the Plaintiff. It is quite clear that the Defendant is not in occupation of the premises in suit, and therefore the question of ejecting the Defendant does not arise. The decree is to eject the Defendant and not anybody else, and therefore Writ of ejectment cannot issue and that too to eject anybody other than the Defendant. If therefore the Petitioner is in occupation the question of ejecting her does not arise, unless and until the Court decides that she is not holding the property on her own right but under her husband. This decision can only be made after the Fiscal reports resistance to the execution of the Writ of ejectment and after due inquiry by the Court.

"The Petitioner fears that the Fiscal can eject her, as there have been instances where a party has obtained judgment against one person and made use of the Fiscal to eject another person, and if that happens she will suffer grave and irreparable harm, loss and damage, by the wrongful exercise of the Fiscal's powers. Court presumes that the Fiscal will act lawfully and within his powers. Court cannot presume that the Fiscal will act unlawfully or beyond his powers, but if he does so, he does at his own risk.

"The question whether she is the tenant of the premises in suit and therefore holding the property on her own right or whether the husband being the tenant is bound to maintain the premises in suit for the benefit of his wife (Petitioner) does not arise at this stage. It has to be inquired by Court only after there is resistance to the execution of the Writ of ejectment.

"Both the Plaintiff and the Defendant knew that the Petitioner and her children were in occupation of the premises in suit and therefore she should have been made a party to the action, or at least notice of the action should have been issued to her, for the proper adjudication of the matters in issue. Having failed to do so, her right to occupy the premises in suit can only be inquired into, after the Fiscal reports resistance to the execution of the Writ of ejectment, as the decree had already been entered.

"For the foregoing reasons the learned District Judge rightly refused to inquire into the Petition of the Petitioner dated 7th August, 1985 and we accordingly dismiss the Petitioner's application with costs."

(A copy of this judgment can be obtained on payment of Rs. 20.00 quoting ref: 5/4/91)

6. WRITS

Employer attempting to hold a second disciplinary inquiry - Disciplinary Rules did not give the employer such right - such a course of action is untenable and not within the jurisdiction.

C.A. Application for Writ No. 342/87

A.K. Cuttilan v. Ceylon Hotels Corporation and others.

Decided on 23.1.1991.

The Petitioner joined the services of the 1st Respondent, a Statutory Corporation with rights to sue and be sued as the Ceylon Hotels Corporation, in 1986, as Receptionist Clerk. After various stages of promotion he was appointed Manager and has served in this capacity at Madawachchiya, Pussellawa and Hanwella Rest Houses.

By letter dated 07.02.1986 the employer interdicted the Petitioner from services. A charge sheet dated 04.03.1986 containing 8 charges was served on the Petitioner and he was asked to quit his official quarters. The inquiry against the Petitioner commenced about 05.05.1986 and was concluded on 04.09.1986, but the verdict was delayed. On the Petitioner complaining about the undue delay he was informed by the First Respondent Corporation by letter dated 26.01.1987 that a fresh inquiry would be held in relation to the charges already framed. The Petitioner in this application sought a Mandate in the nature of a Writ of Certiorari to quash the decision of the 2nd Respondent to refer the charges to the 3rd Respondent and for a Mandate in the nature of a Writ of Prohibition on the Respondents from holding or proceeding with the inquiry.

"The Petitioner protested at the attempt to hold a second inquiry and wanted the reasons for this new development. The 2nd Respondent replied stating that he was acting in terms of the Establishments Code, and that he was empowered to quash the proceedings of the disciplinary inquiries.

"The case for the Petitioner is that the Disciplinary Rules framed by the First Respondent Corporation did not vest the alleged powers in the 2nd Respondent to act in the manner alleged by him and that these being statutory provisions governing disciplinary procedure, the 2nd Respondent's allegations had no legal basis. A copy of the Ceylon Hotels Corporation Disciplinary Rules was marked "P17".

Anandacoomaraswamy, J. (with Wijetunga, J. agreeing) held as follows:-

". . . In the present case a disciplinary inquiry was initiated and a person was appointed to hold the inquiry. After several days of inquiry, which commenced by about 05.05.1986, it was concluded on 04.09.1986. The verdict was delayed. Upto the stage of concluding the inquiry the aforesaid Rules had been complied with, but thereafter the Respondents did not comply with any of the Rules. Instead the 2nd Respondent attempted to hold the second inquiry, purporting to act in terms of the Establishments Code and appointed the 3rd Respondent to hold the Second inquiry. We are of opinion that the 2nd Respondent was not empowered to quash the proceedings of the disciplinary inquiry and to act in terms of the Establishments Code, as we find no provision in the Disciplinary Rules for the 2nd Respondent to act in the manner alleged by him and that these being statutory provisions governing Disciplinary Procedure, the 2nd Respondent's allegation had no legal basis. The Disciplinary Rules framed by the 1st Respondent Corporation did not vest the alleged powers in the 2nd Respondent.

"As the verdict was delayed after the conclusion of the inquiry, the Petitioner through his Union (Jathika Sevaka Sangamaya) obtained a copy of the order, a copy of which is annexed marked "P15". The Respondents do not deny that "P15" is the order acquitting the Petitioner. On the face of the order marked "P15" acquitting the Petitioner the course of action taken by the 2nd Respondent is untenable and not within his jurisdiction.

"For the foregoing reasons we allow the Petitioner's application".

(A copy of this judgment can be obtained on payment of Rs. 22.00 quoting ref: 6/4/91)

NOTE: The purpose of this column is to assist BASL members with information on useful unreported judgements available to those who require them. Those wishing to have copies by post should send a self-addressed stamped envelope with payments by cheque crossed "A/c Payee Only" and made out to the Bar Association of Sri Lanka. Requests for copies must state the reference number indicated for each judgement. Members are also invited to send copies of unreported judgements in Appeals which will be useful to our Members for publication in this column. – Ed.

Divorce & Related Issues : Proposed Reforms

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custody should be the best interests of the child. All applications for interim custody **pending** a divorce should be dealt with by the same court hearing the divorce application. The Judicature Act already provides for such a procedure though it does not appear to be used very often. Custody pending divorce is even adjudicated in the Court of Appeal in habeas corpus proceedings. The court hearing a divorce case should give the issue of custody priority and ensure that appropriate arrangements have been made for the care of minor children.

Applications for variations of custody orders **after** a divorce should be made in the same court to ensure that the earlier records and information are available to the court deciding the issue. If this is not possible arrangements should be made for access to earlier records.

(ii) Financial Provision

The shift in the law towards breakdown of the marriage should be reflected in the law on financial provision for family members after divorce. The present statutory law reflects the marriage breakdown rather than the matrimonial fault concept in its provisions on financial support. However there are gaps in the law which should be the focus of reform.

(A) Financial provision for spouses and children

The Court should be required to make an order regarding financial provision for spouses and children in all cases where a marriage is dissolved by divorce. Guidelines should be spelled out in the legislation but the court should have an overriding discretion to make a just and equitable settlement. The current provisions in the Civil Procedure Code do confer such a jurisdiction on the courts.

The present law provides only for financial support during the lifetime of a former spouse/father, unless a property settlement is made in the divorce decree. This operates as a hardship in the case of women and children. The Wills Ordinance makes no allowance for 'family provision' so that a divorced woman and her children may receive nothing after the death of a former spouse/father. The concept of family provision on death should be introduced by restricting freedom of testation, under the Wills Ordinance. The concept of restricting freedom of testation in the interests of next of kin and close family members is found in indigenous Sinhala Law and Muslim Law.

Maintenance and financial provision for children should be treated as separate from the concept of financial provision for the spouse, since parents have a continuing legal responsibility in this respect, which differs considerably from the limited responsibility to make financial provision for a former spouse.

(B) Distribution of Matrimonial Property/Assets

The Court must be required to make an order regarding the distribution of matrimonial property, in all cases where a marriage is dissolved by divorce.

(a) General Concepts

An order concerning the distribution of matrimonial property or assets should take into consideration the period of the marriage and the contribution of both parties to the common establishment. Equitable distribution of matrimonial property and assets held during the marriage should be the aim of the Court. Adequate recognition should be given to any contribution made by either spouse for the economic benefit of the other spouse or the family unit, and any disadvantages incurred, such as giving up a promising career after marriage.

(b) Matrimonial Property defined

Matrimonial property should be defined as assets and property belonging to the spouses at the date of the order for divorce or separation provided it was acquired otherwise than by gift or on succession from a third party before or during the marriage. A matrimonial home in which the family has lived should be treated exceptionally as matrimonial property, even if it would not normally fall within the above definition. Thus property used as the family home for a period of 15 years or more should be treated as a matrimonial asset of the spouses. A spouse who is the owner of this asset can retain exclusive ownership after divorce, if he/she can make an adequate property settlement in favour of the non-owner spouse.

Cash or property given to the husband on marriage from the bride's side should also be defined as matrimonial property. However, 'dowry' property should not be included, as 'matrimonial property'. Paragraph 'c' below on 'dowry' clarifies this point.

Developing a comprehensive set of guidelines for the use of the judge who makes a property settlement, should thus be a priority, utilising developments that have taken place in other jurisdictions, in this regard. Equitable distribution of assets must receive priority to cushion spouses from the economic consequences of dissolution of marriage.

On divorce, a property settlement may be made on behalf of minor children, either from separate property or matrimonial property. Special provision will have to be made for disabled or economically dependant adult children. The non-statutory Roman Dutch law already recognises the latter concept.

(c) Dowry

The present law regulating this matter is complex due to the application of statutory provisions and Roman-Dutch law. The recovery of dowry property should in particular be delinked from the issue of matrimonial fault, and the Roman Dutch law on the subject of forfeiture of benefits should be abolished by statute.

The concept of 'dowry' refers in our law exclusively to gifts given at marriage **to the wife.** Dowry is thus her separate property and not a matrimonial asset. The law should recognise this, so that dowry will not be distributed by court, in making a property settlement under 2(ii) (B).

It is important to recognize that Cash/Property gifted to the bridegroom, from the bride's side though described by some social practice as 'dowry'is not so in our law. It should thus be deemed matrimonial property under 2(ii) (B) (b) above and should not be treated as the exclusive property of the husband. This will be an indirect effort to discourage the practice of making donations from the bride's side to the bridegroom. Many women and Women's Organizations are of the view that this practice should be prohibited by law.

3. Decree Nisi and Decree Absolute

Persons who have obtained a decree nisi sometimes contract subsequent marriages prior to the decree being made absolute, in the belief that their marriage has been dissolved, and that they are legally free to re-marry. The second marriage in this situation is void and not recognised in law. This prevents the spouses and children of the second marriage acquiring any legal rights. A woman for example will not obtain the rights and benefits accruing to a widow, such as pension rights, provident fund rights, compensation due, etc.

If the irretrievable breakdown concept is accepted, it becomes unnecessary to insist that an order for divorce should take the form of a decree nisi as well as a decree absolute. The basis on which our law requires a decree before a marriage can be dissolved is that, an interim period should be provided for reconciliation purposes. It is strongly recommended that the new divorce law provides for the dissolution of the marriage by the issue of a decree absolute in the first instance.

The failure to make the order final in the first instance and the inadequacy of sanctions can only cause hardship to parties who are victims of corruption in a divorce action. Such persons become aware of an action having been filed against them, for the first time, on receipt of the decree nisi. Proposals to meet this kind of situation are contained in the next paragraph.

4. Dissolution of Marriage obtained by Fraud

There have been several instances where parties have filed action to obtain a dissolution of marriage and, by fraudulent means (which include corruption in the service of summons, concealment of the action from the respondent, using persons to impersonate the respondent in court, obtaining false reports on the fact of service of summons etc.) have in fact obtained a decree for divorce without the respondent ever having been aware that such an action had been filed and tried.

In some instances the respondents have become aware of such an action only when the decree nisi is served on him/her.

It is recommended that specific provision should be included recognizing the right of a party to have the decree absolute set

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Proposed Reforms on Divorce Law

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aside on proof of the fact that it was obtained by fraud. The authority of the Court to exercise this power is accepted as a fundamental principle under the present law, but it is recommended that a provision be included in the statute in specific terms.

It is also recommended that this kind of fraudulent practice should be discouraged by the imposition of specific penal sanctions on all persons who are involved in the perpetration of the fraud.

JUDICIAL SEPARATION

The present law is a combination of Roman Dutch law and Statute law. The Roman-Dutch law in this regard should be replaced by statute law.

The grounds for judicial separation should be -

(1) adultery
(2) cruelty
(3) malicious desertion
(4) mutual consent

It would be anomalous to refer to a time period, that should be combined with consent, in a situation where it will become possible to obtain a divorce on proof of mutual consent combined with a period of separation. Adding a time limit for separation (even of one year) would be tantamount to endorsing a right to claim restitution of conjugal rights, which our law does not recognised.

Provision similar to those on divorce should regulate the aspects of custody and financial provision.

NULLITY

The present law combines statute law and Roman-Dutch law. The Roman Dutch law in this regard should be replaced by statute law.

The Roman-Dutch law concept of putative marriage should provide the basis for statutory reforms on the status of children of a void marriage. (Changes in the law on nullity would also suggest there should be a review of the current legal perceptions on the status of illegitimacy).

Some provisions should be enacted to regulate distribution of property, that would have come within the concept of matrimonial property had the marriage been valid and for maintenance and custody of any minor children.

MATTERS INCIDENTAL TO DIVORCE, SEPARATION & NULLITY

ACCESS TO MATRIMONIAL HOME

Domestic violence pending a divorce or other matrimonial relief remains a serious problem for Sri Lankan women and children. The present law provides for:

(1) complaints to the police who invariably do not think they should interfere,

(2) a procedure involving obtaining a court injunction against the husband/father. Such injunctions can only be obtained when matrimonial litigation has been initiated.

(3) The deserted wife's legal right to live in the matrimonial home pending matrimonial relief.

Legislation on domestic violence and access to the matrimonial home should be enacted on lines explored in other countries with similar legislation.

The following issues should be addressed:

(1) The right of the spouse who has assumed custodial responsibilities of minor children to continue to live in the matrimonial home pending matrimonial relief should be recognised. (Case law has recognised this position).

The following rights should be recognised :

(1) The right of a woman without child care responsibilities and without means of support to continue to live in the matrimonial home pending matrimonial relief. (Case law can be considered to have recognised this position).

(2) The right to obtain an injunction against a spouse who harasses another even when matrimonial litigation has not been initiated (i.e. expansion of present law regulating injunctions and matrimonial relief).

(3) Legal restraints such as police powers of arrest, against a husband who violates a court injunction and harasses a woman and children in their home.

(4) Introduction of a concept of marital rape in a situation where spouses are married, but living apart.

PROCEDURE AND FORUM

Reforms should introduce a non-adversarial approach to matrimonial dispute settlement. An effort should be made to train counsellors who can facilitate conciliation before or during court proceedings. There should be an effort to provide separate representation for a child. Non-Governmental Organisations working in the area of family relations should be given status in this respect. The concept of a Family Court with the emphasis on conciliation should be revived. Divorce litigation in adversarial court proceedings under existing law sometimes takes as long as ten years, thus undermining the physical and emotional wellbeing of spouses as well as their children. The present distribution of jurisdiction between several courts handling family disputes such as the Magistrate's Courts and the District Courts also prevents these courts from giving the required priority to resolving these disputes. For instance custody disputes surface in Magistrate's Court on the basis of a possible "breach of the peace" but these courts are powerless to make orders in regard to the custody of the child. Similarly a custody issue may surface in the course of maintenance actions that are presently litigated exclusively in the Magistrate's Courts. The Magistrate has no jurisdiction there to make an order on custody.

Serious thought should be given to minimising litigation in divorce proceedings. Once the marriage breakdown concept is introduced into the law, it will not be necessary to continue the present focus on adversarial litigation. The law should move towards a more conciliatory approach to the settlement of matrimonial disputes.

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