AFFIDAVITS

1. TUDERDANISTER ANTONY FERNANDO V RANKIRI HETTIARCHCHIGE FREDIE PERERA

SC HC CA LA No. 279/2012
Decided On : 17/12/2014

SallemMarsoof PC, J., B. Aluvihare PC, J., PriyanthaJayawardena PC, J.

The Petitioner instituted an action in the District Court claiming for a right of way from the Respondent, and after the trial the learned District Judge decided the case in favour of the Plaintiff and granted the relives prayed for in the plaint. The Respondent appealed to the Civil Appellate High Court, where the appeal of the Respondent was allowed and the judgment of the District Court was set-aside. The Petitioner being aggrieved by the said judgment of the Civil Appellate High Court, filed the instant Leave toAppeal application in the Supreme Court.

Prior to the matter been heard, the Counsel for the Respondent raised an preliminary objection as the affidavit filed in the Supreme Court in the Leave to Appeal application is defective, hence the application should be dismissed *in limine*.

In the affidavit filed by the Petitioner, at the commencement the religion of the Petitioner was stated as Christian and made the affidavit under an oath. However at the jurat the Petitioner has affirmed instead of signing under an oath.

HELD

In the Supreme Court Rules relating to filing of an affidavit along with the petition in a Leave to Appeal application,the format of an affidavit that should be filed is not being provided. Therefore therelevant legislations need to be considered in order to determine the validity of the affidavit in question.

In the said light the Oaths and Affirmation Ordnance was enacted in 1841and was replaced by Ordinance No. 3 of 1842. Later the Oaths and Affirmations Ordinance No. 9 of 1895 was enacted consolidating the laws relating to oaths and affirmations in the judicial process and forother purposes. This Ordinance is in force at present and thus applicable to the instant matter.

The word "Affirmant" was explained in the case of *De Silva and Others v L.B. Finance Ltd.* (1993) 1 SLR 371.

The term "oath" was defined as follows; "an oath isa religiousassertion, by which a person renounces the mercy and imprecatesthe vengeance of Heaven if he do not speak the truth" (Stroud's Judicial Words and Phrases, 6th Ed.)

The term "deponent" was defined in various dictionaries such as Wharton's Concise Dictionary, Oxford Dictionary and Collins Dictionary, where all such definitions consist the general concept of a deponent being a person who makes a written testimony under oath.

In the instant case at the begging of the affidavit the Petitioner has stated the facts in the affidavit under oath. The word affirmant has not being used. In the jurat the word deponent and affirmed was used. In the jurat the place and the date of signinghas been expressly stated, which are essential elements of an affidavit. There is no dispute as to it was signed before a Commissioner of Oaths.

What is essential in an affidavit is to state that the person who is stating the facts therein does so after taking an oath or affirmation as an affidavit is considered as evidence in Law. Therefore it is necessary to show that the person who swears or affirms to the facts stated in the affidavit did so before a competent authority or a person. For this reason the place of swearing or affirmation, the date on which the affidavit was signed are essential parts of an affidavit.

Apart from stating that the Petitioner signed the affidavit before a Commissioner ofOaths, jurat states the place and the date on which the affidavit was signed. Jurat in an affidavit is an integralpart of an affidavit and it cannot be considered in isolation. In other words an affidavitshould be considered in its totality. In applying this test and considering the totality of the affidavit in question, and applying the relevant laws and accepted practices the Court considered that the requirement of a valid affidavit had been sufficiently fulfilled as required by the Oaths and Affirmation Ordinance.

Preliminary Objection Over-ruled.

Ref. 01/11/ 2015

CIVIL PROCEDURE CODE

2. MANGALIKA DE SILVA (NEE HEMACHANDRA) V. PRABHATH JOSEPH DE SILVA & ANOTHER,

SC Appeal No. 122/2011,
Decided on. 26.06.2015,
Eva Wanasundera P.C., J. ,Sisira J. de Abrew J. & Anil Gooneratne J.

Section 615(1)(a) – Divorce - forfeiture of benefits

The grounds of divorce should not influence the trial Judge if he decides to act under Section 615(1)(a).

The principle of forfeiture of benefits under common law would not interfere with separate property of the offending spouse. If the property of the innocent party which is actually given to the offending party who has benefitted or would benefit in the future on accounts of marriage, then the offending party is liable to forfeit those benefits.

Matrimonial faults or offences committed cannot form the basis of a settlement to give effect to the provisions contained in Section 615 of the Civil Procedure Code.

Principles applicable to grant a divorce (i.e adultery, malicious desertion etc.) is one thing and distribution of assets after divorce or dissolution of marriage is another. The two aspects cannot be so closely connected to give a benefit to a spouse which enable court to re-distribute property, unless in limited situations recognized by law.

Cases referred to:

Dondris Vs. Kudatchi (1902) 7 NLR 107
De Silva Vs. De Silva (1925) 27 NLR 289
Fernando Vs. Fernando 63 NLR 416
P. Samarasinghe Vs. L. Samarasinghe 1990 (1) SLR 31

This was a divorce suit filed in the District Court of Colombo. The learned Additional District Judge by his judgment of 16.1.2007 granted a divorce to the wife on grounds of malicious desertion and adultery, of the husband (Defendant-Appellant-Respondent). The trial Judge having granted relief as aforesaid proceeded also to make an order in terms of Section 615(1) of the Civil Procedure Code and ordered the Defendant-Appellant-Respondent to transfer an undivided half share belonging to him in the matrimonial house to his wife.

Defendant-Respondent-Appellant appealed to the High Court, and the learned High Court Judge by judgment of 02.08.2010 vacated the judgment of the learned District Judge and directed that trial de novo be held. Appeal to this Court is from the judgment of the High Court by the wife, Plaintiff-Respondent-Petitioner. Supreme Court granted Leave to Appeal from the judgment of the High Court on 29.08.2011 limited to a question of law as follows.

"Whether the learned Judge was correct in law in directing that the Defendant-Respondent-Respondent shall transfer his ½ share of the matrimonial property to the Plaintiff-Respondent-Respondent (wife)".

There is an area of discretion vested with the court as per Section 615(1). An order under this section could be made "if it thinks fit". Section 615 (1)(a) could be resorted to, if the court thinks it be ' reasonable' to make a conveyance of property. Much emphasis has to be placed on the words "if it thinks fit" and 'reasonableness'. If the court wish to act in terms of Section 615(1)(a) it could do so if it thinks fit and make a reasonable order. As such court necessarily has to make an order for divorce on the available grounds for divorce, and thereafter decide to make such conveyance or settlement which is reasonable. It is my view that the grounds of divorce should not influence the trial Judge if he decides to act under Section 615(1)(a).

..... On a perusal of all above authorities emerging from the statute and common law, tends to safeguard all property which does not bring in benefits derived from marriage. The principle of forfeiture of benefits under common law would not interfere with separate property of the offending spouse. In brief property of the innocent party which is actually given to the offending party who has benefitted or would benefit in the future on accounts of marriage, then the offending party is liable to forfeit those benefits. There is no doubt an element of reasonableness to a great extent that touch the root of the problem which is separate from grounds of divorce or separation, has to be considered and kept in mind if a decision has to be made in this regard.

The learned High Court Judge emphasis the fact that the trial Judge's views inter alia ..... has prejudiced the trial judge and had influenced him to

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make an order against the Defendant-Appellant to transfer ½ share of the property in question to the wife the Plaintiff-Respondent. Even if I am not fully convinced of the above, I have to observe that the High Court Judge was more or less correct in arriving at that conclusion as there is much emphasis by the learned trial Judge as regards (a) to (g) of his judgment. As such I endorse the view of the learned High Court Judge that as per Section 615(1) of the Civil Procedure Code, the learned trial Judge has erred to the extent of making an order to transfer ½ share of the property in question in favour of the wife.

There is no dispute that the property in question was purchased for Eight Hundred and Fifty Thousand rupees (Rs. 8½ lakhs) in the name of both parties. Evidence also reveal that property in question (deed No. 1123) was purchased subject to a mortgage and monthly installments paid by the husband the Defendant-Appellant, from his Bank account for a period of 15 years. There is also some evidence that after the breakdown of the marriage relationship Plaintiff paid the remaining balance. As such both parties had contributed to purchase the property in question.

It is evident that a loan had been obtained and the Defendant-Appellant had taken steps to repay the loan in monthly instalements and he was involved in business which was doing well at a certain stage during the pendency of the marriage. It is not possible to ascertain the position as to disbursements of money by each party and arrive at a conclusion based on a balance sheet. The gist of the evidence indicates that all recognizable steps to initiate and purchase the property had been taken and done by the husband, and the wife had also a share in it and made a fair contribution to achieve the purpose. At the point of breakdown of the marriage, parties tend to exaggerate and blame each other, which would not have been in their contemplation during better times of their relationship. I also note that evidence had been placed before the trial court that the property in question is worth about 90 million rupees. Evidence of the Defendant-Appellant husband, was that a perch could be valued at 6 to 7 million rupees.

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In all the above facts and circumstances this court is strongly of the view that it would be unreasonable to make such conveyance or settlement of the property in favour of the wife (Plaintiff-Respondent) and deprive the Defendant-Appellant-Respondent of his ½ share to the property. Irrespective of each party's contribution to the property, both have enjoyed and derived benefits from the property as long as the marriage subsisted. It is not possible to get a fair assessment of each ones contribution to the property in question. To give the entirety of the property to the wife alone would be unfair as it is necessary in terms of our statute law to make a reasonable order. In the circumstances and in the context of the case it is necessary at the end to view the situation with Section 615 of the Civil Procedure Code in mind and to view the situation broadly in a reasonable manner and see if the proposal (relief claimed by the wife) meet the justice of the case. As I have already observed earlier in this judgment, matrimonial faults or offences committed cannot form the basis of a settlement to give effect to the provisions contained in Section 615 of the Civil Procedure Code. I have discussed in this judgment that the influence of the common law of deriving benefits from marriage should be sacrificed but not to the extent of giving up the each other's half share to the disputed property. The position would have been different if the wife alone had purchased the property and conveyed the entirety to the defendant-Appellant-Respondent. If that was so, an order by this court to re-convey the entire property to the wife is reasonable and justifiable. It is not the case. Principles applicable to grant a divorce (i.e adultery, malicious desertion etc.) is one thing and distribution of assets after divorce or dissolution of marriage is another. The two aspects cannot be so closely connected to give a benefit to a spouse, which enable court to re-distribute property, unless in limited situations recognized by law and as discussed above.

Therefore I affirm the order of the learned High Court Judge only in so far as setting aside the judgment of the learned District Judge, wherein the learned District Judge directed the Defendant-Respondent-Appellant to transfer ½ share of his entitlement of the matrimonial house at No. 378, Nawala Road, Rajagiriya to the wife the Plaintiff-Respondent-Petitioner. I hold that the Defendant-Respondent-Appellant is entitled to ½ share of the matrimonial house at 378, Nawala Road, Rajagiriya.

As such I answer the only question of law referred to in the proceedings/journal entry of 29.08.2011 in the negative. The house and property remains co-owned by the Appellant and the Respondent. Parties have indicated to court that they do not wish to go for a re-trial as ordered by the High Court and would abide by the ruling of the learned District Judge granting a divorce to the wife on the ground of malicious desertion and adultery. This court affirms that part of the judgment of the learned District Judge. The trial Judge had not ordered permanent alimony as order was made to transfer ½ share of the matrimonial house. The learned District Judge has also allowed taxed costs payable in favour of the wife and damages in a sum of Rs. 15 lakhs payable by the co-defendant. This court observes that, only those orders of the learned District Judge granting a divorce and the order against the co-defendant and payment of taxed cost would be enforceable, and would remain unaltered. However the innocent party was the Plaintiff-Respondent-Petitioner and she would be entitled to an order in her favour for permanent alimony. Accordingly order is made to pay a sum of Rs. 3 million as permanent alimony to the wife.

Subject to the above variations this appeal is dismissed. No costs.
Ref. 02/11/ 2015

FUNDAMENTAL RIGHTS

ACME LANKA DISTILLERS (PVT.) LTD. V. HON RAVI KARUNANAYAKE, MINISTER OF FINANCE & OTHERS,

S.C. (F.R.) Application No. 64/2015, S.C. (F.R.) Application No. 71/2015, 72/2015 and 84/2015

Decided on 24.06.2015

K. Sripavan, C.J., C. Ekanayake, J., R. Marasinghe, J.

Article 126(1) of the Constitution

Any aggrieved person has the right to challenge the infringement not only when it is imminent but also after it has occurred. The failure to challenge an imminent infringement will never be a bar to challenge the actual infringement.
Article 126(2) must be given a generous and purposive construction. The starting point of one month prescribed by Article 126(2) is when the Petitioners were freely able to purchase a copy of the impugned Gazette.

cases referred to:

Siriwardena and Others Vs. Brigadier J. Rodrigo and Others (1986) 1 S L R 384

When the instant FR applications were taken up for hearing, Learned counsel for the Respondents raised a preliminary objection on the ground that the said applications had been filed outside the time period stipulated in Article 126(2) of the Constitution and hence should be dismissed *in limine*. It was contended that the alleged infringement of the Petitioners' fundamental rights by the Respondents took place when the budget proposal was brought to the public domain by way of a budget speech made in Parliament on 29th January 2015 and that the Petitioners should have invoked the jurisdictions of this Court within one month from 29th January 2015.
The Petitioners contention was that they became aware of the said publication only at a later date and were able to secure a copy of the relevant Gazette only after 27th February 2015.
It must be emphasized that courts of law have nothing directly to do with mere decisions of policy or budget speeches made in Parliament. Such speeches or budget proposals have no legal impact until Parliament confers some legal power on it.
The Rule of Law which postulates equal subjection to the law requires the observance of the law in all cases. In fact, it could be said that perhaps the most important defining feature in a democratic society based upon the rule of law is that any aggrieved person has the opportunity of challenging the decision of the Hon. Minister of the Government of the day, in appropriate cases.
it was held that the moment a person becomes aware of the possibility of an infringement, he must rush to Court and invoke the jurisdiction under Article 126. Any aggrieved person has the right to challenge the infringement not only when it is imminent but also after it has occurred. The failure to challenge an imminent infringement will never be a bar to challenge the actual infringement.

In the instant applications, the infringement occurred not when the budget proposals were made in Parliament but only when the Hon. Minister of

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