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

Sooriya Pahtirennehelage Piyalka
Weerakanthi,
Ingaradaula,
Narangoda.
Petitioner

SC APPEAL NO: SC/APPEAL/179/2019
SC LA NO: SC/HCCA/LA/310/2017
HC NO: NWP/HCCA/KUR/102/2011/F
DC KULIYAPITIYA NO: 605/T

Vs.

1. Sembukutti Arachchige Shanthi Siriwardena,
   Ingaradaula, Narangoda.
   (Deceased)

1A. Sembukutti Arachchige Radhika Siriwardena,
   Ingaradaula, Narangoda.

2. Sembukutti Arachchige Premaratne,
   Dambagahagedera, Yakwila.

3. Sembukutti Arachchige Piyathilaka,
   Ingaradaula, Narangoda.

4. Sembukutti Arachchige Dharmasena,
   Ambalangoda.
   (Deceased)

4A. Gange Lalitha De Silva
4B. Sembukutti Arachchige Sisira Priyankara
4C. Sembukutti Arachchige Sisira Sanoja Dilhani
All of No. 5, Polwatta Municipal Houses, Ambalangoda.
5. Sembukutti Arachchige Leelawati Manike,
Ingaradaula, Narangoda.
6. Sembukutti Arachchige Paulu Appuhamy,
Munamaldeniya, Akarawatta.
Respondents

AND BETWEEN

Sooriya Pahtirennehelage Piyalka Weerakanthi,
Ingaradaula, Narangoda.
Petitioner–Appellant

Vs.

1. Sembukutti Arachchige Shanthi Siriwardena,
Ingaradaula, Narangoda.
(Deceased)
1A. Sembukutti Arachchige Radhika Siriwardena,
Ingaradaula, Narangoda.
2. Sembukutti Arachchige Premaratne,
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   Ingaradaula, Narangoda.
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All of No. 5, Polwatta Municipal Houses,
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   Ingaradaula, Narangoda.
6. Sembukutti Arachchige Paulu Appuhamy,
   Munamaldeniya, Akarawatta.

Respondent-Respondents

AND NOW BETWEEN

1. Sembukutti Arachchige Shanthi Siriwardena,
   Ingaradaula, Narangoda.
   (Deceased)

1A. Sembukutti Arachchige Radhika Siriwardena,
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Ingaradaula, Narangoda.

6. Sembukutti Arachchige Paulu Appuhamy,
Munamaldeniya, Akarawatta.

1A, 2nd, 3rd, 4B, 4C, 4D, 5th and 6th Respondent-Respondent-Appellants

Vs.

Sooriya Pahtirennehelage Piyalka Weerakanthi,
Ingaradaula, Narangoda.

Petitioner–Appellant–Respondent

Before: Hon. Justice Priyantha Jayawardena, P.C.
Hon. Justice A.L. Shiran Gooneratne
Hon. Justice Mahinda Samayawardhena

Counsel: M.C. Jayaratna, P.C., with H.A. Nishani and H. Hettiarachchi for the 1A, 2nd, 3rd, 4B, 4C, 4D, 5th and 6th Respondent-Respondent-Appellants.

Jacob Joseph for the Petitioner-Appellant-Respondent.

Argued on : 26.10.2021

Written submissions:

by the Respondent-Respondent-Appellants on 05.10.2020.

Decided on: 28.02.2024

Samayawardhena, J.

The original petitioner instituted these proceedings in the District Court of Kuliyapitiya in terms of section 528 of the Civil Procedure Code seeking letters of administration to administer the intestate estate of the deceased on the basis that she is the widow of the deceased. She tendered the marriage certificate marked P1 with the petition. The original 2nd respondent who is the brother of the deceased (with the support of the other siblings) countersued for letters of administration on the basis that the marriage between the petitioner and the deceased is a nullity in terms of section 18 of the Marriage Registration Ordinance, No. 19 of 1907, as amended, since the petitioner married the 2nd respondent's deceased brother without having her former marriage dissolved by a competent Court.

Section 18 of the Marriage Registration Ordinance enacts:

> *No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.*

Section 19 of the Marriage Registration Ordinance enacts:

> *19(1) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court.*

(2) Such judgment shall be founded either on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.

Section 607 of the Civil Procedure Code provides for a spouse to institute an action in the District Court seeking a declaration that the marriage is a nullity on any ground that results in the marriage between the parties being deemed void under the laws of Sri Lanka. It was held in *Peiris v. Peiris* [1978-79] 2 Sri LR 55 that this includes the application of Roman Dutch law which recognises *inter alia* duress, mistake, fraud and immaturity as grounds on which nullity of marriage can be sought. In *Seneviratne v. Premalatha* (SC/APPEAL/211/2012, SC Minutes of 02.05.2016) it was observed that a party can invoke section 607 against his or her spouse whose has entered into the marriage with that party without having his or her former marriage dissolved by an order of Court.

607(1) Any husband or wife may present a plaint to the Family Court within the local limits of the jurisdiction of which he or she (as the case may be) resides, praying that his or her marriage may be declared null and void.

(2) Such decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to Sri Lanka.

Section 608 of the Civil Procedure Code provides for a dissolution of marriage on separation a *mensa et thoro* for a specified period identified in the section. However, it was held in *Tennakoon v. Tennakoon* [1986] 1 Sri LR 90 that the words “either spouse” in section 608(2) of the Civil Procedure Code must be understood as referring only to the innocent spouse for the purpose of the relief of divorce under section 608(2)(a) or

section 608(2)(b) of the Civil Procedure Code. The necessity to prove a matrimonial fault has not been done away with.

> *608(1) application for a separation a mensa et thoro on any ground on which by the law applicable to Sri Lanka such separation may be granted, may be made by either husband or wife by plaint to the Family Court, within the local limits of the jurisdiction of which he or she, as the case may be, resides, and the court, on being satisfied on due trial of the truth of the statements made in such plaint, and that there is no legal ground why the application should not be granted, may decree separation accordingly.*
>
> *(2) Either spouse may-*
>
> > *(a) after the expiry of a period of two years from the entering of a decree of separation under subsection (1) by a Family Court, whether entered before or after the 15th day of December,1977, or*
> >
> > *(b) notwithstanding that no application has been made under subsection (1) but where there has been a separation a mensa et thoro for a period of seven years,*
>
> *apply to the Family Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (a), or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (b), enter judgment accordingly:*
>
> *Provided that no application under this subsection shall be entertained by the court pending the determination of any appeal*

> *taken from such decree of separation. The provisions of sections 604 and 605 shall apply to such a judgment.*

As seen from the marriage certificate P1, the position of the petitioner seems to be that since she did not hear from her former husband for more than seven years, she contracted the second marriage.

The former husband was alive at the time of the second marriage and at the inquiry before the District Court into the issuance of letters of administration, the former husband gave evidence for the 2nd respondent.

The District Court refused to issue letters of administration to the petitioner (sought on the basis that she is the widow of the deceased as crystallised in the issues), and instead issued the same to the 2nd respondent (as one of the heirs of the deceased).

On appeal, the High Court set aside the order of the District Court and ordered trial *de novo* on the basis that the District Judge failed to consider "*as to whether or not the marriage contracted between the petitioner and the deceased was valid and lawful under and in terms of section 108 of the Evidence Ordinance to be read with section 18 of the Marriage Registration Ordinance*."

Being dissatisfied with the judgment of the High Court the respondents have appealed to this Court.

Section 107 of the Evidence Ordinance reads as follows:

> *When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.*

Section 108 (as it stood prior to the amendment introduced by Act No.10 of 1988 whereby seven years was reduced to one year) runs as follows:

> *Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.*

Sections 107 and 108 are complementary to each other in that the latter is the proviso to the former. Both these sections fall under the chapter "Burden of Proof" in the Evidence Ordinance.

In *Davoodbhoy v. Farook* (1959) 63 NLR 97 it was held that these two sections do not enact a presumption of law or fact but only a rule of evidence as to the burden of proof. Basnayake J. (as he then was) with the agreement of Pulle J. at page 99 states:

> *It is essential to bear in mind that these two sections do not enact a presumption of law or fact, but enact rules governing the burden of proof like any one of the other rules that precede them. Section 107 enacts the rule and section 108 enacts the proviso to it. In one case it is sufficient to "show" that the person about whom the question has arisen was alive within thirty years, in the other it must be "proved" that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive. These sections regulate the burden of proof in a case in which one party affirms that a person is dead and the other party that the same person is alive, and the question for decision is whether the person is dead or alive.*

This was further explained at pages 100-101 in the following manner:

> *In a case where one party affirms that a person is dead and another that he is alive, if a party produces evidence to the effect that he was alive within thirty years then the person who affirms that he is dead*

> *must prove that he is dead; but if the person who affirms that he is dead instead of proving that he is dead leads evidence which proves that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive then the person who affirms that he is alive must prove that he is alive. So that in a case where the question is whether a person is alive or dead and one party affirms that he is dead and the other that he is alive and it is in evidence that he was alive within thirty years the burden that lies on the party that affirms that he is dead by virtue of section 107 to prove that he is dead shifts by operation of section 108 to the party that affirms that he is alive if it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive.*

But E.R.S.R. Coomaraswamy, The Law of Evidence, Vol II, Book I, pages 428-429, is not in favour of this dichotomy between presumption of fact and law on the one hand and burden of proof on the other. He takes the view that such difference is artificial:

> *The fact is that rules as to burden of proof and presumptions are so involved together that it is artificial to separate a given situation and to state that it is a pure rule of the burden of proof and not of a presumption. Every rebuttable presumption in favour of one party necessarily involves a rule as to burden of proof in the other and vice versa.*

Explaining the affinity between sections 107 and 108 of the Evidence Ordinance, the learned author on page 430 states that section 107 creates a presumption of the continuance of life, and section 108 functions as a clause that supplements section 107.

> *Sections 107 and 108 must be read together, because the latter section is a proviso to the earlier. Section 107 creates a legal presumption of continuance of life, if nothing is shown to the contrary. Section 108 is a proviso to section 107, so that if a man has not been heard of for one year [after the amendment in 1988] by those who would naturally have heard of him, had he been alive, the presumption of continuance of life under section 107 ceases, and the burden of proving him to be alive lies on the person asserting it by denying the death.*

It is seen that whereas section 107 is based on the presumption of continuity of life, section 108 is based on the presumption of death.

In *Hamy Vel Muladeniya v. Siyatu* (1945) 46 NLR 95 Jayetileke J. states:

> *Under section 108 of the Evidence Ordinance when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the presumption of life ceases, and the burden is shifted to the person who denies the death.*

The High Court concedes that it is common ground that the second marriage was contracted whilst the first marriage was still subsisting, thereby rendering the second marriage null and void under section 18 of the Marriage Registration Ordinance. Nevertheless, the High Court thereafter takes the view that the second marriage can be given validity by proper invocation of section 108 of the Evidence Ordinance, and that the District Court had failed to consider it. This is a misdirection in law.

It is undisputed that under the Marriage Registration Ordinance, during the subsistence of a marriage, a spouse cannot lawfully enter into another marriage, and such subsequent marriage during the subsistence of the former marriage is void. It must also be born in mind that dissolution of marriage by a judgment of a competent Court under section

19(1) of the Marriage Registration Ordinance is necessary only "during the lifetime of the parties". If one party is dead, there is no need for dissolution of marriage by an order of Court. Section 108 of the Evidence Ordinance creates only a presumption of death.

As much as there is a strong affinity between section 107 and 108 of the Evidence Ordinance, there is a strong affinity between section 108 of the Evidence Ordinance and the exception to section 362B of the Penal Code.

Section 362B of the Penal Code provides:

> *Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

The exception to this section states:

> *This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the lime of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time:*
>
> *Provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge.*

Pattison v. Kalutara Special Criminal Investigation Bureau (1970) 73 NLR 399 is one case where the exception to section 362B of the Penal Code

was successfully invoked to defeat a criminal charge of bigamy. It was held in this case:

> *Where, in a prosecution for bigamy, the defence of the accused is based on the Exception to section 362B of the Penal Code, namely that the accused who contracted a second marriage did not know that his first wife had been alive at any time during the preceding seven years, the burden is on the prosecution to prove knowledge on the part of the accused that his first wife had been alive when he contracted his second marriage.*

Although there is a close correlation between section 108 of the Evidence Ordinance and the exception to section 362B of the Penal Code, it shall be born in mind that successful invocation of either section 108 of the Evidence Ordinance or the exception to section 362B of the Penal Code does not transform an invalid second marriage into a valid one.

In *Fenton v. Reed* (1809) 4 Johns 52 (N.Y. Sup. Ct.) it was observed:

> *The statute concerning bigamy does not render the second marriage legal, notwithstanding the former husband or wife may have been absent above five years, and not heard of. It only declares that the party who marries again, in consequence of such absence of the former partner, shall be exempted from the operation of the statute, and leaves the question on the validity of the second marriage just where it found it.*

In the case of *Re Josephine Ratnayake* (1921) 23 NLR 191, the wife filed an action seeking a declaration that her husband is dead on the basis that she did not hear from her husband for more than seven years. The District Court dismissed the action. On appeal, De Sampayo J. affirmed the judgment of the District Court and held:

> *This application is entirely misconceived. It is supposed to have been in pursuance of section 108 of the Evidence Ordinance, which is merely laying down a rule of evidence that, if a husband is absent for a certain period without any information as to his whereabouts, for certain purposes his death may be presumed. But nowhere is there any provision laying down the procedure for obtaining a declaration of Court. The only way that the section of the Evidence Ordinance can be availed of is by repelling any charge of bigamy that may be made against her if she marries again. But beyond that that section does not help the appellant.*

In *Hamy Vel Muladeniya v. Siyatu (supra)* it was held that "*Where a person is presumed to be dead in accordance with the provisions of section 108 of the Evidence Ordinance, his property may be divided among his heirs*."

As was held in *Davoodbhoy v. Farook (supra)* that "*These sections [sections 107 and 108] regulate the burden of proof in a case in which one party affirms that a person is dead and the other party that the same person is alive, and the question for decision is whether the person is dead or alive.*" However, in the instant case there is no issue as to whether the former husband of the petitioner was alive or dead at the time the petitioner contracted the second marriage to the deceased: he was alive.

In the case of *Parkash Chander v. Parmeshwari* (AIR 1987 PH 37) it was observed:

> *The presumption under S. 108 of the Evidence Act arises only when the question is raised in Court as to whether a man is alive or dead and such question is in issue. There is no presumption in this regard unless such a proceeding comes in the Court and an issue in this regard is raised. S.108 is only a rule of evidence and presumption is*

drawn for purposes of reaching at a conclusion on the concerned issue.

In certain jurisdictions, remarriage is legally recognised when one spouse is believed to be deceased or has been absent and unheard of for a period of years, typically ranging from three to seven. In such circumstances, the second marriage is considered to be valid until held void by a Court of competent jurisdiction.

In India, section 13(1)(vii) of the Hindu Marriage Act of 1955 provides that a Hindu marriage can be dissolved by a decree of divorce on the ground that the other party has not been heard of as being alive for a period of seven years or more by those who would naturally have heard of that party had they been alive. Similar provisions are found in section 27(h) of the Special Marriage Act of 1954 in India.

Article 41 of the Family Code of the Philippines declares that a marriage entered into by any individual while a previous marriage is still in effect is considered null and void, unless, before the subsequent marriage, the prior spouse has been absent for four consecutive years, and there exists a well-founded belief that the absent spouse is deceased. However, for the purpose of contracting the subsequent marriage, the present spouse must initiate a summary proceeding, as provided in the Code, to declare the presumptive death of the absentee, without prejudice to the consequences of the absent spouse's reappearance.

In the UK, in terms of sections 1 and 2 of the Presumption of Death Act 2013, where a person is thought to have died, or has not been known to be alive for a period of at least seven years, any person may apply to the High Court for a declaration that the missing person is presumed to be dead. According to section 3(2), a declaration under this Act is effective against all persons and for all purposes, including for the purposes of the

acquisition of an interest in any property, and the ending of a marriage or civil partnership to which the missing person is a party.

There are no similar express provisions found in the Marriage Registration Ordinance or any other statute in Sri Lanka that link the presumption of death to remarriage.

The Tsunami (Special Provisions) Act, No. 16 of 2005 made provisions to issue death certificates where persons resident in identified areas as at 26.12.2004 were found missing for six months from that date. Section 2 of the Act reads as follows:

> *Notwithstanding the provisions of section 108 of the Evidence Ordinance, where any person, who had been resident in an area referred to in the First Schedule to this Act as at December 26, 2004 or was known to have been in or travelling through such area on that date, cannot be found and has not been heard of for six months since that date by those who would normally have heard of such person has such person been alive, and the disappearance is attributable to the Tsunami that occurred on that date, the burden of proving that such person is alive is on the person who affirms it.*

Under our law, the presumption of death is not a ground for dissolution of marriage.

Hence in terms of section 18 of the Marriage Registration Ordinance, the second marriage contracted with the deceased without the former marriage having been dissolved by a decree of divorce from a competent court is void. On the facts and circumstances of this case, section 108 of the Evidence Ordinance has no application, and the High Court was in error when it set aside the District Judge's order on that ground and ordered a retrial in order to consider the application of the original petitioner in light of section 108 of the Evidence Ordinance.

This court granted leave to appeal against the judgment of the High Court on the following questions of law:

1. *Did the High Court err in law when it held that the question of the second marriage could have been decided along with the provisions of section 108 of the Evidence Ordinance despite section 18 of the General Marriages Ordinance is clear on that issue?*
2. *Did the High Court err in law in ignoring section 19(1) of the General Marriages Ordinance?*
3. *Did the High Court err in law by ordering a re-trial?*

I answer the questions of law in the affirmative. I set aside the judgment of the High Court and restore the order of the District Court dated 20.07.2011 and allow the appeal but without costs.

However, the judgment of the District Court is restored subject to the condition that issue No. 11 raised by the respondents need not be decided at this stage of the case. Issue No. 11 is: *"Should the property described in paragraphs 6 and 7 of the statement of objections of the respondents be included in the inventory in this case?"*

In terms of section 539(1) of the Civil Procedure Code, the inventory shall be filed by the person to whom the Court decides to issue the probate or letters of administration within a period of one month from the date of taking the oath as the executor or administrator. When the Court is called upon to decide to whom the probate or letters of administration shall be issued, no time shall be wasted on inquiring into the correctness of the details of the deceased's property included in the original petition. Although it is a requirement under section 528(1)(d) of the Civil Procedure Code that the petitioner shall set out the details of the deceased's property in the petition, this is different from filing the inventory under

section 539(1) of the Civil Procedure Code. Section 539(1) reads as follows:

> *In every case where an order has been made, by a District Court declaring any person entitled to have probate of a deceased person's will, or administration of a deceased person's property granted to him it shall be the duty of the said person, executor or administrator, in whose favour such order is made, to take within fifteen days of the making of such order, the oath of an executor or administrator as set out in form No. 92 in the First Schedule, and thereafter to file in court within a period of one month from the date of taking of the oath, an inventory of the deceased person's property and effects, with a valuation of the same as set out in form No. 92 in the First Schedule and the court shall forthwith grant probate or letters of administration, as the case may be.*

At this stage, the question to be decided is to whom letters of administration shall be issued and nothing else.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court