

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

In the matter of an Appeal against
the Judgment dated 08.02.2017 of
the Civil Appellate High Court of
Central Province.

Alles Dilkush Chandrani Bernedette
No. 172/2B,
Fruithill,
Hatton.

Plaintiff

**S.C Appeal 10/2018
S.C/HCCA/LA 140/2017
CP/HCCA/Kandy 137/2012(FA)
DC Hatton Case No. D/1549**

Vs

Velu Sridharan,
Warleigh Bungalow,
Warleigh Estate,
Dickoya.

Defendant

Mohamed Hisham Faiz
Dumburugiriya Road,
Hatton.

Co-Defendant

AND BETWEEN

Mohamed Hisham Faiz
Dumburugiriya Road,

Hatton.

Co-Defendant-Appellant

Vs

Alles Dilkush Chandrani Bernedette
No. 172/2B,
Fruithill,
Hatton.

Plaintiff-Respondent

Velu Sridharan,
Warleigh Bungalow,
Warleigh Estate,
Dickoya

Defendant-Respondent

AND NOW BETWEEN

Mohamed Hisham Faiz
Dumburugiriya Road,
Hatton.

Co-Defendant-Appellant-Appellant

Vs

Alles Dilkush Chandrani Bernedette
No. 172/2B,
Fruithill,
Hatton.

Plaintiff-Respondent-Respondent

Velu Sridharan,
Warleigh Bungalow,
Warleigh Estate,
Dickoya

**Defendant-Respondent-
Respondent**

Before : P. Padman Surasena, J
Achala Wengappuli, J
K. Priyantha Fernando, J

Counsel : P. Peramunugama with Ranganath
Peiris and Jithma Anjalee for the Co-
Defendant-Appellant-Appellant.

Nayanajith De Silva instructed by De
Silva & De Silva for the Defendant-
Respondent-Respondent.

Wardani Karunaratne with Hiruni Silva
instructed by P. Suthanthiraraj for the
Plaintiff-Respondent-Respondent.

Written submissions : 15.03.2018 by the Plaintiff-Respondent-
Petitioner

Not submitted by the Defendant-
Respondent-Respondent

Argued on : 15.05.2024

Decided on : 01.11.2024

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) filed action in the District Court of *Hatton* against the Defendant-Respondent-Respondent (hereinafter referred to as the Defendant) for divorce on the ground of malicious desertion by the defendant. The plaintiff also prayed for permanent alimony and the custody of the two children. The plaintiff is the wife and the defendant is the husband.
2. In his amended answer, the defendant while denying the malicious desertion on his part prayed for a dismissal of the plaintiff's action, and alleged that the plaintiff is committing adultery with the Co-defendant-Appellant-Appellant (hereinafter referred to as the co-defendant) and claimed Rs. 1,000,000 as damages from the co-defendant for breaking down his marriage. It was the position of the defendant that the plaintiff has filed this action in order to obtain a divorce as she is living in adultery with the co-defendant. However, it is pertinent to note that, the defendant did not pray for divorce from the plaintiff based on the alleged adultery. For the ease of reference, I will refer to the parties as they were referred to in the District Court.
3. After trial, the learned District Judge entered judgment in favour of the defendant dismissing the plaintiff's action. The District Court also ordered the co-defendant to pay the defendant damages in a sum of Rs.500,000 as prayed for in the prayer to the plaintiff.
4. The co-defendant being dissatisfied with the said judgment of the learned District Judge, appealed against the said judgment to the Provincial High Court of Civil Appeals of the Central Province holden in *Kandy*.
5. The learned Judges of the High Court, after hearing the appeal, by their judgment dated 08.02.2017 dismissed the appeal preferred by the co-defendant. Being aggrieved by the said judgment of the High Court of Civil Appeals, the co-defendant sought leave to appeal against the said judgment of the High Court from the Supreme Court. This Court, after considering the application, granted leave to appeal on the following question of law:

“Whether the party in a divorce action can claim damages against the co-defendant without praying for a divorce, on the ground of adultery.”

6. The learned Counsel for the co-defendant submitted that, a party cannot claim damages from the co-defendant for committing adultery, without him seeking divorce from the spouse. It is his contention that, the defendant has not prayed for divorce from the plaintiff but made the co-defendant a defendant for the purpose of seeking damages without disclosing a cause of action known to the law of this country. The learned Counsel further submitted that, as there is no claim from the plaintiff in terms of section 598 of the Civil Procedure Code read with section 603, the defendant cannot claim pecuniary damages from the co-defendant.
7. In his written submissions, the learned Counsel for the co-defendant has submitted that the finding of the learned trial Judge is wrongful and is against the applicability and/or the scope of section 598 read with section 603 of the Civil Procedure Code. The learned Counsel relied on what was held in case of ***Premanie V. Leelaraja [1990] 1 S.L.R. 31.***
8. It is the submission of the learned Counsel for the co-defendant that adultery is not a delictual wrong in Sri Lanka, and is only one of the grounds for which marriage may be dissolved by the law applicable in Sri Lanka. The learned Counsel also relied on the case of ***Senadipathi V. Senadipathi 43 NLR 272*** in this aspect.
9. The learned Counsel for the defendant submitted at the hearing of this case that, the defendant is entitled to file action for damages against the co-defendant without praying for divorce from the plaintiff, due to the loss of consortium caused by the co-defendant by committing adultery with the plaintiff. The learned Counsel relied on the case of ***Abeyesundara V. Abeyesundara CA 63/2004 (F)***, decided on 30.08.2012.
10. In Sri Lanka adultery is not a penal offence. However, our Courts have taken the view that the standard of proof required to establish adultery to be of proof beyond reasonable doubt. Adultery is a ground for divorce and the aggrieved spouse may claim damages against the co-defendant.

11. The nature of damages awarded against a co-defendant is compensatory, not punitive. The measure of damage is based upon two considerations.

- I. The actual value of the wife to the husband.
- II. The proper compensation to him for the injury to his feelings, the blow to his honour, and the hurt to his matrimonial and family life.

(De Silva V. De Silva 27 NLR 289, Butterworth V. Butterworth & Englefield [1920] L.J.P.P 151)

12. In the instant case, the learned District Judge has given good and sufficient reasons for her conclusion that the co-defendant has committed adultery with the plaintiff. The learned trial Judge has also given reasons for deciding on the quantum of damages as compensatory, not punitive. The issue before this Court is whether the defendant could claim damages against the co-defendant without praying for a divorce, on the ground of adultery.

13. The evidence revealed that the marriage has broken down irrevocably. The plaintiff sought divorce on the ground of desertion by the defendant. It is the position of the defendant that the marriage has broken down not due to him deserting the wife, but because of the adulterous conduct of the plaintiff and the co-defendant. On that basis, the defendant sought to add the co-defendant as a party and claimed damages from the co-defendant. However, although the defendant prayed for a dismissal of the plaintiff's claim for divorce, he did not pray for divorce on the ground of adultery between the plaintiff and the co-defendant as he has alleged.

14. As I have mentioned before, the learned District Judge has analyzed the evidence placed before her on the issue of adultery. If the adultery can be proved, the defendant has a clear cause of action against the co-defendant for loss of consortium of his wife (plaintiff) and the injuria caused to him. The issue that must be addressed is whether that cause of action can be joined in the same action without him seeking a divorce? Whether there is a misjoinder of causes of action?

15. Joinder of causes of action was discussed in the case of ***Adlin Fernando and another V. Lional Fernando and others [1995] 2***

Sri. L.R. 25. In that case The Court of Appeal held that the provisions of the Civil Procedure Code relating to the joinder of causes of action and parties are rules of procedure and not substantive law. Court should adopt a common-sense approach in deciding questions of misjoinder or non-joinder.

16. In the case of *Adlin Fernando (supra)*, His Lordship *Ranaraja J.* with *S.N. Silva J.* agreeing said;

“What is of importance however is, that the provisions of the Civil Procedure Code relating to the joinder of causes of action and parties, are rules of procedure and not substantive law. It follows, that Courts should adopt a common-sense approach in deciding questions of misjoinder or non-joinder. ... Section 36 provides, if any cause of action cannot be conveniently tried or disposed of together, for Court to ex mero motu or on the applications of defendants with notice to the plaintiff, at any time before the hearing, or on agreement of the parties after the commencement of the hearing, to order separate trials of any causes of actions.”

17. According to his stance, in the instant case, the defendant needs to provide evidence of adultery between the plaintiff and the co-defendant in order to support and secure his claim, that it was the plaintiff's adultery with the co-defendant, and not his desertion that caused the breakdown of the marriage. If the argument of the co-defendant is to be accepted, even after proving adultery in this case, the defendant will have to file another action for damages based on adultery, where he would be required to prove adultery once again.
18. Our Courts have repeatedly held that Courts should effectively and completely adjudicate upon and settle all the questions involved in an action to avoid multiplicity of cases and to diminish the cost of litigation. Therefore, it is my considered view that the cause of action for damages by the defendant against the co-defendant could be joined in this action without causing prejudice to any of the parties.
19. The learned Counsel for the co-defendant relied on the case of ***Premanie Samarasinghe V. Leelaraja Samarasinghe [1990] 1 Sri L.R. page 31.*** This is a case where the husband filed action against the wife for separation. The defendant (wife) while seeking for a dismissal of the plaintiff's action, sought as relief, the legal title of the house and property and also for movable properties

mentioned therein from the plaintiff husband. Court held that, where the wife has not put matrimonial fault of her husband in issue, she cannot seek settlement of property on the basis of forfeiture of benefits. Court held further, that the defendant has not put matrimonial fault of the spouse and therefore she is not entitled to such relief. Without praying for a divorce or separation, the wife could not seek settlement of property on the basis of forfeiture of benefits. The instant application is not against the spouse, but against the co-defendant who caused injuria to the husband by committing adultery with his wife. Therefore, *Premanie(supra)* has no application to this case.

20. The learned Counsel for the co-defendant also relied on the case of *Senadipathi(supra)*. In that case, the wife filed divorce action against the husband. The husband also claimed a divorce against the wife on the ground of adultery with the co-defendant from whom he claimed Rs. 10,000 as damages. Apart from that, the husband further claimed Rs. 7,073 from the plaintiff on three other causes of action. They are for the articles damaged by her, plaintiff's share for improving the land and for some rubber coupons appropriated by her without the defendant's consent. Court held that, the causes of action other than the Rs.10,000 for damages from the co-defendant cannot be introduced in a matrimonial action. In the instant case, the defendant has included the cause of action for damages from the co-defendant, and not against the plaintiff, which he is entitled to in a matrimonial action. Hence, *Senadipathy(supra)* has no application to the instant case.
21. *Maasdorp's Institutes of South African Law Volume IV*, has discussed the issue of filing separate action for damages against the adulterer without filing action against the spouse for divorce.

"The claim for damages is generally instituted in the action brought against the offending spouse for divorce, the person with whom the adultery has been committed being joined as co-defendant. The husband may, however, bring an action against the adulterer even though he has condoned his wife's adultery, and similarly there is nothing to prevent him from suing for compensation in a separate action and that even without having first sued his wife for divorce, though the fact of his not having done so may raise a presumption of

collusion which he will have to be prepared to meet by satisfactory evidence.”

The above passage refers to cases of ***Viviers V. Kilian, 1927 A.D. 449 and Biccard V. Biccard and Fryer, 9 S.C. 473.***

22. In case of *Viviers V. Kilian (supra)*, His Lordship *Solomon C.J.* held that on principle there is no reason for holding that, because a husband condones his wife's misconduct he thereby loses his right of proceeding against the person who has injured him by committing adultery with her. However, that may mitigate damages.
23. The cause of action against the co-defendant is for damages for injuria caused to the defendant by loss of consortium from his wife. Although the defendant opts not to seek divorce against the plaintiff, there is no reason why the defendant cannot proceed with the cause of action against the co-defendant for the injuria caused to him in the same action. Whether there is collusion between the plaintiff and the defendant against the co-defendant has to be decided on the evidence adduced in the case, no such evidence is present in the instant case as the marriage has been irrevocably broken down and the action for divorce has been filed by the plaintiff. For the reasons stated in paragraphs 14-18 of this judgment, there is no misjoinder of causes of action by claiming damages for injuria by the defendant as the marriage between the plaintiff and the defendant has been broken down due to the adulterous conduct of the co-defendant and the plaintiff.
24. Section 603 of the Civil Procedure Code provides for the defendant in a matrimonial action for dissolution of marriage, to oppose the relief sought by the plaintiff on any ground which would have enabled him to sue the plaintiff for such dissolution. The Court may in such action, give to the defendant in his application the same relief he would have asked for and be entitled to, as if he has presented a plaint seeking such relief.
25. In the instant case, the defendant has opposed the action filed by plaintiff on the ground of desertion, stating that the alleged adultery has caused the breakdown of the marriage. I do not see any reason why the defendant cannot proceed against the co-defendant for damages caused to him by injuria, without proceeding for dissolution of the marriage in the same action. As I have mentioned

before, there is no misjoinder that would cause prejudice to the co-defendant.

26. For the afore said reasons, I answer the question of law in the affirmative. The judgment of the District Court as well as the judgment of the High Court are affirmed. Appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI

I agree

JUDGE OF THE SUPREME COURT