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

SC/APPEAL/211/2012

SC/HCCA/LA No. 541/2011
WP/HCCA/Gampaha/164/2006 (F)
D.C. Negombo Case No. 2566/Special

In the matter of an application for Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5C of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 against the Judgment delivered in Appeal No. WP/HCCA/GAM/164/2006(F) on 11.11.2011.

Udagepolage Gunasiri Seneviratne
'Yamuna', Gulawita,
Walallawita.

PLAINTIFF

Vs.

Pattiya Widanage Carmen Premalatha
No. 8, Waagouwwa Cross Road,
Central Watte, Waagouwwa,
Minuwangoda.

DEFENDANT-APPELLANT

Va.

Udagepolage Gunasiri Seneviratne
'Yamuna', Gulawita,
Walallawita.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN
Udagepolage Gunasiri Seneviratne
'Yamuna', Gulawita,
Walallawita.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Pattiya Widanage Carmen Premalatha
No. 8, Waagouwwa Cross Road,
Central Watte, Waagouwwa,
Minuwangoda.

DEFENDANT-APPELLANT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Priyantha Jayawardena P.C., J &
Anil Gooneratne J.

COUNSEL: Kaushalya Nawaratne with Mokshini Jayamanne and Yoddhya Thambavita instructed by Sivananthan & Associates for the Plaintiff-Respondent-Appellant.

Malin Rajapaksa for the Defendant-Appellant-Respondent

WRITTEN SUBMISSIONS TENDERED ON:

21.01.2013 (by the Plaintiff-Respondent-Petitioner)
28.02.2013 (by the Defendant-Appellant-Respondent)

ARGUED ON: 08.03.2016

DECIDED ON: 02.05.2016

GOONERATNE J.

This was an action filed in the District Court of Negombo for a declaration that the marriage between the Plaintiff-Respondent-Petitioner and the Defendant-Appellant-Respondent was ab initio null and void. The circumstances under which relief was sought was on the basis that the Defendant-Appellant-Respondent (hereinafter referred to as Respondent) had contracted two marriages which had not been legally dissolved or declared void by a court of competent jurisdiction and as such the purported marriage between Plaintiff-Respondent-Petitioner (hereinafter referred to as the Petitioner) and the Respondent was invalid and thus null and void. Learned District Judge delivered judgment on or about 08.12.2006 in favour of the Petitioner. In the appeal to the High Court, the learned District Judge's judgment was set aside by judgment delivered by the High Court on 06.10.2012 (X6)

Supreme Court on 04.12.2012 granted Leave to Appeal on question of law stated in paragraph 15 (a) and (b) of the petition dated 22.12.2011. The said questions are:

15.(a)(i) In terms of the provisions of Section 18 of the Marriages (General) Ordinance No. 19 of 1907 as amended read together with the provisions of Section 607 of the Civil Procedure Code, is it imperative for any husband or wife to present

a Plaint praying that his/her marriage may be declared null and void on any of the ground recognized by the law applicable to Sri Lanka?

(ii) If the above question is answered in the affirmative, is the Defendant precluded in law from asserting that the marriage between the Petitioner and the Respondent is valid in law?

(b) Are the provisions of Sections Section 18 of the Marriages (General) Ordinance No. 19 of 1907 as amended read together with the provisions of Section 607 of the Civil Procedure Code, applicable only to parties where there is a "valid" marriage?

The position of the Petitioner very briefly was that the Respondent had contracted two previous marriages with one Jeinul Abdeen Mohamed Ishak and one Ratnayake Mudiyaselage Gnanasena. Petitioner argues that both marriages subsisted at the time of the purported marriage between the Petitioner and the Respondent. It is simply the basis of the Petitioner that the purported marriage between the Petitioner and the Respondent is null and void and no force or avail in law. I observe that by law and fact it would not be permissible for any person or citizen of our country, other than those who profess the Islam faith to contract marriages in the manner alleged above by the Petitioner. However the case between parties seems to have gone a long way and finally reached the Apex Court due to the prevailing circumstances of the case for which some members of the society or community may fault the legal fraternity in this country.

There are some primary facts that need to be understood prior to considering the questions of law on which leave was granted. Petitioner and Respondent by Marriage Certificate P1 were married to each other, by October 1992. However the facts placed before this court reveal that the Respondent was earlier married on or about November 1977 to one Jeinul Abdeen Mohomed Ishak (P2 certificate) and on or about August 1985 to Rathnayake Mudiyanselage Gnanasena (P3). It is also stated that by 4th of March 1983 Respondent obtained a divorce from the said Jeinul Abdeen Mohamed Ishak in D.C Gampaha Case No. 23883.

In the District Court four admissions were recorded mainly on aforesaid matters other than the question of divorce referred to above. However the learned District Judge had arrived at a conclusion that the marriage between the Respondent and the abovenamed Jeinul Abdeen Mohamed Ishak was dissolved by a Court of competent jurisdiction. This court has no reason to dispute the trial Judge's findings on that aspect of the dissolution of marriage. As such from the point of view of the Respondent there would not be a bar for her to contract the second marriage between herself and Rathnayake Mudiyanselage Gnanasena. However at the trial before the District Court the second marriage of the Respondent was considered to be invalid in view of the evidence that transpired in the trial

court that the said Gnanasena was also legally married to another person called Leela Gunarasekera. There is some evidence that transpired in the trial court that the said Lela Gunasekera had been separated with Gnanasena for a period of over seven years.

The material placed before this court indicates without a shadow doubt that the Respondent was well aware of the fact that she was already married to a person called Gnanasena at the time and period she thought it fit subsequently to marry the Petitioner. As such the several events that flow from and in between P1 to P3 in which ever chronological order, (before I consider the legal provisions) I observe that the sacred Institution of Marriage was made to suffer due to unacceptable and in a way immoral acts or conduct of persons, involved as litigants or lay witnesses in the District Court.

There is present and can be found an element of illegality in the contracts of marriages referred to above. The repeated marriages within intervals create some confusion. If the argument goes to the extent that the last marriage before the marriage in question was invalid, how should the law consider it? Does the law encourage a wrongdoer to contract an illegal marriage at a certain point of time and permit another marriage to occur subsequently, having taken advantage of an illegal marriage and announce to the world that the former marriage was void.

Contracts are illegal because they are forbidden by Statute or because they are contrary to public policy, which is a common law concept. A contract is contrary to public policy when it is in the public interest that it should not be enforced.

Illegality is a matter of degree, varying according to the granting of the legal prohibition. Two general categories of illegal contracts can be distinguished. Some illegal contracts contain an element of obvious moral turpitude; in others such taint is absent…. The courts treat contracts of the latter category more leniently than contract, of the former class.

Pg. 85 – Charlesworths Mercantile Law 12th Ed. By Clive M. SCHMITTHOFF

This court no doubt has to examine the relevant portions of evidence that was led in the District Court. Plaintiff-Petitioner having produced the relevant Marriage Certificates P1 – P3, stated that after he got married to the Respondent in 1992, there were problems between both of them and as such instituted divorce proceedings on or about 2001/2002. When these proceedings were pending the Petitioner came to know that the Respondent had contracted two previous marriages and thereafter he withdrew the first divorce case. Having obtained information of two prior marriages the Petitioner instituted another divorce case which is the case in question. The above items of evidence remains un contradicted and no doubt suggest the extent to which the Petitioner was misled. The Respondent party led the evidence of two official witnesses and that of Gnanasena, whom the learned

District Judge reported facts and directed the police to conduct investigations regarding witness Gnanasena's acts and conduct of contracting two marriages, with a view of initiating criminal proceedings, against him. I would welcome the step taken by the learned District Jude in this regard to directed the police to take the required steps according to law. This is a step taken by court to protect the society from such evils and a lesson to others behaving in such an awkward manner, irrespective of ones strata in life. The Respondent chose not to give evidence.

I have perused the entirety of the written submissions of both parties in all the courts concerning the divorce case. The position projected on behalf of the Respondent party is that Gnanasena was already married to one Leela Gunasekera and that marriage was not dissolved. As such an attempt made by the Respondent to demonstrate that since the marriage between herself and Gnanasena was void abintio due to the position of witness Gnanasena, the marriage in question remain intact between the Petitioner and Respondent. This position is untenable in law. I reject the entirety of the reasoning and judgment of the learned High Court Judge in this regard. It is scandalous to appreciate such a view. Respondent's position as stated above is an abuse of the process of law.

The substantive law and the procedural law on this subject is contained in Section 18 of the General Marriages Ordinance and Section 607 of the Civil Procedure Code.

Section 18 reads thus:

> "18 - 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."

It is the submission of the Petitioner that although the provisions of Section 18 of the said Ordinance stipulates provisions as aforesaid, the Defendant-Respondent is duty bound to comply with the provisions of Section 607 of the Civil Procedure Code and thereby to obtain a Judgment and Decree declaring that the said marriage between the Defendant-Appellant and the said R.M. Gunanasena is null and void. In other words, the provisions of Section 18 of the said Ordinance shall be read together with and/or interpreted in conjunction with the provisions of Section 607 of the Civil Procedure Code, which reads thus:

Section 607 reads thus:

> Section 607(1) –
>
> "Any husband or wife may present a Plaint to the District 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",

The Petitioner's submissions on this aspect of the above provisions of law connecting with Respondent's acts and conduct is relevant in the context of the case in hand.

I state that Section 18 is not at all ambiguous. It is crystal clear. It simply states that a marriage is valid only if one of the contracting parties or both <u>have not entered into</u> a previous marriage. If either of them have contracted a previous marriage same has to be dissolved by a Court of Competent Jurisdiction prior to the marriage in question or the marriage relied upon by the parties. If not the contract of marriage would be invalid. When a statute is clear and could be easily understood further explanations, interpretations are not necessary. The intention of the legislature must be deduced from the language used. I refer to the General Principles of Interpretation by *Maxwell on The Interpretation of Statutes 12th Ed. Pg. 28 ….*

> If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.

I have in this Judgment observed that the Respondent Party misled the Petitioner. The Respondent either knowingly or unwillingly had not disclosed her marriage to Gnanasena until the Petitioner discovered such marriage which induced him to file a divorce case. Law cannot be so ignorant to recognise the

fact that Gnanasena was already married to another and by that to permit the Respondent to take mean advantage to regularise the marriage between the Petitioner and the Respondent.

I would at this point of the Judgment wish to put the record in its correct perspective having considered the following positions reflected in the *Text Book on Family Law – 6th Ed. Jonathan Herring*.

At pg. 53

> The law relating to marriage draws an important distinction between those marriages which are annulled and those which are ended by divorce. Where the marriage is annulled the law recognises that there has been some flaw in the establishment of the marriage, rendering it ineffective. Where there is a divorce the creation of the marriage is considered proper but subsequent events demonstrate that the marriage should be brought to an end.

At pg. 55

> A void marriage is one that in the eyes of the law has never existed. A voidable marriage exists until it has been annulled by the courts and, if it is never annulled by a court order, it will be treated as valid. This distinction has a number of significant consequences:
>
> 1. Technically, a void marriage is void even if it has never been declared to be so by a court, whereas a voidable marriage is valid from the date of the marriage until the court makes an order. That said, a party who believes his or her marriage to be void would normally seek a court order to confirm this to be so. This avoids any doubts over the validity of the marriage and also permits the parties to apply for court orders relating to their financial affairs.

At pg. 59

> If at the time of the ceremony either party is already married to someone else, the 'marriage' will be void. The marriage will remain void even if the first spouse dies during the second 'marriage'. So, if a person is married and wishes to marry someone else, he or she must obtain a decree of divorce or wait until the death of his or her spouse. If the first marriage is void, it is technically not necessary to obtain a court order to that effect before marrying again, but that is normally sought to avoid any uncertainty. In cases of bigamy, as well as the purported marriage being void, the parties may have committed the crime of bigamy. Chris Barton has argued that there is little justification for making bigamy a crime and instead more could be done at the time of marriage to check whether parties are free to marry.

The above material obtained from the English Law attitudes would have a universal application, and there is no prohibition to draw a parallel to our local conditions, from above. Material placed before this court indicates that the Petitioner was misled to a great extent by the Respondent. The Respondent's record indicates her ability to contract marriages but with no respect to the Institution of Marriage and she entered into such marriage contracts at any cost disregarding good moral conduct. It is no doubt illegal and contrary to public policy as it would not be in the best public interest to contract a marriage whilst another marriage is pending, and not dissolved according to law.

I reject Respondent's contention that it was not necessary to obtain a Decree from court to have the previous marriage dissolved, for the reason that marriage between the Respondent and Gnanasena was in any event null and

void. The said Gnanasena was already married at the time and period when the Respondent entered into a contract of marriage with him. Non-disclosure of the above position by the Respondent to the Petitioner is to take undue advantage and circumvent the law. A man or woman cannot be permitted to take advantage of his own wrong. *Brooms Legal Maxims 10th Ed pg. 191* "no man can take advantage of his own wrong" If the Respondent was genuine in her approach a proper disclosure should be made and should have taken the proper legal steps as per Section 607 of the Civil Procedure Code.

It is relevant in the context of this case to extend the maxim on 'approbate and reprobate'. Where one party is permitted to remove the blind which hides the real transaction the maxim applied that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief and insist upon its apparent character to prejudice his adversary. The maxim is founded not so much on any positive law as the broad and universally applicable Principles of Justice 20 NLR at 124.

I would for more clarity on the issue reproduce the views of the learned District Judge as contained in the following extract from the Judgment of the District Court…

අධිකරණය විසින් මෙහිදී සලකා බැලිය යුතු වන්නේ එකී ඥාණසේන සහ චිත්තිකාරිය විසින් ඇති කර ගන්නා ලද විවාහය අධිකරණයක් මගින් විසුරුවා හැර නොමැති අවස්ථාවකදී එකී චිත්තිකාරියට නැවත විවාහයකට ඇතුලත් විය නොහැකිය යන

කාරණය යි. සාමාන්‍ය විවාහ ආඥා පණත් 18 වන වගන්තියට අනුව පාර්ශවකරුවන් විවාහයකට ඇතුළත් වන අවස්ථාවේදී ඔවුන් ඊට පෙර ඇති කර ගන්නා ලද විවාහයක් නීත්‍යානුකූල ලෙස විසුරුවා හැර හෝ ශූන්‍ය බවට ප්‍රකාශනයට පත් කර නොමැති අවස්ථාවක එකී දෙවන විවාහය වලංගු නොවේ. මෙහිදී ව්‍යවස්ථාදායකය විසින් එකී දෙවන විවාහය ඇති කිරීමට පෙර පල වන විවාහය ශූන්‍ය බවට ප්‍රකාශ කර ගැනීමේ අවශ්‍යතාවක් පෙන්නුම් කර තිබේ. මේ අනුව සැබැවින් ම විත්තිකාරියට සහ ඥාණසේන අතර ඇති වූ විවාහය නීතිය ඉදිරියේ වලංගු විවාහයක් නොවේ. නමුත් එම පදනම මත සිට විත්තිකරියට නැවත විවාහයකට ඇතුලත් විය නොහැකිය. විත්තිකාරිය නැවත විවාහයට ඇතුළත් වීමට නම් එකී විත්තිකාරිය ඥාණසේන සමග වී. 2 ලේකණය අනුව ඇතුලත් වූ විවාහයෙන් ශූන්‍ය බවට ප්‍රකාශ කරවා ගත යුතුව තිබුණි. එසේ ප්‍රකාශ කරවා ගැනීමකින් තොරව විත්තිකාරිය පැ. 1 ලේකණය මත පැමිණිලිකරු සමග නැවත විවාහයකට ඇතුළත් වී ඇත. මේ අනුව සාමාන්‍ය විවාහ ආඥාපණතේ 18 වන වගක්තිය පැ. 1 දරණ විවාහය සහතිකය සම්බන්ධයෙන් ද අදාල වේ. මේ අනුව විත්තිකාරිය පැ 3 විවාහයෙන් ඇතුලත් වූ විවාහය ශූන්‍ය බවට ප්‍රකාශයට පත් කරවා ගෙන නොමැති බැවින් විත්තිකාරිය සහ පපැමිණිලිකරු පැ. 1 දරණ ලේඛණය මත ඇතුලත් වූ විවාහය නීත්‍යානුකූලව වලංගු නොවන ශූන්‍ය විවාහයක් බව තහවුරු වේ.

The question of law raised in this appeal are answered as follows in favour of the Petitioner.

15(a)(i) Yes. In the context and circumstances of the case in hand Respondent should have resorted to the provisions of Section 607 of the Civil

Procedure Code to dissolve her previous marriage with Gnanasena prior to entering into a marriage with the Petitioner. If not it amounts to an abuse of the process of law.

(ii) Yes

15. (b) It is available to both a husband or wife to have the marriage dissolved on any ground which renders the marriage contract between them void by law.

In all the facts and circumstances of the case, I set aside the Judgment of the High Court and affirm the Judgment of the learned District Judge dated 8th December 2006. As such the appeal is allowed with costs, as per the prayer to the Petition of Appeal dated 22.12.2011.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREME COURT