

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

*In the matter of an Application for the grant of
Writs of Certiorari and Mandamus under and
in terms of Article 140 of the Constitution.*

CA/WRIT/266/2021

Liyanaage Champika Harendra Silva
No.10,
Rutland Lodge,
Rutland Street,
High Wycombe,
HP11 2FS,
United Kingdom.

Appearing by his Attorney;

Liyanaage Thilakaratne Silva
No.1029/1/A,
Pothuarawa Road,
Malabe.

PETITIONER

Vs.

1. W.M.M.B. Weerasekara
Registrar General
Registrar General's Department,
No. 234/A3,
Denzil Kobbekaduwa Mawatha,
Battaramulla.
2. M.A.P.Sewwandi
Assistant Registrar General
Registrar General's Department,
No. 234/A3,
Denzil Kobbekaduwa Mawatha,
Battaramulla.
3. Poorna Sewwandi Nagasinghe
No.01,
Charles Babbage Close,
Chessington,
Surrey,

KT92SA,
United Kingdom.

4. K.Chathura Mihidum
Divisional Secretary
Kaduwela Divisional Secretariat,
Udawaththa Road,
Malabe.
5. S.R.D.M. Samarakoon
Additional District Registrar
Kaduwela Divisional Secretariat,
Udawaththa Road,
Malabe.
6. Registrar
District Court,
Kaduwela.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Senany Dayaratne with Nishadi Wickramasinghe for the Petitioner
Nayomi Kahavita S.C. with M. Fernando S.C. for the 1st, 2nd, 4th, 5th and 6th
Respondents

Argued on: 18.09.2023

Written Submissions: Petitioner :22.11.2023

1st, 2nd, 4th, 5th and 6th Respondents :07.11.2023

Decided on: 01.12.2023

Sobhitha Rajakaruna J.

The Petitioner primarily seeks a mandate in the nature of a writ of Certiorari quashing the decision of the 1st Respondent - Registrar General of Marriages for Sri Lanka ('Registrar') reflected in his letter dated 19.03.2021, marked 'A12'. By way of the said letter the Registrar has informed the Petitioner that when a marriage is registered as per the laws of Sri Lanka he is unable to recognize, under the prevailing laws of this country, a dissolution of such marriage obtained in a foreign country. Further, he has opined in the said 'A12' that the Petitioner ought to obtain a decree from a competent court in Sri Lanka filing a divorce action. Additionally, the Petitioner seeks mandates in the nature of a writ of Mandamus directing the

Registrar and other Respondents to give legal effect to the decree of divorce dissolving the marriage between the Petitioner and the 3rd Respondent issued by a Family Court in England.

Based on the contents of the motion dated 17.03.2023 filed on behalf of the Petitioner, this Court is convinced that sufficient evidence has been tendered to Court in proof of serving notices of this Application on the 3rd Respondent who was absent and unrepresented throughout these proceedings. The other Respondents and the Petitioner agreed on 18.09.2023 that the instant Application may be dealt with and determined solely on the basis of written submissions.

In focus of the factual matrix, the Petitioner who is a dual citizen of Sri Lanka and the United Kingdom ('UK'), married the 3rd Respondent on 09.12.2010 in Colombo, Sri Lanka, evinced by the certificate of marriage marked 'A3'. Thereafter, the 3rd Respondent also migrated to the UK where both the said parties established their matrimonial home. However, due to the subsequent breakdown of their marriage, the Petitioner has instituted an action for divorce, bearing No.1955/D/15 (Vide - 'A5') in the District Court of Kaduwela. Nevertheless, in response, the legal representatives of the 3rd Respondent informed the District Court of Kaduwela that the 3rd Respondent had, by that time, filed for divorce in the Family Court at Kingston-Upon-Thames in England, bearing case No. BV15D22438. Due to this reason, on 19.02.2016 the Petitioner withdrew the said divorce case in the Kaduwela District Court (Vide - 'A7'). The Petitioner states that subsequently, by a decree issued on 02.05.2018 by the said Court in England the marriage between the Petitioner and the 3rd Respondent was dissolved. The documents marked 'A8(a)' and 'A8(b)' are annexed as supporting evidence for the decree certifying their dissolution of marriage.

Following the dissolution of the first marriage, the Petitioner entered into another marriage on 20.08.2019 at a Marriage Registration Office in Bangkok, Thailand and seemingly the relevant documents are marked as 'A10(a)' and 'A10(b)'.

Consequently, by way of a letter dated 08.02.2021 marked 'A11', the Petitioner has requested from the Registrar that legal effect be given in Sri Lanka to the decree of dissolution of marriage obtained in England and to record such dissolution by disregarding/invalidating/removing the entry of the marriage with the 3rd Respondent from

the relevant register. However, by the aforesaid impugned letter marked 'A12', the Registrar (through the 2nd Respondent) informed the Petitioner that the divorce obtained in England could not be recognized in Sri Lanka, as per the advice received from the Attorney General's Department and that the Petitioner should obtain a Divorce, especially from a competent court in Sri Lanka.

I must now consider the law applicable in Sri Lanka with respect to the dissolution of marriage. Section 19 of the Marriage Registration Ordinance No.19 of 1907 ('Ordinance') reads:

- (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 impotency at the time of such marriage.
- (3) Every court in Sri Lanka having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on any such ground.

In terms of the above provisions, a marriage registered under Sri Lankan law can be dissolved by any court in Sri Lanka having matrimonial jurisdiction. The grounds for such dissolution are mentioned in the above section 19(2) apart from the relevant provisions in the Civil Procedure Code ('CPC'). The Chapter XLII of the CPC declares the procedure in matrimonial actions. It is clear that the said section 19 applies to general marriages registered under the above Ordinance, thus, the provisions in section 19(1) also deal with such marriages. However, in terms of the said section 19(1), a marriage registered under Sri Lankan law can be dissolved by "some competent court". The question that arises, in this case, is whether a competent court in a foreign country also comes within the purview of such a term: "some competent court".

It is important to note that, by virtue of the said section 19(1) and the provisions of section 596 of the CPC, refers to a divorce of a *vinculo matrimonii*, a Latin term which is usually identified as 'the chain or bond of matrimony'. The Legislature in its wisdom has avoided

using the words ‘divorce of a marriage’ or ‘divorce from the spouse’ but has used the phrase ‘divorce of a *vinculo matrimonii*’ in the respective provisions of Law. This, in my view, has an impact to a certain extent on the question that needs to be resolved in this case.

The Petitioner argues that no limitation is drawn in the said section 19(1) upon the term “some competent court” limiting such court only to a court of Sri Lanka. Accordingly, the Petitioner contends that “some competent court” abroad, i.e. one which is vested with powers of dissolution of marriage, may exercise such powers to dissolve a marriage that is entered in Sri Lanka. Further, it is submitted that in the absence of an express provision in Section 19(1) that ousts the jurisdiction of foreign courts in respect of dissolving a marriage, it is a necessary implication that Sri Lanka can recognize decisions in divorce actions instituted in “competent courts” in other countries.

Asokan Nee Kandasamy v. Asokan (1994) 1 SLR 413 is a case where the Plaintiff-Petitioner instituted an action for divorce against her husband in the District Court of Colombo on the ground of malicious desertion (constructive) and also claimed the custody of the two children born as a result of the marriage. The marriage in question took place in India, and the parties lived in Madras until the Petitioner had to quit the matrimonial home owing to the matrimonial fault of the husband. She came to her parental home in Colombo in the year 1990 with her two children. Thereafter she instituted the action above and summons were served on the Defendant through a solicitor residing in Madras and the Ministry of Justice via Sri Lanka Consular in Madras. The defendant did not appear at all to defend the action. The District Judge dismissed the action, inter-alia, on the basis that section 597 of the CPC is not applicable since the marriage was contracted in Madras and as such the court has no jurisdiction in respect of a marriage contracted outside Sri Lanka.

I wish to borrow the below articulations formulated by the distinguished Judge Ananda Grero in the above case, in resolving the issues of the case in hand:

“Section 19 of the Marriage (General) Ordinance read with Section 24 of Judicature Act, and also with Section 3 of the Judicature (Amendment) Act No. 71 of 1981 reveals that divorce jurisdiction is exercisable by the District Court irrespective of where the marriage was contracted.

Section 597 of the Civil Procedure Code does not prohibit a court from entertaining a plaint where malicious desertion took place outside Sri Lanka. This section read with section 19 of the Marriages (General) Ordinance does not preclude a competent District Court to entertain a plaint where it appears from the plaint that the party resides within its local jurisdiction and alleges a ground for divorce as contemplated in Section 19 of the Marriages (General) Ordinance.

*The learned Additional District Judge was of the opinion that a wife's domicile is, that of the husband, and it is a court of the husband's domicile that has jurisdiction to grant a divorce. She was attracted by the decision of *Le Mesurier v. Le Mesurier*¹*

*As rightly submitted by the learned Counsel for the plaintiff-petitioner in his written submissions, the matrimonial law has undergone several changes since the decision of the aforesaid case. As contended by the learned Counsel for the plaintiff-petitioner, the Supreme Court in the above stated case held that the District Court of Matara had no jurisdiction notwithstanding Chapter 42 of the Civil Procedure Code, because the law, Registration (Marriages, Birth & Deaths) Ordinance No. 6 of 1847 gave divorce jurisdiction to the District Court only to a marriage contracted locally. But it is not so as the law stands today. In the result, the decision of the *Le Mesurier* case has no application to the marriage contracted by the plaintiff-petitioner in the present case.”*

The decision in the above *Asokan Nee Kandasamy* case provokes the question as to whether a marriage entered in Sri Lanka can be dissolved in “some competent court” outside Sri Lanka, as it determines that divorce jurisdiction is exercisable by the Sri Lankan courts irrespective of the place where the marriage was contracted. Now I must advert to the below vital critiques on divorce laws of Sri Lanka, made by Shirani Ponnambalam in **“Law and the Marriage Relationship in Sri Lanka” 2nd Revised Edition, Lake House Investments Ltd, pp. 304 to 311.**

“The inevitable outcome of a mixed divorce law would be to give people wanting to rid themselves of marriage a last resort when they find that they cannot succeed on any other ‘ground’. Matrimonial misconduct and the breakdown theory are therefore mutually inconsistent grounds and the Sri Lankan legislature should either substitute the breakdown theory for the theory

¹ INLR 160

founded on matrimonial guilt or improve the application of the fault based grounds for divorce entrenched in the Marriage Registration Ordinance.” (at page 305)

“It is interesting to note that the Sri Lankan divorce laws as set out in the Civil Procedure Code, are an innovation which do not resemble either the South African or the English law position. Both the recently enacted Divorce Act of South Africa and the Matrimonial Causes Act of England require proof of an irretrievable breakdown of the marriage as a prerequisite for the award of a decree of divorce. Consequently, the court is the ultimate arbitrator on the state of the marriage relationship and inevitably this helps to ensure that only a union which is utterly and hopelessly broken down receives judicial sanction. In other words, the courts, in effect, confer de jure recognition on a de facto state of affairs and this is clearly justifiable on the premise that both from the point of view of the parties concerned, and society at large, it is far more equitable to come to terms with the reality of a situation, thereby providing every encouragement to the unfortunate parties to rehabilitate and adjust to a new way of life, rather than to perpetuate the unhappy existence of an empty shell of marriage.” (at page 306 & 307)

The above point of view of Shirani Ponnambalam, in my view, focuses on the fact that the principle of irretrievable breakdown of marriage should be given prominence over fault based grounds for divorce.

Why does a divorce of *vinculo matrimonii* need legal sanction? One aspect of the answer to this question may be that such sanction is required to resolve consequential issues such as distribution of property, child custody, alimony, child access and child support. In addition to that, such sanction is, to my mind, paramount for the better manifestation of *vinculo matrimonii* and to tighten the relationship between the husband and wife, enhancing the family concept. The protection of children and their rights also can be linked to this social concept.

Although the instant Application deals with the provisions relating to divorce in the said Ordinance, enacted in 1907 during the British period, several other laws have also been established in Sri Lanka to deal with marriage and divorce. This includes the Kandyan Marriage and Divorce Act which was enacted post-independence in 1952 and the Muslim Marriage and Divorce Act which was enacted in 1951. I cannot see any restrictions being imposed by law against the choice of any person who is subjected either to Kandyan law or

to Muslim law, to select the relevant law that he/she should get their marriage registered. On the other hand, it is observed that parties to a marriage under the Kandyan Marriage and Divorce Act, are expected to apply to the District Registrar for a dissolution of marriage and not to a court of law.

In this case, the Petitioner and the 3rd Respondent have chosen to tie the nuptial knot under the said Ordinance in Sri Lanka. However, both parties have migrated to the UK and are blessed with a child. As a result of the breakdown of the *vinculo matrimonii* both parties have opted to proceed with the legal proceedings in England to get their matrimonial bond dissolved. If there is a stringent law that prevents parties who opted to get their marriage registered in Sri Lanka, from seeking a divorce *vinculo matrimonii* in another country based on genuine reasons, they may ordinarily face severe hardship including physical, mental and financial agony. The obligation to provide for the necessary care, support and maintenance including medical expenses of a dependent child or the spouse living in another country also needs to be taken into consideration in this regard. Thereby, at large the rights of the members of a family, including children will be affected to an extent unknown to others if a narrow interpretation is given to the provisions of the said section 19(1). I believe that the inconvenience explained above will eventually go against the intention of the legislature embodied in the said section 19(1) as our laws generally do not intend to affect the rights of any person in society when making laws.

In light of the above and with a close examination of related laws and the legal jurisprudence I hold that there cannot be any restrictions for a marriage entered into in Sri Lanka under the said Ordinance to be dissolved in a competent court in a foreign country, if such court opines that such dissolution could be permitted under their laws. Thus, I am inclined to accept the proposition of the Petitioner that the legislature has not intended to limit the words “some competent court” of the said section 19(1) only to a court in Sri Lanka.

Anyhow, the competence of such foreign court regarding the term “some competent court” should be assessed, with additional guidelines. One of such is to ascertain whether the law of such a country has bestowed the jurisdiction to the respective court to dissolve marriages entered into in a foreign territory. Secondly, it is quintessential that both parties who entered into the contract of marriage in Sri Lanka have been residing in the respective country, for a

reasonable period of time when applying for a divorce. Thirdly, I take the view that both the husband and wife should actively participate in such divorce proceedings in a foreign court while being subjected to the procedure adopted in such court concerning matrimonial actions. I have taken the initiative to provide the above three guidelines in order to avoid either of the parties being deprived of any right that they derived from the registration of their marriage under the said Ordinance in Sri Lanka. For the reasons set out above, a valid decree of dissolution of marriage entered into in a foreign country can be given effect, when necessary, within Sri Lanka, subject to other laws of this country and the above guidelines formulated by me. I am convinced that the Petitioner and the 3rd Respondent have fulfilled all of the above necessary criteria when obtaining their decree of divorce in England.

Hence, the final issue that remains is whether the Petitioner is entitled to a mandate in the nature of a writ of Certiorari to quash the decision reflected in the impugned document marked 'A12'. Based on my findings above, I cannot agree with the opinion of the Registrar that the Petitioner ought to obtain a divorce decree after instituting a divorce action in a court in Sri Lanka at a time where the *vinculo matrimonii* between the Petitioner and the 3rd Respondent have been dissolved by a competent court in England. Thus, in no way can it be assumed that it is lawful for the Petitioner to institute another divorce case in Sri Lanka as erroneously recommended by the Registrar since the Petitioner has already entered into his second contract of marriage in Thailand. Therefore, I hold that the document marked 'A12' should be quashed.

Having considered the main question of law, what remains to be examined is whether a duty has been cast upon the Registrar in terms of the said Ordinance in Sri Lanka to place on record in the relevant register about any divorce of a *vinculo matrimonii* declared by a local or foreign court of law by invalidating/removing the entry of such marriage initially registered in Sri Lanka. Although I am unaware of any extraneous arrangements made between the Registrar and the Registrars of District Courts, in reference to divorce decrees, I need to stress that there doesn't appear to be any express provision in the said Ordinance that bound the Registrar to execute such a duty whenever a District Court of Sri Lanka issues a divorce decree. Therefore, I am unable to grant any of the mandates in the nature of writs of Mandamus as prayed for in the prayer of the Petition. Nevertheless, my determination should not be an impediment

for any relevant party to get a declaration, if they wish, under section 217 of the CPC from a District Court in Sri Lanka confirming or establishing the dissolution of marriage which has taken place in a foreign country. Likewise, there cannot be any restriction for a District Court in this country to accept a valid document, during any appropriate proceedings, establishing a dissolution of a marriage (entered into in Sri Lanka) by a competent court in another country, however, it must be subject to the guidelines spelled out above by me and the provisions of the law relating to evidence.

In these circumstances, I proceed to issue a writ of Certiorari against the 1st and 2nd Respondents quashing the decisions reflected in 'A12'. However, I am not inclined to grant any other reliefs prayed for in the prayer of the Petition.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal