

SALIENT POINTS ON DIVORCE ACTIONS

- The relevant provisions in relation to divorce actions are contained in several statutes, but arguably the most important are the Provisions contained in the Civil Procedure Code to wit Chapter XLII of the Civil Procedure Code. Chapter XLII contains sections 596 to section 638. These are the material sections that one has to study to obtain a clear knowledge on Divorce Actions.
- Where can a party institute a divorce action?

Section 597 of the Civil Procedure Code as amended very clearly states that a divorce action could be instituted by presenting a Plaint to the District Court within the local limits of the jurisdiction of which the husband or the wife resides. Whereas, (except Testamentary Actions) by virtue of the operation of section 9 of the Civil Procedure Code as amended action could be instituted only where the Defendant resides.

- When should one add a Co – Defendant in a divorce action?

Where adultery is alleged, under section 598 and 599A of the Civil Procedure Code as amended such would necessitate a Co-Defendant being named. There are only three grounds based upon which a party alleging adultery is excused from naming the adulterer/adulterers. Such is contained at section 598 (1), (2) and (3) of the Civil Procedure Code as amended which reads as follows;

“598

- (1) That the Defendant is leading the life of a Prostitute, and that the Plaintiff knows of no person with whom the adultery has been committed;
- (2) That the name of the alleged adulterer is unknown to the Plaintiff, although he has made due efforts to discover it;
- (3) That the alleged adulterer is dead;”

Furthermore, specifically if the aforementioned circumstances arise there should be a prayer to be excused from making the alleged adulterer a Co-Defendant and the allegations of fact upon which it is founded, supported by an Affidavit of fact or other sufficient evidence which shall be embodied in the plaint.

- What is the point of making a Co-Defendant a party to a divorce action?

(a) To prove matrimonial fault; and

(b) To include a claim for pecuniary damages against such Co-Defendants.

- Is there a judgment in divorce actions?

According to the Civil Procedure Code as amended there should not be any judgments pronounced in divorce actions and the material end result of a divorce action should be the decree *nisi* and the decree absolute. As per section 604 of the Civil Procedure Code as amended the time period that should elapse from the granting of the decree *nisi* for it to be made absolute should not be a period less than three months. The rationale of giving this time period is to give the parties one last opportunity to reconcile and recommence their matrimonial relationship. Furthermore, subsequent to the decree *nisi* being entered in favour of a party to a divorce action for it to be converted in to a decree absolute would not be automatic and the party who so desires must move Court to convert the decree *nisi* into a decree absolute [*Aserappa v. Aserappa* (37 N.L.R. 372)]

- Decree to nullify a marriage.

Under section 607 a party to a marriage could present an action for a declaration of nullity in relation to the marriage in issue. One of the controversial authorities decided on the point is (*Sivacolunthu v. Rasama* 24 N.L.R. 89) which held that concealment of pregnancy by the wife as at the time of the marriage is a ground for the husband to obtain a decree of nullity of marriage.

- Application for a decree of separation *a mensa et thoro*.

The most important section in this regard is section 608 of the Civil Procedure Code as amended. The most controversial aspect of the aforementioned section is contained in section 608 (2) of the Civil Procedure Code as amended. Section 608 (2) regulates the conversion of a decree of separation aforementioned into a decree of dissolution of marriage. One of the most contentious points with regards to the aforementioned was whether there was a need to prove matrimonial fault after a decree of separation had been obtained for it to be converted to a decree of dissolution of marriage or whether by effluxion of time itself a decree of separation *a mensa et thoro* would be converted into a decree of dissolution of marriage.

In ***Muthurane v. Thuraisingham* (1984) 1 Sri L. R. 381** held that there was no requirement to prove matrimonial fault when obtaining a decree of dissolution of marriage subsequent to a decree of separation.

The aforementioned authority was overruled in ***Tennekoon v. Somawathie Perera alias Tennekoon* (1986) 1 Sri L. R. 90 / 1986 1 C. A. L. R. 268**. In such authority the Honourable Supreme Court held that matrimonial fault is an absolute necessity in obtaining a decree of dissolution of marriage whether it be an action for a decree of dissolution of marriage from the onset or when a decree of separation *a mensa et thoro* is converted into a decree of dissolution of marriage.

- The rights of the Co-Defendant?

If adultery is established the Co-Defendant will be liable to pay costs of suit and damages. Still, if the Co-Defendant at the time of the adultery did not have reason to believe that the relevant party was not married then under section 612 of the Civil Procedure Code as amended the Co-Defendant will be exonerated from paying damages and costs. Another proviso which is relevant to the aforementioned is that the party concerned was at the time of the adultery living apart from her husband leading the life of a prostitute.

- *Alimony pendent lite* and cost of litigation

Under section 614 of the Civil Procedure Code as amended a party can present an application by way of a Petition requesting Court to grant Alimony pending the action. Still alimony pending the action shall in no case be less than one – fifth of the husband’s average net income for the three years next preceding the date of the order. Furthermore, cost of litigation could also be obtained by a spouse who is suffering from indigent circumstances.

- According to section 615 the Court upon pronouncing a decree of divorce or separation can order for the benefit of the spouse or of the children of the marriage or of both that the other spouse shall do any one or more of what is contained in section 615 of the Civil Procedure Code as amended.

In this regard the authority of ***Ranee Wellala v. D. R. Wellala* 73 N.L.R. 505** is important where it was held that:

The jurisdiction of the court under section 615 of the Civil Procedure Code to make an order for permanent alimony becomes exercisable only at the stage when a divorce decree is being or has been made absolute (although, in practice, matters concerning the liability to pay alimony, an the nature and the quantum of payment are investigated at an earlier stage). Accordingly, it is open to the wife to differ her application for permanent alimony to a stage subsequent to the entry of the decree absolute.

- Section 618 of the Civil Procedure Code as amended recognizes the validity of anti-nuptial or post-nuptial settlements.
- Furthermore, section 622 of the Civil Procedure Code as amended provides the Court can even after entering a decree absolute for dissolution of marriage make further orders as envisaged by section 622 of the Civil Procedure Code as amended.

- Grounds under which a party can obtain a divorce in Sri Lanka?

The grounds are three in number and contained in section 19 of the Marriage Registration Ordinance No. 19 of 1907 as amended which are as follows ;

(1) Malicious desertion/Constructive malicious desertion

(2) Adultery

(3) Incurable impotency as at the time of marriage which was known to the spouse suffering with incurable impotency and not divulged to the other spouse.

- In Sri Lanka divorces can only be obtained where matrimonial fault has been proved and cannot be obtained by way of consent. This is the very reason that even if one spouse admits matrimonial fault and wishes to settle the matter that evidence is led of the innocent spouse to prove matrimonial fault to the satisfaction of court.
- The importance of the matrimonial fault

When it comes to the dissolution of marriage everything depends on the intention of the parties to wit whether the offending spouse intended to bring the matrimonial bond to an end. To find this out we cannot go into the mind of the alleged offending spouse to figure out whether in fact such offending spouse intended to bring the matrimonial bond to an end. Hence, the pivotal piece of evidence that is looked at is whether the offending spouse left the matrimonial home or whether due to the expulsive acts of the offending spouse the innocent spouse had to leave the matrimonial house.

- Discussion on *factum* of desertion, *anumus deserendi* and *animus revertendi*.
- Discussion of the recent Authority of **Gomes v. Gomes** bearing case No. **S.C. Appeal 123/14** decided on 7th June 2018.

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