COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 31 (25 August 2023)
SCA 16/2022
(Arising in DV 37/2021)

In the matter between

Kalaichelvi Karunakaran **Appellant**
(rep. by Mr. Divino Sabino)

and

Durakiannu Karunakaran **Respondent**
(rep. by Mr Fank Elizabeth)

Neutral Citation: *Karunakaran v Karunakaran* (SCA 16/2022) [2023] SCCA 31) (Arising in DV 37/2021) (25 August 2023
Before: Robinson, Tibatemwa-Ekirikubinza, Adeline, JJA
Summary: **Divorce- Section 4 (1) (b) of the Matrimonial Causes Act CAP 124 –** *appeal against decision of Govinden CJ granting a conditional order of divorce to the Respondent on the premise of the Appellant's unreasonable behaviour which made expected living together as a married couple impossible.*
Heard: 11 August 2023
Delivered: 25 August 2023

ORDER

The appeal is dismissed and the orders of the Supreme Court are upheld.
I make no order as to costs.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA. (Robinson JA, Adeline JA concurring)

The Facts

1. The Respondent is a retired judicial officer and now a Notary Public residing at Mont Fleuri Mahe and the Appellant is a school teacher and presently working at the Independence School, Ile du Port, Mahe.

2. The parties were married on 17th September 1984, at Mayiladuthurai Town, in the state of Tamil Nadu, India in an arranged marriage and registered under Hindu Marriage Act.

3. After the marriage, the Appellant joined the Respondent in Seychelles. Two children Khalyan Karunakaran and Kavinya Karunakaran (who are now adults) were born as a result of the said marriage.

4. On 16th April 2021, the Appellant (wife) filed an application before the Family Court Tribunal seeking protection orders:
   (i) restraining the Respondent from verbally abusing and making threats of violence against her;
   (ii) restraining the Respondent from conducting any acts of violence towards her
   (iii) restraining the Respondent from visiting or otherwise physically accessing the matrimonial home at La Misere.
   (iv)Relinquishing keys or otherwise ceasing to keep the master Bedroom and study room locked.

5. On 26th April 2021, the Respondent instituted divorce proceedings in the Supreme Court and subsequently an application for urgent stay of the proceedings which were underway at the Family Tribunal.

6. It is important to note from the outset that in Seychelles there is but one ground for divorce namely, "*irretrievable breakdown of the marriage*". At the time the petition was filed in the Supreme Court, the relevant Legislation was the Matrimonial Causes Act, Cap 124[1]

[1] The provision was carried into the Civil Code of Seychelles 202 which commenced on 1 July 2021.

7. The ground could be proven in one of four ways listed in section 4 (1) of the Act as follows:

   Subject to this Act, a party to a marriage may petition the court for divorce on the ground that the marriage has irretrievably broken down because-

   a. the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
   b. the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent;
   c. the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition; or
   d. the petitioner and the respondent have lived apart for a continuous period of at least 1 year preceding the presentation of the petition and the respondent consents to the grant of the divorce.

8. The Respondent averred in the divorce petition that the marriage had irretrievably broken down since his wife has behaved in such a way that the Respondent cannot reasonably be expected to continue to live with her. The Respondent cited several actions as constituting unreasonable behaviour by his wife: lack of love and affection for the past 20 years, desertion and lack of matrimonial consortium, separation of rooms but living in the same matrimonial home, provocative arguments on property issues, use of filthy language against the Respondent, the Appellant claiming that she was an incarnation of "Kaali" a mythological Hindu goddess of violence and killing, threats of murdering the Respondent, change of religion into idol worship and black magic, ill treatment of the Respondent by not cooking for him and restricting the Respondent's movements in the matrimonial home.

9. On the other hand, the Appellant, as respondent in the petition denied the allegations on which the petition was based. More specifically, she averred that she was always supportive of the Respondent and his career. That she had not withheld physical contact with her husband and in fact it was the husband who had issues. That the Respondent had twisted facts and was the one who isolated himself in his own home. That with regard to the

averments of emotional abuse, it is the Respondent who had been abusive towards her. He had left the matrimonial home on his own accord.

10. Both parties gave their testimonies before the Supreme Court.

11. Having heard the submissions and evidence of both parties, Govinden CJ found in favour of the Respondent and granted him a conditional order of divorce.

12. Dissatisfied with the Trial Judge's decision, the Appellant lodged an appeal in this Court on grounds that:

1.The Learned Chief Justice erred in granting the petition when there was no evidence or finding thereof that the parties made an attempt at reconciliation.

2.The learned Chief Justice failed to identify the facts that she put into consideration in making the findings that the respondent cannot reasonably be expected to live with the appellant in so failing to identify such facts we are unaware if the learned Chief Justice took into consideration matters precluded by Section 8(2) of the Matrimonial Causes Act that is the court shall not take into consideration any incident which occurred if the parties lived more than six months after the last incident.

3.The learned Chief Justice erred in making the finding in paragraph 61 of the ruling in concluding that the parties have lived apart since 2017 yet the respondent did not plead the ground of divorce that the parties have not been living apart.

Reliefs sought:

13. The appellant prayed that this Court sets aside the ruling of the Learned Chief Justice and make the following orders:
    (i)Allow the appeal
    (ii)Quash the conditional order for divorce granted
    (iii)Costs against the Respondent
    (iv)Any other order that the court sees fit.

14. To avoid unnecessary repetition, the parties' submissions will be reproduced at the point where the Court will be resolving each ground of appeal.

Ground 1

15. Whether the Learned Chief Justice erred in granting the petition when there was no evidence or finding thereof that the parties made an attempt at reconciliation.

Appellant's submissions

16. In arguing Ground 1, Counsel for the Appellant submitted that no evidence had been tendered by the Petitioner to show that attempts at reconciliation had been made and thus the petition ought to have been dismissed. Counsel relied on Section 5 of the Act and argued that for a petition for divorce to succeed, the court must be satisfied on the evidence presented that reconciliation has been explored and has failed. Counsel cited the case of J.M v N.M (DV 148\2016) [2018] CSC 503 where the court refused to grant a divorce due to lack of evidence showing that there was an attempt made at reconciliation.

17. The appellant's counsel submitted that there were no attempts at reconciliation but only attempts towards agreement on how to divide matrimonial property. He referred to the testimony of the Appellant on record where in re-examination, she had been asked to clarify the role of a person who her husband had mentioned in his testimony as an individual who had approached the Appellant with intention of reconciling the couple. The Appellant had answered: "nobody came to talk about any reconciliation as such. That I am very much clear. Mrs. Sandri, Sandrija was just mentioning about his (the Respondent's) health." Counsel also referred to the testimony of the Appellant in which she was firm that even the couple's daughter only discussed possible settlement of property issues.

18. Counsel for the Appellant referred to the Respondent's evidence and submitted that the Respondent made vague statements about having engaged Mrs. Sundair and his daughter to speak to the appellant with a view of settling the matter. That the slightest attempt was an agreement on how to divide matrimonial property but not reconciliation of the parties to the marriage.

19. The Appellant's Counsel therefore contended that since there were no attempts at reconciliation, the court ought not to have granted a conditional order for divorce before satisfying itself on whether or not the parties had attempted to reconcile.

Respondent's reply

20. Counsel referred to the Respondent's evidence at pages 134 and 135 of the Record, where the Respondent testified about engaging several people including the couple's daughter to mediate with the Appellant. Prior to engaging the daughter, the Respondent's sister - Mrs. Sundari Jawahal - had approached the Appellant with a proposition that the couple meets in the presence of their children but the Appellant refused.

21. Counsel submitted that the Respondent had in fact pleaded a failure of reconciliation in paragraph 9 of his petition and further averred that there was no possibility of reconciliation. Counsel referred to the Respondent's testimony at pages 134, and 169 of the proceedings where he stated that his marriage had irretrievably broken down and that reconciliation was impossible. Counsel for the Respondent also referred to letters on the record, letters in which he, as lawyer for the Respondent advised the Appellant that her relationship with the Respondent was currently estranged and that the Respondent wanted to settle the impasse amicably through mediation and informal meetings. That however, the Appellant showed disinterest in taking up the opportunity to reconcile because she never replied to the said letters. He argued that this communication is further evidence of attempts by the Respondent to reconcile with his wife.

22. Counsel submitted that the above was ample evidence that the parties had attempted reconciliation at various intervals although it turned out unsuccessful.

Court's consideration of ground 1

23. This ground is rooted in Section 5 of the Act which provides that (1) the court shall not grant a divorce on a petition under Section 4 (1) unless it is satisfied that –
    (a) **Attempt has been made to reconcile the petitioner and the respondent**.

(b) After inquiring into the evidence presented by the parties to the proceedings, there is no reasonable possibility of reconciliation between the parties; and

(c) The marriage has irretrievably broken down as provided in section 4 (1).

24. The Appellant's contention was specifically under Section 5 (1) (a) which prohibits the court to grant a divorce without satisfying itself that "attempt has been made to reconcile the petitioner and the respondent."

25. This is a factual issue and it can only be resolved by evaluating the evidence adduced before the trial court.

26. I will first deal with the contents of the letters of the Respondent's Counsel addressed to the Appellant, which Counsel for the Respondent argued were evidence of attempts at reconciling the parties. In one letter dated 24th February 2020, the lawyer states:

> *Our client has instructed us to contact you with a view to settle your matrimonial issues amicably through mediation and informal meetings. (It then continues), You are hereby requested to contact our Chamber within the next 7 days to discuss how best to resolve the impasse and settle the matrimonial properties*.

27. Another letter dated 12th July 2020 and addressed to the Appellant, states inter alia:

> *Two months have now lapsed since you took receipt of our letter and we were wondering if you have been able to seek legal advice since. We would be most grateful if you could revert with a response to our offer or any counter-proposal you may have, in order to avoid litigation (washing dirty linen in public) with a view of settling this matter amicably and out of court.*

28. Another letter dated 27th August 2020 and addressed to Counsel for the Appellant focuses almost exclusively on property issues, mentioning that all the matrimonial properties in Seychelles and India were purchased solely by the Respondent. The letter continues to state

that other property was acquired by the Respondent through his inheritance. That the Respondent requests that all the properties be returned and transferred to him immediately and he would then transfer one property or a house to the Appellant.

29. In regard to the above mentioned letters, I am in agreement with the Appellant that the focus of the communication was on how to settle matrimonial property issues. The communication cannot be taken as attempts at reconciliation.

30. I now move to the oral testimony of the parties. The Respondent testified that he had engaged the couple's daughter and his sister to approach the Appellant and facilitate reconciliation. The Appellant does not contest that several people talked to her. What she however is categorical about is that the said individuals had only proposed the possibility of settling property disputes and not reconciliation of the relationship.

31. The question therefore is: whose narrative is to be believed?

32. Counsel for the Appellant submitted that the Respondent made vague statements about having engaged Mrs. Sundair and the couple's daughter to speak to the appellant with a view of settling the matter.

33. I have looked at the relevant testimony of the Respondent on record. Counsel for the Respondent asked the Respondent thus: "*Tell the Court what attempt have you made to reconcile with her and why have you come to the conclusion that there is no possibility at all of reconciliation between you and her?"*

34. It is then that the Respondent mentioned several people who had approached the Appellant for reconciliation. I do not find the statement of the Respondent vague.

35. I note that during examination in Chief of the Appellant, her lawyer made several attempts to ask the Appellant whether people, (including their daughter) made attempts to reconcile the couple. The Appellant's answer to that question, put to her several times, was evasive.

All she kept on emphasising was that the people who approached her with suggestions that the couple reconciles "did not know the clear picture … they accepted everything that they were told" (by the Respondent). She would then go on to testify about matters not asked of her by her lawyer. The fact that the Appellant did not agree with the approach taken by the people who approached her or that she felt they were not useful is not in itself evidence that there were no attempts towards reconciliation.

36. I further take note that the Appellant accepted during cross examination that at one time the husband had proposed that the couple renews their marriage vows.

37. In my opinion, this no doubt was also an attempt at saving the couple's strained relationship.

38. I am therefore satisfied and make a finding that the evidence above was sufficient to show attempt at reconciliation.

39. And it cannot be said that the Trial Judge issued the conditional order of divorce, without first establishing that attempts towards reconciliation of the parties had been made.

40. I have also found it pertinent to make note of the fact that in paragraph 9 of his Plaint, the Respondent did not only plead that all attempts at reconciliation between the parties had failed. He also pleaded in the same paragraph that there was no possibility of reconciliation. Regarding the averment that there was no possibility of reconciliation, the Respondent was alive to the requirement in Section 5 (1) (b) of the Act that the court shall not grant a divorce on a petition under Section 4 (1) unless it is satisfied that – after inquiring into the evidence presented by the parties to the proceedings, there is no reasonable possibility of reconciliation between the parties. He pleaded it.

41. Indeed, in granting the petition for divorce, the Trial Judge stated inter alia:

> *I have thoroughly considered the content of the Petition and its affidavit and that of the affidavit in reply. I have also carefully scrutinised the testimonies*

and evidence adduced by the two parties whilst applying my mind to the legal principles applicable in this case ...I am equally satisfied that there is no possibility of reconciliation between the parties. Therefore, it is just and necessary that the marriage should be dissolved…

Ground 1 fails.

Ground 2

42. **The learned Chief Justice failed to identify the facts that he put into consideration in making the findings that the respondent cannot reasonably be expected to live with the appellant in so failing to identify such facts we are unaware if the learned Chief Justice took into consideration matters precluded by Section 8(2) of the Matrimonial Causes Act that is the court shall not take into consideration any incident which occurred if the parties lived more than six months after the last incident.**

Appellant's submissions

43. Counsel submitted that the Trial Judge failed to show which facts he relied on to grant the conditional order of divorce. That as such, neither the rationale of the Judge's findings nor conclusion established whether he followed the direction provided in Section 8(2) of the Matrimonial Causes Act. The said provision states that, the court shall not take into consideration any incidence of alleged unreasonable behavior which occurred if the parties lived together for more than 6 months after the last incidence.

44. On the premise of the above provision, counsel submitted that the allegations put forth by the Respondent regarding unreasonable behaviour were incidents which had transpired between 20I5 and 20I9. That at the time, the Respondent was still accessing the matrimonial house until 31st May 2021. Counsel contended that even if the date of 7 July 2021 (when the Respondent ceased living in the house full time) was to be considered, the allegation of desertion would still fall outside the statutory period of six months prescribed in Section 8 (2) of the Matrimonial Causes Act.

45. In support of the above submission, Counsel relied on the case of Karol D'Unienville vs. Elvis D'Unienville [2023] SCSC 441 where the court found that the Respondent had, in support of the nullification of the marriage, relied on incidents that fell outside the 6 months' timeframe prescribed by the law. The court disregarded those incidents.

Respondent's reply

46. The Respondent supported the findings of the Trial Judge that the Respondent cannot be reasonably be expected to continue to live with the Appellant due to her unreasonable behaviour. Counsel submitted that the learned Judge considered all the relevant facts and evidence adduced before coming to the decision of granting the divorce sought by the Respondent.

Court's consideration of ground 2

47. Section 8 (2) of the Matrimonial Causes Act provides that:

> For the purposes of section 4(1)(b), the court shall, in determining whether the petitioner cannot reasonably be expected to live with the respondent disregard the fact that the parties to a marriage have lived together for a period of, or periods which together amount to, not more than 6 months after the date of the occurrence of the last incident relied on by the petitioner and held by the court to support the petitioner's petition.

48. I opine that Section 8 (2) *is akin* to the old time doctrine that the **condonation of a marital offense, constituting a ground for divorce**, will bar the condoning spouse from thereafter relying on that offense to obtain a divorce. It has its origins in English Canon Law. The doctrine of condonation stems out of the very need to prevent a spouse who certainly has forgiven an offence by the other from changing their mind and by founding a petition for matrimonial relief upon it. One prime element of condonation is the assumption of **norma**l marital relations after knowledge of the marital wrong.

49. In the matter before us, the question would be whether after the last episode of

unreasonable conduct it can be said that there was resumption of normal marital relations.

50. The Petitioner (now Respondent in this court) stated the following particulars of the Appellant's unreasonable behaviour that made the expectation of living together as a married couple futile:

(a) no love, affection, care or concern on the part of the Appellant towards the Petitioner and there has been no normal bodily or physical contact between the parties as husband and wife for the past 20 years.

(b) Since 2015, the Appellant practically deserted the Petitioner by separating herself completely from all normal interactions and stopped all contacts and normal conversations with the Petitioner and moved into a separate room and started to sleep and live apart from the Petitioner but in the same matrimonial home.

(c) From January 2019, the Respondent started provocative arguments on property issues and become very aggressive, hysterical and used filthy languages against the Petitioner and claimed frequently that she is an incarnation of "Kaali" a mythological Hindu goddess of violence and killing, and issued out threats that she was going to kill the Petitioner, when the time comes.

(d) Frequently, the Respondent claimed that the Petitioner was a sinner and cursed that his daughter would be the sacrifice and suffer for the sins of the Petitioner.

(e) The Respondent started to worship a metallic, three prolonged-spear and used to hang dolls in her room by putting rope around the neck of the dolls and engaged in black magic-like activities in the house.

(f) The Respondent used to cause mental cruelty through aggressive behaviour, insults, verbal abuse and engaged in provocative arguments and recorded secretly the Petitioner's conversation in the house.

(g) The Respondent has ill-treated the Petitioner without providing or reserving food for him.

(h) Since April 2019, the Petitioner was forced to make a separate cooking arrangement in the same kitchen, which created a clash in sharing the kitchen resulting in arguments over food stuff kept in the same fridge.

(i) Since the beginning of 2019, the Respondent isolated the Petitioner, restricted his movement within his room and consistently engaged in verbal abuse, insults, provocations and repeatedly turned violent, aggressive and abusive and treated the petitioner with mental cruelty.

(j) The Respondent on occasions issued threats to the Petitioner that she will commit suicide leaving a note in her hand writing that the Petitioner was responsible for her death and make the Petitioner spend rest of his life in prison.

(k) The Respondent also isolated the Petitioner from the normal family activities since 2015 except the Hindu wedding rituals activities of their children.

(l) The Respondent verbally abused the Petitioner on a regular basis, causing the Petitioner to feel emotionally sad, depressed and low. Since April 2019, the Respondent has continued this behaviour until she drove the Petitioner to leave out of the matrimonial home at La Misere.

(m) The Respondent has ill-treated the Petitioner with continuous and incessant verbal abuse, neglect by commission and omission.

51. The trial Judge found the Respondent's averments above and testimony credible. He went ahead to grant the divorce.

52. The Trial Judge summed up the situation by stating *inter alia* that:

This lack of love, care and attention and emotional and verbal abuse appears to have occurred over the years, intermittently, by both sides. Family affairs appear and issues appear to have always been taken care of in a transactional manner. … The lack of verbal communication and petty arguments over trivial matters (had) become a daily occurrence … coming mostly from the Respondent, led to the inevitable consequence of the Petitioner moving out.

53. To resolve ground 2, we must answer the question: "Is there evidence that within the 6 months before the filing of the petition, the Respondent behaved in such a way as to show the Appellant that he had forgiven her conduct?"

54. It must be noted that inquiry into and isolation of the last incident of conduct in a divorce petition based on a ground such as adultery, cruelty, desertion etc. may be easy to ascertain. However, in a petition founded on the ground of unreasonable behaviour of one spouse which makes expected living together as a married couple impossible, such isolation cannot be straight forward. This is because unreasonable behavior is not an incident, it is a continuum and thus one may not be able to point to a particular conduct as that which broke the proverbial camel's back.

55. The petition for divorce was filed on 26th April 2021. It is an accepted fact by both parties that although the Respondent relinquished the keys to the house on 31st May 2021, he had stopped residing in the home on 7th July 2020 – that is when he "permanently" moved out. The evidence adduced also clearly showed that the couple had ceased living as husband and wife way before the date when the Respondent permanently ceased to reside in the home. The benefits of a marital union ceased long before the petition was filed. For a long time, the concept of separate households under the same roof was clearly applicable in the case before us.

56. It must be emphasized that in reply to the divorce petition, no where did the Appellant plead that the Respondent had resumed normal marriage life with the Appellant, only to turn round and file a petition. In her affidavit, the Appellant denied the all the averments of the Respondent to the effect that her behavior and conduct was such that the Respondent

could not reasonably be expected to live with her. It was the averment of the Appellant that it was the Respondent who was abusive, who withdrew himself from all marital and family benefits and then twisted the facts to blame his wife. In regard to this, the Trial Court said thus:

> This Petitioner has his own share of faults and other negative attributes which I find proven by the Respondent. However here the question is not the unreasonable behavior of the petitioner or whether he is of good or bad character. The question is having regard to the alleged behavior of the Respondent during the marriage can the Petitioner be reasonably expected to live with this Respondent. This the Respondent has failed to address. To this court, instead of showing that on a balance of probabilities the Petitioner should not be believed the Respondent's position was that it was the Petitioner who was unreasonable and not her, something that goes on to show that the marriage has indeed irretrievably broken down.

57. The Appellant did not plead Section 8 (2) of the Act as a bar to the granting of the divorce. The issue was not live at the court below and it must be for this reason that the Trial Judge neither interrogated the issue nor made a finding on the matter. And on perusal of the record, I find no no evidence adduced to the effect that the relationship had improved and that the petition was filed within less than 6 months of resumption of normal marital relationships. What we are dealing with is a course of conduct between thre couple rather than a single act evidencing disharmony. And there is no evidence that the behaviour or relationship improved at any one time.

58. I therefore hold that **Ground 2 fails.**

Ground 3

Appellant's submissions

59. Under this ground, the Appellant faulted the learned Trial Judge's finding that the parties had lived apart since 2017 yet this was never a ground on which the divorce petition was

based. Counsel contended that a Court cannot formulate a case for the parties. He supported this submission with the authority of **Krishnamart v Savy Insurance [2000] SLR 46**.

60. Furthermore, the Appellant argued that the Respondent in fact admitted in his affidavit supporting the petition that he was still living in the home in April 2019 and it is on his own volition that he moved out of the said home on 7th July 2020.

Respondent's reply

61. Counsel for the respondent submitted that even though it is true that the learned Chief Justice mentioned in passing that the parties had lived apart since 2017, this fact was not used the learned Chief Justice to grant the conditional order of divorce.

62. Counsel explained that it was just a fact that the Chief Justice saw fit to mention in his judgment but did not base his decision on this fact. That the judgment of the Chief Justice was abundantly clear that the conditional order for divorce was being granted based on unreasonable behaviour and not on the basis that the parties have lived apart for more than one year.

63. In conclusion, the Respondent prayed that the appeal be dismissed with costs.

Court's consideration of ground 3

64. I carefully read the decision of the learned Trial Judge and I agree with the Respondent's counsel that the Judge did not base his decision to grant the conditional order of divorce on the erroneous finding that the parties had lived apart from 2021.

I therefore find no merit in ground 3.

Conclusion and Orders

65. Since all the grounds of the appeal fail, I hold that the appeal fails. Consequently, the orders

of the Supreme Court are upheld.

66. I make no order as to costs.

Dr. Lillian Tibatemwa-Ekirikubinza, JA.

I concur

F. Robinson, JA.

I concur

B. Adeline, JA.

Signed, dated and delivered at Ile du Port on 25 August 2023.