

CROSS-PETITION FOR DIFFERENT RELIEF: DUTY OF THE COURT

*Ramasamy v. Ramasamy*¹

Mr. Ramasamy (the petitioner) filed a petition praying for a decree of divorce on the ground that his wife had lived separately from him for 7 years immediately preceding the presentation of the petition and was unlikely to be reconciled with him.² He also filed a discretion statement admitting to having committed adultery during his marriage and praying that the court exercise its discretion in his favour.³ In her

⁹ A.I.R. 1954 S.C. 652.

¹⁰ Note 1, at p. 54.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ 9 of 1965.

¹ In the High Court, [1978] 1 M.L.J. 99. In Court of Appeal, unreported but see *The Straits Times* 28th February 1978 at p. 13.

² S. 82(1)(e) of the Women's Charter (Cap. 47, Singapore Statutes, Rev. Ed. 1970).

³ By virtue of the proviso to s. 84(2) of the Women's Charter, the court *may* dismiss the petition if it finds that the petitioner has committed adultery even though the ground for divorce has been proved. (Emphasis mine.) Rule 28 of the Divorce Procedure Rules 1950, S. 425/1950, requires such a petitioner to file a discretion statement "... setting forth particulars of the acts of adultery committed and of the facts which it is material for the court to know for the purposes of the exercise of its discretion."

answer, Mrs. Ramasamy (the respondent) gave 6 reasons why the petition should fail, viz.:

- (i) that a divorce would result in financial and other hardship to her;
- (ii) that it would cause serious repercussions to her social status in the Indian community;
- (iii) that it was an anathema to her on religious and moral grounds;
- (iv) that the 7 years' separation was planned and imposed upon her by the petitioner;
- (v) that the general conduct of the petitioner towards her did not warrant the granting of a divorce to him; and
- (vi) that if a divorce were granted she would not be entitled to a share in the petitioner's estate upon his death.

Further, the respondent prayed for a decree of judicial separation on the ground that her husband had, since the solemnisation of the marriage, been guilty of adultery.⁴ It may be pointed out here that, during the hearing of the appeal, "[c]ounsel confirmed that the woman named in that statement [the petitioner's discretion statement] was the same woman mentioned in Mrs. Ramasamy's cross-petition."⁵ In the reply to this allegation, the petitioner alleged that his wife had herself committed adultery with some man unknown.

The divorce petition was heard in the High Court before Mr. Justice Choor Singh. He determined the action in the following way. He found that the petitioner had proved the ground for divorce. Regarding the respondent's 6 points in defence, Choor Singh J. said that they were irrelevant having regard to the 7 year separation ground because "no question of fault on the part of the petitioner enters into the picture at all."⁶ He then considered the petitioner's discretion statement and decided to exercise his discretion in the petitioner's favour — and thereupon pronounced a decree nisi of divorce. As for the respondent's prayer for judicial separation, Choor Singh J. said that he had "rejected" it without considering its merits. He took such a course because he felt "[t]here was no love or affection left between them" and that therefore "no useful purpose would be served by granting a decree of judicial separation."

The aggrieved respondent appealed against Choor Singh J.'s decision. In an unreported decision,⁷ the Court of Appeal allowed the appeal and ordered a re-hearing of the divorce petition. *The Straits Times* reported that "[t]he judges held that in the circumstances and with regard to certain procedural requirements in the Women's Charter, it was fundamental that the High Court hear Mrs. Ramasamy's cross-petition before it made the decree order for her husband."⁸

This note covers both the action before the High Court and the Court of Appeal.

⁴ S. 95, Women's Charter read together with s. 82(2)(6).

⁵ See *The Straits Times*, n. 1.

⁶ [1978] 1 M.L.J. at p. 100.

⁷ See *The Straits Times*, n. 1.

⁸ *Ibid.*

Cross-petition for a relief which is different from that sought in petition

The first point of interest in this petition is that in her cross-petition, the respondent asked for a relief different from that prayed for by the petitioner. She cross-petitioned for judicial separation in a petition for divorce. As far as may be ascertained this is the first reported local case of this nature although at least one Malaysian case is known where a cross-petition was brought for the same relief as that in the petition, *albeit* on different grounds.⁹

The Women's Charter does not specifically refer to cross-petitions (whether for a similar or different relief) except to direct the court, upon the presentation of a petition, to inquire into "any countercharge which is made against the petitioner."¹⁰ Similarly, the Divorce Procedure Rules 1950 do not mention cross-petitions. Perhaps the practice of allowing cross-petitions follows that in England. Latey gives two ways by which cross-petitions may arise: either in an answer to the petition¹¹ or in a petition commenced separately but later consolidated with the earlier petition.¹² There is nothing in the Divorce Procedure Rules 1950 to prohibit the former while the latter appears permissible under Order 4 of the Rules of the Supreme Court.¹³ It may be assumed that in the instant petition the wife had prayed for judicial separation in her answer as, upon consolidation of two petitions, the parties will normally no longer be referred to as "petitioner" and "respondent" (as was the case here) but as "husband" and "wife".¹⁴ The reason for the change in terminology makes much sense when one considers that upon consolidation, unless both petitions were brought by the same spouse, each party will be the petitioner in one action and respondent in the other.

Duty of the court

The principal point of interest concerns the duty of the court upon being presented with a petition for divorce and a cross-petition for judicial separation. The Court of Appeal held that Choor Singh J. acted wrongly in rejecting the cross-petition without considering its merits because there were certain procedural requirements in the Women's Charter. *The Straits Times* report did not make clear whether their Lordships specified these requirements. It may be presumed, however, that their Lordships had in mind section 84 read together with section 95. Section 84 spells out the duty of the court upon the presentation of a petition. Being couched in imperative language, section 84 enjoins Choor Singh J. to inquire into *all* of the following: (a) the facts alleged; (b) whether there has been any connivance or condonation; (c) whether any collusion exists; and (d) any countercharge which is made against the petitioner. It appears clear that a cross-petition is a "countercharge". Section 95 provides that upon a

⁹ *Lee Kah Wah v. Cheah Paik Yean* [1964] M.L.J. 125 where the husband petitioned for divorce on the grounds of cruelty and adultery while his wife cross-petitioned also for divorce but on the grounds of cruelty, adultery and desertion.

¹⁰ S. 84(1), Women's Charter.

¹¹ Latey on Divorce, 15th Ed., note 4.250 at p. 646.

¹² *Ibid.*, note 4.64 at p. 567.

¹³ S. 274/1970.

¹⁴ See Latey on Divorce, n. 11 at p. 660.

petition for judicial separation “the provisions of section 84... shall apply in like manner....” The 2 sections, read together, require Choor Singh J, to inquire into the facts alleged, whether there has been any connivance or condonation and whether any collusion exists, not only as regards the petition, but also as regards the cross-petition. Thus he was not empowered to reject the cross-petition without considering its merits.

As the Court of Appeal did not specifically point out the procedure which the Women’s Charter requires the court of first instance to follow, it is proposed to suggest what it may be. It is submitted that, having found that the petitioner had proved his allegation and that the respondent had not made out a defence to it, Choor Singh J. ought to have proceeded to inquire whether the respondent had proved her allegation of adultery *vis-a-vis* the petitioner. Since the woman she named was the same as the woman the petitioner admitted to having committed adultery with (in his discretion statement) it would appear that, had Choor Singh J. directed himself to this matter, he would have found the respondent’s allegation also proved.

It appears therefore that the effect of the Court of Appeal’s decision on the duty of the court below is that the Women’s Charter required Choor Singh J. to follow a procedure which would have led the judge to find both allegations proved. The startling point to be made here is that, if there were no discretionary bars existing against either petition, then section 84(2) of the Women’s Charter provides that the judge “... shall pronounce a decree nisi of divorce” to the petitioner and section 84(2) read together with section 95 provides that the judge shall also pronounce a decree of judicial separation to the respondent! It is possible that a case may arise where a judge finds himself in the embarrassing situation of being directed by section 84(2) in conjunction with section 95 to pronounce decrees of divorce and judicial separation in respect of the same couple. The point may be illustrated by the following hypothetical fact situation. In a petition for divorce on the ground of 7 year separation, the petitioner is not barred in any way. His wife cross-petitions for judicial separation on the ground that her husband has committed sodomy or bestiality and she is also not barred.¹⁵ To ensure that the wife is not affected by the discretionary bar of unreasonable delay,¹⁶ let us say that the sodomy or bestiality was committed during the period of separation. If the two parties are able to prove their allegations to the satisfaction of the court then section 84(2) entitles both to the reliefs they prayed for.

The Court of Appeal did not direct itself to this problem, as the instant case did not require their Lordships to do so, but it is hoped that this unfortunate consequence may be avoided by either legislative amendment or judicial interpretation.

¹⁵ S. 95, Women’s Charter read together with s. 82(2)(c). It may also be pointed out that an act of sodomy or bestiality does not amount to the discretionary bar of adultery as adultery consists of sexual intercourse with a woman: *Dennis v. Dennis* [1955] 2 All E.R. 51.

¹⁶ Proviso (c)(i) to s. 84(2).

Returning to the instant petition the judge, fortunately, was not placed in the embarrassing situation. This is because the discretionary bar of adultery exists against the petitioner (as he so disclosed in his discretion statement), and adultery was also alleged against the respondent. The next duty of the judge would then appear to be to inquire whether the allegation against the respondent has been proved as an allegation alone cannot constitute the bar.¹⁷

It is interesting to speculate on the alternative decisions the judge could have made.

(a) If he should find that the allegation is not proved, *i.e.* that no discretionary bar exists against the respondent, then section 84(2) makes it imperative for the judge to grant her a decree of judicial separation. He would then most probably refuse to exercise his discretion in the petitioner's favour, although he is free to do so as his discretion is an unfettered one.¹⁸

(b) Should the judge find the allegation proved, he would have to look at all the circumstances of the case to decide in whose favour he would exercise his discretion and thereby determine the fate of the marriage. It is submitted that there appears to be 2 considerations in the petitioner's favour. Since the judge felt that the marriage was already completely broken down, the decision in *Lee Kah Wah v. Cheah Paik Yean*¹⁹ suggests that the judge should favour the petitioner and dissolve the marriage. Further, the petitioner had filed a discretion statement admitting his adultery whereas the respondent had not done so even though the Divorce Procedure Rules 1950 require her to. Courts, as in *Masarati v. Masarati*,²⁰ have always favoured the candid party. In the respondent's favour, on the other hand, lie the 6 points she had put in her answer. Although these points did not amount to a defence to the allegation of 7 years' separation, the judge may nevertheless feel that because of any one or more of them he is inclined to favour the respondent. In the case of *Bull v. Bull*²¹ Sir Jocelyn Smith, P. held that "all other relevant factors relating to the married life of the parties" are also proper considerations. In any case the judge is free to consider which of the two parties he would favour upon a consideration of the circumstances and the parties.

7 year separation and the discretionary bars

The last point made above concerning the relevancy of the parties' conduct during marriage illustrates an anomaly which exists in our law regarding the 7 year separation ground. Choor Singh J., it has been said earlier, reiterated that this ground which was inserted into the Women's Charter in 1967²² is devoid of any implication of fault or

¹⁷ *Williams v. Williams* [1966] 2 W.L.R. 1248.

¹⁸ See proviso to s. 84(2) and Viscount Simon L.C.'s pronouncement in *Blunt v. Blunt* [1943] A.C. 517. English and Malayan cases on this area are most persuasive as the discretionary bar of adultery is worded rather similarly in the English Matrimonial Causes Act 1857, the Federation of Malaya Divorce Ordinance 1952 and in the Women's Charter.

¹⁹ See n. 9.

²⁰ [1969] 2 All E.R. 658.

²¹ [1965] 1 All E.R. 1057.

²² By amending Act No. 9 of 1967.

wrongdoing on the petitioner's part. It is equally devoid of any implication of fault on the respondent's part. Another recent judicial approval of this observation came from Mr. Justice Chua in *Joseph Wong Phui Lun v. Yeoh Loon Goit*.²³ It is unfortunate however that under the proviso to section 84(2) the discretionary bars of collusion, adultery, unreasonable delay and cruelty apply equally to a petition brought on the 7 year separation ground as they do to petitions brought on any other ground. As Winslow J. had said 10 years ago in *Moses v. Moses*,²⁴ the ground carries no stigma and was inserted "to put an end to marriages... where the marriage bond has become no more than a detested shackle". It appears incongruous that, although the ground is devoid of any implication of fault, the petitioner's and the respondent's conduct may be important considerations after the ground has been proved. These bars were introduced to underscore the principle that a divorce should only be granted upon proof of some fault or wrongdoing on the respondent's part.²⁵ While this fault principle underlies all the other grounds for divorce in section 82 (excepting insanity), it was not the reason behind the 7 year separation ground. On the contrary, the 7 year separation ground was motivated by the rationale that where the marriage has irretrievably broken down it serves no one's purpose to preserve the empty shell. The rationale being different, it is submitted that it is worthwhile considering whether the same bars should apply.

In conclusion, it may be said that the re-hearing of the divorce petition is awaited with interest. Perhaps it will make clear what the Women's Charter requires a court to do when hearing a petition for divorce where a cross-petition has been filed for judicial separation. Further, the possible conflict attending to the use of the term "shall" in section 82(2) and the anomaly in making the discretionary bars applicable to a petitioner alleging 7 year separation as a ground for divorce will hopefully be resolved or removed.

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²³ [1978] 1 M.L.J. 236.

²⁴ See n. 6.

²⁵ See Bromley, *Family Law*, 3rd ed., Cap. V generally and p. 126.