

# MARRIAGE CANNOT BE SLAVERY; AN ANALYSIS ON FORCED MARRIAGES AND GROUNDS FOR NULLITY IN SRI LANKAN CONTEXT

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**Abstract** - When considering the concepts such as divorce and nullity in the Sri Lankan context it is very apparent that the laws remain very rigid regarding them. As a grave loophole in law there are no direct provisions for the forced marriages as well. According to our law there are only three grounds to get a divorce in the General Law and as per the Section 19 (2) of the Marriage Registration Ordinance such as malicious dissertation, adultery and incurable impotence at the time of the marriage. In contrary, in England more flexible grounds for divorces can be observed as unreasonable behavior, adultery, desertion, two years separation with content and five years separation without consent which may lead to divorce and forced marriages can involve a range of criminal offences as well.

Therefore the research problem here is to determine whether the grounds for nullity of marriages, divorces in Sri Lanka are adequate and whether they provide necessary provisions covering all the aspects including the forced marriages as well. The main objective is to review the existing grounds for divorce and the nullity of Sri Lanka, locus standi of the parties and to propose the new grounds for a divorce and the nullity of a marriage along with the remedies for forced marriages.

In this research the doctrinal legal research methodology is used as this topic is based on the various legal propositions and legal principles regarding the nullity of marriage. The research is qualitative in nature where the researcher has used some conventional legal sources (text books, case laws), statutes and enactments and some commentaries to derive the research accuracy. The researcher has used one of the unique cases in Sri Lanka, Harin Hugh Dias v. Ambagahage Tekla Fernando (DDV 00889/15) as a primary legal source which provides inferences for nullity, forced marriages and locus standi where an old man has

been cheated by a young house maid and contracted two fraudulent marriages with the same person and the same year forcefully with the help of a Registrar of marriages where the his son's locus standi to declare that marriage null and void is in uncertainty. Apart from that researcher has used a theoretical framework consisted of various jurisprudence schools such as positivism, social contract theory, American realism etc. followed by a contextual analysis.

As per the research results the researcher could find that there is also another aspect which has limited the functionality of the divorces in Sri Lanka. It is Sri Lanka's deep rooted ethics, culture and social morals. It is governing the ordinary lives of people and most of the times the aggrieved parties are discouraged to file divorce no matter how much they are suffered from their forced marriage because of the fear to the society and due to the harm that causes to their dignity. And also more flexible grounds for marriage should be declared such as the mere mismatch of the couples and locus standi to declare the marriages null and void should be provided to the external parties other than the contracted parties to the marriage. As per the conclusion since there are no statutes or laws covering directly this area as per now, the act of forcing to marry must be criminalize and should be included into the Penal Code of Sri Lanka as a separate offence directly and the severe punishments too should be included. And it is high time that the attention of the relevant law making authorities turned towards this lacuna in the law.

**Keywords:** Nullity, Forced Marriages, Locus standi

## I. INTRODUCTION

When considering the concepts such as divorce and nullity in the Sri Lankan context it is very apparent that the laws remain very rigid regarding them. The divorce and nullity

procedures are very strict and they cannot be changed easily. Every procedure are included in written and if the laws are to be changed it should undergo a long procedure. As a grave loophole in law there are no direct provisions for the forced marriages as well. According to our law there are only three grounds to get a divorce in the General Law and as per the Section 19 (2) of the Marriage Registration Ordinance such as malicious dissertation, adultery and incurable impotence at the time of the marriage.

As per a research done by two students from the Edinburgh University they have found only 1.5% of marriages in Sri Lanka results in divorce compared to 42% in the United Kingdom. According to them there are many grounds for the divorce in England such as unreasonable behavior, adultery, desertion, two years separation with content and five years separation without consent. When compared to Sri Lanka we have limited grounds for a divorce which are very hard to prove.

As Hart is proposing in the “positivism” there is no necessary connection between law and morals or law as it is and ought to be. Like in the existing divorce procedures they will never allow to give the divorce to a party for the mere fact that they can't live together. So it is apparent that there is no connection between moral values and the law prevailing in Sri Lanka due to its rigidity.

However the Researcher will bring this issue to light with the help of a unique case decided in Sri Lanka, Harin Hugh Dias v. Ambagahage Tekla Eresha Fernando (DDV 00889/15), case which comes under civil law category.

This case has been filed on the 3rd of November 2015 in the Colombo District Court. In this case the plaintiff's father was an eighty six years old man and he has contracted a purported marriage in 2007 with the defendant who was the house maid of the home and who was fifty three years old by that time. The plaintiff is a dual citizen of Sri Lanka and the United Kingdom, but he is permanently living in the United Kingdom, but he has visited his father several times annually till he contracted this marriage with the defendant lady. After that marriage she has restricted the visits of the plaintiff to see his father and she also has cut off the communication with him. The plaintiff's father, Mr. Gamunu Pieris Dias (GPD) is having a property worth of 150 million in the Cameron Place of Colombo and they have been living there with the defendant since 1995.

Moreover, the plaintiff's father has died in 2012 and the marriage of them has created several suspicions to

the plaintiff. First of all, he was his only son and he was never informed by his father that he is going to contract a marriage between this lady, although he contacted him few days before the marriage. And none of the relations of him has been invited or informed about their marriage although some of his relatives who are residing in Sri Lanka used to visit him rarely, because the defendant lady has taken the physical custody of his father even restricting him to visit his ordinary family physician who has been treating him for almost 40 years. But the plaintiff was trying to get the legal custody of his father once he got to know that he died in late October in 2012.

So the plaintiff is challenging that the defendant lady has made fraudulent marriage certificate and has forced his father to sign the marriage certificates. Here in the marriage certificate his name appears abnormal, as there is a name which he has never used in his life time not in the previous generations only but also in the subsequent generations. And later the plaintiff's lawyers have discovered another marriage certificate between the same parties, with the same Registrar and with the same witnesses. When comparing the two marriage certificates there are lot of unusual occurrences as the unusual family name used as the plaintiff's father's name as, Ponnahannadige Gamunu Pieris Dias. The civil condition of the defendant in one marriage certificate is stated as a “widow” where in the other certificate it is known as the “divorcee of Reginold Alexander Gunawardane”. And most importantly the marriage certificate numbers are not in a sequential order. The marriage certificate which is dated on the 14th of February 2007 bears the number 6560 whereas the certificate in the June month in 2007 bears the number 6557 which is almost irregular. And one witness's name is Dilrukshi Winiprida Pieris (her real name) but in the latest marriage c certificate it is stated as Dilrukshi Winiprida Dias in order to give the sense that she is a relative of Mr. GPD to sign as a witness.

There are some complementary cases which is related to this case as he has filed a case regarding the suspicious death of his father under B1419/12 in the Magistrate Court of Colombo Fort against the defendant and the other case is the DLM 00102/15 a land matter where the defendant has forged the signs of a deed of gift of the above said property and transacted it to her name as proved by the Examiner of Questioned Documents (EQD). And also the defendant has contracted two known marriages before the plaintiff's father where she has been married to one of her father's best friends, and secondly to another old man the above mentioned Mr. Reginold. And the grounds for

this marriage were the adultery and malicious desertion of him by this defendant lady. These facts are apparently supportive when giving the judgment of this case due to her criminal behavior.

However the main issue regarding this case is that the defendant is challenging the plaintiff saying that he has no capacity or the locus standi to declare the nullity of this marriage as it can only be done by the parties to the marriage. She is also challenging him under the Sections 43, 44, 46 (2) of the Civil Procedure Code of Sri Lanka which will be discussed detailed throughout the course of this report. This will be a unique or a land mark case in the Sri Lankan Law history as the nullity is declared by the son of the parties to the marriage and if he will be able to win this case. Anyhow regarding the above said property if the marriage will not be declared as a nullity, the defendant lady will be entitled to the half of the property while the other half will be entitled by the plaintiff according to the laws of succession. Even if he loses this case he will be entitled to the full property through the DLM 102/15 case as the signs have been forged according to the EQD and therefore it is null and void. And although this is a civil case lot of criminal factors are involved such as forgery, common and dishonest intention, cheating etc. as per the Penal Code of Sri Lanka.

Therefore based on background, the research problem has been formulated to determine whether the grounds for nullity of marriages, divorces in Sri Lanka are adequate and whether they provide necessary provisions covering all the aspects including the forced marriages as well. The main objective is to review the existing grounds for divorce and the nullity of Sri Lanka, locus standi of the parties and to propose the new grounds for a divorce and the nullity of a marriage along with the remedies for forced marriages. Furthermore it will be reviewed whether there are adequate grounds for penalties are available for the above unique cases in Sri Lanka.

## II. METHODOLOGY/ RESEARCH DESIGN

In this research the legal research methodology is used which is consisted of legal sources and non-legal sources. Legal sources are basically the primary authority of law constituted by the Judiciary, Legislature and administrative agencies and the secondary authority of law is consisted of some commentary from non- governmental bodies such as Reports, Journals, Legal treaties etc. the researcher has also derived the information from non-legal sources such as life style of people, memories, experiences etc.

Moreover, doctrinal legal research methodology is used as this topic is based on the various legal propositions and legal principles regarding the nullity of marriage. The research is qualitative in nature where the researcher has used some conventional legal sources (text books, case laws), statutes and enactments and some commentaries to derive the research accuracy. The researcher has used one of the unique cases in Sri Lanka, Harin Hugh Dias v. Ambagahage Tekla Fernando (DDV 00889/15) as a primary legal source which provides inferences for nullity, forced marriages and locus standi where an old man has been cheated by a young house maid and contracted two fraudulent marriages with the same person and the same year forcefully with the help of a Registrar of marriages where the his son's locus standi to declare that marriage null and void is in uncertainty. Apart from that researcher has used a theoretical framework consisted of various jurisprudence schools such as positivism, social contract theory, American realism etc. followed by a contextual analysis and a comparative study will also be done regarding the legal system of Sri Lanka and United Kingdom regarding the same area.

## III. RESULTS AND DISCUSSION

As per the research results the researcher could find that there is also another aspect which has limited the functionality of the divorces in Sri Lanka. It is Sri Lanka's deep rooted ethics, culture and social morals. It is governing the ordinary lives of people and most of the times the aggrieved parties are discouraged to file divorce no matter how much they are suffered from their forced marriage because of the fear to the society and due to the harm that causes to their dignity. Especially the female spouse tries to endure every pain especially in rural societies by being backward. But it is bit different in the urban societies as most of the women are independent and they can make their living by their own. So they are not hesitating to go for a divorce.

Although the law remains as this or equal to everyone there are lot of issues faced by the people when getting a divorce or a nullity in Sri Lanka and the law is so much lagging behind in this field due to the unnecessary rigidity. But in the General Law procedure the divorce takes a long period where it will take minimum of three months to be summoned before the courts after filing an application. And when the parties are summoned they are still being produced before the mediation committee to get the consent from the both parties and if one spouse says he/she is not ready to give the divorce then it drags down for some years, for example when proving adultery in Sri

Lanka the name of the co-defendant should be included in the plaint which is apparent that Sri Lankan Law is rigid in this aspect.

According to our law there are only three grounds to get a divorce in the General Law and as per the Section 19 (2) of the Marriage Registration Ordinance such as malicious desertion, adultery and incurable impotence at the time of the marriage.

When considering the malicious desertion there are two grounds such as simple desertion where the deserting spouse leaves the matrimonial home and the constructive desertion where the innocent spouse has to leave the home. In *Silva v. Misinona* (1924) the court interpreted malicious desertion as permanently giving up the matrimonial responsibilities without the consent of the other spouse. Here the spouses have to prove both *animus* and *factum* where the intention to desert and the fact of separation should be proved. But unfortunately the cruelty of the parties had not been covered in this aspect. The innocent party or the deserting party will not have to leave or oust unless the cruelty factor is not involved which can also be included to the end of the malicious desertion, but which has been disregarded by the General Law of Sri Lanka.

The next one is adultery. It is apparent that there are a lot of spouses who are committing adultery, but most of the times it is difficult to prove the adultery. Although it is considered as a civil offence the proof should be shown beyond the reasonable doubt like in criminal offences as per decided by *Jayasinghe v. Jayasinghe* (1954). This is very unreasonable by the aggrieved party as it is very difficult to prove the adultery as a ground for divorce in Sri Lanka which is an extra burden to them. Accordingly proving the matrimonial fault is very essential in the general law and the substantive law and procedural law is difficult to be altered. But in the Kandyan Law it is not necessary to show the matrimonial fault and the substantive law and the procedural law is not rigid as the general law. In the Section 32 of Kandyan Marriage and Divorce Act No. 44 of 1952 recognizes more practicable grounds for the divorce which includes inability to live happily together and the lack of the mutual consent of the parties including the other three grounds in the General Law. So the divorce is possible without proving the matrimonial guilt of the other party. And the procedural law includes that when the parties want to get the divorce they can file an application to the District Registrar which is more complementary and which will preserve the privacy of the parties as well.

But in the General Law procedure the divorce takes a long period where it will take a minimum of three months to be summoned before the courts after filing an application. And when the parties are summoned they are still been produced before the mediation committee to get the consent from the both parties and if one spouse says he/she is not ready to give the divorce then it drags down for some years.

Next reason is that since the procedures are long it costs a lot of money which is unbearable to the poor people. The lawyers charge a lot of fees if the divorce is to be given soon. It is not accessible to everyone equally in the society due to the higher charges and fees which is very unfair by the innocent poor people. Even though they want to divorce and they understand that it is impossible to live together, but still they will not go for a divorce as the initial payment of Rs. 5000 is a big amount for the people.

## IV. CONCLUSION

So when considering the above facts it is apparent that there is an inadequacy with the procedure followed regarding this case due to the lack of statutes and necessary provisions followed in the procedural law. There was also evidence that the law is not accessible in this regard as the major issue of this case lies with the *locus standi* of the plaintiff. But this case can be regarded as a landmark case in Sri Lankan history if the plaintiff party will be able to win this case. If not, or if his request to be heard before the court is rejected it also can be decided that the law is discriminatory in a way and the rigidity of it forbids configuring the justice to the relevant parties. If the authorities can make the relevant laws covering the areas such as the forced marriages, widening the *locus standi* in the civil matters likewise in Fundamental Rights cases there will be better social implications to the society as they will not step backward and make their lives a living hell even without coming in front of the courts.

As per the conclusion since there are no statutes or laws covering directly this area as per now, the act of forcing to marry must be criminalized and should be included into the Penal Code of Sri Lanka as a separate offence directly and the severe punishments too should be included.

Therefore, the forced marriages should be cut off from its root without growing and the society should not tolerate the forced marriages under any circumstance. Every victim irrespective of the gender and the age should stand

against the forced marriages and they should not step backward when they are faced with such a situation. And they should not accept endangering their entire lives and should protest in the very first place. And it is high time that the attention of the relevant law making authorities turned towards this lacuna in our law.

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