Shobana a/p Perumal v Ganesh a/l Guna [2016] MLJU 1108

Malayan Law Journal Unreported

HIGH COURT (IPOH)

HAYATUL AKMAL BT. HJ. ABDUL AZIZ JC

PETISYEN PEMBATALAN PERKAHWINAN NO. 33-218-06/2015

11 May 2016

Shivdev Singh (LH Singh & Co) for the petitoner.
Mariammah a/p Bharathan (Zeti, Mariammah & Co) for the respondent.

Hayatul Akmal bt Hj Abdul Aziz JC:

JUDGMENT INTRODUCTION

[1]The petitioner-wife ("PW") filed a divorce petition against the respondent-husband ("RH") for the marriage to be declared null and void on the ground of non-consummation.

[2]The RH cross-petitioned for damages which includes special and general damages. Before the hearing of the cross-petition, the counsel for the PW raised a preliminary objection and it was allowed by this court. This had lead us to this appeal filed by the RH as regard to this court's decision on the said preliminary objection.

BRIEF FACTS

[3]The PW and the RH were married on 11th December 2013 at the Jabatan Pendaftaran Negara, Negeri Perak. It was an arranged marriage made by family members of both parties. Before the marriage, the PW and the RH have never met in person and they merely communicated through the electronic media. The PW and the RH eventually met a few months before the marriage. It was agreed between the PW and the RH that they would only cohabit after going through the ceremonial marriage which unfortunately did not take place. On the hearing date, i.e., 27th January 2016, parties agreed for the marriage to be declared null and void due to non-consummation, which was granted by this court.

[4]The relevant cause papers for purpose of this petition are as follows:

(a) Encl 1: Petition to nullify the marriage filed on 23rd June 2015

(b) Encl 2: Petitioner's affidavit in support affirmed by Shobana a/p Perumal dated 22nd June 2015

(c) Encl 5: Memorandum of appearance dated 27th July 2015

(d) Encl 6: Respondent's reply to the petitioner's petition to nullify the marriage and the respondent's counter claim, filed by the counsel for the respondent's husband dated 27th July 2015

(e) Encl 8 Petitioner's reply to the respondent's reply and counter claim dated filed by the counsel for petitioner's wife dated 11 August 2015

(f) Encl 12: Respondent's further reply (2) to the petitioner's reply to the respondent's reply and counter claim filed by the counsel for the respondent's husband dated 4th September 2015

THE CROSS PETITION

[5]The RH cross-petitioned for damages which includes special damages of RM14,236.00 spent during the marriage, the withdrawal of RH from acting as a guarantor in the PW car hire-purchase agreement, the return of the handphone, the return of photographs taken of the RH and PW and general damages for RM250,000.00 for emotional and mental anguish suffered by the RH during the marriage.

[6]The PW denies the aforesaid claim made by the RH and replied that the said car has been fully paid by the PW and hence the position of the RH as guarantor is a non-issue, the PW denies keeping any photographs of the RH and the PW and infact all the photographs taken are in the custody of the RH, the PW has also replied that PW had also spent money on the wedding ceremony and had also suffered emotional and mental anguish over the whole affair.

SUBMISSION BY THE COUNSEL FOR THE RH

[7]The counsel for the RH conceeded that s.68 of the the Law Reform (Marriage and Divorce) Act 1976(Act 164) [the LRA] does not provide for damages in a petition for annulment of marriage, but argued that the LRA is also silent on the claim of damages. In an effort to support her argument, the learned counsel referred to Rule 3 Kaedah Perceraian that provides as follows:

> "3. Application of other rules
>
> (1) Subject to these Rules and to any other written law, the Subordinate Court Rules 1980 and the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pendng in the Session Court and in the High Court respectively.
>
> (2) For the purposes of paragraph (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceddings shall be treated as if it were, in the case or proceedings pending in the High Court, a provision of the Rules of the High Court 1980."

[8]The learned counsel further submitted that since there is no specific provision under the LRA or the Rules regarding the award for damages during the annulment proceeding then this court has to refer to the Rules of Court 2012 to use the inherent powers to award damages to the RH.

SUBMISSION BY THE COUNSEL FOR PW

[9]The counsel for the PW submitted that the damages claimed by RH could not be awarded under the LRA because the marriage was annulled by consent of the parties herein for non-consummation. Parties had also agreed to cohabit only after the traditional wedding ceremony was carried out. In this regard, the issue of damages for wilful non-consummation would not arise in this case. Further, s.67, s.68, s.70 and s.71 the LRA only deals with nullity. Claim for damages is not specifically provided under the LRA as matters that need to be decided by the court when annulment of marriage is being granted.

FINDINGS OF THIS COURT

[10]This court allowed the preliminary objection raised and finds that the counter claim brought by the RH cannot be maintained under this petition since damages be it special and or general does not appear to be within the contemplation of s.68 of the LRA for the court to consider save and except in cases of adultery. The reasons are as follows:

LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976 ("the LRA")

[11]Before this court further elaborate on this issue, it is good to briefly peruse the history of the LRA. This court refers to the book titled "Family Law in Malaysia by Kamala M.G Pillai, Lexis Nexis, 2009, where the writer stated

that: “The importance of family law is perhaps best described by Thompson LP in *Re Ding Do Ca, decd* [1966] 2 MLJ 220 FC who stated that personal law as regards questions of marriage, divorce and succession and said:

> *“…are questions which go to the very root of the law relating to the family which after all is the basic of society …and the existence of a civilised society demands that these questions be settled beyond doubt by legislation which will clearly express the modern mores of the classes of persons concerned and put the rights of individuals beyond the chances of litigation.”*

[12]The writer further stated that in 1976, the Law Reform (Marriage and Divorce) Act 1976 (Act 164) was enacted and became law on 1st March 1982. In addition to providing for marriages and divorces, the LRA stipulates the law on maintainance for spouses, former spouses and children, the custody of children and for the division of the matrimonial property.

[13]This court finds that it is essential that the LRA be construed and read strictly as it is and any purported lacunae in the said act has to be addressed by the legislature and this court will not be coaxed into reading non existing provisions into it. This court finds support in the case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 SC where the wife had applied by way of ex-parte injuction to restrain the husband from assaulting, harassing and molesting her. The question arose whether the plaintiff could institute the action against the defendant when section 9(2) of the Married Women Act 1957 prohibited a wife from suing her husband in tort. The learned High Court judge, held that he had jurisdiction to hear the case and that section 9 (2) of the Married Women Ordinance 1957 did not apply as the wife’s action was grounded on criminal offences committed or threatened to be committed against her. The husband then appealed to set aside the interim injuction. The then Supreme Court held that as parties were husband and wife and the allegations of assault and battery constituting a tort were not related to the protection or security of property, the wife was barred by section 9(2) of the Married Women Ordinance 1957. It is to be noted that the Domestic Violent Act 1994 was not inforce at that time. Had the Supreme Court had the benefit of the Act, perhaps the wife would have had a remedy under the Act.

[14]Hence it is very clear that the LRA was enacted to cleary provide for marriages and divorces, maintainance for spouses, former spouses and children, the custody of children and for the division of the matrimonial property. Save and except for damages for adultery the LRA makes no mention of any other forms of damages such as the tortious claims on mental anguish made by the RH in this present case.

TORTIOUS CLAIMS FOR DAMAGES FOR EMOTIONAL AND MENTAL ANGUISH

[15]Notwithstanding the earlier stand made by this court that the LRA in its current construct do not enable claim for damages to dealt with under an action to nullify a marriage pursuant to s.68 of the said act, this court would like to remark in passing the purported claim for damages for emotional mental anguish as put forward by the RH. In a legal article entitled **Spousal Emotional Abuse as a Tort;** Maryland Law Review, Volume 55 / Issue 4, Article 9, by Ira Mark Ellman, Professor, Arizona State University School of Law. B.A., Reed College; MA, University of Illinois; J.D., University of California at Berkeley School of Law, and Agnes Roddy Robb Professor of Law, University of California at Berkeley School of Law. B.S.B.A, J.D., Northwestern University, stated that:

> *“We start with a classic example of spousal conduct that may impose great emotional harm, but one that few people would urge the law to recognize a tort claim under these facts alone. Suppose one spouse simply announces a desire to terminate the marriage by saying, “I’m terribly sorry, but I don’t love you anymore.” It is certainly understandable that the other spouse could be utterly crushed by this withdrawal of affection and that the departing spouse knew well this would be the reaction. Moreover, the forsaken spouse may well believe that the other has breached a promise of a lifetime love. Yet to be able to turn this emotional injury into a successful claim for money damages would be radically inconsistent with the principle now followed in the divorce law of all states, and which we endorse, that a spouse’s mere desire to end the marriage should not*

by itself be punished financially.

Of course, tort principles do not recognize all harmful conduct as actionable. Indeed, as noted already, tort claims for intentional infliction of emotional distress generally require wrongdoing that is grave enough to be termed "outrageous." …we will just assume that virtually no one would assert that merely deciding you are no longer in love and announcing that you do not want to be married to your spouse should be termed "outrageous" and thus constitute a tort. But, of course, marital breakups are rarely quite so simple, and as we next canvass a variety of more challenging scenarios, we invite the reader to consider whether this is the sort of conduct for which the law should provide a tort remedy".

In the case of *Twyman v Twyman, Supreme Court of Texas,* 855 S.W.2d 619 (1993), HECHT, Justice, concurring and dissenting, said:

"The wrongful conduct for which the common law offers redress by an award of damages should be defined by standards sufficiently objective and particular to allow a reasonable assessment of the likelihood that certain behavior may be found to be culpable, and to adjudicate liability with some consistency in the various cases that arise. The tort of intentional or reckless infliction of emotional distress which the Court adopts for the first time today does not meet these standards. As proof, even the Court itself is unable to say whether the conduct complained of in this case either is, might be, or is not tortious. The fault lies in the principal element of the tort, the requirement that a defendant's conduct be outrageous. Outrageousness, like obscenity, is a very subjective, value-laden concept; what is outrageous to one may be entirely acceptable to another. To award damages on an I-know-it-when-I-see-it basis is neither principled nor practical. The diverse perspectives present in a free society make decisions about what is outrageous controversial and uncertain in all but the clearest cases; even then, the law must guard against the danger that a consensus against certain conduct is forged of prejudice and passion rather than indignation against intolerable behavior. ***A law which made outrageous conduct criminal would almost certainly be unconstitutionally vague. A law which makes outrageous conduct tortious, while it may not offend the constitution, is equally injudicious.*** *(emphasis is mine)*

For this reason and others, a general, independent tort of intentional or reckless infliction of emotional distress either should not be recognized or should at least be carefully restricted. The plurality opinion gives little indication that it has considered, or why it has rejected, the arguments against adopting this tort".

[16]In the circumstances the proper forum to litigate this claim by the RH is for the RH to proceed separately by way of a writ action as it would not be appropriate and or suitable to proceed with it under this petition. The element of wilfulness to establish the party at fault in failing to consumate the marriage had been disregarded by both parties herein when they jointly consented to the marriage being annulled by this court, and this would not allow the issue of damages to be addressed in respect of the tortious claim for emotional and mental anguish in the first place apart from the lacunae in this respect in the LRA in its current construct. This court would like to reiterate that what the LRA had done so far is to allow specific claim for damages in the area of adultery under s.58 and s.59 of the LRA only. So unless and until the legislature see fit to make a paradigm shift into claim for damages on emotional and mental distress in a petition for annulment and or divorce, this court sees fit in electing to proceed with caution into such unchartered territory in this country. The law as it stands appears to say that tort cases and divorce cases must be litigated separately.

[17]Married couples share an intensely personal and intitmate relationship. When discord arises, it is inevitable that the parties will suffer emotional distress, often severe. In *Stoker v Stoker,* 616 P.2d 590, 592 (Utah 1980), the Utah Supreme Court wrote in abolishing interspousal immunity by importing a reservation about extending all conduct

actionable between strangers to be automatically actionable between spouses:

> *"The marriage relation is created by the consent of both of the parties, inherently within such relationship is the consent of both parties to physical contacts with the other, personal dealings and ways of living which would be unpermitted and in some cases unlawful as between other persons."*

[18]On hindsight and upon careful consideration and examination of these prouncements, it would be apparent that the nature of the damage claimed for emotional and mental anguish which falls within the ambit of a claim in tort between the spouses is not within the contemplation of the LRA in particular s.68 in its current form, which is the basis in this petition for annulment of marriage as reflected in the intitule of this petition. At this juncture, this court is not making a ruling that spouses do not have a right to make a claim for a purported tortious action against the other since the law has progressed to allow spouses to sue each other in respect of the same. What this court is saying is that a petition for annulment of marriage and or divorce under the LRA is not the proper forum for it. It should be proceeded with under an appropriate and a separate civil claim amongst the disputing parties. Unless and until the legislature makes changes to the LRA to clarify and or provide for this lacunae in respect of this position, the court should not and could not entertain such a claim under the said LRA. A matter which should have been, but has not been provided for in a statute cannot be supplied by the courts.

INHERENT JURISDICTION

[19]The learned counsel for the RH further submitted that since there is no specific provision under the LRA or the Rules regarding the award for damages during the annulment proceeding then this court under Kaedah 3 Kaedah Perceraian can refer to the Rules of Court 2012 to use the inherent powers of the court to award damges to the RH.

[20]In this instance this court cannot agree with the submission and contention of the learned counsel for the RH. There is a big difference between substantive statutory provisions and to the rules referred to. The cases referred to in *Ranjit Singh Sidhu v Open Fibre Sdn Bhd & Ors* [2015] 1LNS 1012 and *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd Garnishee* [1981] 1 MLJ 445, relates to lacunae in the face of the rules governing the procedures in court proceedings which is obviously distinguishable from the present case where the court is looking at a substantive point of statutory law which is silent on the position of tortious claim in the area of emotional and mental anguish in an annullment proceeding under a petition pursuant to s.68 of the LRA. In the case of *Hansraj Gupta v Dehra Dun Mossoorie Electric Tramway Co. Ltd* (1933) AIR, PC 6, it was said "*that a matter which should have been, but has not been provided for in a statute cannot be supplied by the courts*."

[21]The learned counsel for RH had made specific reference to the judgment in the case of *Annamalay Vellippan Thevar v SK Pusphaleela Kulanthavelu* (2013) 1 LNS 672, where the court had allowed the respondent's counter claim on general and special damages. However, in that case, the courts jurisdictional issue as stated above was not raised by either party in that proceeding.

[22]The learned counsel for the RH also referred to the use of the court's inherent powers to award damages for emotional and mental anguish as claimed. The Halsbury's Laws of England, defined "Inherent Jurisdiction" as:

> *"In sum it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."*

[23]However, it has to said that the exercise of this inherent powers of the court has to be exercised judiciously and sparingly. There are four general categories for use of the court's inherent jurisdiction:

1. to ensure convenience and fairness in legal proceedings;
2. to prevent steps being taken that would render judicial proceedings inefficacious;
3. to prevent abuses of process;
4. to act in aid of superior courts and in aid or control of inferior courts and tribunals.

[24]As such, the exercise of inherent jurisdiction is a broad doctrine allowing a court to control its own processes and to control the procedures before it. The power stems not from any particular statute or legislation, but rather from inherent powers invested in a court to control the proceedings brought before it. However, the key restriction on the application of inherent jurisdiction is that the doctrine cannot be used to override an existing statute or rule. This could be seen in the case of *College Housing Co-operative Ltd. v Baxter Student Housing Ltd.* (1976) 2 SCR 475 **CanLII 164 (SCC),** which was a case dealing with whether a judge had exceeded jurisdiction in determining the mortgagee should have priority over other charges and encumbrances. The Supreme Court of Canada stated that a court cannot negate the unambiguous expression of legislative will and further held that:

> *"Inherent jurisdiction cannot, of course, be exercised so as to conflict with statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case"*

[25]Inherent jurisdiction cannot be used to create new rules of substantive law. The Privy Council in *Crawford v Spooner* (1846) 6 Moore PC 1**, pp 8,9)** was explicit when it said that: *"We cannot aid the legislature defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there."* The court as it has been said cannot read deeming provisions into it.

[26]In the case of *Tuan Haji Zulkifli Bin Haji Hussain & Ors v IOI Corporation Berhad & Ors* *(2011) MLJU 665*, the court is not allowed to read into a document deeming provisions in the event of lacunae. In *Stock v Frank Jones (Tiptan) Ltd* (1978) 1 All ER 948**, p 51**, it was said that: *"It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so".*

[27]In the case of *State of Kerala v Mathai Verghese* (1986) 4 SCC 746**, p 749**, it was said that the court can merely interpret a provision so as to make explicit the intention of the legislature. It cannot reframe (rewrite), recast or redesign the provision since the power to legislate has not been conferred on the court. The court should make a purposeful interpretation so as to 'effectuate' the intention of the legislature and not a purposeless one in order to 'defeat' the intention of the legislators wholly or in part.

[28]In this issue of "*casus omissus"*, it is an application of the same principle that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts (Hansraj Gupta (supra)

[29]In the Federal Court decision in the case of *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* (2010) 1

CLJ it was held that:

> "The most recent statement of the guideline to interpretation of contracts statutes and other instruments is to be found in Attorney General of *Belize v Belize Telecom Limited* (2009) UKPC 11*, where delivering the advice of the Board, Lord Hoffmann said: "The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed…It is this objective meaning which is conventionally called the intention of the parties, the intention of the parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument."*

The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable.

CAUSE OF THE BREAKDOWN AND NON-CONSUMMATION OF THE MARRIAGE

[30]In order to succeed, the RH had to establish that there was an element of wilfulness on the part of the PW in the alleged refusal to consummate the marriage.

[31]The said learned counsel refered to **Annamalay Velliapan Thevar's** case (supra) where the learned Judicial Commissioner ("JC") allowed the counter claimed for special and general damages. The learned JC found that the fact of non-consumation was clearly borne out by the evidence and undisputed. This court finds that in that case, it was decided that the cause of the break down and non-consumation of the marriage was the wilfulness on the part of the petitioner husband.

[32]The learned counsel for the PW on the other hand, cited the case of *Ananth a/l Kalyanasundram v Nalineswari a/p Puthiran No 33-1181-12/2011* where the marriage was annulled for non-consumation and the RH claim damages from the PW for expenses incurred such as payment for honey-moon package and "photo studio", the returned of engagement ring and other items. The learned Judge Y.A Datuk Yaacob bin Hj Md Sam decided that:

> *"secara khususnya tuntutan-tuntutan yang dikemukakan oleh responden tersebut tidak diperuntukkan di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 sebagai perkara-perkara yang perlu diputuskan oleh Mahkamah apabila membenarkan pembatalan perkahwinan atau permohonan pembubaran perkahwinan (perceraian). Tuntutan-tuntutan tersebut lebih bersifat suatu tindakan guaman di atas perlakuan torts salah nyata (misrepresentation) atau kemungkiran kontrak. Mahkamah telah menimbangkan setiap tuntutan itu dan membuat dapatan ke atasnya di atas kuasa-kuasa inheren yang ada pada Mahkamah dalam membuat perintah-perintah konsekuential yang difikirkan sesuai dan adil seperti mana yang dipohon di prayer akhir oleh responden dan pempetisyen dalam jawapan kepada petisyen dan di dalam petisyen tersebut."*

[33]As mentioned earlier, the learned counsel for the RH in the present case contended that in light of the lacunae in the LRA on claim for damages, this court should exercise its inherent powers under O.92 r.4 Rules of Court 2012, which provides:

> *"For the removal of doubt it is hereby declared that nothing in these Rules shall de deemed to limit or affect the inherent*

powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."

However as already mentioned, this court is not at liberty to act outside the scope and powers as set out within the confines of the LRA. Inherent jurisdiction cannot be used to create new rules of substantive law. This courts finds that the counter claim cannot be proceeded under this petition because the nature of the counter claim is not something that is within the contemplation of the LRA in general and s.68 in particular at the present moment.

[34]In the present case, the parties agreed that they would only cohabit after the ceremonial marriage and unfortunately the said ceremonial marriage did not taken place. Therefore, there can never be any willful non-consumation in the present case. For completeness this court will briefly touch on what constitute wilful refusal to consummate the marriage. In *Rathee v Shanmugam* *[1981] 1MLJ 263* the parties had agreed that cohabitation would take place only after the celebration of the marriage according to Hindu rites, which was to come about two months after the civil marriage. The respondent procrastinated despite repeated attempts to persuade him to proceed with the religious rites. The respondent ultimately informed the petitioner that he had no intention to proceed with the religious ceremony. The petitioner sought to annul the marriage on the ground of respondent's wilful refusal to consumate the marriage. Wan Suleiman FJ (sitting as a High Court Judge) ruled that the failure by the respondent to proceed with the ceremony according to Hindu rites would entitle the petitioner to refuse to consummate the marriage and this in turn would entitle her to a declaration that the marriage was null and void by reason of wilful refusal to consummate by the respondent.

[35]The RH did not make any attempt to prove that the annulment would be unjust and that the PW is the guilty party who wilfuly refused to consummate the marriage and consequently therefore, due to the the PW's conduct the RH is entitled to damages. In the premise the RH is not entitled to any damages. This court finds that what ever money or gifts given by the RH to the PW are purely on a voluntary basis and the parties have no claim against each other.

[36]This court refers to the Supreme Court in *Karpal Singh & Anor v PP* [1991] 2 CLJ 1458 where Abdul Hamid Omar LP said:

"The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of the law…where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the court cannot act outside those powers and conditions."

[37]This court in looking at the relevant provisions of LRA thus far is also minded to follow the direction of the Federal Court in the case of Berjaya Times Square Sdn Bhd (supra) where his Lordship Gopal Sri Ram FCJ (as he then was) cited with approval the speech of Lord Hoffmann in delivering the advice of the Board in Attorney General of *Belize v Belize Telecom Limited* (2009) UKPC 11, his lordship said:

"The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument mean…"

[38]In the present case, the legislature had clearly provided under s.58 and s.59 of the LRA for damages to be allowed in the case of proven adultery only and nothing else. Hence the court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. To reiterate, the inherent power cannot be invoked to override an express provision of the law where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has set the parameters limiting the scope of such action, the court cannot act outside those powers and conditions.

INTITULE

[39]This court refers to *Chin Yoke Yin v Tan Theam Huat* *2015 11 MLJ 577*, where the divorce petition was filed by the petitioner wife against the respondent husband. The respondent husband cross-petitioned for divorce. The petitioner wife had ten witnesses whilst the respondent husband did not give any evidence. The respondent had moved out of the matrimonial home alleging domestic violence by the petitioner. The marriage was dissolved and the decree nisi for the divorce was made decree absolute immediately. The petitioner sought damages for domestic violence whilst the respondent submitted that damages could not be awarded under the Law Reform (Marriage and Divorce) Act 1976 and that the court did not have jurisdiction to hear this case as regards domestic violence. Dato' Noraini Abdul Rahman J, held that the court has jurisdiction to hear matrimonial matters as it comes within the civil jurisdiction of a High Court. Damages for domestic violence could also be dealt with by the court since the intitulement of the suit mentioned 'Dalam perkara Seksyen-Seksyen 2 dan 10 Akta Keganasan Rumah Tangga 1994' and where a victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, the court hearing a claim for compensation may award such compensation in respect of the injury or damage or loss as it deems just and reasonable.

[40]This court refers to the case of *Abdul Rahim Aki V. Krubong Industrial Park (Melaka) Sdn. Bhd. & Ors.* [1995] 4 Clj 551 where Court of Appeal, held *"**[2]** The intitulement of the appellant as plaintiff in his personal capacity in what purports to be a derivative action herein is clearly wrong. The facts as alleged, even if true, do not support the cause of action relied upon by the appellant. The facts do not appear to fall squarely within a minority shareholder's action on the ground that there had been fraud on the minority. These apart, the relief claimed does not appear to fit the fact alleged. The erroneous cause of action, coupled with the procedural obstacles, must constitute sufficient ground for the dismissal of the appeal."*

[41]In this present case the intitule is "di bawah seksyen 68 dan 70 dan Akta Membaharui Undang-Undang Perkahwinan 1976 (Akta 164) & Kaedah-Kaedah" and nothing more. To anchor the cross-petition under s.68 of the LRA is clearly wrong. The erroneous cause of action, coupled with the procedural obstacles, must constitute sufficient ground for the dismissal of this cross-petiton. Hence this court finds that the counter claim cannot be sustained under this petition.

CONCLUSION

[42]In light of the foregoing reasons this court in the upshot concludes that the preliminary objection is allowed and the counter claim for special and general damages is dismissed with no order as to cost.

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