

NEVILLE FERNANDO
v
CHANDRANI FERNANDO

COURT OF APPEAL
EKANAYAKE, J.
GOONARATNE, J.
CA 902/95
DC KALUTARA 2731/D
JULY 9, 2007

Civil Procedure Code – Divorce – Ground of constructive malicious desertion-Requirements – Burden on whom? Is it a question of fact? Matrimonial relief only to the innocent spouse?

The plaintiff-appellant instituted divorce action seeking a divorce *vinculo matrimonii* dissolving the marriage between him and the defendant-respondent on the ground of constructive malicious desertion of the defendant.

The trial judge dismissed the action holding that, leaving of the matrimonial home by the plaintiff was not due to any fault of the defendant and according to law matrimonial reliefs could be granted only to the innocent spouse.

Held:

- 1) In the case of constructive malicious desertion the spouse who is out of the matrimonial house must show that the other acted with fixed intention of putting an end to the marriage and the burden of proving just cause in order to assert constructive malicious desertion is on the spouse who alleges constructive malicious desertion.
- 2) To constitute the offence of constructive malicious desertion by the defendant the necessary conduct should be of grave and convincing character.
- 3) It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home.

"the function of an appeal Court is to consider the matter without either denying its first Court its special advantages or supposing that it can place itself in the same position by a mere study of the record."

APPEAL from the judgment of the District Court of Kalutara.

Cases referred to:-

- 1) *Anulawathie v Gunapala and another* – 1998 – 1 Sri LR 93.
- 2) *Edwards v Edwards* – 1949 – 21 ALL ER 145.
- 3) *Alles v Alles* – 51 NLR 416.
- 4) *Chellammah v Kanagapathy* – 65 NLR 49 at 52.
- 5) *Oberholzer v Oberholzer* – 1921 – A.D. 272 at 274.
- 6) *Alwis v Piyasena Fernando* – 1993 – Sri LR 119.

Asoka Fernando with Ms. Manori Manik and M. Gamage for plaintiff-appellant.
Rohana Deshapriya for defendant-respondent

September 21, 2007

CHANDRA EKANAYAKE, J.

The plaintiff-appellant (hereinafter sometimes referred to as the plaintiff has preferred this appeal from the judgment of the learned District judge of Kalutara dated 20.11.1995 pronounced in District Court, Kalutara Case No 2731/D seeking *inter alia* to set aside the said judgment and decree of the District Court and to enter judgment and decree as prayed in the plaint. 01

The plaintiff had instituted the above styled divorce action against the defendant-respondent (hereinafter sometimes referred to as the defendant) seeking *inter alia* a divorce *vinculo matrimonii* dissolving the marriage between the plaintiff and the defendant on the ground of constructive malicious desertion of the defendant. The defendant by her answer dated 20.10.1993 whilst admitting only the marriage and the birth of the 2 children namely – Himal Nilruksha Hikkaduwa, Malshi Nilrukshi Hikkaduwa had prayed for a dismissal of the plaintiff's action. By way of further answer defendant had contended that the plaintiff was living with another lady and even a child was born to her as a result of the said undue intimacy and denying the averment in paragraphs 7 of the plaint stated that in or about February 1987 she was chased out of the matrimonial home by the plaintiff after ill-treating her and harassing her. 10 20

When the trial commenced having admitted the marriage between the plaintiff and the defendant and that the matrimonial home was at No. 35, Siri Nawasa Mawatha, Kalutara-North, case had

proceeded to trial on issues 1 to 6 and 9-10 raised on behalf of the plaintiff and the defendant respectively. Since the plaintiff had agreed to give custody of the above two children to the defendant (as appearing at page 26 of the brief), the learned trial judge had stated in the judgment no necessity arises to answer the said issues 7 and 8.

Case of the plaintiff had been concluded with evidence and no oral evidence had been adduced for the defendant's case.

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The learned Trial judge by the impugned judgment had dismissed the plaintiff's action with costs. This is the judgment this appeal has been preferred from.

Perusal of the evidence of the plaintiff reveals that the defendant was in the habit of coupling names of the females and to quarrel with him even prior to the marriage and the defendant continued to do so even after the marriage. His position had been that as he had to leave the matrimonial home he left. Further his evidence in examination-in-chief at page 39 of the brief had been to the following effect:

ප්‍ර : නමා වෙනත් ස්ත්‍රියක් සමඟ ඉන්නවා අඹු සැමියන් වලයෙන්?

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උ : ඔව්

ප්‍ර : කොයිකාලයේ සිටද ඉන්නේ?

උ : 1992 වර්ෂයේ සිට

The evidence to the above effect was not contradicted and his evidence in cross examination (at page 50 of the brief) had been that one lady by the name Priyangani had a child from him and said child's birth certificate was also produced through him marked as V3. He had further testified that said child was born on 18.04.1993 and particulars to prepare V3 was furnished by him and the above position is supported by the particulars appearing in cage 9 of V3. According to V3 father of child born to said Priyangani is Hikkaduwa Nevil Fernando - the plaintiff.

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Having subjected the evidence of the plaintiff with regard to the conduct and behavior of the wife (the defendant) to a severe scrutiny the trial judge had concluded in the judgment that leaving the matrimonial home by the plaintiff was not due to any fault of the defendant and according to our law matrimonial reliefs could be granted only to the innocent spouse.

It is to be observed that the basis of the plaint and issues of the plaintiff had been on the constructive malicious desertion of the defendant-wife. In the case of constructive malicious desertion the spouse who is out of the matrimonial home must show that the other had acted with fixed intention of putting an end to the marriage and the burden of proving just cause in order to assert constructive malicious desertion is on the spouse who alleges constructive malicious desertion,— in this case the plaintiff husband. Therefore it becomes essential to examine the actual facts of the case in order to ascertain whether the party was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the spouse said to have been at fault. It was observed by Weerasuriya, J. in the case of *Anulawathie v Gunapala and another*⁽¹⁾ as follows:

"It is to be observed that when a party seeks a divorce on the ground of constructive malicious desertion what is required to be proved is that, the innocent party was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the other party."

To constitute the offence of constructive malicious desertion by the defendant (here the wife), the necessary conduct should be of grave and convincing character. In this regard it would be pertinent to consider the decision in *Edwards v Edwards*⁽²⁾. Their Lordships at 148:

".... but the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is a question of fact on which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home."

In the light of the above decision it is clear that in any given circumstances whether requirements to constitute constructive malicious desertion are fulfilled, is a question of fact.

The observations of Lord Radcliffe with regard to finding of fact by a trial judge, in *Alles v Alles*⁽³⁾ would also be of importance. Per Lord Radcliffe at 421.

"To reverse this finding on appeal would be a strong step. Only justified if the trial judge had demonstrably misjudged the position."

Similarly Lord Radcliffe in delivering the Privy Council judgment in *Chellammah v V. Kanagapathy*⁽⁴⁾ at 52 has succinctly stated the circumstances in which a finding of fact of a trial court could be interfered with. Per Lord Radcliffe at 52. 100

"The function of an Appeal Court is therefore to consider the matter without either denying its first Court its special advantages or supposing that it can place itself in the same position by a mere study of the record. With these limitations in mind it has to decide whether the judge's findings of fact, since no question of law is in dispute, are so far unmaintainable upon the whole conspectus of the evidence, oral and documentary, that they cannot be supported." 110

The following observation made in *Oberholzer v Oberholzer*⁽⁵⁾ at 274 would be important in the circumstances of this case.

"These matrimonial cases throw a great responsibility upon a Judge of the first instance, with the exercise of which we should be slow to interfere. He is able not only to estimate and credibility of the parties but to judge of their temperament and character. And we, who have not had the advantage of seen and hearing them, must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong." 120

The above principle was followed by His Lordship the Chief justice G.P.S. de Silva, in the case of *Alwis v Piyasena Fernando*⁽⁶⁾. It was held amongst other things that:

"The Court of Appeal should not have disturbed the findings of primary facts made by the District Judge on credibility of witnesses."

In this case the most vital issues of the plaintiff appear to be issues 1 and 2. Those are to the following effect:

"1 පැමිණිල්ලේ 7වෙනි ඡේදයේ සඳහන් පරිදි පැමිණිලිකරු වෛවාහක නිවස අනතුර, කොළඹ 6, හැවිලොක් පාරේ නිවසකට පදිංචිය සඳහා ගියේද? 130

- 2 ඉහත සඳහන් පද-විය එසේ වෙනස් කිරීමට සිදුවූයේ විත්තිකාරිය විසින් පැමිණිලිකරු අනුමත ද්වේශ සහගත ලෙස අත්හැර යාම නිසාද?"

The learned trial judge had answered issue No. (1) in the affirmative and (2) in the negative. Examination of the plaintiff's evidence demands the answer to issue No. (1) to be in the affirmative. What needs consideration now is whether the learned judge was correct in answering issue No. (2) in the negative. Perusal of the impugned judgment reveals that (as appearing at page 67 of the brief) it had been concluded that under those circumstances it cannot be said that there were strong reasons compelling the plaintiff to leave the matrimonial home. The legal position too had been considered by the learned judge. Judge's finding on facts appear to be that according to the own testimony of the plaintiff he had been living as husband and wife with another lady (from 1992) and thus a matrimonial offence by plaintiff was proved before the Court. Therefore he was not an innocent party. Further the learned judge appears to have considered what really led the plaintiff to leave the matrimonial house in February 1987 (as averred in the plaint). Whether it was due to the fault of the defendant-wife. The finding with regard to the above appearing at page 68 of the brief is as follows:

"... මෙම නඩුවෙන් පවරා ඇති අන්දමට 1986 වර්ෂයේ පැමිණිලිකරුට වෛහක නිවසින් ඉවත්වී යාමට වූයේ විත්තිකාරියගේ වරදින්මද යන්නද ඉහතින් සඳහන් හේතූන් මත තීරණය කල නොහැක"

Of course according to paragraph 7 of the plaint the date of leaving the matrimonial home by the plaintiff appears to be 14.2.87. Issue No 01 also refers to the averments in paragraph 07 of the plaint. When concluding as above with regard to constructive malicious desertion it is seen that year 1986 is mentioned there. However paragraph 07 of the plaint gives the date of leaving as 14.02.87. Therefore it is evident that due to some inadvertence, year 1986 appears in the aforesaid finding.

On the evidence available I am unable to infer that plaintiff had left the matrimonial home in February 1987 due to direct consequence of any expulsive acts of the defendant. Further plaintiff's own evidence in cross examination had been that in or about 1987 the

defendant was living in Colombo as she had to follow a course in Borella and he left the matrimonial home in 1986 November or December. Plaintiff's evidence to the above effect would suffice to answer issue No. 02 in the negative since it appears that in February 1987 the defendant had not even lived in the matrimonial home.

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Having examined the evidence I am inclined to agree with the findings of the learned trial judge and I conclude that issues had been correctly answered.

For the foregoing reasons I see no justification in interfering with the findings. Accordingly this appeal is hereby dismissed. In all circumstances of the case no order is made with regard to costs.

GOONERATNE, J. - I agree.

Appeal dismissed.