

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA**

Patadendi Gedara Ratnayake,
alias
Kumbukgolle Gedara
Ratnayake,
No. 37A,
Ihala Arawwala,
Dambulla.

PLAINTIFF

S.C/Appeal No. 116/2015

Vs.

S.C. Application No.

SC/HCCA/LA/286/2014

Civil Appellate High Court of Kandy

Case No. CP/HCCA/81/2009 (FA)

D.C. Matale Case No. D/3841

Kumbukgolle Gedara
Ashokamala,
No. 37A,
Ihala Arawwala,
Dambulla.

DEFENDANT

AND

Patabendi Gedara Ratnayake,
alias
Kumbukgolle Gedera
Ratnayake,
No. 37A,
Ihala Arawwala,
Dambulla.

PLAINTIFF-APPELLANT

Vs.

Kumbukgolle Gedera,
Ashokamala,
No. 37A,
Ihala Arawwala,
Dambulla.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

**In the matter of an Application for
Leave to Appeal under section 5C
of the High Court of the Provinces
(Special Provisions) Act, No. 19 of
1990 as amended by Act No. 54 of
2006.**

Kumbukgolle Gedera
Ashokamala,
Ihala Arawwala,
Dambulla.

**DEFENDANT-RESPONDENT-
APPELLANT**

Vs.

Patadendi Gedara Ratnayake,
Alias
Kumbukgolle Gedera
Ratnayake,
No. 37A,

Ihala Arawwala,
Dambulla.

**PLAINTIFF-APPELLANT-
RESPONDENT**

Before : Priyantha Jayawardena PC, J
Vijith K. Malalgoda PC, J
Murdu N.B. Fernando PC, J

Counsel : Niranjan De Silva with Kalhara Gunawardena for the
Defendant-Respondent-Appellant

Dr. Sunil Cooray for the Plaintiff-Appellant-Respondent

Argued On : 17th January, 2019

Decided On : 4th October, 2023

Priyantha Jayawardena PC, J

This is an appeal filed by the defendant-respondent-appellant (hereinafter referred to as the “appellant”) to set aside the judgment of the Civil Appellate High Court of Kandy (hereinafter referred to as the “High Court”), which allowed the appeal filed by the plaintiff-appellant-respondent (hereinafter referred to as the “respondent”) against the judgment of the District Court refusing to grant a divorce to the plaintiff.

Facts

The appellant stated that she got married to the respondent on the 27th of November, 1980. However, both of them were living in their parents’ houses. Nonetheless, the respondent frequently

visited the appellant at her parents' house, and both of them considered the said house as their matrimonial home.

It was further stated that in 1990, the appellant and the respondent shifted to a new house built by them (however, this fact was disputed by the respondent) on a land owned by his parents, and thereafter, they considered the said house as their matrimonial home. Two daughters and a son were born to them.

The appellant stated that the respondent instituted action in the District Court of Matale on the 15th of May, 2006 praying for a divorce on the ground that she was guilty of constructive malicious desertion. The appellant further stated that the respondent had pleaded in his plaint that her behaviour towards him changed after some time and she had started quarrelling with the respondent for no apparent reason. The respondent in his plaint further stated that he tolerated the hostile conduct of the appellant with great difficulty as he wanted to continue with the marriage.

Furthermore, the respondent stated that a land dispute arose between his father and the appellant's mother, and a case was filed in the District Court of Matale. Due to the aforesaid land dispute, the situation became worse as the appellant frequently quarrelled with the respondent and treated him in a cruel manner.

Moreover, being unable to tolerate the ill-treatment any further, the respondent left the matrimonial home on or around the 11th of July, 2004 and shifted to a house built by him on a land owned by his parents. Thereafter, he took steps to divorce the appellant. However, as a result of the intervention of his relatives and friends once again, both of them started living in the same house.

The respondent further stated that after some time the appellant started to ill-treat him and neglected her duties as a wife. Being unable to bear the ill-treatment, he left the matrimonial home on or around the 5th of January, 2006 leaving some of his belongings in the said home.

The respondent stated that thereafter, he had been living at his brother's house, which is 500 meters away from where the appellant was residing. Further, since his belongings were still in the matrimonial home where the appellant was residing, he visited the said house from time to time to get his belongings when necessary. Moreover, the appellant earns an income from selling paddy and other crops owned by him and has no other source of income.

In the circumstances, the respondent prayed *inter alia*;

- (a) for a divorce on the ground of constructive malicious desertion on the part of the appellant,
- and
- (b) to evict the appellant from the respondent's property.

The appellant further stated that thereafter, she filed an answer denying the allegations made by the respondent in his plaint. The appellant pleaded in her answer that the matrimonial home was built with the income earned by both the respondent and herself. Further, the appellant stated that it was the respondent who abused her and their children and took steps to chase them from the matrimonial home.

Furthermore, she stated that on or around the 9th of July, 2006 the respondent had assaulted the younger daughter and the appellant and chased them out of the matrimonial home. Moreover, the respondent had given their matrimonial home to his brother and his wife and had rented out two of the rooms in the said house.

The appellant further pleaded that the respondent owned several properties and possesses a fixed deposit amounting to Rs. 1,000,000/-. In addition to those, he earns a monthly income of Rs. 30,000/- from farming. Moreover, she had no intention of divorcing the respondent and wishes to continue with their marriage. In the circumstances, the appellant in her answer prayed, *inter alia*;

- (a) to grant an Order directing the respondent to lead to a good family life with the appellant
- (b) to grant the divorce on the basis that the respondent had constructively deserted the appellant if the court is granting a divorce,
- (c) to order the respondent to pay permanent alimony amounting to Rs. 1,000,000/-,
- (d) to give the matrimonial home to the appellant and their children.

Judgment of the District Court

The trial proceeded *inter parte*, and upon the conclusion of the trial, the learned District Judge delivered the judgment holding that the respondent has failed to prove any of the allegations made by him against the appellant. Further, it was held that in the complaint made by the appellant to the police on the 14th of July, 2006 the respondent had admitted that he evicted the appellant and their children from the matrimonial home. Furthermore, at the trial, the respondent admitted that

he had given the said house to his brother and had rented out a few rooms of the said house. Moreover, at the trial, it was proved that the respondent was guilty of constructive malicious desertion. In the circumstances, the learned District Judge dismissed the plaint filed by the respondent.

Being aggrieved by the said judgment of the learned District Judge, the respondent appealed to the High Court on the following grounds;

- (i) the evidence led at the trial had not been evaluated properly by the learned District Judge, and
- (ii) the judgment is contrary to law.

Judgment of the High Court

Having considered the said appeal, the learned judges of the High Court allowed the appeal and set aside the judgment of the District Court on the basis that there was sufficient evidence to prove that the respondent had to leave the matrimonial home due to the conduct of the appellant. It was held that the respondent has been very specific in stating to court how the appellant had been abusive towards the respondent and that the appellant had failed to perform her duties as a wife. Moreover, even though the trial judge held that the appellant was not cross-examined on the alleged harassment caused to the respondent, the evidence shows that the appellant was cross examined on this point. Hence, the appellant is not entitled to alimony on the basis that the desertion was not due to the fault of the respondent.

Being aggrieved by the said judgment of the High Court, the appellant sought Leave to Appeal from this court, and this court granted Leave to Appeal on the following questions of law;

“

- (i) Is the judgment of the Civil Appellate High Court of Kandy wrong in law?
- (ii) Did the Honourable Civil Appellate High Court of Kandy err in law in failing to analyze and evaluate and ascribe the relevant probative values to the evidence lead in the instant District Court case and in overturning the Learned District Judge’s judgment?
- (iii) Did the Honourable Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of the matrimonial fault of constructive malicious desertion of the plaintiff?

- (iv) Did the Honourable Civil Appellate High Court of Kandy err in law in failing to appreciate that the plaintiff's evidence was *ipse dixit* evidence?
- (v) Did the Honourable Civil Appellate High Court err in law in erroneously holding that the defendant had admitted that the plaintiff was compelled to leave the matrimonial home due to the behavior of the defendant?
- (vi) Did the Honorable Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of matrimonial fault of constructive malicious desertion of the plaintiff when there was no clear cogent evidence to evince such?"

During the course of the submissions of the learned counsel for the appellant, he informed the court that the court need not consider the 1st and 5th questions of law stated above.

Did the Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of the matrimonial fault of constructive malicious desertion?

In the instant appeal, both parties claim that their spouses maliciously deserted them. Hence, it is necessary to consider the evidence led at the trial to ascertain;

- (a) whether there is evidence to prove the malicious desertion, and
- (b) if there is evidence to prove malicious desertion, which party had deserted the spouse.

Evidence at the trial

At the trial, the respondent admitted that the appellant left the matrimonial home because she was assaulted by him.

“ප්‍ර: තමුන්ට යෝජනා කරනවා විත්තිකාරිය නිවසින් ගිහින් තිබෙන්නේ තමන් පහර දුන්න නිසා කියලා?”

උ: එහෙමයි”

Moreover, in the Police complaint made by the respondent on the 14th of July, 2006 he stated that he had chased the appellant and the children from their matrimonial home.

“මම එයාලා ගෙදරින් එලවලා ඉන්නේ”

The above admission of the respondent was corroborated by the evidence given by their daughter and son at the trial.

The evidence of Sandhya Kumari Ratnayake, the daughter is as follows:

“ප්‍ර: මා තමුන්ට යෝජනා කරනවා තමුන්ගේ පියාට වෛවාහික නිවසින් පිටවීමට සිදු වුනා කියලා?”

පි: නැහැ ස්වාමීනි අපිව එලවලා තාත්තා ජීවත් වෙනවා.”

Dinesh Prasanna Kumara Ratnayake, the son, gave evidence and stated:

“37/ඒ ගෙදරින් මගේ සහෝදරියට, මට සහ මගේ මවට පිටවන්න සිදු වුනා. එහෙම සිදු වුනේ පියා ගහලා පැන්නුවා.”

Furthermore, the appellant stated in her evidence at the trial that it was the respondent who harassed her and the children and evicted them from the matrimonial home. The above position was admitted by the respondent under cross examination;

“ප්‍ර: තමුන්ට යෝජනා කරනවා විත්තිකාරිය නිවසින් ගිහින් තියෙන්නේ තමුන් පහර දුන්න නිසා කියලා

උ: එහෙමයි”

The appellant further stated that on the 9th of July, 2007 the respondent assaulted their daughter, Sandhya Kumari, with a mamoty. A complaint was made regarding the said incident to the Dambulla Police Station on the 10th of July, 2006. Thereafter, on the 4th of October, 2006 the Police instituted proceedings at the Magistrate’s Court of Dambulla against the respondent. This incident was also corroborated by both the son and the daughter. Furthermore, the respondent admitted going to the Mediation Board for assaulting their daughter.

“ප්‍ර: එහෙම නම් මම මතක් කර දෙන්නම්, සමක මණ්ඩලයට ගියාද දෙවෙනි දුවට ගහලා

උ: එහෙමයි ස්වාමීනි”

Although the respondent alleged that he left the matrimonial home because of the constructive malicious desertion on the part of the appellant, the evidence led at the trial proves that the respondent continued to live in the said home. In fact, the respondent admitted in his evidence that at the time of instituting action in the District Court, he was residing in the matrimonial home.

ප්‍ර: තමුන් පදිංචි වෙලා සිටිය තැන ලිපිනය මොකද්ද?

උ: අංක 37 (ඒ) ඉහත ඇරැවුල, දඹුල්ල

ප්‍ර: අංක 37(ඒ) කියන තැන තමයි තමාලා විවාහ වෙලා එකට ජීවත් වුනේ?

උ: එහෙමයි ස්වාමිනි

The answer by the appellant and her evidence led at the trial shows that she refused to grant a divorce to the respondent as she wants to resume cohabitation. At the trial, the appellant stated that she cannot afford to get a divorce as she has two children who are of marriageable age.

“මට දික්කාසාද වෙන්න බැහැ. ළමයින් දෙදෙනෙකු ඉන්නවා කසාද බදින වයසේ.”

It is pertinent to note that desertion is a continuing offence and thus, may be terminated at any time on proof of change of *animus* or *factum*. In this context, the respondent has to prove that the appellant conducted herself with the intention of bringing the conjugal life to an end.

Malicious Desertion

The grounds for divorce are set out in section 19 of the Marriage Registration Ordinance No. 19 of 1907, as amended, sets out the grounds for divorce. It reads thus;

“(1) *No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court.*

(2) *Such judgment shall be founded either on the ground of adultery subsequent to marriage, or of **malicious desertion**, or of incurable impotence at the time of such marriage.*

(3) *Every court in Sri Lanka having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on any such ground.”*

[emphasis added]

In addition to the above, section 608(2) of the Civil Procedure Code states;

“*Either spouse may—*

- (a) *after the expiry of a period of two years from the entering of a decree of separation under subsection (1) by a Family Court, whether entered before or after the 15th day of December, 1977, or*
- (b) *notwithstanding that no application has been made under subsection (1) but where there has been a separation a mensa et thoro for a period of seven years, apply to the Family Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (a), or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (b), enter judgment accordingly:*

Provided that no application under this subsection shall be entertained by the court pending the determination of any appeal taken from such decree of separation. The provisions of sections 604 and 605 shall apply to such a judgment.”

In the instant appeal, the respondent alleged that he had to leave the matrimonial home as he was treated in an inhumane and derogatory manner by the appellant. He further alleged that the appellant failed to perform her duties as a wife. Accordingly, the respondent relied on section 19(2) of the Marriage Registration Ordinance to obtain a divorce on the basis of constructive malicious desertion.

Malicious desertion may be either ‘direct’ or ‘constructive’ desertion. The difference between these two grounds depend on the *factum* element of the offence. In the case of ‘direct’ malicious desertion, the deserting spouse leaves the matrimonial home, while in ‘constructive’ malicious desertion, the innocent spouse is forced to leave the matrimonial home due to the expulsive acts of the other.

Desertion has been defined in the case of *Silva v Missinona* 26 NLR 116 as:

“deliberate and unconscientious, definite and final repudiation of the obligations of the marriage state... and it clearly implies something in the nature of a wicked mind.”

It is pertinent to note that the *factum* of desertion has an important bearing on the burden of proof for desertion. Particularly when a spouse leaves the matrimonial home, there is a *prima facie*

inference that the spouse had the required *animus deserendi*. The onus is then shifted to the spouse to rebut the said presumption by proof of *justa causa*, in the absence of which the actual desertion will be established. On the other hand, in the case of constructive malicious desertion, the spouse who is out of the matrimonial home must show that the other spouse has acted with the intention of putting an end to the marriage.

Cruelty by one spouse compels the other to leave the matrimonial home

The respondent stated in his evidence that the appellant frequently quarrelled with him and ill-treated him, which resulted in him leaving the matrimonial home.

Cruelty by one spouse, which renders cohabitation intolerable for the other, amounts to constructive malicious desertion by the offending spouse. A similar view was expressed in ***Somawathie Dias v Alwis* 66 CLW 30**, where it was held as follows:

“cruelty need not necessarily be physical cruelty inflicted personally by the defendant on the applicant. It may be physical or mental cruelty caused by persons whom the defendant has the power to remove from the matrimonial home.”

However, there is no evidence to prove that the appellant treated the respondent in a cruel manner which compelled him to leave the matrimonial home. On the contrary, the aforementioned evidence led at the trial show that the respondent had chased the appellant and their children from the matrimonial home.

Termination of Desertion

Conclusive evidence of a settled intention to terminate the conjugal relationship is best illustrated by proof of abortive efforts for reconciliation. Further, if the offer to reconcile made by the deserting spouse is rejected by the other spouse, the tables will be turned and the opposing spouse will be held liable for desertion. A genuine offer of reconciliation was described in ***Canekeratne v Canekeratne* (supra)** as follows:

“It is only genuine if there is a fixed and settled intention to offer a resumption of marital life under reasonable conditions, and it will not be fixed and settled intention if it is a mere fluctuating desire to resume cohabitation.”

In the instant appeal, the appellant had not sought a decree of divorce in her answer filed in the District Court. Further, she had prayed the Court to direct the respondent to commence the married life with her. Furthermore, the evidence of the appellant shows that she did not want to divorce the respondent and wanted to continue with the marriage. Moreover, when the maintenance application filed by the appellant in the Magistrate's Court of Dambulla was taken up, she had informed her wish to resume the marriage, which was refused by the respondent. Further, at the trial, the appellant categorically stated that she does not want a divorce as she has children of marriageable age. This position was discussed in *Muthukumarasamy v Parameshwary* 78 NLR 493, where it was held as follows:

*“termination of desertion can take place by a supervening animus revertendi, coupled with a bona fide approach to the deserted spouse with a view to resumption of life together; and that a deserted spouse must always, **until presentation of his or her plaint**, affirm the marriage and be ready to take back the deserting spouse.”*

[emphasis added]

In the instant appeal, the plaint was filed on the 15th of May, 2006 while the appellant had made the offer to reconcile the disputes among them on the 9th of May, 2007 when the maintenance application was taken up in the Magistrate's Court. Further, the evidence led at the trial shows that the respondent had not left the matrimonial home even at the time he gave evidence at the trial. On the contrary, it was revealed that he chased the appellant and their children from the matrimonial home.

Did the Civil Appellate High Court of Kandy err in law in failing to analyse and evaluate the evidence led in the District Court case?

The learned judge of the High Court set aside the judgment of the District Court on the basis that there was sufficient evidence to prove that the respondent had to leave the matrimonial home due to the conduct of the appellant.

In evaluation of the evidence given by a witness at a trial, the evidence should be considered as a whole, and the answers given to certain questions either in evidence in chief or in cross examination shall not be considered in isolation. Further, a careful consideration of the totality of the evidence led at the trial shows that there is overwhelming evidence before the District Court

to prove that the appellant was not responsible for the offence of committing the matrimonial offence of constructive desertion. On the contrary, the respondent admitted in his evidence that he chased the appellant and the children from the matrimonial house.

The trial judges have the benefit of seeing the witnesses giving evidence and it facilitates observing the demeanour of the witnesses which is useful in evaluating the evidence. In fact, the demeanour of a witness is one of the matters taken into consideration in accepting or rejecting the evidence of a witness. However, the appellate courts do not have the opportunity of seeing the witnesses giving evidence when hearing appeals. Thus, as a practice the appellate courts do not interfere with the findings of facts of the trial judges unless such findings are perverse.

The above view was expressed by the *Privy Council in Fradd v Brown & Co., Ltd.*, 20 NLR 282, where it was held that where the controversy is about the veracity of witnesses, immense importance attaches, not only to the demeanour of the witnesses, but also to the course of the trial, and the general impression left on the mind of the judge of the first instance, who saw and noted everything that took place in regard to what was said by one or other witnesses. It is rare that a decision of a judge of first instance on a point of fact purely is overruled by an appellate court. Further, a similar view was expressed in *Shaik Alli v Jafferjee* 3 NLR 368.

Moreover, in *Oberholzer v Oberholzer* (1921) South African Law Reports Appellate Division 274, Innes CJ held:

“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 the credibility of the parties but to judge of their temperament and character. And we, who have not had the advantage of seeing and hearing them must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong.”

The learned High Court Judge held that there was sufficient evidence to prove that the respondent had to leave the matrimonial home due to the conduct of the appellant. As stated above, at every point, the appellant was refusing to give a divorce to the respondent and repeatedly requested the respondent to start cohabiting with her. However, the respondent did not heed to any of those requests made by the appellant.

In *N.J.Canekaratne v Mrs. R.M.D. Canekeratne* 66 NLR 380, it was held:

“... it is correct to say that the conduct of the parties up to and including the time of the trial is relevant when the court has to decide who is to blame. Certainly up to the stage of entering decree nisi it is the duty of each party to provide a reasonable opportunity for a resumption of married life, and the party who deliberately and unreasonably refuses to accept that opportunity will be guilty of malicious desertion.”

[emphasis added]

Further, in *N.J.Canekaratne v Mrs. R.M.D. Canekeratne* (*supra*), it was held:

“a wife who has been deserted by her husband is not liable to be ejected by her husband from the matrimonial home. (unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her).”

[emphasis added]

A careful consideration of the evidence led at the trial shows that the appellant was not guilty of committing the matrimonial offence of constructive malicious desertion. Further, at the trial, it was proved that the respondent was guilty of constructive desertion of his spouse. In such circumstances, it is not possible to invoke section 19(2) of the Marriage Registration Ordinance against a spouse who is not guilty of matrimonial fault.

Hence, I am of the opinion that the respondent has failed to establish that the appellant was guilty of constructive malicious desertion.

I am also of the opinion that the High Court has failed to analyse and evaluate the evidence lead in the District Court and erred in setting aside the judgment of the learned District Judge and allowing the appeal filed by the respondent.

Conclusion

In the light of the above, I am of the opinion that the questions of law posed to this court should be answered as follows:

Did the Honourable Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of the matrimonial fault of constructive malicious desertion of the plaintiff?

Yes

Did the Honourable Civil Appellate High Court of Kandy err in law in failing to analyse and evaluate the evidence lead in the instant District Court case and in overturning the judgment of the learned District Judge?

Yes

In view of the foregoing answers, it is not necessary to consider the other questions of law stated above.

Therefore, the appeal is allowed. I set aside the judgment of the Civil Appellant High Court of Kandy in Appal No. CP/HCCA/81/2009 (FA) dated 20th of May, 2014 and affirm the judgment of the District Court of Matale delivered in D/38/41 dated 31st March, 2009.

I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J

I Agree

Judge of the Supreme Court

Murdu N. B. Fernando PC, J

I Agree

Judge of the Supreme Court