IN THE SUPREME COURT OF THE DEMOCRATIC SOCILIST REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal under the Provisions of Section 5C (1) of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

Wewita Hettige Upul Premalal Perera,
No. 209A, Mahawatta,
Alubomulla.

Petitioner

Supreme Court Case No.
SC Appeal 192/14
Civil Appeal High Court – Kalutara,case No.
WP/HCCA/Kal 13/10 (F)
District Court – Panadura, Case No. 4194/D

Vs-

Kiriwanawattegedara Beatrice Sandya Kumari,
Udahawatta,
Siyambalagoda,
Danture
Kandy.

Respondent

And between

Kiriwanawattegedara Beatrice Sandya Kumari,
Udahawatta, Siyambalagoda,
Danture, Kandy.

Respondent-Appellant

-Vs-

Wewita Hettige Upul Premalal Perera,
No. 209A, Mahawatta,
Alubomulla.

Petitioner-Respondent

And now between

Wewita Hettige Upul Premalal Perera,
No. 209A, Mahawatta,
Alubomulla.

Petitioner-Respondent-Petitioner

-Vs-

Kiriwanawattegedara Beatrice Sandya Kumari,
Udahawatta,
Siyambalagoda,
Danture, kandy.

Respondent-Appellant-Respondent

Before: Hon. Buwaneka Aluwihare P.C J

Hon. Upaly Abeyrathne J

Hon. Anil Gooneratne J

Counsel: W. Premathilaka for the Petitioner Respondent Appellant

Rohana Jayawardane For the Respondent –Appellant Respondent

Argued on: 16. 01. 2016

Decided on: 12. 07.2016

Aluwihare PC. J

Petitioner-Respondent-Petitioner-Appellant (hereinafter the Appellant) instituted action in the District Court by way of summary procedure against his wife praying for a divorce a *vinculo matrimonii* on the sole ground that they had been living in separation, a mensa et thoro, for a period of seven years prior to the institution of the action together with malicious desertion, in terms of section 608 (2) of the Civil Procedure code.

The appellant took up the position that he was legally married to the Respondent Appellant Respondent (hereinafter the Respondent) in the year 1994 and brought the Respondent to his residence where they commenced the matrimonial life.

It was the assertion on the part of the Appellant that the Respondent quarrelled with the Appellant and his parents and in the year 1995, she left the matrimonial home with their only child. Appellant asserts further that with the intention of continuing on with the married life he brought back the Respondent and the child to his residence. The Respondent, however had left the matrimonial home with the child for the second time in the year 1997. It is the contention of the Appellant that she did so with the intention of never returning to live with the Appellant. The Appellant has averred that he and the Respondent have been living in separation from bed and board (mensa et thoro) for a period of 10 years, and that the Respondent had maliciously deserted him and she had deprived him from having sexual relationships continuously for the said period.

The learned trial judge having satisfied himself of the material placed before the court on behalf of the Appellant granted a divorce in his favour on the ground of malicious desertion on the part of the Respondent and directed to have the decree nisi served on the Respondent in terms of section 377 of the Civil Procedure Code.

The Respondent filed objections seeking to set aside the judgement of the learned District Judge and she took up the position that the Appellant had previously instituted divorce action in the same district court against the Respondent and the said action had been dismissed by the court. The Respondent, however admitted (paragraph 6 of the objections filed before the District Court) that she and the Appellant lived separately from 1997 to the date of filing the case. It was her position that there was constructive malicious desertion on the part of the Appellant as she was ejected from the matrimonial home.

At the inquiry before the District Court the sole evidence placed by the Respondent was, with regard to the case filed previously (case no 3118 District Court Panadura) by the Appellant for divorce. This evidence was placed through the Registrar of the District Court. The Registrar testified to the

effect that the case filed by the Appellant had been dismissed on15th May 2008 and no steps had been taken to appeal against the said order. From his testimony, it was quite apparent that, the divorce had not been sought in terms of Section 608 of the Civil Procedure Code, in case no 3118.

The learned District Judge in a well-considered judgment, granted a divorce as pleaded for, to the Appellant. The learned trial judge had concluded that the Respondent had committed the matrimonial fault of maliciously deserting the Appellant, depriving him of conjugal relations and had lived in separation *a Mensa et Thoro*, for a period of over 7 years.

The High Court of Civil Appeals, however by its order dated 29th October 2013 reversed the order made by the learned District Judge and aggrieved by the said order the Appellant sought leave from this court against the said order of the High Court of Civil Appeals.

This court granted leave on the questions of law referred to in paragraph 16 of the Petition of the Appellant dated 21st November 2013 which are as follows:-

(a) The judgement is contrary to the Law

(b) The judges have erred in holding that the Petitioner should give oral evidence to corroborate the facts, when the action has been filed under summary procedure, especially where the Respondent herself admits that she continuously lived for more than 10 years, separate from the Petitioner.

(c) The judges have erred in failing to realise that when the decree nisi is entered in favour of the Petitioner, the burden of rebutting the Petitioners' issue shifts to the Respondent.

(d) The honourable judges have failed to realise the practical inability to reunite the parties where the Respondent had left the matrimonial home wilfully and never attempted to return to the matrimonial home for a period of well over 10 years.

(e) The honourable judges have failed to understand the fact, that the acts of the Respondent have deprived the petitioner having conjugal relationships with his wife for a continuous period of over 10 years, which amounts to malicious desertion.

The Learned Judges of the High Court of Civil Appeals held that it is mandatory to prove the matrimonial fault of the opposite party to obtain a decree of divorce in terms of Section 608 (2) of the Civil Procedure Code and cited the following 'head note' in the case of *Tennakoon Vs. Somawathe Perera* 1986 1 SLR pg.90.

> *" It is incumbent on a spouse seeking a divorce under section 608 (2) of the Civil Procedure Code on the ground of separation for a period of seven years to establish matrimonial fault. Only a procedural change enabling summery procedures to be used instead of a regular action was effected by section 608 (2) of the Civil Procedure Code"*

This is the present state of the law as it stands today. The learned judges of the High Court, however, have held that the Appellant had not led any evidence,

but only marked certain documents which the High Court was of the view irrelevant to prove the matrimonial fault, malicious desertion, in this instance.

At the hearing of this appeal it was contended on behalf of the Appellant, that the learned judges of the High Court erred, in holding that the Appellant ought to have given oral evidence at the inquiry and further the High Court failed to appreciate the fact that, once the decree nisi is entered in favour of a party (in the present case the Appellant) the burden of rebutting the position taken up by the party in favour of whom the decree nisi is entered, shifts to the opposite party(the Respondent).

It is to be noted that as referred to earlier, the Respondent did not place any material to rebut the position taken up by the Appellant at the inquiry i.e. that she deserted the Appellant in 1997. Apart from the bare statement in paragraph 6 of her statement of objections where she asserted that they are living in separation since 1997 and that she was maliciously evicted from the matrimonial home by the Petitioner, no other material was placed by the Respondent to substantiate that fact.

It is to be noted that as a general rule the procedure in matrimonial actions is regular procedure in terms of Section 596 of the Civil Procedure Code. Section 608 (1) of the said Code, re-affirms this rule with respect to applications for *a separation a mensa et thoro.*

But the amended section 608 (2) departs from the general rule and stipulates summary procedure for obtaining a decree of divorce founded on separation *a mensa et thoro.*

Unlike in an ordinary regular action, Section. 377 of the Civil Procedure Code casts a burden on the defendant to show sufficient cause against the Order Nisi and if the defendant fails to do so, then the defendant must face the consequences. In the case of *Caderamanpulle vs. Ceylon Paper Sacks Ltd. 2001 3 SLR 112,* Nanayakkara J. Commenting on the importance of an order *nisi* issued in a summary action, observed that, "Unlike in an ordinary regular action, section 377 of the Civil Procedure Code casts a burden on the

defendant to show sufficient cause against the order *nisi* and if he fails to do so he must face the consequences. Summary procedure has been designed with a view to expeditious and quick disposal of action. Therefore a defendant in summary procedure action is expected to act without delay, if he is to obtain relief from Court."

In the instant case the Respondent did not challenge what was asserted by the Petitioner, but merely produced the case record of a previous divorce action which had been dismissed. It should be noted that the grounds for divorce in the action that was dismissed (case no 3811) is different to that of the ground for divorce in the instant case. Hence, the earlier case filed for divorce by the Appellant is no bar to file a subsequent action for divorce, if the grounds for divorce relied upon, are different.

The learned judges of the High Court of Civil Appeals, in my view erred, when they held that the Appellant had failed to establish a matrimonial fault, whereas he had in the affidavit sworn by him had clearly stated that the Respondent left for the second time and never returned. Bertram CJ in the case of *Silva Vs Missinona* 26 NLR 113, held that, "Desertion to be a ground for divorce must be malicious, that is to say, it must be a deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state. It must be *sine animo reverlendi.* Divorce should only be granted if the desertion complained of was a repeated desertion, and the offending spouse contumaciously refused to return to married life"

The above in my view, is exactly what the Appellant asserted when he filed action under summary procedure and on the part of the Respondent she has failed to discharge the burden cast on her to rebut the said assertion. In the circumstances, I am of the view that the learned District Judge was correct in making the order nisi, made against the Respondent, absolute.

The learned judges of the High Court of Civil Appeal had failed to appreciate the fact that, the burden was on the Respondent to show sufficient cause

against the order nisi, if the Respondent was to succeed, when action is filed under summary procedure in terms of the Code of Civil Procedure.

Accordingly, I set aside the order made by the High Court of Civil Appeals dated 29th October 2013 and affirm the order made by the learned District Judge of Panadura made on 5th March 2010

The appeal is allowed, However, in the circumstances of this case, I order no costs.

Judge of the Supreme Court

Justice Upaly Abeyrathne

I agree

Judge of the Supreme Court

Justice Anil Gooneratne

I agree

Judge of the Supreme Court