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

In the matter of an Appeal with Leave to Appeal obtained from this Court.

GUNESHI MALLIKA GOMES [*nee* GUNAWARDENA]
No.15/1/A, Gomes Path,
Colombo 4.

PLAINTIFF

S.C. Appeal No. 123/14
S.C. HC. CA. LA No. 215/14
HC Appeal No.
WP/HCCA/MT/134/10/F.
D.C. Mount Lavinia
Case No. 3600/2002/D

VS.

JAMMAGALAGE RAVINDRA RATNASIRI GOMES
No.15/1/A, Gomes Path,
Colombo 4.

DEFENDANT

AND BETWEEN

GUNESHI MALLIKA GOMES [*nee* GUNAWARDENA]
No.15/1/A, Gomes Path,
Colombo 4.

PLAINTIFF-APPELLANT

VS.

JAMMAGALAGE RAVINDRA RATNASIRI GOMES
No.15/1/A, Gomes Path,
Colombo 4.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

GUNESHI MALLIKA GOMES [*nee* GUNAWARDENA]
No.15/1/A, Gomes Path,
Colombo 4.

PLAINTIFF-APPELLANT-PETITIONER/APPELLANT

VS.

JAMMAGALAGE RAVINDRA RATNASIRI GOMES
No.15/1/A, Gomes Path,
Colombo 4.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE:	Priyasath Dep PC, CJ H.N.J. Perera J. Prasanna Jayawardena PC, J.
COUNSEL:	S.A. Parathalingam, PC with Varuna Senadhira instructed by M/S Samararatna Associates for the Plaintiff-Appellant-Petitioner/Appellant. Rohan Sahabandu, PC with Hasitha Amarasinghe for the Defendant-Respondent-Respondent.
WRITTEN SUBMISSIONS FILED:	By the Plaintiff-Appellant-Appellant on 01st September 2014 and 23rd February 2017. By the Defendant-Respondent-Respondent on 31st October 2014 and 16th February 2017.
ARGUED ON:	15th July 2016, 27th September 2016 and 24th January 2017
DECIDED ON:	07th June 2018

Prasanna Jayawardena, PC, J.

On 20th April 1983, the Defendant-Respondent-Respondent ["the defendant"] and the Plaintiff-Appellant-Petitioner/Appellant ["the plaintiff"] married each other, at Colombo. The plaintiff is the wife. The defendant is the husband. There are four

children born of the marriage - two sons and two daughters. The defendant's mother owned a house at Gomes Path, in Colombo 4. The newly wedded couple lived there for a few years. Later, they moved to the defendant's parental home in Dehiwela and during this time, the house at Gomes Path was renovated. After the renovation was completed, the plaintiff and the defendant lived at this house at Gomes Path, from 1995 onwards. They both described that house as their `matrimonial home'.

On 28th September 2001, the plaintiff instituted action against the defendant in the District Court of Mt. Lavinia praying for a decree of divorce *a vinculo matrimonii* on the ground that the defendant was guilty of constructive malicious desertion. At the time the action was filed, the plaintiff was 40 years of age and the defendant was 43 years of age. When this action was instituted and during the course of the trial, both the plaintiff and the defendant continued to live in the house at Gomes Path, together with their four children.

In this background, the plaintiff stated in the plaint that, from April 1995 onwards, there were frequent disagreements between the spouses and that the defendant and his mother harassed the plaintiff. The plaintiff also averred that, the defendant ill-treated the children of the marriage and failed to meet their needs. She claimed that, the defendant frequently abused, ill-treated and hit the plaintiff and the children and that he often instructed the plaintiff to leave the matrimonial home and that he threatened to eject the plaintiff from the matrimonial home and to divorce the plaintiff. However, in paragraph [8] (ඇ) of the plaint, the plaintiff specifically averred that, despite these difficulties, the plaintiff continued to tolerate the situation in the interests of her children.

Thereafter, the plaintiff made the following averments with regard to a specific incident which is alleged to have occurred on 07th July 2001: *ie:* that, on the night of 07th July 2001, the defendant, without any reasonable or justifiable cause, assaulted the plaintiff in an inhuman and ruthless manner [අමානුෂික හා නිර්දය ලෙස පහර දෙන ලදී] in the presence of the domestic staff. The plaintiff stated that, the defendant then ordered the plaintiff to leave the matrimonial home and threatened to pour kerosene on the plaintiff and burn her unless she does so. The plaintiff stated that, on the following morning, she made a complaint to the Police at the Bambalapitiya Police Station. This complaint was marked "පැ 6" at the Trial.

The plaintiff specifically averred that, as a result of the aforesaid incident, the plaintiff was compelled, from 07th July 2001 onwards, to terminate all marital relations and connections she had been having with the plaintiff. Further, the plaintiff specifically pleaded that, from 07th July 2001 onwards, she and the defendant ceased to cohabit with each other and lived entirely separately from each other, but within the house at Gomes Path. She also pleaded that, all attempts made by her and her relatives and friends to resuscitate the marriage, failed. The plaintiff stated that the plaintiff and the defendant have not cohabited from 07th July 2001 onwards and up to the date of the institution of this action on 28th September 2001,

Finally, the plaintiff averred that, the defendant engaged in the aforesaid conduct with the intention of ending the marriage and that, accordingly, the defendant is guilty of constructive malicious desertion.

In his answer, the defendant flatly denied the allegations made against him by the plaintiff in the plaint. He pleaded that the plaintiff has made these false allegations in her efforts to obtain a divorce from the defendant and alleged that, the plaintiff had made a false complaint to the Police on 08th July 2001. The defendant averred that, there had been some minor disputes between the spouses but that the defendant bore these difficulties in the interests of his children.

When the trial commenced, the plaintiff and the defendant framed their issues based on the averments in the plaint. The plaintiff gave evidence. She did not call any other witnesses. Similarly, only the defendant gave evidence.

A perusal of the judgment of the learned District Judge shows that he has considered the evidence, in detail. Having done so, he has observed that, the plaintiff has not claimed that, *prior to* 07th July 2001,the defendant had, by his deeds or words, sought to end the marriage or to eject the plaintiff her from the matrimonial home or to make it impossible for her to remain in the matrimonial home.

With regard the alleged incident which the plaintiff states occurred on 07th July 2001, the learned trial judge observed that, although the plaintiff had stated in her complaint marked "ළ 6" that, the defendant slammed the plaintiff's head against the wall, hit her with a torch and broken some furniture, the plaintiff has *not* made these claims during her evidence-in-chief. The learned judge went on to note that, although the plaintiff had stated in the plaint and in "ළ 6", that the defendant *threatened* to pour kerosene on her and burn her, the plaintiff has claimed, during her evidence-in-chief, that the defendant had, in fact, poured kerosene on her and tried to set her on fire. The learned judge noted that, the defendant had stated, at the Police Station, that he wished to continue with the marriage. The learned Judge observed that, despite the plaintiff's claims that the alleged incident was a grave one, she and the defendant had gone *together* to the Police Station on 08th July 2001 and returned *together* to the matrimonial home and that, the plaintiff has *not* asked the police to take any action in pursuance of her allegations of threats, assault and an attempt to set her on fire. In the light of these facts, the learned District Judge held that, the plaintiff had not proved the occurrence of the alleged incident on 07th July 2001, which is pleaded in the plaint.

With regard to the plaintiff's claim that the plaintiff and the defendant had lived entirely separately after 07th July 2001, the learned District Judge held that, the evidence showed that, after that day, the defendant had his meals in the matrimonial home and that these meals were prepared by the plaintiff, the defendant met some of the expenses of the children and continued to contribute towards a part of the domestic expenses and utilities bills of the household and regularly supplied the household with rice and liquid petroleum gas. The learned judge concluded that this evidence showed that a degree of matrimonial relationship between the spouses had continued after 07th July 2001.

In the light of these findings, the District Court held that, the plaintiff had failed to establish that the defendant was guilty of constructive malicious desertion and, therefore, dismissed the plaintiff's case.

The plaintiff appealed to the Provincial High Court of Civil Appeal holden in Mount Lavinia. In appeal, the learned High Court Judges affirmed the judgment of the District Court and dismissed the plaintiff's appeal.

The plaintiff sought leave to appeal from this Court. Leave to appeal was granted on the following four questions of law:

(i) Whether the Civil Appellate High Court erred when it held that the Police Statements marked "P3F", "P3G" and "P3H" did not bear evidence of cruelty on the part of the defendant ?

(ii) Whether the Civil Appellate High Court erred when it held that the matrimonial relationship between the parties continued even after the institution of the divorce action and erred by disregarding the evidence led by the plaintiff which established that the parties did not recommence their marital relationship after 07th July 2001?

(iii) Whether the Civil Appellate High Court erred by holding that the marriage between the plaintiff and the defendant had not failed ?

(iv) Whether the Civil Appellate High Court erred by holding that the plaintiff had failed to establish that the defendant was guilty of constructive malicious desertion ?

In this regard, it hardly needs to be said here that, section 19 (1) of the Marriage Registration Ordinance No. 19 of 1907, as amended, lists *"malicious desertion"* as one of the three grounds on which a decree of divorce *a vinculo matrimonii* may be entered by a competent court. It is equally well known that, "malicious desertion" may take place either by way of *simple* malicious desertion or by way of *constructive* malicious desertion.

Simple malicious desertion or, as it is sometimes called, *actual* malicious desertion is where the spouse who is alleged to be guilty of malicious desertion physically separates from the matrimonial home or terminates matrimonial consortium, with the intention of deserting his or her spouse. The term *"consortium"* usually denotes the composite incidents of a marital relationship. In **GROBBELAAR vs. HAVENGA** [1964 S SALR (N) 522 at p.525], Harcourt J described the term "*consortium"* as *"….. an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage."* Harcourt J went on to cite Birkett LJ and observe that, that this *"totality"* embraces *"companionship, love, affection, comfort, mutual services, sexual intercourse - all belong to the married state. Taken together, they make up the consortium;"*.

Constructive malicious desertion is where the conduct or speech of the spouse who is alleged to be guilty of malicious desertion gives his or her spouse no reasonable alternative other than to depart from the matrimonial home or to cease matrimonial consortium. In this regard, Gorrel Barnes J has commented in the early and often cited case of **SICKERT vs. SICKERT** [1899 Probate 278 at p.282], *"In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him."*. This led Lord Merriman to pithily observe in **LANE vs. LANE** [1951 P 284 at p.286] *"Desertion is proved if the husband leaves the home, or drives the wife away from the home, with intent to bring the home to an end and without her consent or fault. It does not matter, therefore, on which side of the front door, so to speak, the spouses are found when they part."*.

The four questions of law set out above require this Court to examine the evidence placed before the District Court and then determine whether the High Court was correct when it affirmed the view taken by learned trial judge that, the plaintiff had failed to prove that the defendant was guilty of constructive malicious desertion.

However, before examining the evidence, it is necessary, to ascertain *what* the plaintiff in this case was required to prove in order to obtain a divorce on the ground of constructive malicious desertion by the defendant. In order to do so and in the light of the need to carefully consider the plaintiff's appeal, particularly in view of the facts and circumstances of this case, this Court should examine the principles of the applicable Law.

In this regard, the Marriage Registration Ordinance does not define the term *"malicious desertion"* used in Section 19 (2) of that enactment. Therefore, one has to look at the decisions of the Courts to ascertain what amounts to *"malicious desertion"*. The decisions of our Courts on this subject frequently refer to decisions of the English Courts which have influenced the development of our Law in this area. This led a learned author [Law and the Marriage Relationship by S. Ponnambalam - 2nd ed. at p. 6] to comment, with regard to the decisions of our Courts on the law of marriage and divorce, that *"Indeed (our) judicial decisions are replete with reference to English law authority ….."*. A perusal of the decisions on malicious desertion in South Africa shows that the Courts in that country too, have referred to English decisions when formulating the South African law on malicious desertion. In this background, in addition to examining the decisions of our Court on malicious desertion, it will be useful to look at the decisions of the English Courts. When one does so, it is soon seen that, not only is there an, at times bewildering, multitude of cases where the English Courts have made pronouncements on malicious desertion, there are instances where it is difficult to reconcile the views that have been expressed in some of these cases. It is, perhaps, this, which led Lord Merriman P to observe, in **WATERS vs. WATERS** [1956 1 AER 432 at p. 437], *"I am not going to attempt the task, which would be difficult if not impossible, of reconciling all the recent cases in the Court of Appeal on these topics, or of reconciling some of them with some of the older cases."*.

However, a study of the decisions of our Courts and a perusal of the decisions of the English Courts together with a reference to the South African decisions, does enable the extraction of some broad principles applicable to the question of what constitutes malicious desertion, in our Law.

Firstly, it is evident that, broadly speaking, malicious desertion, whether it be simple desertion or constructive desertion, takes place when the following elements come together: the *factum* [fact] of physical separation when the spouse who is alleged to be guilty of malicious desertion deserts the matrimonial home or matrimonial consortium; coupled with *animus deserendi* [intention of deserting] on the part of that spouse. Thus, Lord Greene MR in **BUCHLER vs. BUCHLER** [1947 1 AER 319 at p.320] observed, *"It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion."*. In our law, Poyser J identified these two elements in **ATTANAYAKE vs. ATTANAYAKE** [16 Cey L.R. 206 at p. 207] when he cited, with approval, the statement by Gorrel Barnes J in **SICKERT vs. SICKERT** that, *"In order to constitute desertion, there must be cessation of cohabitation and an intention on the part of the accused party to desert the other."*. The term *"cohabitation"* used by Gorrel Barnes J means much the same thing as the term *"consortium"* mentioned earlier. In **PERERA vs. GAJAWEERA** [2005 1 SLR 103 at p.107], Wimalachandra J observed that establishing malicious desertion requires proving *"….. not only the factum of desertion but also the required animus to repudiate the marital relationship ….."*.

With regard to the <u>first</u> requirement of the *factum* of desertion or, to use the words of Poyser J in **ATTANAYAKE vs. ATTANAYAKE**, the *"cessation of cohabitation"*, the spouse who is accused of having committed malicious desertion, should have committed the acts or said the words which are said to constitute simple or constructive malicious desertion, *against the wishes* of his or her spouse. As Basnayake CJ stated in **RAJESWARARANEE vs. SUNTHARARASA** [64 NLR 366 at p.369], the desertion must be *"against the desire"* of the deserted spouse.

Consequently, separations by consent or by compulsion caused by an unavoidable requirement such as, for example, a spouse being deployed elsewhere by the armed forces, having to relocate for compelling business purposes or having to live apart for medical reasons would, usually, negative a charge of malicious desertion. However, it also has to be noted that, such consensual or compelled separation may later turn into malicious desertion if it is established that, at some point in time, one of the spouses changed the character of the arrangement and deserted the other. As Greene M.R observed in **PARDY vs. PARDY** [1939 P 288 at p.302], *"A de facto separation may take place without there being animus deserendi, but, if that animus supervenes, desertion will begin from that moment, unless, of course, there is consent by the other spouse."*. A similar observation was made by Sansoni J, as he then was, in **CANEKARATNE vs. CANEKARATNE** [66 NLR 380 at p.382]. However, as observed later, these issues with regard to separation by consent or

compulsion do not arise in the present appeal and, therefore, need not be considered further in this judgment.

A desertion may end if, before the deserted spouse commences an action praying for a divorce on the ground of malicious desertion, the deserting spouse reconciles and returns to the matrimonial home or resumes cohabitation or makes a *bona fide* offer to do so. Further, an unreasonable refusal of such an offer by the erstwhile deserted spouse may, in some circumstances, turn the tables and make the erstwhile deserted spouse a *deserting* spouse. Thus, in **MUTHUKUMARASAMY vs. PARAMESHWARY** [78 NLR 488 at p.493] Sharvananda J, as he then was, stated, *"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….. The refusal of a defendant's bona fide offer to return which the plaintiff had no right to refuse converted the plaintiff into the deserting party and the plaintiff thereafter became the deserter and rendered himself guilty of malicious desertion."*. A similar observation was made by Sansoni J in **CANEKARATNE vs. CANEKARATNE** [at p.382]. However, as observed later, these issues with regard to reconciliation and return do not arise in this appeal and, therefore, need not be considered further in this judgment.

In cases of *simple* malicious desertion, the *factum* of the desertion is, usually, easy to identify and establish since the spouse who is alleged to have committed malicious desertion physically leaves the deserted spouse and the matrimonial home. Therefore, what remains is to ascertain that the departure was not consensual or for compulsive reasons and also whether there has been a *bona fide* offer to reconcile and return before the institution of the action.

However, it is less easy to identify the *factum* of desertion in cases of *constructive* malicious desertion where the Court is, usually, called upon to decide whether the conduct or speech of the spouse who is alleged to be guilty of constructive malicious desertion gave the deserted spouse no reasonable alternative other than to leave the matrimonial home or to cease cohabitation. Thus, In **ANULAWATHIE vs. GUNAPALA** [1998 1 SLR 63 at p.66] Weerasuriya J [then in the Court of Appeal] stated *"….. 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.".* A similar statement was made by Ekanayake J [then in the Court of Appeal] in **FERNANDO vs. FERNANDO** [2007 1 SLR 159 at p.162].

It will be useful to look at the question of what amounts to the type of conduct or speech on the part of the deserting spouse which will be regarded as *"expulsive"* conduct or speech amounting to constructive malicious desertion. Adjectives such as *"grave and weighty"* or *"grave and convincing"* have been sometimes used when referring to the type of conduct or speech which justifies a charge of constructive malicious desertion. However, these adjectives do not, by themselves, help in identifying the nature of such conduct or speech.

Instead, in cases of constructive malicious desertion, the question that the Court is called upon to determine is whether the conduct or speech of the deserting spouse was of a nature which the deserted spouse, who is to be judged on the standard of a reasonable spouse who is in the marital relationship which existed in that particular case, could not be reasonably expected to tolerate and live with, in the light of the facts, circumstances and relationships of that particular case. As Diplock LJ, as he then was], stated in the Court of Appeal in **HALL vs. HALL** [1962 3 AER 518 at p.526] *"For conduct to amount to constructive desertion ….. the conduct must be such that a reasonable spouse in the circumstances and environment of these spouses could not be expected to continue to endure. This I apprehend is what is meant by such expressions as `serious', `convincing', `grave and weighty' ….."* . Diplock LJ wryly added *"….. although I await with some philological excitement an example of conduct which is `grave' without being `weighty'."*

Thus, the type of conduct or speech which will justify a charge of constructive malicious desertion is limited to conduct or speech which can be reasonably regarded as being *expulsive* in the facts, circumstances and relationships of that particular case; and, therefore, excludes trivial or even annoying behaviour which a reasonable spouse in the facts, circumstances and relationships of that particular case, would be reasonably expected to tolerate and live with. Thus, Asquith LJ, as he then was, observed in **BUCHLER vs. BUCHLER** [at p.326] that conduct or speech which will be regarded as being expulsive and constituting constructive malicious desertion "….. *must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other `for better for worse'. The ordinary wear and tear of conjugal life does not in itself suffice."*. On similar lines, Diplock LJ observed, in **HALL vs. HALL** [at p,526], that, *"The undue sensibility or eccentric phobias of the complaining spouse"* will not convert behaviour which *"a reasonable spouse would endure, albeit unhappily, as part of the wear and tear of married life"* into conduct amounting to constructive malicious desertion.

To move on to the second requirement of the *animus deserendi* or, to again use the words of Poyser J in **ATTANAYAKE vs. ATTANAYAKE**, *"intention on the part of the accused party to desert the other."*, the spouse who is accused of malicious desertion, whether it be simple or constructive, should have acted with the deliberate intention of finally terminating and repudiating the marriage and with no intention of resuming the marriage on some future date. Thus, in **SILVA vs. MISSINONA** [26 NLR 113.at p.116], Bertram CJ referred to the need for a *"deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state."* and added that the term `malicious desertion' *"clearly implies something in the nature of a wicked mind."*. The learned Chief Justice went on to say [at p.116] that, the desertion *"must be sine animo revertendi" - ie:* that the deserting spouse must not have the intention of resuming the marriage. In **GOONEWARDENE vs. WICKREMASINGHE** [34 NLR 5 at p.8] Garvin SPJ observed, with regard to malicious desertion, that, *"it must be of such a character as would justify the inference that the spouse who is alleged to have deserted the other did so deliberately and with the intention of repudiating the marriage state."*. See also

Dalton ACJ in **RAMALINGAM vs. RAMALINGAM** [35 NLR 174 at p.178], Basnayake CJ in **RAJESWARARANEE vs. SUNTHARARASA** [at p.369], Weerasekera J [then in the Court of Appeal] in **ROSALIN NONA vs. JAYATHILAKE** [2003 1 Appellate Law Recorder 16 at p.18], Ekanayake J in **FERNANDO vs. FERNANDO** [at p.162] and Wimalachandra J in **PERERA vs. GAJAWEERA** [at p.106 and p.108].

Here too, in cases of *simple* desertion, the *animus deserendi* of the spouse who is alleged to have committed malicious desertion is, usually, easy to identify since that intention is shown by the physical act of leaving the matrimonial home or terminating cohabitation. As Lord Greene MR observed in **BUCHLER vs. BUCHLER** [p.320] *"In the case of actual desertion the mere act of one spouse in leaving the matrimonial home will in general make the inference an easy one."*.

However, it is less easy to identify *animus deserendi* in cases of *constructive* malicious desertion since the intention of the spouse who is alleged to have committed constructive malicious desertion remains in the matrimonial home and his intention must be inferred and determined from his or her conduct or speech which is said to have caused his or her spouse to leave the matrimonial home or to cease cohabitation. In this regard, in **BUCHLER vs. BUCHLER**, Lord Greene MR went on to state [at p.320-321], *"In the case of constructive desertion where there is no such significant act as the departure by the spouse who is alleged to be in desertion, the acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. If they do not satisfy this test, not only is an expulsion in fact not proved, but it is not legitimate to infer an intention to desert. A man may wish that his wife will leave him, but such a wish, unless accompanied by conduct which the court can properly regard as equivalent to expulsion in fact, can have no effect whatsoever. Conversely, where the conduct of the required nature is established, the necessary intention is readily inferred since no one can be heard to say that he did not intend the natural and probable consequences of his acts ….."*.

There has been some controversy in the English Law on the question of whether the intention of the spouse who is said to be guilty of constructive malicious desertion is to be ascertained *subjectively - ie:* by proof that he or she did, in fact, have the intention of finally ending the marriage at the time of the impugned conduct or speech; or *objectively - ie:* on the basis that he or she must be presumed to have intended the natural and probable consequences of that conduct or speech.

In the case of **BOYD vs. BOYD** [1938 4 AER 180], the Court took the subjective view that, in cases of alleged constructive malicious desertion, it must be proved that the spouse who is accused of constructive malicious desertion did, in fact, have the intention of ending the marriage when he or she indulged in the impugned acts or speech. However, as stated earlier, in **BUCHLER vs. BUCHLER**, Lord Greene MR took a more objective approach and held that, a spouse who is alleged to be guilty of constructively malicious desertion must be presumed to have intended the natural and probable consequences of his or her acts or speech which made the other spouse leave the marital home, even if he or she did not, in fact, intend to end the

marriage. In the later case of **HOSEGOOD vs. HOSEGOOD** [1950 66 1 TLR 735], Denning LJ, as he then was, sought to qualify the objective approach advocated by Lord Greene MR and stated that, when a spouse's behavior compels the other spouse to leave the matrimonial home, the presumption that such a consequence was intended is only one which *may* be drawn and not one which must be drawn and went on to hold that, that proof that the allegedly deserting spouse did not, in fact, intend to terminate the marriage, will absolve him or her of a charge of constructive malicious desertion. However, subsequently, in **SIMPSON vs. SIMPSON** [1951 1 AER 955 at p. 957] Lord Merriman disapproved of the aforesaid view taken by Denning LJ in **HOSEGOOD vs. HOSEGOOD** and followed the approach of Lord Greene MR in **BUCHLER vs. BUCHLER** that a spouse must be taken to have intended the natural and probable consequence of his own behavior.

This divergence of views was addressed by the Privy Council in **LANG vs. LANG** [1954 3 AER 571].which was an Appeal from the High Court of Australia. The judgment of Lord Porter suggests that the Privy Council was of the view that: if the husband's conduct or speech is such that a reasonable man must know that it will probably result in the departure of his wife from the matrimonial home, the fact that the husband did not wish this consequence does not rebut the inference that he intended the probable consequences of his behavior and, therefore, intended his wife to leave home. In the later case of **GOLLINS vs. GOLLINS** [1963 2 AER 966], the House of Lords examined the decision in **LANG vs. LANG** and Lord Reid explained the import of the earlier decision [at p.974] stating, *"So the decision was that if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, you have wilfully deserted her, whatever your desire or intention may have been."*.

Thus, the position in the English Law is that: a spouse who is charged with constructive malicious desertion is presumed to have intended the natural and probable consequences of his or her conduct or speech which made the other spouse leave the matrimonial home, even if he or she did not, in fact, intend to end the marriage. The natural and probable consequences of the impugned conduct or speech are to be judged on the standard of a reasonable spouse who is in the marital relationship which existed in that particular case and in the light of the facts, circumstances and relationships of that particular case.

Learned President's Counsel who appeared in this case have not referred to any decision of our Courts which has examined this question. I have not been able to find any such decision either. In my view, the aforesaid approach which is now used in England, recommends itself as a rational and equitable approach. I take this view because this approach, which I may term as being dualist in nature, succeeds in: objectively holding a spouse responsible for the natural and probable consequences of his or her conduct or speech; but, realistically, also takes into account the fact that, since the marital relationship is a very personal one, such behaviour should be subjectively assessed in the light of the relationship between the spouses.

Finally, a spouse who is charged with malicious desertion may counter such charge by: in the case of a charge of simple malicious desertion, establishing that, he or she was justified in leaving the marital home or ceasing cohabitation because he or she was given sufficient cause to do so by the other spouse; and, in the case of constructive malicious desertion, establishing that, the other spouse gave sufficient cause which justified the conduct or speech which is alleged to constitute constructive malicious desertion. This limitation is reflected in the observation made by Innes CJ in **WEBBER vs. WEBBER** [at p. 246], that, a wife who *"left her husband finally against his will and without legal justification ….."* is guilty of malicious desertion - *vide:* also Dalton ACJ in **RAMALINGAM vs. RAMALINGAM** [at p.178] and H.N.G.Fernando J, as he then was, in **ARIYAPALA vs. ARIYAPALA** [65 NLR 453 at p.454]. Here too, what amounts to sufficient cause which justifies a spouse leaving his or her matrimonial home or ceasing cohabitation or engaging in the impugned conduct or speech, will, naturally, vary with each case and the facts, circumstances and relationships which exist in each such case.

The considerations referred to above [other than the effect of a return to the matrimonial or cohabitation or a *bona fide* offer to do so] were neatly encapsulated by Sinha J in **BIPINCHANDRA JAISINGHBHAI SHAH vs. PRABHAVATI** [AIR 1957 SC 176 at p.183] where the learned judge stated, *"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned:(1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively."*.

To sum up, the decisions cited above indicate that, some of the aspects of the constituent elements required to establish `malicious desertion' are:

(i) With regard to the *factum* [fact] of malicious desertion: in the case of simple malicious desertion, the deserting spouse, should have deliberately and without being compelled to do and also without sufficient cause being given by the deserted spouse, left the matrimonial home or ceased cohabitation, against the wish of the deserted spouse; and, in the case of constructive malicious desertion, the deserting spouse should have deliberately and without being compelled to do and also without sufficient cause being given by the deserted spouse, engaged in conduct or speech which gave the deserted spouse no reasonable alternative other than to leave the matrimonial home or to cease cohabitation.

(ii) With regard to the *animus* [intention] of malicious desertion: in the case of simple malicious desertion, the deserting spouse, at the time he or she left the matrimonial home or ceased cohabitation, should have had the deliberate intention of finally terminating and repudiating the marriage and not had an intention of resuming the marriage at some

future date; and, in the case of constructive malicious desertion, the deserting spouse should have engaged in the impugned conduct with the deliberate intention of finally terminating and repudiating the marriage and without having an intention of resuming the marriage at some future date *or* such an intention was the natural and probable consequence of the impugned conduct - *ie:* that he or she should have acted with *animus deserendi*;

(iii) The deserting spouse should not have reconciled and returned to the matrimonial home or resumed cohabitation or made a *bona fide* offer to do so, before the deserted spouse instituted the action seeking a divorce on the ground of malicious desertion.

I have only sought to refer to some of the aspects of the constituent elements of malicious desertion and have not sought to attempt a definition of what constitutes `malicious desertion'. In this regard, it has to be kept in mind that, as Sir Henry Duke [later Lord Merrivale P.] perceptively observed in **PULFORD vs. PULFORD** [1923 Probate 18 at p. 21], *"Desertion is not the withdrawal from a place but from a state of things"*. The nature of that `state of things' and the manner of the `withdrawal' will, naturally, depend on the two spouses, their relationship, their personalities and beliefs, their social and financial position, their past histories and hopes for the future, their families, their circumstances, their dwelling place and a myriad other factors. Consequently, malicious desertion can occur in a wide variety of situations and circumstances. Further, it has to be kept in mind that, the two constituent elements - *ie:* the *factum* of desertion and the *animus deserendi* - may not be readily identifiable as separate elements and, instead, be inextricably intertwined within the facts and circumstances placed before the Court. Quite obviously, the result is that, as mentioned earlier, what constitutes `malicious desertion' will vary from case to case. This makes it unwise to contend that a definition of `malicious desertion' can be formulated and applied across the board. In this regard, I would like, if I may, to echo the sentiments of Lord Jowitt LC in **WEATHERLY vs. WEATHERLY** [1947 AC 628 at p. 631] where he referred to several decisions on `desertion' and commented *" ….. in all of them the judges have declined, in my view wisely declined, to attempt any definition of `desertion'"*.

Quite obviously, the question of whether the elements required to constitute malicious desertion have been established in a particular case are questions of fact to be decided by the Court upon the facts and circumstances of each particular case.

To now turn to the four questions of law before us, I will commence by considering the second question of law and fourth question of law since they are both founded on the principal issue of whether the plaintiff had successfully established that the defendant was guilty of malicious desertion.

The second question of law asks whether the High Court erred when it held that the matrimonial relationship between the parties continued even after the institution of the divorce action and whether the Court disregarded the evidence led by the plaintiff in this regard. The fourth question of law asks whether the High Court erred by

holding that the plaintiff had failed to establish that the defendant was guilty of constructive malicious desertion.

As set out in the aforesaid survey of the applicable legal principles, I should first examine whether the plaintiff had established the *factum* of malicious desertion.
In this regard, as mentioned earlier, the plaintiff acknowledged, in paragraph [8] (ආ) of her plaint, that the marital relationship between the plaintiff and the defendant existed up to 07th July 2001. In fact, during her cross examination, the plaintiff confirmed that, *"*2001 දක්වා විවාහක සම්බන්ධකම් පැවතුනා ..... *"*. Thus, the learned trial judge correctly observed that, the plaintiff did not claim that the marriage relationship had ended prior to 07th July 2001. Instead, as set out earlier, the plaintiff's alleged case is that, the marriage relationship ended as a result of the alleged incident on 07th July 2001 and that, from that date onwards, the plaintiff and the defendant have not cohabited.

With regard to this alleged incident, it has to be noted that, in her contemporaneous complaint to the Police marked "පැ6", the plaintiff has stated that the defendant slammed her head against the wall, hit her with a torch, smashed the furniture, ordered her to leave the house and threatened to pour kerosene on her and burn her if she did not do so. Thereafter, in her plaint, that, the plaintiff has averred that, the defendant assaulted her in an` inhuman and ruthless' manner and that the defendant threatened to pour kerosene on the plaintiff and burn her unless she leaves the matrimonial home. It can be persuasively contended that, if such an incident did, in fact, occur, the plaintiff would have been left with no reasonable alternative other than to leave the matrimonial home or to cease cohabitation and, thereby, make the defendant guilty of constructive malicious desertion. As Weerasooriya J stated in **BABUNONA vs. ALBIN KEMPS** [67 NLR 183 at p.185], *"It is hardly necessary to point out that under section 19 (2) of the Marriage Registration Ordinance (cap. 112), which governs the marriage of the parties to this case, cruelty per se is not a ground for dissolution of a marriage. But cruelty on the part of one spouse, which is of such a nature as to make cohabitation intolerable for the other, amounts in law to constructive malicious desertion by the offending spouse, and would on that basis constitute a ground for dissolution of the marriage at the suit of the innocent spouse."*.

It follows that, the success of the plaintiff's case is dependent on her succeeding in proving that the alleged incident did occur on 07th July 2001 in a manner similar to that described in the plaint.

However, a perusal of the proceedings show that, when the plaintiff gave her evidence-in-chief, she did *not* state that the defendant assaulted her or slammed her head against the wall or hit her with a torch or smashed the furniture or threatened to pour kerosene on her and burn her. Instead, in her evidence-in-chief, the plaintiff only voiced an entirely new accusation that the defendant had, in fact, poured kerosene on her and tried to set on her on fire but was prevented from doing so by the domestic staff and her children. Thus, it was very clear that, the plaintiff placed, before the District Court, significantly conflicting versions of the alleged incident

which is said to have occurred on 07th July 2001. In contrast, the defendant, in his answer and in his evidence, steadfastly denied the occurrence of the incident.

Further, the plaintiff did not call the members of the domestic staff or her children to testify regarding the alleged incident although she said that they had been present at the time. The plaintiff did not give any explanation for not calling these witnesses. The plaintiff did not produce any medical or photographic evidence which would show that she had been assaulted, even though it is likely that there would have been tell-tale signs if she had been assaulted in the manner she claimed in the plaint and in "පැ6".

The plaintiff herself said that, she and the defendant had gone to the Police Station *together* and retuned home *together*. That is unlikely to be the conduct of a woman who has been gravely assaulted and threatened by her husband, the previous night. It is also significant that, the plaintiff did not ask the Police to take any action against the defendant with regard to an alleged assault or threat to burn her or, as she claimed in her evidence, an actual attempt to set her on fire.

In the light of all these facts and circumstances, the learned trial judge held that the plaintiff had failed to prove that the alleged incident which she claimed as the ground on which the defendant is guilty of constructive malicious desertion and, accordingly, dismissed the plaintiff's case. The High Court affirmed this determination.

In the light of the facts and circumstances I have recounted, I see no reason why this Court should take a different view. In this regard, there is much wisdom in the observation made Innes CJ in **OBERHOLZER vs. OBERHOLZER** [1921 AD 272 at p.274], which was cited to us by Mr. Sahabandu, PC who appeared for the defendant. Innes CJ stated *"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."* .

In view of the second question of law, it is also necessary to examine whether, the conduct of the plaintiff and the defendant *after* 07th July 2001, supports the plaintiff's allegation of constructive malicious desertion.

In this regard, it is relevant to first consider the impact, upon the plaintiff's case, of the fact that the plaintiff and the defendant continued to live in the same house at the time of the institution of the action and, thereafter, during the continuance of the trial.

Learned President's Counsel who appeared in this case have not referred to any decision of our Courts which has examined this specific question. The only decision of our Courts on this point which I have been able to trace, is a case decided by the Supreme Court on 15th July 1881 and reported in SCC IV 107 [names of the parties are not stated in the Report]. In this case, Cayley CJ recognised that, in certain

circumstances, a divorce could be granted on the ground of constructive malicious desertion even though the parties lived in the same house.

Both learned President's Counsel have referred us to the South African case of **HATTINGH vs. HATTINGH** [1948 4 SALR 727] where the two spouses continued to live in one house with their children but the defendant wife refused to perform any marital obligations and did not speak with the plaintiff or look after the house, Broome J held that, the defendant's conduct showed a fixed determination to bring the marriage relationship to an end, which made her guilty of malicious desertion, although the spouse lived under one roof.

A perusal of the decisions of the English Courts on this issue is useful. In **POWELL vs. POWELL** [1922 P 278], Lord Buckmaster held that, malicious desertion can exist even where the two spouses live under the same roof but in two separate parts of the house and have no dealings with each other. Thereafter, in **SMITH vs. SMITH** [1939 4 AER 533], it was held that, the fact that the parties are living under the same roof raises a rebuttable presumption that they are cohabiting but that this presumption can be rebutted by evidence that, in fact, the parties lived entirely separately though they happened to live under the same roof. In this case, the husband lived in the basement of the house and the wife lived on the ground floor of the same house but there were no dealings, relations or conversations between them. Sir Boyd Merriman P held that malicious desertion had been established. The approach taken in **SMITH vs. SMITH** was approved in **ANGEL vs. ANGEL** [1946 2 AER 635] and **WALKER vs. WALKER** [1952 2 AER 138]. In **WILKES vs. WILKES** [1943 1 AER 433], Hodson J took the view that, where the parties live under the same roof but, nevertheless, one of them allege malicious desertion by the other, it must be shown that the two did not share a *"common home"* although they physically lived under the same roof. In **WANBON vs. WANBON** [1946 2 AER 366], the Court held that, malicious desertion can exist even where the two spouses live under the same roof and not in two physically separated tenements but, in the words of Pilcher J at *"completely at arm's length."*. In **HOPES vs. HOPES** [1948 2 AER 920], Denning LJ, as he then was, held that, where the two spouses lived under the same roof, malicious desertion can take place only where the two spouses have, in effect, ceased to share one household and have, in effect, set up two separate households under the same roof. Denning LJ stated [at p. 925], *"In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households or, in other words, when they are no longer residing with one another or cohabiting with one another."*. This approach was later followed in **EVERITT vs. EVERITT** [1949 1 AER 908].**BULL vs. BULL** [1953 2 AER 601], **NAYLOR vs. NAYLOR** [1962 P 253] and **LE BROCQ vs. LE BROCQ** [1964 3 AER 464].

I am of the view that, the aforesaid approach formulated by Denning LJ in **HOPES vs. HOPES**, which has been adopted in several subsequent decisions of the English Courts and constitutes strongly persuasive authority - *ie:* that, where the two spouses live under the same roof, malicious desertion can take place only where the two spouses have, in effect, ceased to share one household and have, in effect, set up two separate households - should be applied to the case which is now before us.

A perusal of the evidence shows that, although it is apparent that the spouses did not talk to each other, the plaintiff stated, in her evidence-in-chief, that (i) she and the defendant live in the same house but occupy separate bed rooms, which suggests that the rest of the living areas of the house, the kitchen and other areas are used by both spouses and their children and that they all use the same entrance door; (ii) the defendant brings about 10 kilos of rice for the use of the house, each month; and (iii) the defendant pays half of the electricity bill. Further, in cross examination, the plaintiff admitted that: (i) she cooked the meals and the defendant had those meals; (ii) the defendant paid for the liquid petroleum gas used in the matrimonial home; and (iii) the defendant met some of the expenses of the children. Thereafter, when the defendant gave evidence, he maintained that he supplied the major part of the needs of the household by way of food and supplies.

The learned trial judge was of the view that, the totality of the aforesaid evidence established that, after 07th July 2001, a degree of a marital relationship had continued between the plaintiff and the defendant while they lived under the same roof. It appears to me that, although the evidence does suggest that, the plaintiff and the defendant lived largely *"separate lives"* under one roof after 07th July 2001, there was still a family home and an extent of cooperation between them in maintaining the marital establishment in which the plaintiff and the defendant lived with their children. The evidence does not suggest that there were separate households.

In these circumstances, I do not think that this Court has reason to differ from the learned trial judge's determination that, a degree of a marital relationship had continued between the plaintiff and the defendant, after 07th July 2001. In this regard, I take a view similar to that expressed by Harmon LJ in **LE BROCQ vs. LE BROCQ** where the learned Judge stated [at p. 472] *"I do not think that there was desertion here. There was no separation of households. There was separation of bedrooms, separation of hearts, separation of speaking: but one household was carried on, one kitchen where cooking was done, and they had their meals from the same supply, the husband providing the money and the wife buying the food. It would be carrying the doctrine of desertion, or constructive desertion, beyond anything within my knowledge of this kind of matter if I were to say that there was desertion here."*.

Consequently, it is evident that, the plaintiff had failed to prove the *factum* of the `desertion' alleged by her. In these circumstances, there is no need to consider whether the alleged `desertion' was consensual or compulsive or whether there was sufficient cause for the alleged acts which are said to amount to `desertion'.

Further, since the plaintiff had failed to prove the *factum* of desertion, the question of ascertaining the defendant's intention, also does not arise.

In these circumstances and for the reasons set out above, the second and fourth questions of law are answered in the negative.

To now turn to the remaining two questions of law, the first question of law asks whether the High Court erred when it held that the Police Statements marked "P3F", "P3G" and "P3H" did not bear evidence of cruelty on the part of the defendant. These statements were produced at the trial marked "පැ6", "පැ7" and "පැ8" respectively. The

statement marked "ළ6" has been considered earlier in this judgment. The other two statements marked "ළ7" and "ළ8" were made by the plaintiff on 18th August 2006 and 20th July 2002 - *ie:* long after this action was instituted. Therefore, they are not strictly relevant to the plaintiff's cause of action, which was before the Court. In any event, the plaintiff has led no cogent evidence to support the claims she has made in "ළ7" and "ළ8". The defendant has emphatically denied that there is any truth in the claims made by the plaintiff in these statements. The statements, by themselves, do not constitute proof of `cruelty' on the part of the defendant. The learned trial judge, who had the advantage of seeing the demeanour of the plaintiff and the defendant and hearing their testimony has held that, the plaintiff had not proved that the defendant was guilty of any form of `cruelty' to her. I see no reason to take a different view.

The third question of law asks whether the High Court erred by holding that the marriage between the plaintiff and the defendant had not failed. This question of law appears to be misconceived since our law, as it now stands, does not recognize the irretrievable breakdown of a marriage or the failure of a marriage as constituting a ground for divorce. In any event, as set out earlier, the learned trial judge has held that, a degree of a marital relationship had continued between the plaintiff and the defendant while they lived under the same roof, after 07th July 2001. I see no reason to differ from that view.

Accordingly, the first and third questions of law are also answered in the negative.

In these circumstances, I am compelled to hold that, on an application of our law as it now stands to the facts of this case as were established by the evidence placed before the District Court, the learned trial judge was correct when he dismissed the plaintiff's case and the learned judges of the High Court were correct when they affirmed the judgment of the District Court and dismissed the defendant's appeal.

Before I conclude, it has to be observed that, this is a sad case which has seen the parties locked in a long and bitterly contested battle over whether they should remain married or not. The wife sought this divorce in 2001, when she and her husband were both in their early forties. The fact that this appeal was fought by both of them suggests that, the unhappy marriage which led to this action being instituted has continued to remain so during the 17 years in which this case has traversed the Courts. It seems that the rancour between the spouses continues unabated. This litigation has seen the plaintiff and the defendant into their late fifties and has to have exacted its heavy toll on both spouses and their children.

As stated earlier, on an application of the prevailing principles of law to the facts of this case, this appeal must be dismissed. The outcome is that, the wife must be denied the divorce which she has sought for 17 years and be compelled to remain in what she believes is an unhappy and unfulfilling marriage. The husband is left only with what appears to be the pyrrhic victory of an empty marriage.

Cases such as the present one raise the question of whether there should be changes to our law which is presently set out in section 19 of the Marriage

Registration Ordinance, and which was enacted over a century ago. Although, in practice, the fact that litigation in Sri Lanka is adversarial, gives an opportunity for parties who have reached a consensus, to exit the predicament they find themselves in, that solution is unavailable in the absence of consensus. It appears to me that, these are grave questions which befit the attention of the Law Commission of Sri Lanka and the Legislature. I will venture to make some observations in this regard, which I hope will be of some relevance.

The sole grounds for divorce in our law, at present, are the three grounds specified in section 19 of the Marriage Registration Ordinance, which are all `fault based'. This led Sharvananda CJ to observe in **TENNAKOON vs. TENNAKOON** [1986 1 SLR 90 at p.92], citing Professor Hahlo in The South African Law of Husband and Wife, *"Our common law of divorce is based on the `guilt' and not on the` marriage breakdown' principle ..... Adultery and malicious desertion are breaches of the fundamental obligations flowing from the marriage contract, for it is of the essence of the marriage relationship that the spouses should adhere to each other, being physically and spiritually 'one flesh' ..... ".* These solely `fault based' grounds for divorce set out in section 19 of the Marriage Registration Ordinance are derived from religious values which had prevailed in European countries and found their way into our Law with the advent of the colonialists to Sri Lanka. This was illustrated when Bertram CJ, in **SILVA vs. MISSINONA**, with his usual erudition, cited [at p. 115-116] a passage in Huber's Protectiones [Vol. III p.1203] (at p.115) which reads "*Moribus hodiernis sequimur ius divinum novi foederis, quo duetantum causae cognoscuntur, adulterium, item malitiosa desertio."* and traces the origin of the concept of `malicious desertion' to the *ius divinum* [`divine law'] which recognises two grounds for divorce - namely: (i) adultery and (ii) malicious desertion. I have ventured to obtain an approximate and perhaps inelegant translation of that passage into English, which would be: *`by the covenant and customs of the present day, we follow the divine law, in which there are only two known causes, adultery and malicious desertion which is made with the intention of not returning to it, by means of which the bond of marriage is dissolved'*. Bertram CJ went on to observe that, the idea that the divine law sanctioned divorce only on these two limited grounds is found in the 15th verse [7th chapter] of St. Paul's First Epistle to the Corinthians. The learned Chief Justice also observed that these two concepts are embodied in section 20 [now section 19] of the Marriage Registration Ordinance No. 19 of 1907, as amended. The thinking that the `fault based' grounds for divorce set out in section 19 of the Marriage Registration Ordinance are sanctioned by divine or theological authority is reflected in the passage from Professor Hahlo's book cited by Sharvananda CJ in **TENNAKOON vs. TENNAKOON** and, much more recently, in **ROSALIN NONA vs. JAYATHILAKE** where the Court of Appeal said [at p.18], *"We are not unaware of the saying that in order to put asunder what God has put together the Court must be satisfied that the intention of the parties was clear and deliberate that they wished to sever the bonds of matrimony."*.

It seems to me that, the restriction of the grounds on which a divorce may be granted to the solely `fault based' grounds set out in section 19 of the Marriage Registration Ordinance, is alien to our traditional laws which allowed for divorce to be granted on the ground of the breakdown of a marriage or upon consensus - *vide:* section 32 of the Kandyan Marriage and Divorce Act No. 44 of 1952, as amended and sections 27 and 28 of the Muslim Marriage and Divorce Act No. 13 of 1951, as amended

together with the provision under Islamic Law for a divorce by mutual consent [*Mubarat*]. Yet, it appears that, these initially alien ideas based on European theological values which were introduced by the colonial powers, have embedded themselves into the value system of this country during the time Ceylon [as Sri Lanka then was] was governed by these colonial powers and persist unchanged, to this day and, indeed, are often espoused as our very own traditional values.

However, the Law in England, which enabled a divorce only on `fault based' grounds from the time of the passing of the Matrimonial Causes Act of 1857, was changed in 1969 with the enactment of the Divorce Reform Act of 1969, later replaced with the Matrimonial Causes Act of 1973, both of which provides for divorce on the ground that a marriage has irretrievably broken down. It is telling that it was none other than the Archbishop of Canterbury who appointed the Study Group which submitted the recommendations set out in the *"Putting Asunder: A Divorce Law for Contemporary Society"* Report which led to the enactment of the Divorce Reform Act of 1969.

Similarly, in South Africa, the law enabled a divorce only on `fault based' grounds until 1979. Wille [Principles of South African Law - 9th ed. at p. 321] states that, *"Severe criticism of the shortcomings of the old divorce law led to an investigation by the South African Law Commission."*. The recommendations and report of the South African Law Commission led to the passing of the Divorce Act No. 70 of 1979 which did away with the "fault based" approach and enabled divorce on the ground of irretrievable breakdown of the marriage where the Court is satisfied that, *"the marriage relationship between the parties has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them." - vide:* section 4 (1) of the Act.

In India, in addition to the provisions of section 13 of the Hindu Marriage Act, 1955 and section 27 of the Special Marriage Act, 1954 which state that a non-consensual divorce may be obtained by an aggrieved spouse who establishes adultery, cruelty, desertion for not less than two years and some other limited and specific grounds, section 13B of the Hindu Marriage Act and section 28 of the Special Marriage Act provide for spouses to obtain a `no- fault' consensual divorce by mutual consent if they have lived separately for one year or more and satisfy the Court that the two spouses *"have not been able to live together and that they have mutually agreed that the marriage should be dissolved.."* Although the statute law of India does not list `irretrievable breakdown of the marriage' as a ground for granting a divorce., the Supreme Court of India has, on occasion, taken the view that the continuance of a marriage which has irretrievably broken down is tantamount to `cruelty', which [unlike in our Law] is a statutorily recognised ground for divorce in India - *vide:* **BHAGAT vs. BHAGAT** [AIR 1994 SC 710], **ROMESH CHANDER vs. SAVITRI** [AIR 1995 SC 851] and **SNEH PRABHA vs. RAVINDER KUMAR** [AIR 1995 SC 2170].In **JORDAN DIENGDEH vs. S.S.CHOPRA** [AIR 1985 SC 935 at p.940-941], the Supreme Court of India stated, *"It appears to be necessary to introduce irretrievable break down of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down.".*

As stated earlier, on an application of our law as it now stands to the facts of this case as were established by the evidence placed before the District Court, this Court must dismiss this appeal and affirm the judgments of the District Court and High Court. The parties will bear their own costs.

I regret the delay, on my part, in preparing this judgment. It was partly due to unavoidable circumstances - official commitments at an Inquiry and an accident which required surgery.

Judge of the Supreme Court

Priyasath Dep PC, CJ
I agree

Chief Justice

H.N.J. Perera J.
I agree

Judge of the Supreme Court