

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

*In the matter of an application for
Appeal from an Order of the High
Court of Civil Appeal of the Central
Province Holden in Kandy dated 11th
December 2020 in HCCA Kandy Case
No. CP/HCCA/KAN/80/2017(FA),
under the High Court of the Provinces
(Special Provisions) (Amendment)
Act No. 54 of 2006 and Article 128
read with Article 154P of the
Constitution.*

SC Appeal No. 67/2021
SC HC CALA No. 56/2021
HC Appeal No. CP/HCCA/KAN/80/2017 (FA)
DC Kandy Case No. DDV 2387/12

Abdul Kareem Nizar
No.30/4
Galkanda Lane, Aniwaththa,
Kandy.

PLAINTIFF

vs.

Inoka Uthpalani Kaluarachchie
Ettiwatta,
Hettimulla.

DEFENDANT

AND BETWEEN

Abdul Kareem Nizar

No.30/4

Galkanda Lane, Aniwaththa,

Kandy.

PLAINTIFF - APPELLANT

vs.

Inoka Uthpalani Kaluarachchie

Ettiwatta,

Hettimulla.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Inoka Uthpalani Kaluarachchie

Ettiwatta,

Hettimulla.

DEFENDANT-RESPONDENT-PETITIONER

vs.

Abdul Kareem Nizar

No.30/4

Galkanda Lane, Aniwaththa,

Kandy.

PLAINTIFF-APPELLANT-RESPONDENT

BEFORE : **S. THURAIRAJA PC, J**
ACHALA WENGAPPULI, J AND
K. PRIYANTHA FERNANDO, J.

COUNSEL : Hemathilake Madukanda instructed by Udaya Bandara for the Defendant - Respondent - Petitioner.
Samantha Rathwatte, PC with M. Bandara instructed by Upuli Amunugama for the Plaintiff - Appellant - Respondent.

WRITTEN Defendant-Respondent-Petitioner – not filed.

SUBMISSIONS : Plaintiff-Appellant-Respondent – not filed.

ARGUED ON : 08th September 2023.

DECIDED ON : 20th October 2023.

S. THURAIRAJA, PC, J.

In the matter before this Court, the Plaintiff-Appellant-Respondent, namely Abdul Kareem Nizar (hereinafter referred to as “the Plaintiff”), brought forth a petition for the dissolution of his marriage with the Defendant-Respondent-Petitioner, namely Inoka Uthpalani Kaluarachchie (hereinafter referred to as “the Defendant”), praying for a decree of divorce *a vinculo matrimonii* on grounds of malicious desertion by the Defendant in the District Court of Kandy. The District Court, through its judgment rendered on 4th March 2017, adjudged that the Plaintiff had failed to substantiate the charge of malicious desertion and accordingly dismissed the Plaintiff's claim. Subsequently, the High Court of Civil Appeal of the Central Province Holden in Kandy, by Judgment dated 11th December 2020, held in favour of the Plaintiff and overturned the decision of the District Court.

The Defendant, aggrieved by the judgment of the High Court, has now sought recourse from this Court, lodging an appeal by way of Petition dated 13th January 2021,

praying that the High Court's Judgment be set aside, and the District Court's Judgment be reinstated.

Upon the presentation of the instant case before this Court on 16th July 2021, leave to appeal was granted on the following question of law:

“(i) Did the Civil Appellate High Court misdirect themselves that the evidence led by the Respondent amounts to malicious desertion?”

The question of law set out above requires this Court to examine the evidence proffered before the District Court and subsequently determine whether the learned High Court Judges rightly diverged from the view taken by the learned District Court Judge in determining that the Plaintiff had satisfactorily established the culpability of the Defendant for malicious desertion.

Factual Matrix

The narrative of this case unfolds against the backdrop of a marriage between the Plaintiff and the Defendant on 31st January 2010. The Plaintiff is the husband, and the Defendant is the wife. No children were born of the marriage. Further, the Defendant surpasses the Plaintiff in age by seven years, and their affiliation to different religious faiths, Islam for the Plaintiff and Roman Catholic for the Defendant, underscores their diverse backgrounds. The registration of the marriage transpired without the knowledge of the Plaintiff's parents, primarily due to apprehensions stemming from their divergent religious affiliations. Nevertheless, the Plaintiff avers that, over time, his parents came to accept the marriage, even bestowing gold ornaments upon the Defendant as a symbol of their approval, a fact which is undisputed by the Defendant.

It is to be noted that on examination of the testimony, disparities exist in the chronology of events as recounted by both parties. The Plaintiff, employed within the hospitality industry in Sri Lanka at the time of the marriage, averred that he travelled to Seychelles in search of a new job in February 2010. Six months hence, in August

2010, the Defendant followed suit, and together, they established their matrimonial home in Seychelles.

The Plaintiff further contended that in the ensuing period between August 2010 and October 2011, there was a gradual breakdown of the marriage attributable to the Defendant's conduct. The Plaintiff highlighted a series of incidents: the Defendant's unfounded suspicions, escalating quarrels, and disparaging conduct towards the Plaintiff's friends and family, which allegedly culminated in emotional detachment and disruption of the Plaintiff's professional life. The Plaintiff posits the age disparity and religious divergence as contributing factors to the discord.

A specific incident of note (pages 81 and 84 of the Appeal Brief marked "X") involves an alleged visit by the Defendant to the Plaintiff's workplace, during which she caused a commotion that rendered an impossible work environment for the Plaintiff.

Notably, the Plaintiff and the Defendant frequently shuttled between Seychelles and Sri Lanka during their matrimonial journey. For instance, in October 2010, the Plaintiff and the Defendant returned to Sri Lanka and temporarily resided at the Defendant's parental home. The Plaintiff subsequently returned to Seychelles in late October 2010, with the Defendant joining him approximately a month later.

However, in October 2011, following an extended period of discord, the Plaintiff and the Defendant returned to Sri Lanka together. Upon arrival at the airport, the Defendant chose to depart with her parents. Since October 2011, the Plaintiff and the Defendant have maintained separate residences, marking a decisive cessation of conjugal cohabitation. This act of separation constitutes the basis for the Plaintiff's claim of malicious desertion against the Defendant.

The Plaintiff asserted that, during the period from October 2011 to the initiation of these proceedings, the Plaintiff took proactive steps, with the support of his parents, to invite the Defendant to resume marital life, which the Defendant had allegedly refused.

Conversely, the Defendant denied these averments made by the Plaintiff, stating that she did not intend to terminate the matrimonial relationship, and is, in fact, inclined to resume said matrimonial life with the Plaintiff, but on the condition that this is done so at any place except the Plaintiff's parental house. The Defendant has testified that the impetus for this condition is alleged mistreatment by the Plaintiff's family, in particular his sister, at the matrimonial home in Seychelles (page 85 of the Appeal Brief marked "X"). According to the Defendant, the Plaintiff's sister attempted to confine the Defendant in the matrimonial house in Seychelles to prevent her from visiting the Plaintiff's workplace and, as a result, the Defendant contends to possessing legal justification for not being inclined to resume marital life at the Plaintiff's parental house.

What does seem to be apparent, however, is that the above-mentioned incident appears to align with the Plaintiff's account of the commotion incited by the Defendant at his workplace.

On behalf of the Plaintiff, he and his father gave evidence. On behalf of the Defendant, the Defendant gave evidence, and no witnesses were called.

Analysis

Section 19(1) of the Marriage Registration Ordinance No. 19 of 1907, as amended, lists "malicious desertion" as one of the three grounds upon which a decree of divorce *a vinculo matrimonii* may be entered by a competent Court. This form of desertion may manifest either as *simple* malicious desertion (sometimes called *actual* malicious desertion) or by way of *constructive* malicious desertion.

The Marriage Registration Ordinance does not explicitly define the term "malicious desertion" employed in Section 19(2) of that enactment. Consequently, one has to peruse past decisions of the Courts to determine the constituent elements requisite for establishing grounds for divorce based on malicious desertion.

In **Attanayake vs. Attanayake 16 Cey L. R. 206**, Poyser J identified the two pivotal elements necessary to establish malicious desertion as follows:

"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."

This fundamental premise was affirmed by Sinha J in **Bipinchandra Jaisinghbhai Shah vs. Prabhavati (AIR 1957 SC 176)**, wherein 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)."

It has to be borne in mind that what constitutes malicious desertion invariably hinges upon the specifics of each case, as articulated by Jayawardena J in **Gomes vs. Gomes (S.C. Appeal No. 123/14 by minutes dated 07th June 2018)**:

"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."

This is especially pertinent because, as observed by Sir Henry Duke (later Lord Merrivale P.), in **Pulford vs. Pulford (1923 Probate 18)**:

"Desertion is not the withdrawal from a place but from a state of things".

Factum of Separation

In the case of **Gomes v Gomes (supra)**, Jayawardena J stated as follows:

*"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."*

[Emphasis added]

The term "consortium" is taken to be synonymous with "cohabitation" used in Poyser J's statement in ***Attanayake v Attanayake (supra)*** referred to above. Furthermore, Jayawardena J drew upon the elucidation of "consortium" as propounded by Harcourt J in ***Grobbelaar vs. Havenga (1964 S SALR (N) 522)***:

"An abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage... [which embraces] companionship, love, affection, comfort, mutual services, sexual intercourse - all belong to the married state. Taken together, they make up the consortium."

In ***Rajeswararane v. Sunthararasa (64 NLR 366)***, Basanayake CJ stipulated that, with regard to the first requirement of the factum of desertion, the desertion must be "against the desire" of the deserted spouse.

Sinha J, in ***Bipinchandra Jaisinghbai Shah vs. Prabhavati (supra)***, stated as follows:

"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."

It is, therefore, evident that in cases involving simple malicious desertion, the factum of desertion is substantiated when the spouse accused of malicious desertion deliberately and without sufficient cause, physically leaves the matrimonial home or ceases cohabitation against the wishes of the deserted spouse.

The Defendant contended that the Plaintiff failed to establish that she left the matrimonial home in Seychelles as they both left Seychelles jointly and arrived together in Sri Lanka in October 2011. In application of the above-established

principles to the instant case, however, the Defendant's choice to depart with her parents in October 2011, and thereby cease co-habitation with the Plaintiff, constitutes the initial requirement, i.e., the factum of desertion, requisite to establishing malicious desertion. On the face of the evidence presented to the District Court, in my view, the Plaintiff substantiates his claim that this separation was against his consent and willingness. Furthermore, it is important to note that between the period from October 2011 to the institution of legal proceedings, and up until present day, the Plaintiff and the Defendant have not lived together.

Animus Deserendi

In ***Perera v Gajaweera (2005 1 SLR 103)***, Wimalachandra J observed that establishing malicious desertion necessitates demonstrating:

"...not only the factum of the desertion but also the required animus to repudiate the marital relationship."

In ***Silva v Missinona (26 NLR 113)***, Bertram CJ defined this concept as follows:

"Deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state."

He further added that the desertion must be "*sine animo revertendi*", signifying that the deserting spouse must harbour no intention to resume the marriage.

Similarly, in the cases ***Goonewardene v Wickremesinghe (34 NLR 5)***, Garvin SPJ opines:

"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."

In English case of ***Buchler v Buchler [1947 1 AER 319]***, Lord Greene MR stated:

"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."

Consequently, the mere act of the Defendant discontinuing cohabitation serves as a sufficient foundation for inferring *animus deserendi*.

The Defendant's intention to desert the Plaintiff is further underscored by her refusal to recommence the marital life at the Plaintiff's parental house, citing mistreatment by the Plaintiff's family, which has led to her reluctance to reside in a place where she perceives a threat of confinement.

As articulated by Sinha J in ***Bipinchandra Jaisinghbhai Shah vs. Prabhavati (supra)***, a spouse charged with simple malicious desertion may counter such charge by 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.

Dalton ACJ reflects this limitation in ***Ramalingam v Ramalingam (35 NLR 174)***, where the learned judge declared:

"If a woman left her husband finally, against his will, and without legal justification, her desertion would in law be malicious."

H.N.G Fernando J, as he was then, employed similar views in in ***Ariyapala v Ariyapala (65 NLR 453 at p.454)***.

Counsel for the Defendant invoked the case of ***Ramalingam v Ramalingam (supra)*** to establish that the Defendant possessed lawful justification for not residing in the Plaintiff's parental home due to fears of potential confinement.

The learned High Court Judges make reference to these averments in their verdict and state that by the Defendant's own testimony, where she alleges that the Plaintiff's sister endeavoured to confine her within the matrimonial residence in Seychelles to prevent her from causing disruptions at the Plaintiff's workplace (page 85 of the Appeal Brief marked "X"), confirms that such incidents caused by the Defendant have occurred in

the past. The learned High Court Judges further state that no police report or similar corroborative evidence attesting to such an incident involving the Plaintiff's sister was presented by the Defendant.

I am inclined to concur with the learned High Court Judges' inferences and, consequently, hold that the Defendant's desertion of the Plaintiff lacks legal justification and is, therefore, characterized by malicious intent.

Another facet to consider is the Plaintiff's averments that he entreated the Defendant to resume marital life before initiating legal proceedings in this Court.

In ***Muthukumarasamy vs. Parameshwary (78 NLR 488)*** 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."

Similar views were taken in ***Canekaratne v Canekaratne (66 NLR 380)*** by Sasoni J:

"It should also be remembered that a spouse may offer to resume cohabitation after a separation has taken place, but it is for the Court to decide whether the offer is genuine. 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 a fixed and settled intention if it is a mere 'fluctuating desire to resume cohabitation'. When either spouse has made such an offer, a rejection of it by the other will turn him or her into a deserter."

This was affirmed by Jayawardena J in ***Gomes v Gomes (supra)***, where he observed:

“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.”

The learned High Court Judges have referred to the Plaintiff’s testimony that he, with the support of his parents, proactively sought the Defendant to resume marital life, which the Defendant allegedly declined. This submission is corroborated by the evidence submitted by the Plaintiff’s father. The High Court Judges further referenced the Defendant’s assertion that she has always acted with the sole purpose of maintaining marital life with the Plaintiff, yet, the learned Judges observed, she failed to exhibit any concrete positive steps or initiatives post-October 2011 to resume marital life.

In light of these aforementioned facts and circumstances, I discern no valid grounds to take a different view than that of the learned High Court Judges. The Defendant’s claims of making multiple offers to recommence marital life do not appear genuine, particularly due to the absence of evidence to corroborate that these offers were made before the Plaintiff instituted legal proceedings.

Therefore, I am inclined to endorse the position taken by the learned High Court Judges, which entails setting aside the District Court’s judgment and affirming that, based on the evidence presented before the District Court, the Plaintiff has satisfactorily proven that the Defendant is guilty of malicious desertion.

At this juncture, it is imperative to underscore that I am cognizant of the conventional understanding that marriage is not only a union of two individuals but also an amalgamation of two families and their respective cultural bonds, inevitably intertwined when two individuals enter into matrimony. This perspective finds

reflection in the law; the legal framework governing divorce in Sri Lanka, as embodied in the Marriage Registration Ordinance of 1907 and heavily influenced by pre-existing Roman-Dutch and English legal systems, is premised on the notion that marriage is a lifelong commitment that can only be dissolved upon on proof of serious matrimonial fault. This underscores the law's aversion to marital dissolution and its preference for the preservation of conjugal ties, even in the face of life's trials and tribulations.

In ***Silva v Missonona (supra)***, Bertram CJ refers to the following principle adopted in the South African case of ***Gibbon v Gibbon (1 2 E.D.C. 284)***, per Shippard J:

“The theory of the Roman-Dutch law appears to have been that divorce should never be granted while there remains a hope of reconciliation.”

However, the law and its application must evolve in conjunction with the shifting tides of societal mores and perspectives. Especially when drawing focus upon newer generations, it is hardly a need to say that venerable concepts such as education, financial independence, and gender roles in the context of marriage have transformed since the enactment of the Marriage Registration Ordinance in 1907, influenced partly by the cultures of Western societies. To a large extent, the current law remains unreformed and is, in several notable ways, incompatible with modern notions relating to marriage.

With this in mind, I allude back to Harcourt J's definition of the word "consortium" in ***Grobbelaar v Havenga (supra)***. On observation of this instant case, there is an evident absence of an abstraction encompassing companionship, love and affection, among other elements, within the marital relationship between the Plaintiff and the Defendant. Most importantly, I find a palpable absence of hope, replaced by a discernible withdrawal from a state of things amounting to "desertion," as elucidated by Sir Henry Duke (later Lord Merrivale P.), in ***Pulford vs. Pulford (supra)***. As stated above, notwithstanding the absence of any reservations in law about cohabitation during divorce proceedings, I do not observe any instances or even genuine attempts

at resuming marital life in the period between the institution of this action and the present day.

In fact, there is a striking observation in the Plaintiff's evidence: he testifies that he found the Defendant's behaviour so intolerable that,

“මට තීරණයක් ගන්න අමාරුයි. මට ඉවසාගන්න බැරි නිසා මම ආවේ. ඊට පස්සේ එයන් එක්ක ගිහින් මගෙන් එයාට කරදරයක් වෙයි කියලා මට බය හිතුවා.”

An approximate and unofficial translation of the above reads as follows:

“Making a decision is challenging for me. I came because I could not be patient any longer. Later, I was afraid that if I went with her, I would cause harm to her.”

In the face of such circumstances, I am of the view that this Court is not inclined to mandate cohabitation and the resumption of a marital life upon any man or woman, as the law currently stands, that appears before this Court.

Decision

Finally, I turn to address the question of law to which leave has been granted by the Supreme Court on 16th July 2021, as previously cited.

In response to the question of law, pursuant to the aforementioned facts and circumstances, I answer in the negative in finding that the learned Judges of the Civil Appellate High Court did not misdirect themselves that the evidence led by the Respondent amounts to malicious desertion. The appeal is thereby dismissed.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT