

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

S.C. Appeal No. 137/2014
SC/ HCCA/LA No.443/2013
WP/HCCA/GPH - 131/2009(F)
D.C. Negombo Case No. 6825/D

In the matter of an Application for Leave
to Appeal under Section 5C of the High
Court of the Provinces (Special
Provisions) Act No. 54 of 2006

Meringnage Rohan Fernando
144, Old Negombo Road,
Kanuwana,
Ja-Ela.

PLAINTIFF

Vs.

Patikiri Arachchige Dona Indrani
Chandralatha Amarasekera
No. 52, Weragala,
Padukka.

DEFENDANT

AND

Patikiri Arachchige Dona Indrani
Chandralatha Amarasekera
No. 52, Weragala,
Padukka.

DEFENDANT-APPELLANT

Vs.

Meringnage Rohan Fernando
144, Old Negombo Road,
Kanuwana,
Ja-Ela.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Meringnage Rohan Fernando
144, Old Negombo Road,
Kanuwana,
Ja-Ela.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Patikiri Arachchige Dona Indrani
Chandralatha Amarasekera
No. 52, Weragala,
Padukka.

DEFENDANT-APPELLANT-RESPONDENT

BEFORE: S.E. Wanasundera P.C., J.
Priyantha Jayawardena P.C., J. &
Gooneratne J.

COUNSEL: Dr. Sunil Cooray for the Plaintiff-Respondent-Appellant
P.K. Prince Perera for the Defendant-Appellant-Respondent

ARGUED ON: 20.05.2016

DECIDED ON: 28.07.2016

GOONERATNE J.

This was a divorce action filed in the District Court of Negombo, by the Plaintiff husband against his wife based on the allegation of malicious desertion. In the District Court, Plaintiff succeeded in obtaining a divorce, but the Defendant wife having appealed to the Civil Appellate High Court was able to convince the High Court, and get a Judgment in her favour wherein the High Court set aside the Judgment of the learned District Judge. However the Supreme Court on 04.08.2014 granted leave on questions of law set out in paragraph 11(a) and (b) of the petition dated 26.10.2013. The said question reads thus:

- (a) Did the learned High Court err in holding that the Defendant had no mental element to desert her Plaintiff husband;
- (b) Did the learned High Court err in holding that the learned District Judge had written the Judgment without considering the laid down principles in respect of aspect of matrimonial fault of malicious desertion.

The material placed before this court indicates that parties concerned had met in Hong Kong and had an affair and decided to marry. Both of them came to Sri Lanka in 1996 and got married on or about 24.10.1996. It is stated by the Plaintiff that after a period of two months both of them left for

Hong Kong. Plaintiff also allege that after the marriage both were not staying together but stayed separately from each other. Learned District Judge has in his Judgment stated that both parties due to disputes between them had no connection with each other as from 05.12.2000. Plaintiff further states that as from the said date the Defendant-wife refused to live with him, and thereby maliciously deserted him. The version of the Defendant wife very briefly was that both of them lived in Hong Kong for a period of 8 years and the Plaintiff left Hong Kong for Sri Lanka on or about June 2003. Defendant wife had on or about 17.08.2006, returned to Sri Lanka, but the Plaintiff never came to the Airport to pick her up and as such the Defendant with her relatives visited the house of Plaintiff but he had avoided meeting her. It is also stated in evidence that, she came to know that her husband had contracted another marriage.

The pith and substance of the evidence led before the trial court indicates that both of them allege desertion of each other but the wife's version of the husband avoiding her has been corroborated in some way by the evidence of the wife's brother. It is stated by this witness that both of them came to Sri Lanka in 1998 and both of them stayed in his house for several days. Two matters are corroborated by this witness.

- (a) Avoidance by Plaintiff of his wife at the time and period she came in search of him to Sri Lanka.

(b) Contracting of another marriage by the husband and told by the husband to the witness.

This witness also states that he had arranged a meeting for both of them at Galle Face on a particular day but the Plaintiff husband failed to turn up. Evidence led at the trial also indicates that both of them complain of each other being involved with other persons, wife having an affair with her employer and the husband having left the wife, has got involved with another lady and has a child. These allegations are of course mere allegations without cogent reasons to support such allegations and it remains not established in the way it should be established in a court of law. The points suggested by Plaintiff husband of Defendant's desertion are mere assertions and allegations which should have been corroborated in the context of this case.

I am inclined to accept the views expressed by the learned High Court Judge in the Judgment dated 20.09.2013. I agree with the learned High Court Judge's views that the Defendant wife has not maliciously deserted the Plaintiff as from 05.12.2000. Plaintiff has not established that fact of malicious desertion. On a balance of probability there must be definite and strong proof to establish that the Defendant intended to terminate the marriage as from 05.12.2000.

Instead there is evidence furnished before the trial court that the Defendant wife came in search of him to Sri Lanka and the way the Plaintiff avoided the Defendant. This aspect no doubt has been corroborated by the other witness called by the Defendant, which Defence version appears to be more probable. No doubt there is a vast difference in the age between them to be 12 years. The wife being the elder partner to the husband, it is very strange as to why such an age factor was never discussed at the time of marriage? These are not matters that could have been discovered especially when the age gap is more than 10 years. In any event that is no barrier for marriage, and not a ground for divorce.

My writing this Judgment is not an exercise to explain and expand jurisprudence on matrimonial relations, but to explain the simple truth that if the deserting spouse leaves the matrimonial home with the fixed intention of terminating the marriage, malicious desertion could be proved. The facts made available to this court does not in any way demonstrate the intention of the Defendant wife to terminate marital relations with the husband. A mere desertion for a period would not amount to malicious desertion. There has to be proof of no return or the point of no return to the other spouse which should be apparent. In order to further fortify my views I refer to the *Attanayake Vs. Attanayake (1937) 16 CL Rec 206*. In this case Plaintiff had been taken to her

mother's house by the Defendant after a quarrel and left there. At a subsequent date the Defendant wrote a letter to Plaintiff's mother and accused of adultery and declared "I do not want your adulterous daughter". Poyser J. held Defendant had shown a deliberate intention to repudiate the marriage since the factum of desertion too had been established, a divorce was granted. In another case *Canekaratne Vs. Canekaratne* 66 NLR 380 held whether they are leading separate lives on account of a mutual agreement or due to force of circumstances, if an intention to put an end to the marriage is manifested, desertion will be established. What is absent and lacking in the case in hand is an intention to put an end to marital relations. I am not in a position to act on mere assertions in the absence of strong evidence to terminate the marriage. That may be the reason for the Defendant to only seek dismissal of the action without a cross claim for divorce. The function of the court is to determine the relative importance of the acts complained of as items of evidence to support an inference of desertion, which amounts to malicious desertion and not just mere desertion.

The learned High Court Judge has considered the case of *Silva Vs. Missinona* 26 NLR 113.

Held:

Desertion to be a ground for divorce must be malicious, that is to say, it must be deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state. It must be *sine animo revertendi*. Divorce should only be

granted if the desertion complained of was a repeated desertion, and the offending spouse has contumaciously refused to return to married life.

At pgs. 117 & 118

If one now refers to the facts in the light of these principles, it is clear that no case of malicious desertion has been made out. There may have been desertion, but it was certainly not malicious, and, in particular, it is certainly not established that it took place sine animo redeundi. The institution of marriage would be in a perilous position if, when husband and wife quarrelled about the place where they should reside, and the wife, during a state of friction took refuge with her parents, it was held that these facts of themselves entitled the husband to a decree for divorce. I am not able to see in this case that during the material period the husband ever definitely put at the disposal of his wife a home where she could go and live with him. She left him at a period of mutual exasperation, when he himself was anxious to get rid of his wife, and it seems to me quite impossible that her conduct should be regarded as malicious. Even in this very action he himself declared in his evidence. "If I take my wife with me there is no doubt that she would kill me. I am not willing now to take her to a house at Kataluwa. She would poison me. I am not now willing to live with her in any house." These are clearly not circumstances in which the remedy of the Roman-Dutch law would be granted.

I observe that the situation of the parties to this marriage is very unfortunate. No doubt there is an age difference. When times were good the age was not a barrier but with the effluxion of time it is seen as a human problem. Material placed before court suggest that the Plaintiff-husband attempted to sever all connections with the Defendant wife. Legally he is at a disadvantage in the absence of proving actual and definite acts of repudiation

of obligation of marriage with an intention not to resolve disputes between them on the part of the Defendant wife. In desertion the element of malice is an important aspect. Entire episode is without malice on the part of the Defendant wife.

I cannot say the same as regards the Plaintiff husband. Evidence show that he has intended to put an end to all marital relations. The reasons do not clearly surface in evidence for his benefit. I answer the question of law as follows:

- (a) No. Learned High Court Judge's conclusions are supported by legal principles relevant to 'Malicious Desertion' as referred to in the decided cases cited in the Judgment of the High Court.
- (b) No.

It is the view of this court, and as expounded by jurist that desertion is a continuing offence and as such could be terminated at any time on proof of a change of animus or factum. In these circumstances either party has a right to reinstitute fresh proceedings. The plaint filed in the year 2006 with all procedural steps and positions in law urged by either party at the trial and in the appeal to the High Court, ultimately concluded in the Apex Court only by mid-2016. This, certainly is a long lapse of time, to a litigant involved in matrimonial disputes. It is desirable for the parties concerned to do what is best for each other and consider realities of life.

In all the above facts and circumstance I affirm the Judgment of the High Court and dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S. E. Wanasundara P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C., J

I agree.

JUDGE OF THE SUPREME COURT