

In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka

CA 887/2000 F
DC Colombo 17702/D

Sybil Dewapriya Abeysingha,
105, Kandy Road,
Kiribathgoda
Plaintiff-Appellant
Vs
L S C Perera,
"Sunray Pharmacy",
Maharagama Road,
Piliyandala.
Defendant-Respondent

Before: A W A Salam,J
Counsel: W Dayaratna PC with Sameera Dodangoda for the
plaintiff-appellant and Mayura Gunawansa for the defendat-
respondent.

Argued on: 25.04.2011.

Written Submissions filed on: 27.04.2011.

Decided on: 30.01.2012.

A W Abdus Salam, J

This is an appeal from the order of the learned additional district judge of Colombo dated 22.11.2000 dismissing the plaintiff's action based on the failure to establish malicious desertion to obtain a decree of divorce for the dissolution of the marriage contracted between the plaintiff and the defendant.

The facts briefly are that the plaintiff filed action against the defendant for the dissolution of the contract of marriage entered into between the parties on 2 April 1987. The plaintiff alleged that the parties lived together for a short period of time and due to quarrelsome and suspicious attitude of the defendant the marriage lasted only until 15 November 1989 on which date the defendant is alleged to have left the matrimonial home. The defendant having thus left the matrimonial home with the only child born during the lawful wedlock had filed maintenance proceedings in the Magistrate's Court of Colombo which culminated in the making of an order against the plaintiff for payment of maintenance.

The defendant in her answer inter alia denied having maliciously deserted the plaintiff and alleged that it was the defendant who in fact did maliciously desert her on 15 November 1989. By way of relief the defendant inter alia sought the dismissal of the plaintiff's action.

The matter of the dispute proceeded to trial on 6 admissions and 16 issues. The admissions made by the parties included the submission to the jurisdiction of court, the contract of marriage entered into between the parties, the employment of the plaintiff,

the birth of Sanisha Udyogi Abeysingha and the relevant maintenance proceedings in which the plaintiff was ordered to pay maintenance to the defendant and the aforesaid Sanisha.

The main issue raised by the plaintiff was whether the defendant maliciously deserted him on 15 November 1989. As far as the plaintiff's case is concerned, the burden was on the plaintiff to establish on a balance of probability that it was the defendant who deserted him on the day in question as the defendant in her answer had clearly denied the allegation that she ever deserted the plaintiff. The position maintained by the defendant was that it was the plaintiff who deserted her and therefore she had not committed any matrimonial offences.

In the light of the conflicting positions taken up by the parties with regard to the allegation of desertion the learned district judge has analyzed the evidence adduced at the trial by both parties and come to the definite conclusion that the evidence given by the plaintiff is not worthy of credit. In doing so the learned district judge has analyzed the evidence of the plaintiff with that of the defendant and also compared the position taken up by the plaintiff in the maintenance case as regards the allegation of desertion.

In the impugned order, the learned district judge has observed that the plaintiff has claimed in paragraph 15 of the plaint that he endeavoured to settle the dispute with the defendant solely for the welfare of the child born as a result of the marriage between the parties. However, according to document marked as D1 (maintenance proceedings) it is categorically recorded on the very first day said that the plaintiff was not willing to invite the

defendant for a reunion. By reason of this contradiction the learned district judge was not inclined to place any reliance on the evidence of the plaintiff as regards his claim that the defendant was the guilty party.

Even as regards the date of desertion the learned district judge was not prepared to accept the evidence of the plaintiff in that he claimed that the alleged desertion took place on 15 January 1989. The contradiction on this account had arisen as a result of the evidence given by the plaintiff in the Magistrate's Court wherein it was stated by the plaintiff that the parties were living together until 22nd February 1990. Even before the learned district judge, the plaintiff admitted having lived together with the defendant beyond 15 November 1989. As a result of these contradictions the learned district judge was unable to answer the issue of the plaintiff regarding the alleged desertion in his favour.

It is well established law that where the findings on the question of fact are based upon the credibility of the witnesses on the trial judge's perception of the evidence led before him, then such findings are entitled to great weight and utmost consideration and will be reversed only if it appears that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses. In this case the evaluation of the evidence by the trial judge does not appear to be blameworthy. The trial judge has had privilege of seeing the witnesses and observing their demeanour in the witness box. Regarding the crucial issue as to who deserted whom and when it took place the learned district judge has correctly arrived at an adverse finding against the plaintiff's testimonial trustworthiness. The learned district judge

being in the position of the master on all matters of fact including the proper assessment of the credibility of the parties who had testified before him cannot be faulted for his conclusion.

As I have observed in the case of Fradd v. Brown & Co. Ltd. 18 NLR 302, when the question turns on the credibility of the witnesses the appellate court should be generally guided by the impression of the judge who saw the witnesses as to how they performed in the witness box. In this case it can hardly be said that the judge has misapprehended the facts relating to the main issue regarding the question of malicious desertion.

In the circumstances, I see no reason to interfere with the judgment of the learned district judge and therefore dismiss this appeal subject to costs.

Judge of the Court of Appeal

Kwk/-