

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

C.A. 1046/1998 (F)
D.C Galle 2052/D

D. R. Mahendra of
Kendala, Boossa.

PLAINTIFF

Vs.

M. Badrika of
Devenigoda, Ratgama.

DEFENDANT

AND NOW

M. Badrika of
Devenigoda, Ratgama.

**DEFENDANT-APPELLANT-
PETITIONER**

Vs.

D. R. Mahendra of
Kendala, Boossa.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Appellant and the Respondent
absent and unrepresented

DECIDED ON: 14.11.2012

GOONERATNE J.

This is an appeal from a judgment delivered in a Divorce case by the learned District Judge of Galle dated 9.3.1998. At the hearing of this appeal both parties were absent and unrepresented. In fact this appeal had been mentioned on several dates in this court but parties were absent and unrepresented, though brief fees had been deposited by both parties. The Petition of Appeal has been filed by the Defendant-Appellant wife. Judgment in the District court had been delivered in favour of the Plaintiff husband. Parties proceeded to trial on 8 issues and 2 admissions. (date of marriage and Plaintiff's house was the matrimonial home). The main issue to be resolved appears to be issue No. 1 based on malicious desertion of the wife.

The Petition of Appeal narrates a very lengthy account of the case which is more or less in the form of written submissions. The Appellant appears to contest the case on the basis of the cause of action, which was not specifically pleaded, but the cause of action pleaded was malicious desertion by the wife leaving the matrimonial home, and the trial Judge has placed more reliance on the reason being the Defendant-Appellant repeated absence from home and refusal to have sexual congress with husband. Plaintiff was an Army Soldier who according to the nature of employment cannot continuously be resident at the matrimonial home. As such whenever possible he had made himself available at the matrimonial house and on such occasions the evidence given by the Plaintiff was that the wife refused to enter into sexual congress with the husband.

The trial Judge has considered that part of the evidence to be vital item of evidence which favour the Plaintiff-Respondent. This is evident from the answer given by the trial Judge to issue No 5 which is answered as “චන්තිකාරිය විසින් පැමිණිලිකාරැට වෛකාහක නිවස තුළදීම ද්වේශ සහගතව අතහැර දැමීම මත ඇත් වූ තත්ත්වයක් මත චන්තිකාරිය වචන නිවසින් පිටව ගොස් ඇත.

The trial Judge has considered the reason for the breakdown of the marriage and has in detail analysed Defendant-Appellant failure to enter

into sexual congress with Plaintiff-Respondent and attribute such reason to be a ground necessary to prove malicious desertion. This court would not interfere and disturb those findings.

Desertion is a continuing offence. It is a continuing course of conduct 29 NLR at 325: a Law Rec 60. Where a woman leaves her husband finally against his will without legal justification, her desertion could in law be malicious 35 NLR 174.

In the above circumstances I affirm the judgment of the learned District Judge. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL