

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

C.A 177/1997 (F)  
D.C. Gampaha 30391

A. Samarasiri Kaluarachchi of  
No. 35/9, Veyangoda Road,  
Kalagedihena.

**PLAINTIFF**

Vs.

Mallika Iranganie Wadupola of  
Pillassa, Kurunegla.

**DEFENDANT**

And

A. Samarasiri Kaluarachchi of  
No. 35/49, Veyangoda Road,  
Kalagedihena.

**PLAINTIFF-APPELLANT**

Mallika Iranganie Wadupola of  
Pillassa, Kurunegla.

**DEFENDANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** N.R.M. Daluwatte P.C. with W.D. A. Fernando  
for Plaintiff-Appellant

S.N. Vijithsinghe with C. Liyanage  
for 1st Defendant-Respondent

**ARGUED ON:** 06.05.2011

**WRITTEN SUBMISSIONS**

**FILED ON:** 24.06.2011 – Defendant-Respondent  
20.07.2011 – Plaintiff-Appellant

**DECIDED ON:** 02.08.2011

**GOONERATNE J.**

This was a Divorce suit filed in the District Court of Gampaha by the Plaintiff husband, against his wife the Defendant-Respondent on grounds of malicious desertion. According to the plaintiff Defendant maliciously deserted her husband on or about 30.06.1987. This appeal arises from the judgment of the Learned District Judge dated 22.01.1997, dismissing Plaintiff's action. In the said judgment the relief sought by the Defendant-Respondent in her amended answer (paragraph 'ආ' of the prayer) relating to adultery of Plaintiff-Appellant was also dismissed. Parties proceeded to trial on 22 issues and 2 admissions. The fact that by this

marriage a child by the name of Rajitha Madusanga was born and that the matrimonial home was set up at Dewalapola Balabowe were admitted facts. By Marriage Certificate marked P1 parties married on or about 10.04.1986. In the plaint it is pleaded that parties after marriage lived together without any problem for about 6 months. Plaintiff was holding the post of Assistant Government Agent and the wife was a Graduate Teacher at the time of marriage.

The learned President's Counsel for the Appellant drew the attention of this court to certain items of evidence and sought to demonstrate to this court that the learned District Judge has erred in his conclusions on the question of malicious desertion. On the other hand learned Counsel for Defendant-Respondent stress the fact of her in-laws from time to time created problems for her suggesting ill treatment by the in-laws and bringing about an intolerable situation and land-lord's request for the house, which led her to leave the matrimonial home. The evidence led in the trial court indicates that Plaintiff's two sisters and a husband of one of the Plaintiff's sisters lived in the matrimonial house. This is indicative of the fact that both the Plaintiff and his wife could not lead an independent trouble free life without interference from the beginning of their marriage. In fact disputes and quarrels with in-laws are not denied by Plaintiff. It is in evidence that

Plaintiff has been away from the house during week-days due to his employment and was able to join the wife only during the week-end. The absence for a period as above left room for the Plaintiff to hear gossip from his sisters who kept on saying unpleasant things about his wife.

It is in evidence that the two of them had quarrels during week-ends and things seem to have gradually developed with a police complaint marked P2. Evidence has been given that the Defendant wife had been raising her voice or shouting which even the neighbours could hear, and such conduct had been confirmed in the evidence of Kaviraj Ranaweera called by Plaintiff. P2 complaint by Plaintiff states that the wife had left the house with the child and stayed with a neighbour and very many people in the area had gathered which resulted in making the Plaintiff shameful and insulted. It is further stated that the Defendant threatened to commit suicide and or drink poison, and that P2 statement had been made for future reference. There is also material placed in the lower court that after the child was born the wife as usual stayed with her parents and after sometime returned to her matrimonial home. Thereafter quarrels became worse and developed into a worse situation. The date on which, according to Plaintiff, desertion took place had been 28.06.1987. (Two weeks after the complaint P2).

The Plaintiff suggested only 3 issues, whether 6 months after marriage the wife gave up her matrimonial obligations (as in paragraph 5 of plaint) and malicious desertion of wife on 30.6.1987. Consequential issue (3) for relief in terms of the prayer. In contrast Defendant-Respondent raised issues 4-21. The summary of it is that Defendant had to live with in-laws who created problems for her and Plaintiff took the side of in-laws. Defendants request to take her to the official residence and failure of Plaintiff to adhere to such request. Further when the child was born she went and stayed with the parents. Thereafter the question of returning to the house at Dewelapola. Land-lords demand to vacate house on 27.6.1987. All furniture in the house sent to Plaintiff's sister's house at Kalagedihena. Plaintiff had on that occasion, taken the wife and child to her parent's house and left them in the parent's house. Issue No. 14 suggest request of 1<sup>st</sup> Defendant to live with Plaintiff and child and Plaintiff's failure or neglect of such request. The important issues are No. 16 -17 suggesting 1<sup>st</sup> Defendant visiting the Plaintiff in his official residence on 02.9.1987 at Mihintale and the Plaintiff act as in paragraph 12 of answer. i.e. not coming to the residence at Mihintale by Plaintiff and informing police who requested her to quit the house. As a result she went to her parent's home. Issue No. 19 -21

relate to the Co-Defendant but the District Court had answered them in the negative.

The issues taken in it's entirety suggest a story but the truth of it need to be ascertained by reference to evidence. However all above are factual matters that had been considered by the learned District Judge who had the opportunity to listen to the evidence of witnesses and test demeanor of the witnesses and decide on all factual matters. This court will not interfere unnecessarily with factual matters unless for good reason.

Even if three Judges heard this case (no valid objection for hearing), I cannot blame the prevalent court system in our country and observe same not to be a breach of *audi aultrem partem*, rule.

The all important matter to be decided is the question of malicious desertion and whether the District Judge is correct on this aspect of his conclusion. At this point I would prefer to incorporate the following authorities to consider the legal aspects of malicious desertion before I decide on the evidence led at the trial and trial Judge's conclusion.

Malicious desertion 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. 34 N.L.R at 8; 13 Law Rec. at 58 see 26 N.L.R 113. In the absence of a deliberate intention to repudiate the marriage the refusal to return to the husband does not amount to malicious desertion 12 Law Rec. 40. But where a woman leaves her husband finally against

his will and without legal justification her desertion could in law be malicious. 35 N.L.R 174. Lapse of time is not the sole standard by which malicious desertion is determined. 2 B.R 138. Refusal to consummate a marriage amounts in law to desertion and entitles the wife to obtain a dissolution of marriage. 25 N.L.R 222. Desertion is a continuing offence. It is a continuing course of conduct. 29 N.L.R at 325; 9 Law Rec. 60.

Desertion to be a ground for divorce must be malicious; that is to say, it must be a deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state. 26 N.L.R 113

Based on evidence learned District Judge has considered the aspect of 'desertion'. The judgment refer to Plaintiff-Appellant's version of malicious desertion stating that on or about 30.6.1987 after a dispute the Defendant's wife had got down a hiring car and left the house with the child and her belongings on her own volition. To support Plaintiff's version witnesses Dharmaratne, Ranaweera and a sister of Plaintiff was called to give evidence. (Folio 309/310 of brief). In the judgment Defendant's version was also considered, that on or about 28.6.1987 Plaintiff had taken the Defendant and child in a hiring car and left her at the parent's house as Pillessa, on the pretext of land-lord demanding the house and promising her that no sooner he finds another house he would bring her back. In this regard District Court has considered the evidence of Defendant's father and one Benedict Mendis. Witness B. Mendis state that Plaintiff had brought the

Defendant and child to the house of the parents and that the witness was present at the time they arrived, and after sometime Plaintiff left. The District Judge in order to arrive at a conclusion has looked at police complaint 1V1 by 1<sup>st</sup> Defendant to Veyangoda Police made on 30.6.1987 about a divorce by Plaintiff and the fact that Plaintiff would take up the position that Defendant left him. Such complaint was made for future reference. It was District Judge's view that in view of above the wife did not have the intention to desert the husband. Further P2 makes it clear according to it's contents the trial Judge state that it was agonizing for the Plaintiff to continue married life. Thereafter within about 2 ½ months from statement P2 Plaintiff filed action. It appears to this court that the original Court Judge has accepted the more probable version of the 1<sup>st</sup> Defendant-Respondent. I do not wish to interfere with the trial Judge's views above. (contained in folios 312/313 of the judgment). To add to this I would also contribute that the gradual harassment by the in-laws from the very early days of marriage would be some form of encouragement for the wife to accept husband's request which was coupled by land-lord's demand to vacate the house. It was more or less a ruse and a wily subterfuge, to get rid of her.

On the above version of Defendant-Respondent I cannot come to a conclusion that the wife has deliberately left the matrimonial house with



the intention of repudiating marriage ties. Evidence suggests that she was led or misled by her husband to leave the house.

The question of reconciliation had also been considered by the District Judge. Reference is made to V4, V5 & V6 to support reconciliation on the part of the wife. Letter V4 does not suggest an intention to desert the Plaintiff. It is a very humble request on the part of the wife to get another house and start the usual life. It is dated 26.7.1987. V5 and V4 taken together does not suggest malice in any form. V6 telegram is sent in an emergency to request the husband to come immediately as child is sick. Original plaint filed in September 1987. Even time limit seems to be insufficient.

The learned trial Judge has in the judgment considered and compared the several acts and evidence of Plaintiff-Appellants to ascertain as to whether Defendant's wife deliberately and or maliciously deserted the husband. The followings are noted and elicited from the judgment of the District Judge.

- (1) Witness of Plaintiff Dharmaratne visiting house of Defendant's parents at 'Pillassa' to request Defendant to resume marriage ties. Denied and rejected by wife.
- (2) Plaintiff's evidence admitting that since 28.6.1987 never went to the house of wife's parents.

- (3) Taking a house on rent by Plaintiff at Veyangoda as in his evidence. Judge's observations that if Plaintiff could come to the Veyangoda house from his official residence at Mihintale during Week-ends, there is no difficulty to get to 'Pillassa' Kurunegala to visit wife. As such there is a deliberate refusal to visit the wife and resume marital relationship.
- (4) Further to matters stated in (3) above the small child of Plaintiff and Defendant was at the house at pillassa Kurunegala. But the Plaintiff had not ever bothered to see the child. As the trial Judge observes'...කුළුදුල් දරුවා සිටියේ පිලිස්සේ 1 වෙනි විත්තිකාරිය සමග වන අතර, පැමිණිලිකරු විසින් දරුවා බැලීමට හෝ හොඳයක් වැලඳී සිටීම පුදුමයට කරුණකි.

Further to above the following extract is incorporated from the judgment of the Original Court is included regarding Trial Judge's views after service of summons of Defendant-Respondent.

1 වෙනි විත්තිකාරියට සිතාසි ලැබීමෙන් පසුවද ඇය දරුවා සමග සහ සිය පියා සමග මිනිත්තලේ පැමිණිලිකරුගේ නිල නිවසට ගොස් ඇති අතර, පැමිණිලිකරු උවමනාවෙන්ම නිවසින් මග හැර ඇති බව ඉදිරිපත් වී ඇති සාක්ෂි අනුව පෙනී යයි. මිනිත්තලයට මෙම නඩුව පැවරීමෙන් පසුව 1 වෙනි විත්තිකාරිය පැමිණි බව පැමිණිලිකරු පිලිගනී. තවද 1987/06/28 න් පසු 1 වෙනි විත්තිකාරිය බැලීමට හෝ කැඳවා ගෙන ඒමට තමා නොගිය බවද පැමිණිලිකරු ඔහුගේ සාක්ෂියේදී පිලි ගෙන ඇත. තවද 1990/10/25 වෙනි දින සාක්ෂි වල 13 පිටුවේදී 1 වෙනි විත්තිකාරිය විවාහය ගෙන යාමට කැමරත්තෙන් සිටින බව පැමිණිලිකරු පිලිගෙන ඇත.

The argument of learned President's Counsel that desertion was not as in issue No. 2 but when witness Dharmaratne's evidence suggesting a request to join the Appellant and refusal by wife to accept such officer would be the point of malicious desertion is not tenable as that seems not to be the position in the original court which view I endorse. In any event that position cannot amount to desertion with malice, in view of (1) to (4) above and the several attempts on the part of the Defendant wife and her father to reconcile, being turned down or rejected by Appellant. I also agree with learned counsel for Respondent that a party cannot be permitted to present a different case in appeal. Bastian's case 1993(1) SLR 184.

I also agree that Appellant's conduct makes matters easy for both courts to decide the case in favour of the Defendant-Respondent. In *Muthukumaraswamy Vs. Parameswary* 78 NLR 488 – Deserted spouse must always until presentation of plaint affirm the marriage and be ready to take back the wife. Appellant never expressed a desire to do so, though the wife tried on several occasions on her own and with her father to resume marriage ties. The evidence available suggest that the Plaintiff-Appellant either willingly or unwilling or deliberately whittled the process of reconciliation.

In all the above circumstances I am of the view that there is no merit in this appeal. The Defendant wife had been harassed by the in-laws. This fact was not specifically rejected by the Plaintiff. Interference of in-laws is a perennial problem in our society. At times it is a mere prestige battle, and result in break down of marriages, and attempts to deny association of relatives as the truth is very often hidden or exaggerated. Plaintiff-Appellant seems to have worked according to a plan to get rid of his wife and child by a gradual process. Initially the problems created by in-laws. Then constant quarrel between the two of them, as a result of conduct of in-laws. Finally the plan to force the wife to leave the matrimonial home and denial of reconciliation. The learned District Judge has carefully considered all the available evidence and pronounced a well considered judgment. As such I affirm the judgment of the District Court and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL