

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

Ediriweera Arachchige Ariyasena
No. 7, Kings Street,
Kandy.

PLAINTIFF-APPELLANT

C.A 265/1997
D.C. Kandy 1407/D

Vs.

1. Chandrika Jayaweera
Personal Manager,
Sri Lanka Tractor Corporation
Olcott Mawatha, Colombo 11.
2. Arawinda Mutukumaran
No. 126, Hill Street,
Dehiwela.

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Appellant is absent and unrepresented
Philip Chandraratne for Defendnat-Respondnets

ARGUED ON: 03.05.2011

DECIDED ON: 25.5.2011

GOONERATNE J.

This appeal arises from the judgment of the District Court of Kandy in a divorce case. Learned District Judge dismissed Plaintiff husband's divorce case filed on the basis of adultery and malicious desertion and awarded damages to the 1st Defendant-Respondent, wife, a sum of Rs. 100,000/=. Case proceeded to trial in the original court on 14 issues.

It was admitted at the trial that the child by the name of Sameera Ediriweera was born during lawful wedlock. Issue Nos. 1 – 5 are answered in favour of the Plaintiff. Both husband and wife after marriage, and up to February 1978 resided in the residence belonging to the wife's parents at 'Kaburugamuwa'. On or about 1978 the 1st Defendant's wife was employed in the Sri Lanka Tractor Corporation and as such up to end of 1979 the 1st Defendant resided at No. 20, 10th Lane Kollupitiya a house belonging to her elder brother and 2nd Defendant. Plaintiff had been in the prisons service at Homagama and Colombo up to February 1978, and from 1979 to 3.1.1989 had been attached to the Magazine Prison, where he had his board and lodging. It is also in evidence that as a result of the 1st Defendant residing at her brother's residence in Kollupitiya and as the

Plaintiff was during 1981 attached to the Badulla Open Prison, Plaintiff could not visit his wife frequently or live with her, during a certain period of their life.

The allegation of adultery which is a serious allegation and if proved would result in court granting a divorce. However the learned Judge has analysed the evidence adduced in this regard as follows. On or about 24.5.1981 Plaintiff had at about 6.45 p. m gone to the house of the 2nd Defendant where the 1st Defendant-wife was residing and that he went there without any notice to the 1st Defendant wife. It is at that point of time and date that he saw his wife and the 2nd Defendant involved in sexual activity, which he had witnessed. It was Plaintiff-Appellant's evidence that on 24.5.1981 he was to go to Badulla by train schedule to leave Colombo Fort at 8.15 p. m and having come from Matara, arrived at about 6.00 p. m on 24.5.1981 at the Fort railway station. Since he had some time till 8.15 p. m to board the Badulla train he decided to visit his wife. No other evidence was led to corroborate Plaintiff's evidence on above. The trial Judge has considered the evidence of the Plaintiff as follows and there is no doubt that his version above is false.

පැමිණිලිකරු ඔහුගේ සක්ෂියේ මෙම සිද්ධිය සිදුවන වකවානුව තුළ දෙපාර්ශ්වය අතර ඇතිවූ සිදුවීම් මෙසේ දක්වා ඇත.

ප්‍ර. 23 වන සෙනසුරාදා භාරියාව සිටියේ ඇයගේ පියාගේ නිවසේ?

උ. ඔව්.

ඒ තැනැත්තිය මා සමග ආවේ නැතැ. මම තනියම ආවා. මැයි 24 වන දින මම කොල්ලුපිටියට ගියා. ඊට පස්සේ මැයි 25 වන දින බදුල්ලට ගියා.

ප්‍ර. ඒ සතියේ භාර්යාව සමග ගෙදර සිටියා.

උ. ඔව්.

ප්‍ර. මාතර සිට තමයි කෝච්චියේ ආවේ 24 දා.

උ. ඔව් භාර්යාව එක්ක නොවෙයි. කොලඹ සිට භාර්යාව එක්ක ගියා. 17 දා කොළඹ සිට මාතර ගියා. මම ආවේ 24 දා.

මෙහිදී 23 වන දින පැමිණිලිකරු සමග 1 විත්තිකාරිය මාතර සිය දෙමව්පියන්ගේ නිවසේ සිටි බව පැහැදිලි වේ. 24 වන දින ඇය පැමිණිලිකරු සමග පිටත්ව නොපැමිණි බවද ඔහු සාක්ෂි දරා ඇත. මේ අනුව කවර අවස්ථාවකදීද 1 විත්තිකාරියව මාතර සිය කොලඹ බලා පිටත්ව ආවේ යන්න පැහැදිලි නොවේ. එහෙයින් 24 වන දින සවස 6.45 ට පමණ පැමිණිලිකරු 2 විත්තිකාරුගේ නිවසට කිසිදු දැනුම් දීමකින් තොරව පැමිණි වට 1 විත්තිකාරිය එම ස්ථානයේ සිටියේද යන්න පිලිබඳ බලවත් සැකයක් මේ අනුව පහලවේ. තවද ඊට ප්‍රථම දිනයේ සිය භාර්යාව සමග සිට ඇය කැටුව නොපැමිණි පැමිණිලිකරු එහි කොලඹ නිවසට යා යුතු වන්නේ එහි 1 විත්තිකාරිය සම්මුඛ වීමේ අභිලාශයෙන් බව පැහැදිලිය. ඔහුගේ සාක්ෂිය අනුව ඔහු සිරිතක් වශයෙන් 1 විත්තිකාරිය සම්මුඛ වන්නේ දෙමව්පියන්ගේ නිවසේ මාතරදිය. එහෙයින් දරුවකු ප්‍රසූත කර සිටි 1 විත්තිකාරිය සති අන්තයේ මාතර නිවසට ගොස් නැවත උක්ත වේලාවේදී පෙරලා පැමිණ තිබුණේද යන්න සාක්ෂි වලින් පැහැදිලිව අනාවරනය නොවේ.

The other points that create doubts of the allegation of adultery

are:

- (a) No allegation of adultery suggested in the Magistrate’s court proceedings on maintenance

- (b) In a letter written by Plaintiff to his wife suggest that Plaintiff pray that within a month he would be able to be with her.
- (c) Action filed after a lapse of 5 years from the date of the alleged incident.
- (d) Letters marked 1D1, 1D3, 1d4, 1D6, 1D8, 1D9 by Plaintiff to 1st Defendant makes no reference to misconduct on the part of the 1st Defendant.

The learned District Judge reject the allegation of adultery. This court need not alter or reverse the findings of the District Court in this regard in the absence of sufficient material to prove fact of adultery.

The other ground for divorce on malicious desertion had not been proved. It seems to be to both courts that the Plaintiff with the intention of ending this marriage kept away from his wife and made false allegation of adultery and malicious desertion. Delay in filing action by Plaintiff fortify the position of the 1st & 2nd Defendants and the District Judge very correctly reject the version of Plaintiff and had granted damages to the 1st Defendant in a sum of Rs. 100,000/-. The law on adultery strikes at the root of the marriage relation and it's consequences both legal and social continue; 6. Law Rec. 117. It is a very serious matter to make allegations on adultery. If it is false like in this case the innocent party should be adequately compensated. Trial Court Judge very correctly awarded damages in a sum of Rs. 100,000/= to the wife, 1st Defendant.

The law pertaining to malicious desertion can be understood without any difficulty. 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. *34N.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*.

Appellants attempt to obtain a divorce is a frivolous attempt. Plaintiff-appellant's arrogance towards his wife never helped him in the Original Court and in the Appellate Court, to obtain a divorce. Appellant by his own conduct unnecessarily wasted his own time which would have been very precious for a family unit. In all the above circumstances Judgment of the District Court is affirmed. Appeal dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL