

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

In the matter of an Application of Final Appeal under Section  
755 of the Civil Procedure Code

Maswela Gedera Somasiri Bandara  
Central Provincial Council Secretariat,  
Pallekele Gam Udawa,  
Kandy.

**Plaintiff-Appellant**

**C.A.NO.1155/98 (F)**

**D.C.KANDY CASE NO.3427/D**

Vs.

Dissanayake Mudiyansele Ashokawathie  
Menike,  
Gunnepana, Degaldoruwa.

**Defendant-Respondent**

**BEFORE** : **K.T.CHITRASIRI, J.**

**COUNSEL** : Ms.Sajeewa Siriwardena with Samanmalie Ellapperuma  
Attorneys-at-Law for the Plaintiff-Appellant  
Issuru Somadasa Attorney-at-Law for the Defendant - Respondent

**WRITTEN SUBMISSIONS**

**FILED ON** : 18<sup>th</sup> February 2013 by the Defendant-Respondent  
11<sup>th</sup> March 2013 by the Plaintiff-Appellant

**ARGUED ON** : 13<sup>th</sup> JANUARY 2013

**DECIDED ON** : 03<sup>rd</sup> APRIL 2013

**CHITRASIRI, J.**

This is an appeal seeking to set aside the judgment dated 22.9.1998 of the learned District Judge of Kandy. Appellant in this appeal also sought to have a decree for divorce dissolving his marriage contracted with the defendant-respondent (hereinafter referred to as the defendant) on the basis of malicious desertion.

In the aforesaid judgment, learned District Judge decided that the plaintiff-appellant (hereinafter referred to as the plaintiff) failed to establish "constructive malicious desertion" on the part of the defendant upon which the case of the plaintiff had been filed. Accordingly, he dismissed the plaint filed by the plaintiff with costs.

The plaintiff, in paragraph 10 of the plaint has stated that he had to leave the matrimonial home on 25.10.1993 due to cruel treatment of the defendant. In evidence he has said that the defendant ill-treated him while they were living in a government quarters. He has further stated that the defendant even used to come to his work place and abused him in the presence of others.

Apart from the said evidence as to the alleged ill treatment, basically it is because of the non-disclosure of a child been born to the defendant before the marriage that this action had been filed. Even though the said child had been introduced as a daughter of a sister of the defendant at the time of their marriage, she had subsequently admitted that the said child was born to her. The defendant in her evidence had denied that she ill-treated the plaintiff but had admitted that the child referred to above is a daughter of hers.

The learned District Judge having considered the evidence recorded had decided that the plaintiff failed to establish constructive malicious desertion on the part of the defendant in the degree required by law and had dismissed the action accordingly. In deciding so, he has stated thus:

“ වත්තිකාරියගේ ඇනුම් බැනුම් ඉවසීමට නොහැකිව පැමිණිලිකරු වෛවාහක නිවස අත්හැර ගිය බව කියයි. ඒ පිළිබඳව යොග්‍ය බැලිය යුත්තේ පැමිණිලිලෙන් ඉදිරිපත් කර ඇති පැ3 සහ පැ4 දරන ලේඛණ ආශ්‍රයෙනි. නමුත් පැ3 සහ පැ4 දරණ ලේඛණයට අනුව කිසිදු හිංසාවක් හෝ කරදරයක් වත්තිකාරියගෙන් සිදුවූ බවක් සඳහන් නොවේ. නමුත් පැ4 හි අපහාස කරන ලද බවක් සඳහන් වේ. පැ4 දරණ පොලිස් පැමිණිලිලට අවධානය යොමුකළ විට පෙනී යන්නේ ඒ අවස්ථාව වන විට වෙනවිම සඳහා දික්කසාද නඩුවක් පවරා ඇති බව පැමිණිලිකරු කියා ඇත. නඩුවක් පැවරූ පසුව නඩු නිමිත්තක් ඇති නොවේ. නඩු නිමිත්ත ඇතිවන්නේ නඩුවක් පැවරීමටත් පෙරය. පොලිසියට කරන ලද පැමිණිලිල කර ඇත්තේ 1995. 03. 13 වන දින වන අතර, මෙම නඩුව පවරා ඇත්තේ 1994.12.02 වන දිනය. ඒ අනුව පැහැදිලිව පෙනීයන්නේ නඩුව ඔප්පු කර ගැනීම සඳහා පැමිණිලිකරු පොලිසියට පැමිණිලිලක් කර ඇති බවයි. එවැනිනක් නිතරානුකූලව පිලිගත නොහැකිය. එසේ හෙයින් ද්වේශසහගත අත්හැරීම සහ නඩුව පැවරූ පසුව කරන ලද මානසික හිංසාවක් අදාළ නොවේ.”

The cause of action disclosed by the plaintiff is on the basis of constructive malicious desertion on the part of the defendant. Such a cause of action is recognized in our law under Section 19(2) of the Marriage (General) Ordinance. Hence, it is the burden of the plaintiff to establish that the acts of the defendant compelled him to leave the matrimonial home. In this instance, the plaintiff alleged that the cruelty on the part of the defendant had been the reason for

him to leave her. In such a situation, alleged cruelty should have been caused deliberately by the defendant with the intention of repudiating the marriage.

In this regard, **Hahlo** in the book titled "**The South African Law of Husband and Wife**" [Second Edition at Pg.382] states thus:

*"Any form of cruelty or neglect which is sufficient to found an action for judicial separation is also sufficient to found an action for divorce, on the ground of constructive desertion, provided the defendant acted with the intention to put an end to the marital relationship."*

In the case of **V.R.Sinnathamby V Annammah** [55 N.L.R. at page 349] many disputes between a husband and his wife had erupted because the wife insisted that her brother should remain in the house contrary to the desire of the husband. There was evidence that the husband was assaulted on two occasions by the wife's brother and that, on the second occasion, the husband left the home. In that decision it was held that under those circumstances the husband's departure from the home did not constitute malicious desertion.

The evidence in this case, as to the circumstances that led for the plaintiff to leave the home does not even so grave. It seems that basically it is on the strength of the evidence as to the non-disclosure of a child been born to the defendant that the plaintiff sought to have a divorce. All that evidence has been considered by the learned District Judge and has decided that no sufficient evidence is forthcoming to establish constructive malicious desertion. He being the trial judge is the best person to decide whether the defendant intended to bring the matrimonial relationship to an end.

This position was upheld in the case of **P.P.Wickremasuriya V S.L.S.R.Samarasuriya**. [68 N.L.R. (1965) at page 349] In that decision it was held:

*“ The findings of the learned Judge were reached after having had the advantage – denied to Appellate Courts – of seeing and hearing the parties. It was for the learned Judge to decide whether the husband’s conduct towards his wife caused her to leave: it was for the learned Judge to decide all such questions of knowledge and intention on his part as would show whether he was guilty of desertion”.*

Having considered the circumstances of this case, it is my considered view that the learned District Judge is correct when he decided that the plaintiff has failed to establish constructive malicious desertion on the part of the defendant. Moreover, as decided in Wickramasuriya V Samarasuriya (supra) this Court exercising appellate powers does not wish to interfere with the findings arrived at by the trial judge on the facts of the case since no glaring mistake is found therein. In the circumstances, I do not see any reason to interfere with the findings of the learned District Judge. Accordingly, this appeal is dismissed.

Having considered the circumstances of this case, I make no order as to the costs of the appeal.

*Appeal dismissed.*

JUDGE OF THE COURT OF APPEAL