

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

Ekanayake Arachchige Pemadasa,
Bibulagawatta,
Puskolayaya, Kirama.

Plaintiff

Vs.

C.A. No. 1023 / 2000 F

D.C. Walasmulla No. 311 / D

Sudusinghe Gunawathie,
C/O Renuka Ekanayake,
No. 96, Kottawatta,
Kolambage Ara.

Defendant

And Now Between

Ekanayake Arachchige Pemadasa,
Bibulagawatta,
Puskolayaya, Kirama.

Plaintiff-Appellant

Vs

Sudusinghe Gunawathie,
C/O Renuka Ekanayake,
No. 96, Kottawatta,
Kolambage Ara.

Defendant -Respondent

BEFORE : UPALY ABEYRATHNE, J.
COUNSEL : K.V. Sirisena with N.A. Gunawardana for
the Plaintiff Appellant
The Defendant Respondent is absent and
unrepresented.
ARGUED ON : 17.05.2012
DECIDED ON : 28.06.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted the said action against the Defendant Respondent (hereinafter referred to as the Respondent) seeking a decree for divorce *a vinculo matrimonii* on the ground of malicious desertion. The Respondent filed answer denying the averments in the plaint and sought a decree for divorce *a vinculo matrimonii* on malicious desertion on the part of the Appellant and a decree for a sum of Rs. 50,000/- as permanent alimony to be paid by the Appellant. The case proceeded to trial on 13 issues. After trial the learned Additional District judge has delivered a judgment in favour of the Respondent.

The Appellant contended that the learned Additional District judge has failed to evaluate the evidence of the Appellant and the capacity to pay a sum of Rs. 50,000/- as permanent alimony.

The Appellant has given evidence at the trial. But he has not called witnesses to give evidence in order to prove the malicious desertion on the part of the Respondent. The Appellant has stated that on or about 10.04.1978 the Respondent eloped with another person. But he has not produced a police

complaint or any other similar documentary proof to establish the said facts. On the other hand the Appellant has instituted the present case in the District Court on 15.09.1998 almost 20 years after the alleged desertion. If he was the innocent party why did he wait such a long time to institute an action against the Respondent?

The Respondent has given evidence and has led the evidence of one witness. The Respondent in her evidence has stated that the Appellant after consuming alcohol quarrels and assaults her upon the question of dowry. She further said in evidence that the Appellant spent his earnings for gambling and neglected the maintenance of the family and after some time the Appellant left the matrimonial home. This evidence has been supported by the evidence of another witness. The Respondent has further stated that the Appellant is drawing a pension of Rs 4000/- per month. The Appellant has not produced any documentary evidence to disprove his said income.

Where each party alleges that the other is the deserter it is necessary to ascertain who is substantially responsible for the desertion in law. The party who really deserts is the one who compels the desertion. Accordingly in the present case the Respondent has proved malicious desertion on part of the Appellant on a balance of probability.

In the said circumstances I am of the view that the learned Additional District Judge has come to a right conclusion after evaluating the evidence of the case. Hence I see no reason to interfere with the judgment of learned Additional District Judge dated 21.07.2000. Therefore I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Court of Appeal