

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

Indu Nilmini Urmila Ethapane *nee* Bodinagoda
No. 17, Don Carolis Mawatha,
Colombo 05.

PLAINTIFF

C.A. Case No. 385/2000 (F)

**D.C. Colombo Case No.
19076/D**

-Vs-

Nihal Indrajith Ethapane
No. 08, Botheju Avenue,
Colombo 05.

DEFENDANT

AND NOW

Indu Nilmini Urmila Ethapane *nee* Bodinagoda
No. 17, Don Carolis Mawatha,
Colombo 05.

PLAINTIFF-APPELLANT

-Vs-

Nihal Indrajith Ethapane
No. 08, Botheju Avenue,
Colombo 05.

DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Amila Perera for the Plaintiff-Appellant.
Sanjeewani Cabral Gunathilake for the Defendant-Respondent.

Argued on : 17.01.2017

Decided on : 14.12.2017

A.H.M.D. Nawaz, J.

In this action instituted by a wife (the Plaintiff-Appellant, hereinafter sometimes referred to as the "the Plaintiff") on 20.05.1997 against her husband (Defendant-Respondent, hereinafter sometimes referred to as "the Defendant") the Plaintiff sought a dissolution of her marriage with the Defendant.

The plaintiff's case was that she married the Defendant on 12.09.1972 and there were three children born out of this marriage. She alleged in her plaint that;

1. the Defendant neglected her and the matrimonial home;
2. the Defendant was callous of the plaintiff's feelings;
3. the Defendant constantly quarreled and abused her in the presence of outsiders and the children;
4. the Defendant did not heed any reasonable request of the Plaintiff and his conduct brought an end to the marriage.

As a result of the above conduct of the Defendant, she averred that on 30.11.1994, she was compelled to leave the matrimonial home with the children and that the Defendant was guilty of constructive malicious desertion.

She sought a divorce *a vinculo matrimonii* on the ground of constructive malicious desertion, a sum of Rs.75,000/- as alimony and the legal and physical custody of the three children.

The basis of the plaintiff's claim was that her husband's conduct was such as to amount to constructive malicious desertion which brought an end to the marriage.

The Defendant on the other hand denied all allegations of the Plaintiff and stated that immediately after the marriage they had been living in the U.K. and after returning to Sri Lanka, they were living together and in the latter part of 1994 his business suffered loss and due to this reason they mutually agreed to shift their living to the plaintiff's parental home at No.27/3, Chandraleka Mawatha, Colombo 8.

After the said house was sold in 1998, the Defendant stayed in a room which could not accommodate the entire family, but he regularly visited the Plaintiff and children and took them out as well. He further stated that he was still attached to the Plaintiff and children and he wanted to live with them happily. It would appear therefore that the Defendant denied constructive malicious desertion and he was on good terms with the children.

According to the plaint, the first child was born in 1976, the second in 1981 and the third was in 1986. As one could see, the births of the children had been sexennial. In other words the three children had been born once every six years. This is indicative of the fact that both the Plaintiff and Defendant had enjoyed conjugal bliss and had been in good family relationship until 1986. The Defendant expressed his willingness to return to the Plaintiff in order to resume cohabitation thus displaying *animus revertendi*.

When the trial was taken up on 15.02.1999, the Plaintiff raised the following two issues: namely:-

1. As per the matters mentioned in paragraph 5 of the plaint, on or about 30.11.1994, was the Plaintiff compelled to leave the matrimonial home?
2. If so, is the Plaintiff entitled to the reliefs prayed for in the plaint?

The Defendant did not raise any issue. At the trial only the Plaintiff had given evidence on her behalf and no other witnesses were called to support her story. At least the first daughter who was 23 years old in 1999, and had been living with the Plaintiff, could

have been summoned to give evidence if the plaintiff's allegations against the Defendant had been true.

If the Plaintiff left the matrimonial home with her children on 31.11.1994, why did she wait almost three years to institute this action on the ground of constructive malicious desertion on the part of the Defendant? This is an irresistible question one is driven to pose. The Plaintiff has not given any acceptable reason for this unusual delay. The only reason given was that she wanted to discuss the matter with the children when they had grown up. This is not an acceptable answer for the delay which this Court could countenance. It shows that she too wanted the marriage to continue.

It is to be noted that even after the separation in November, 1994, the Plaintiff and the Defendant, on many occasions, had been seen together. The Plaintiff has admitted these events in her evidence under cross-examination. Firstly, she admitted that even after the separation she had gone with her children and lived with the Defendant. She had attended birthday parties with the Defendant. She had also gone to see a doctor with the Defendant. This conduct on the part of the parties would show that neither of them wanted to end their nuptial tie.

In the case of *Rajeswararane v. Sunthararasa*, (1962) 64 N.L.R. 366, Basanayake C.J. observed at page 369:

"Although the parties were at variance as to where they should reside there was no intention on the part of either to break up the marriage because they were willing to continue to live as husband and wife".

This observation aptly applies to the instant case.

The testimony of the Plaintiff demonstrates that she went to her parents' house because of financial difficulties the Defendant had, but it would be common ground that a wife for this reason alone would not leave the husband for the abode of her parents. There may be ups and downs and crests and troughs in life but it is an eternal verity that at all times both parties would live together, shoulder the difficulties and carry on in the interests of the children.

According to the evidence of the Plaintiff it is clear that though she had gone to her parents' home with the children, she would often come to see the Defendant at his place of abode during weekends. In front of society they comported themselves as husband and wife without manifesting their differences. Did they put in an appearance of a Darby and Joan? Yet the learned District Judge of Colombo did not believe the plaintiff's story of constructive malicious desertion on the grounds she had urged in paragraph 4 of the plaint. After having considered the evidence of the Plaintiff, the learned District Judge has refused the reliefs prayed for by the Plaintiff. This appeal is against that judgment dated 23.09.2000.

In my view the grounds averred by the Plaintiff in paragraph 4 of the plaint have not been established by sufficient evidence. The subsequent conduct of both parties after the alleged constructive desertion on 30.11.1994, clearly indicates that there was no factum of constructive malicious desertion that could be deduced from any act on the part of the Defendant. I would observe that there is not any tittle of evidence suggestive of the fact that the Defendant ever neglected the welfare of his children.

In the event that the husband was at fault in driving the wife out of the matrimonial home, the bona fide attempts made by the husband for reconciliation cannot be ignored lightly. A Divisional Bench of the Supreme Court declared in *Muthukumaraswamy v. Parameshwary* (1976) 78 N.L.R. 488:

"Termination of malicious desertion can take place by a supervening animus revertendi, coupled with a bona fide approach to the deserted spouse with a view to resumption of life together. Where the deserting spouse makes a genuine offer to return to the matrimonial home with a view to resumption of life together, the deserted spouse cannot lawfully refuse reinstatement. A deserted spouse must always, until the presentation of his plaint, affirm the marriage and be ready to take back the deserting spouse." - (per Sharvananda, J. [as he then was] with Thomotheram, J. and Ratwatte, J. concurring)

Considering the evidence led in this case, I am of the view that the Defendant had always demonstrated his *animus revertendi* with the intention of living together with the

Plaintiff and the children, and the Plaintiff has failed to establish constructive malicious desertion on the part of the Defendant.

I therefore affirm the judgment of the learned District Judge and dismiss the appeal without costs.

JUDGE OF THE COURT OF APPEAL