

1951

Present : Basnayake J. and Pulle J.

DE MEL, Appellant, *and* DE MEL *et al.*, Respondents

S. C. 277—D. C. Colombo, 1,250/D

Divorce—Malicious desertion—Unfounded charge of adultery.

Where a husband suspected without reasonable grounds that his wife had committed adultery and ordered her to leave the house and refused to be reconciled to her unless she gave a written confession of adultery—

Held, that there was malicious desertion on the part of the husband.

¹ (1951) 53 N. L. R. 25.

APPPEAL from a judgment of the District Court, Colombo.

U. A. Jayasundera, K.C., with *J. N. Fernandopulle, C. G. Weeramantry* and *Felix Bahareti*, for the plaintiff appellant.

H. V. Perera, K.C., with *N. K. Choksy, K.C.*, and *H. W. Jayewardene*, for the first defendant respondent.

N. E. Weerasooria, K.C., with *W. D. Gunasekera*, for the second defendant respondent.

Cur. adv. vult.

June 28, 1951. PULLE J.—

This is an appeal in an action for dissolution of marriage instituted by the husband on the ground that his wife, the first defendant, had committed adultery with the second defendant from whom he claimed Rs. 10,000 as damages. The defence was a denial and the wife counter-claimed a divorce on the ground that the plaintiff had maliciously deserted her. The learned District Judge dismissed the plaintiff's action against both defendants and entered a decree in favour of the wife dissolving the marriage.

The case for the plaintiff centres round an incident which occurred on the night of March 7, 1945. The plaintiff and his wife retired for the night. The second defendant who was a guest and a friend of the family slept in an adjoining room. The plaintiff got out of his bed at about 1 a.m. and discovered that his wife was not on her bed and that the door leading to the room where the second defendant was sleeping was partly open. He switched on first the light in his room and on switching on the light of the neighbouring room he saw the wife rising up from the second defendant's bed. If what the plaintiff says he saw that night were true, there can be no doubt that a strong *prima facie* case of adultery was made out.

The wife denies that she lay on the bed of the second defendant. Admittedly she was in the room of the second defendant but her version is that she was suffering from a pain in the chest for which she consulted medical advice only two days previously and that on the night in question the pain became worse and she entered the second defendant's room to help herself to a little brandy from a bottle kept in an almirah in that room. Having taken the bottle she turned back to proceed to her own room and thence to the dining room when the plaintiff asked angrily "Why, why" and before she could explain he approached her in an

attitude of violence, whereupon she dropped the bottle on a couch and ran towards the drawing room where he gave her a beating. The husband admits the beating and justifies it, naturally from his point of view, on the ground of provocation.

But for the unusual hour at which the wife was discovered in the room, it could not be a matter for comment if the wife entered the adjoining room, even when the second defendant was there alone, on some legitimate business. The second defendant was a friend who had a few weeks previously been lodging with them. It was also customary for the wife to prepare the second defendant's bed and take a cup of "Ovaltine" to the room before he retired.

Whether the version given by the wife was probably true depended principally on the independent evidence called to support her. The Police Sergeant and Proctor E. B. Sumanatilake who came before dawn the same night testify to having seen the bottle of brandy on the couch. It is undisputed that she gave her version regarding the bottle of brandy to the Police Sergeant who recorded her statement. Learned Counsel for the husband has invited us to reverse the finding in favour of the wife because her evidence that she switched on the light on entering the second defendant's room was disbelieved. The learned trial Judge accepted the wife's evidence as to the purpose for which she entered the room because it was corroborated by reliable evidence. He did apply his mind to the effect of disbelieving her on this part of the case. He states, "In spite of the first defendant's want of candour on this point, I accept as true her explanation for her presence in the visitors' room that night". The reason given by the trial Judge appears to be adequate and I see no ground for reversing the finding in her favour on the issue of adultery.

It was next submitted that even if the issue of adultery was answered against the husband the learned District Judge was wrong in allowing the wife's claim for a dissolution of the marriage on the ground of malicious desertion. At the outset I may state that the trial seems to have proceeded on the tacit understanding that if the Court accepted the wife's version of her presence in the visitors' room, her counterclaim would succeed. I cannot, otherwise, understand from the note of Counsel's arguments why no reference whatever is made by them to the issue of desertion and the learned trial Judge himself deals with it in three lines.

"As regards the first defendant's claim in reconvention I would hold that the plaintiff's conduct amounts in law to constructive malicious desertion".

The only point taken in the petition of appeal bearing on the issue of desertion is that in any event the alimony awarded was excessive. Be that as it may, it was not contended at the argument in appeal that the appellant was precluded from attacking the decree in his wife's favour.

In examining the evidence of desertion and the authorities cited in connexion therewith, it is essential to remember that the plaintiff's

version that he saw his wife in the act of rising from the second defendant's bed has been rejected. After the assault he asked her to clear out of the house and she left on the morning of March 8. From that date down to November 29, 1945, when the plaint was filed, the husband persisted in maintaining that his wife had committed adultery and refused to be reconciled to her on the basis of her version of what had happened. He wanted nothing less than a written confession of adultery with which he intended to pursue an action for damages against the second defendant. If the wife did not commit adultery a confession, written or otherwise, was out of the question. His attitude towards the wife is summed up by his own evidence :

“ I was quite convinced in my own mind that my wife would not have gone into second defendant's room except for the purpose of committing adultery. There was no stage after this incident when I contemplated taking back my wife. I was adamant about not taking her back ”. At the time he filed the action he was not merely convinced that his wife had committed adultery on March 7 but also on November 15, 1944, and February 26, 1945. The latter charges were not, however, pressed.

On the charge of desertion learned Counsel for the husband relied strongly on the following proposition laid down by Lord Merriman in the case of *Glenister v. Glenister*¹ :

“ If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause. ”

In my opinion *Glenister's case* can clearly be distinguished from the facts as found by the trial Judge in the present case. The admitted facts of *Glenister's case*, namely, the presence of strangers in the house during the absence of the husband and the birth of a child probably conceived at a time when the husband could not have had access to the wife pointed to adultery. When one has regard to all the facts, not the facts which constituted the husband's version of the incident, could the plaintiff have honestly believed that his wife had committed adultery ? The only point that could be made against her is that she entered a dark room to take a bottle of brandy from the almirah at one end. Prior to March 7 she was admittedly a chaste and faithful wife. There were no recriminations and no suspicions. The husband was aware that she was ill two days previously and ought to have known that the doctor had prescribed brandy as a palliative. Was it reasonable on his part to put the worst construction possible on her presence in the room, fly into a temper and assault her and then order her out of the house after turning a deaf ear to the explanation which she offered ? I am unable, on the facts as found by the District Judge, to hold that the husband had any reasonable grounds for believing that adultery had been committed.

¹ (1945) P. 30.

In the case of *Silva v. Missinona*¹ Bertram C.J. ventured to define "malicious desertion" as a "deliberate and unconscientious, definite and final repudiation of the obligations of the marriage state". The repudiation must be *sine animo revertendi*. A knowingly unfounded charge of adultery accompanied by a request to leave the matrimonial home is to my mind a final repudiation of the marriage state, where such a charge, as in this case, is persisted to the end. No wife innocent of such a charge could be expected to offer a renewal of her consortium with the husband so long as he maintained the charge. According to the evidence a reconciliation was only possible if the wife confessed to adultery in writing. In the case of *Dallas v. Dallas*² the wife petitioned for divorce on the ground of adultery coupled with desertion. The husband refused to live with his wife unless she wrote a letter exonerating a lady of whom she believed she had reason to be jealous. The wife's refusal to write the letter which led to the separation was held to be desertion on the part of the husband. A spouse who lays down a condition for reconciliation which no self-respecting person could accept must take the full consequences of such a condition being rejected.

There remains to consider the case of *Thelland v. Thelland*³ cited on behalf of the plaintiff. The wife sued for a judicial separation on the ground of cruelty. The husband counterclaimed a divorce for adultery. There was not sufficient evidence of physical cruelty, but she was granted a decree and the custody of the children, because slight evidence of physical cruelty was coupled with an unfounded charge of adultery. In appeal the decree was set aside for the reason that, although the husband failed in convincing the trial Judge that adultery was actually committed, the facts before him were sufficient justification for his belief that adultery had been committed and that the bringing of the counter-charge could not, therefore, amount to cruelty. By analogy it is argued that a separation brought about by a charge of adultery, which ultimately failed, cannot amount in law to malicious desertion. When the facts of *Thelland v. Thelland* are examined the differences are striking. In support of the counterclaim the husband produced several letters written by his wife praying for forgiveness which according to the Court of Appeal were inconsistent with her innocence. For reasons which I have given earlier the finding of the learned Judge as to what the plaintiff must have seen on entering the visitors' room, and not what he states he saw, could not have reasonably created in his mind the belief that his wife had committed adultery.

I would dismiss the appeal with costs.

BASNAYAKE J.—I agree.

Appeal dismissed.

¹ (1924) 26 N. L. R. 113.

² 31 Law Times Reports 271.

³ (1906-1909) 3 Appeal Court Cases 528.