

1962 *Present: Weerasooriya, S.P.J. and Abeyesundere, J.*

W. H. BABUNONA, Appellant, and ALBIN KEMPS, Respondent

*S. C. 440/60—D. C. Tangalla, 6813/D*

*Divorce—Cruelty per se is not a ground—Marriage Registration Ordinance (Cap. 112), s. 18(2).*

Cruelty on the part of one spouse is not a ground under section 19 (2) of the Marriage Registration Ordinance for the dissolution of marriage at the suit of the other spouse, unless it is of such a nature as to make cohabitation intolerable for the latter and amounts in law to constructive malicious desertion by the offending spouse.

Where a wife assaulted her husband who had, by his own adulterous misconduct in the matrimonial home, rendered cohabitation intolerable for the wife—

*Held*, that it was not open to the husband to sue for dissolution of marriage even if the assault amounted to cruelty.

**A**PPEAL from a judgment of the District Court, Tangalla.

*W. D. Gunasekera*, for Defendant-Appellant.

*Cecil de S. Wijeratne*, with *E. B. Vannitamby*, for plaintiff-respondent.

July 19, 1962. WEERASOORIYA, S.P.J.—

This is an appeal from the judgment and decree of the District Court of Tangalla granting to the plaintiff-respondent a dissolution of his marriage with the defendant-appellant. The plaintiff brought this action on the 30th May, 1958, alleging that from about May, 1957, the defendant treated him with habitual cruelty and on several occasions assaulted him and that as a result he was compelled to live apart from her. He claimed a declaration dissolving their marriage on the ground of constructive malicious desertion.

The only issues raised at the trial by plaintiff's counsel closely follow the averments in the plaint and are as follows :—

- (1) Did the defendant treat the plaintiff with habitual cruelty from about May, 1957 ?
- (2) As a result of such conduct on the part of the defendant was the plaintiff compelled to leave the defendant ?
- (3) If so, is the plaintiff entitled to a divorce on the ground of constructive malicious desertion ?

It is clear that on these issues the plaintiff would not be entitled to a divorce on the ground of constructive malicious desertion unless both issues (1) and (2) are decided in the affirmative. The Judge decided

issue (1) in the affirmative. He did not give a direct answer to issue (2), but in effect he decided it in the negative, for his finding was that the defendant left the plaintiff. He should, therefore, have decided issue (3) also in the negative. Instead of doing so, he held that the defendant was guilty of malicious desertion.

Mr. Wijeratne who appeared for the plaintiff sought to support the judgment and decree on the strength of the finding that the defendant treated the plaintiff with habitual cruelty from about May, 1957. He submitted that such conduct *per se* constituted malicious desertion.

According to the evidence, the plaintiff married the defendant in 1934, and they appear to have lived happily till 1957. The parties did not have any children. In 1946 or 1947 one Heen Nona, the daughter of the defendant's sister, came to reside with them. Shortly afterwards, the plaintiff became intimate with Heen Nona. She conceived and gave birth to a child. For her confinement she was taken to Tangalla Hospital. According to the defendant, she had no suspicion at the time that the father of the child was the plaintiff. That child was given away to a third party, and Heen Nona returned to the house of the plaintiff and the defendant and continued to live there. In 1953 she conceived again. She gave birth to the second child at the Tissa Hospital. This child and Heen Nona were brought to the house of the plaintiff and the defendant where they have been ever since. According to the defendant, even at that time she had no suspicion that the plaintiff was the father of this child. It was only in April, 1957, that the plaintiff admitted to her that he was the father and then trouble arose between them.

The evidence of the plaintiff that from the inception of his intimacy with Heen Nona the defendant was a party to an arrangement whereby, as they had no child, he should live with Heen Nona for the purpose of begetting a child which they could adopt, has been rejected by the Judge as a fabrication.

It is common ground that on the 24th May, 1957, the defendant assaulted the plaintiff and caused him injuries which necessitated his staying in hospital for three days. According to P5, which is a complaint made by the plaintiff to the village headman, the defendant left him on the 26th of June taking with her all her clothes and some jewellery. The defendant does not appear to have returned to the matrimonial home thereafter. The plaintiff said that on the 2nd August the defendant came up to his house and aimed a blow at him with a club which he warded off. He made a complaint to the headman. Then again on the 19th of August the defendant walked up and down the stile of his house armed with an iron rod saying that she would eat his flesh. On that occasion too the plaintiff made a complaint to the village headman. As a result of this complaint the Police applied to the Magistrate to have defendant bound over to keep the peace. The defendant then undertook to keep away from the plaintiff and not to harass him. The plaintiff stated that he did not want her to come back to him. No further action was taken thereafter on that application.

It is clear that from about May, 1957, there had been cessation of cohabitation between the plaintiff and the defendant, and that the reason for it, as well as for the defendant leaving the plaintiff on the 26th June, was because the plaintiff insisted on keeping Heen Nona in the house and living with her. The plaintiff, therefore, would appear to be the party guilty of constructive malicious desertion, and not the defendant. But even assuming to be correct the finding of the Judge that the conduct of the defendant towards the plaintiff from May, 1957, onwards amounted to habitual cruelty, the question is whether the defendant could on that ground be held to be guilty of malicious desertion so as to entitle the plaintiff to a declaration dissolving his marriage with her.

Counsel for the plaintiff relied on certain dicta in the judgments of the Court of Appeal in the South African case of *Wentzel v. Wentzel*<sup>1</sup> and the local case of *Wijesinghe v. Wijesinghe*<sup>2</sup> for his submission that cruelty *per se* constitutes malicious desertion. In each of those cases the wife sued the husband for a judicial separation on the ground of his cruelty and misconduct and as a result of which, it was alleged, she was compelled to leave him. In the former case Solomon, J., while holding that the defendant was guilty of misconduct and cruelty towards his wife, stated: "But that does not in my opinion conclude the case. For it is not sufficient for the plaintiff to prove cruelty towards her on the part of her husband, she must go further and show that the cruelty has been of such a nature and so persistent as to make further cohabitation with him intolerable." In the latter case my brother Sansoni expressed himself in more or less the same terms.

I do not think that it is open to the plaintiff in the present case to say that the assault on him by the defendant on the 24th May, 1957, even if it amounted to cruelty, made cohabitation with her intolerable, for he had already by his own misconduct with Heen Nona rendered cohabitation intolerable for the defendant. Still less can he avail himself of the acts imputed to the defendant on the 3rd and 19th of August, 1957. It is hardly necessary to point out that under section 19 (2) of the Marriage Registration Ordinance (Cap. 112), which governs the marriage of the parties to this case, cruelty *per se* is not a ground for dissolution of a marriage. But cruelty on the part of one spouse, which is of such a nature as to make cohabitation intolerable for the other, amounts in law to constructive malicious desertion by the offending spouse, and would on that basis constitute a ground for dissolution of the marriage at the suit of the innocent spouse.

On the evidence as accepted by the trial Judge, no constructive malicious desertion has, in our opinion, been established against the defendant. If the finding of the Judge on issue (3) was intended to be a finding of actual malicious desertion based on the fact that the defendant left the plaintiff, it would be a wrong finding in law since the plaintiff was entirely to blame for the defendant leaving him and the circumstances

<sup>1</sup> (1913) A.D. 55.

<sup>2</sup> (1954) 57 N. L. R. 489.

in which she left him were such that no self-respecting wife could have done otherwise. Moreover, the case for the plaintiff, as set out in his pleadings and in the issues, was not one of actual malicious desertion.

The judgment and decree appealed from are set aside and the plaintiff's action is dismissed with costs in both Courts.

ABEYESUNDERE, J.—I agree.

*Appeal allowed.*

