

1976 Present : Thamotheram, J., Sharvananda, J., and Ratwatte J.
K. MUTHUKUMARASAMY, Appellant, and PARAMESHWARY,
Respondent

S. C. 416/73 (F)—D. C. Jaffna, 1476/D

*Divorce—Malicious desertion—Supervening animus revertendi—
 Termination of desertion—Offer of return by deserting spouse—
 Whether deserted spouse could refuse re-instatement—Effect of
 such refusal.*

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 re-instatement. A deserted spouse must always, until presentation of his plaint, affirm the marriage and be ready to take back the deserting spouse.

APPEAL FROM a judgment of the District Court, Jaffna.

C. Ranganathan with N. Senanayake, Rohan Perera and G. Bakmeewewa for the Plaintiff-Appellant.

P. Navaratnarajah with K. Sivanathan and S. Manduleswaran for the Defendant-Respondent.

Cur. adv. vult.

May 24, 1976. SHARVANANDA, J.—

The plaintiff-appellant instituted this action on 4th May, 1967, for a divorce from his wife, the defendant-respondent, on the ground of her malicious desertion.

The marriage of the plaintiff with the defendant was registered on 22nd May, 1966, and the marriage was solemnized according to Hindu rites on 5th June, 1966. It was an arranged marriage and the main motivation of the plaintiff agreeing to marry the defendant was the fat dowry that she brought with her. The defendant, though she had lost her father early, was brought up by a rich uncle who had no children of his own. The defendant's dowry was mainly provided by the uncle. The evidence discloses that she was very much attached to her uncle and aunt who treated her as their own daughter. Her mother also resided with them. Half the substantial house which belonged to that uncle was given by him as part of her dowry. That house was only about 200 yards away from the plaintiff's house where the plaintiff took her after the marriage to establish their matrimonial home. The matrimonial home lacked many of the amenities and comforts that were available to the defendant at her house. The affluent circumstances of the defendant contrasted in a great measure with the indigent circumstances of the plaintiff. According to the plaintiff, the defendant never adapted herself to her new habitat and was anxious to resume living with her people in her uncle's house and had several times left for her uncle's house without his permission. But, according to the defendant, the plaintiff and his mother were interested in using her as a lever to bring pressure on her doctor brother and her uncle to squeeze money to be siphoned off to the plaintiff's widowed sister who was in indigent circumstances.

The plaintiff's allegation is that the defendant, on 30th December, 1966, finally left him without reasonable or probable cause and had thereafter refused to live with him. The case proceeded to trial on the following issues :—

- (1) Did the defendant leave the plaintiff's house on 30.12.66 in circumstances which amounted to a repudiation by her of the marriage status ?
- (2) If so, is the plaintiff entitled to a—
 - (a) decree for divorce ?
 - (b) decree for the custody of the child ?

By her amended answer dated 23rd November, 1971, the defendant set out elaborately her case for resisting the plaintiff's allegation and, while praying for the dismissal of the plaintiff's action, asked for judicial separation.

In the course of the trial, a reconciliation was provisionally effected on 16th January, 1970, and the parties were persuaded to live together at the house of the plaintiff. But the reconciliation was short-lived and the status quo ante of mutual recrimi-

nation was restored, one party blaming the other for the ultimate break-up. After trial, the learned District Judge, after an exhaustive review of the evidence, held against the plaintiff and dismissed the plaintiff's action. He granted the defendant's prayer for a judicial separation. The trial Judge formed a dim view of the plaintiff's conduct and attributed the failure of the marriage to the plaintiff's inconsiderateness and hard-heartedness in regarding her as a milch cow and not as a wife. In appeal, Mr. Ranganathan made a valiant attempt to substantiate the plaintiff's allegations and to demonstrate the defendant's childish preference of her home to the matrimonial home as irresponsible conduct unbecoming of a dutiful wife. He, very relevantly, stressed the wife's matrimonial obligation to live with her husband in the matrimonial home even though there be shortcomings and submitted that the defendant, knowing her husband's objections to her attachment to her home, never made a serious attempt to break away from her home and to live with him in the matrimonial home provided by him, cut off from her people and doing his biddings. This contention postulates absolute and unquestioned obedience to the husband on the part of the wife, a submissiveness incompatible with the assertion of any rights on her part. The law does not accord such a derogatory status to the wife. It does not regard the wife as her husband's slave, though it requires her to comply with her husband's reasonable requests and demands. Mr. Ranganathan further pointed out, with certain plausibility, to the discrepancies in the original answer and the amended answer and to the improbabilities of the conduct ascribed to the plaintiff which, according to the defendant, was responsible for frustrating the reconciliation recorded on 16th January, 1970. On an examination of the pleadings and evidence in the case, it does appear that certain of the findings of the trial Judge against the plaintiff will have to be revised. But the ultimate decision on the appeal does not rest on them. Fortunately, in the overall view of the admitted facts and circumstances of the case, it is not necessary to reach a determination on every disputed issue of fact arising in the case.

One fact emerges out of the thicket of details. The plaintiff never gave a chance for the marriage to get on its legs as it were. A little consideration and understanding on his part for her natural predilection for her home might have saved the marriage from going to the rocks. At the time of the alleged separation, things were not beyond repair. A little patience might have salvaged the marriage. But the plaintiff thought of his dignity and matrimonial rights only and exhibited no understanding of his young wife's eagerness to see and hobnob with her people. In his view, to leave his house without his

express permission was a heinous matrimonial offence. The plaintiff filed this action on 4th May, 1967. At the time the defendant was heavy with child by the plaintiff. The child was born on 16th July, 1967. In the course of the habeas corpus proceedings had on 7th March, 1967, the defendant had stated that she could not resume life with the plaintiff "in the present circumstances" (meaning in her state of pregnancy) and had opined that it was difficult to go and live with the plaintiff in his house. True that she declined the plaintiff's offer when the plaintiff stated that he was ready to provide all comforts and amenities suited to her status in a separate house. But one cannot spell in the refusal a final repudiation by her of the marriage tie. The circumstances point to an innocent explanation. Nothing disastrous had befallen the plaintiff to justify his rushing into the divorce Court on 4th May, 1967. The door had not been irrevocably closed. The plaintiff could well have afforded to await the birth of the child when the difficulties envisaged by her would pass away and there would be no excuse for her for refusing to rejoin him in a separate house. One cannot help concluding from the plaintiff's undue haste to rush into Court that his precipitate action was motivated by his apprehension that the defendant would rejoin him after the confinement and that he wanted to forestall her. The timing of the divorce action and the subsequent conduct and attitude of the plaintiff to his child confirms in abundant measure the suspicion that the plaintiff had no regard for the matrimonial bond. He had behaved, as a complete stranger, to his first born child. He has no shred of affection for his son and no interest or concern for him. He was so hard-hearted as not even to visit the hospital even though the defendant had kept him informed of the child's birth. He did not think, as father, to have the child's birth registered. Later even he has not manifested any love for his child. This unnatural behaviour on the part of the plaintiff shows him in poor light.

According to the plaintiff, the defendant deserted him on 30th December, 1966, without reasonable or probable cause and had thereby definitely refused to live with the plaintiff. It is true that the defendant did leave the plaintiff's house on 30th December, 1966. The question is: In what circumstances did she leave? Did she leave *sine animo revertendi*? Did she leave with the settled intention of terminating her marriage with the plaintiff? The plaintiff states: "On 30.12.66 my wife left my house without informing anybody. I was at Jaffna at that time. I returned home at about 6 p.m. When I came back I found that she had gone away. I looked out for her for about one or two hours. When I left in the morning she did not tell me that she was going to pay any visits on that

day. She did not come back on the 1st. I saw her the next time on the 11th January, 1967." According to the plaintiff, nothing untoward happened on the morning of 30th December, 1966, or on the preceding days between them to warrant her leaving him for good. If one is to believe him, it is curious that though he looked for her in the village for one or two hours, he did not go to the defendant's house which was only 200 yards away to verify whether she had gone there, nor had he subsequently searched for her at her house till she came back voluntarily on 11th January, 1967. Why did the plaintiff abstain from looking for her in the most probable place? On the plaintiff's evidence taken in its totality there is nothing to suggest her final going away from the matrimonial home with the intention never to return. From the fact that she had gone to her mother's place without the plaintiff's prior sanction, one cannot spell out that she intended to leave her husband for good. She might have been indiscreet, but she was not deserting her husband. *Animus desertendi* cannot be attributed to her. Her letter dated 27.12.66 (P2), written only three days earlier, militates against such supposition. I shall reproduce the translation of P2 for a proper appreciation of her disposition. It reads as follows:—

"My dear husband,

I was very sorry to read the letter sent by you. You should be the king of my house. Did we get married so that the world and the neighbours may laugh at us? We should live hereafter as milk and honey and co-operate with each other.

I have not disobeyed your word. I shall worship you as my God and venerate you hereafter.

I am weak on bed and I could not come to your place and I am really sorry for it. Please excuse me. I shall recuperate my health and come back to your place. I have been very obedient and restrained towards you and God knows about it. As I am weak, I beg of you to call on me and look after me.

Your obedient and loving wife,

M. PARAMESWARY."

This letter belies the plaintiff's assertions and is eloquent of the affection and regard of the defendant for the plaintiff. On receipt of this letter written by the defendant from her house to the plaintiff, the plaintiff went by car to her house and brought her to his house. Considering the fact that she was on her family way and that her mother was there to look after her while, in spite of her condition, she had to attend to everything at her husband's house, I am of the view that the defendant had good reason to leave the plaintiff's house on 30th December, 1966, for her mother's house and to prefer to stay there for the time being.

True, she did not get her husband's consent, and for that reason the plaintiff might have been piqued. But the element of malicious desertion was absent in such departure. The defendant's conduct might have been imprudent and unwise, but, certainly it cannot be stamped as mala fide. In the circumstances, issues 1 and 2 will have to be decided against the plaintiff on the plaintiff's own version of the facts. In view of this conclusion, it is not necessary to examine the defendant's version of the events of her married life.

Even assuming that the defendant deserted the plaintiff on 30th December, 1966, the next development on the plaintiff's own evidence turns the table against the plaintiff and makes him the actual deserter. For, it appears that on the evening of 11th January, 1967 the defendant voluntarily came back to the plaintiff's house and went into the bed room and arranged the things that were there. The timing of the return two days prior to the Hindu festival of Thaipongal is not without its significance. She was in the house for a length of time that evening. But the plaintiff wanted a written undertaking from her that she would not leave without informing him and that she would not stay away for such a long period and, according to the defendant that she severed all connections with her mother and uncle. That was the condition that he laid down to allow her to remain in the house. She was penitent and was prepared to ask for his pardon, but she refused to sign such a document containing such degrading terms. The plaintiff could have graciously pardoned her, but instead he chose to humiliate her and refused to have her in the house unless and until she gave the undertaking. Consequently she was compelled to leave the house at about 11 p.m. In the middle of the night she was thus obliged to go back to her house. The attitude and conduct of the plaintiff, to say the least, smacks of refined cruelty and is inexcusable. By her bona fide return she had purged herself of her fault, if any, in leaving the plaintiff's house on 30th December, 1966, and thus terminated the desertion. Termination of 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. The genuineness of the defendant's offer to return has not been questioned. In the circumstances, the plaintiff could not have lawfully refused re-instatement. The refusal of a defendant's bona fide offer to return which the plaintiff had no right to refuse converted the plaintiff into the deserting party and the plaintiff thereafter became the deserter and rendered himself guilty of malicious desertion. Even when reconciliation was thereafter attempted at the instance of the plaintiff through the agency of

C. Sivagurunathapillai, the plaintiff, according to Sivagurunathapillai, persisted on the defendant giving a written undertaking as a prelude to reconciliation. The plaintiff's senseless demand tended to destroy any chance of resuming cohabitation.

A deserted spouse must always, until presentation of his plaint, affirm the marriage and be ready to take back the deserting spouse. "Desertion as a ground for divorce differs from the statutory ground of adultery and cruelty in one important respect. The offence founding the cause of action is not complete — is (as it were) inchoate — until the action is constituted. If one spouse has committed adultery, or has treated the other with cruelty, the latter has an accrued right to petition for divorce. He or she may at once repudiate the marriage and is no longer bound to affirm it and re-instate the offending spouse. The deserted spouse has no such right, no such election. If the deserting spouse genuinely desires to return, his or her partner cannot refuse re-instatement." — per Evershed *M. R. Perry v. Perry* (1952—1 A. E. R. 1076 at 1079—1080). On the view of the facts, the plaintiff rendered himself responsible for the parties living apart subsequently. He has to blame himself for the subsisting state of affairs.

It is not necessary to go into the circumstances of the break-up and into the question of responsibility for the failure of the reconciliation attempted during the pendency of the proceedings. The trial Judge has accepted the defendant's version, though such version is open to a certain amount of criticism.

In my view, it is not the defendant but it is the plaintiff who, is guilty of malicious desertion. In the circumstances, the defendant is entitled to a decree of judicial separation.

I fully endorse the trial Judge's finding "that the plaintiff is not entitled to the custody of the child as he has upto date shown no love for, interest in or consideration for the child." By his callous disregard of his paternal obligations, the plaintiff has disentitled himself to any claim for the custody of his child. The interest of the child demands that he should be with the defendant and not with the plaintiff who has conducted himself as a stranger. The plaintiff will however, if he is so minded, be entitled to have reasonable access to the child at the defendant's house.

The judgment entered by the District Judge is affirmed and the appeal is dismissed with costs.

THAMOTHERAM J.—I agree.

RATWATTE J.—I agree.

Appeal dismissed.