

1962. Present : Basnayake, C.J., and Herat, J.

RAJESWARARANEE, Appellant, and SUNTHARARASA,
Respondent

S. C. 479/59—D. C. Chavakachcheri, 1688/D

Divorce—Malicious desertion—Proof.

In an action for divorce on the ground of malicious desertion proof is necessary that the deserter wilfully brought to an end the existing state of co-habitation with the deliberate purpose of abandoning conjugal society.

Where both husband and wife were anxious to resume their conjugal life, but the husband wanted the wife to come to his house while the wife wanted the husband to come to her house in the same village—

Held, that malicious desertion on the part of the wife was not proved.

APPPEAL from a judgment of the District Court, Chavakachcheri.

S. Nadesan, Q.C., with *S. Sharvananda*, for Defendant-Appellant.

H. W. Jayewardene, Q.C., with *P. Navaratnarajah* and *N. R. M. Daluwatte*, for Plaintiff-Respondent.

March 7, 1962. BASNAYAKE, C.J.—

This is an appeal from the judgment of the learned District Judge of Chavakachcheri in an action for divorce on the ground of malicious desertion. The plaintiff alleged that he was married to the defendant on 22nd May 1955 and that by that marriage there were two children namely Madhumalar Rasakularanee born on 27th December 1955 and Anton Rajaselvan born on 1st December 1957.

The story of the domestic life of the parties to the marriage is briefly as follows :—The plaintiff was a clerk in the Government Clerical Service stationed at Colombo at the time of his marriage. The defendant is the daughter of a cousin of his. Their parental homes were at Nunavil in Chavakachcheri opposite each other about 200 yards apart on either side of the Kandy Road. At the time of the marriage the plaintiff was stationed in Colombo. They shared the plaintiff's brother-in-law's house at Nugegoda. He was the Chief Accountant in the Forest Department and had rented out a spacious house. They lived in that house until 2nd June 1955 when the plaintiff's brother-in-law suddenly died. In consequence of that the house had to be given up and the plaintiff's sister and the defendant left for Jaffna. At about the same time the plaintiff was transferred to the Jaffna Kachcheri, and he rented out a house at No. 18 Colombagam Road, Jaffna. He shared that house with his widowed sister Thavamany. They resided in that house for nine months until April 1956. On 17th February 1956, about two months after the birth of her first child, the defendant left for her father's house as she was suffering from an illness which was described by the doctor as puerperal insanity. Her jewellery was handed over to her father and a receipt obtained.

On 5th March 1956 the defendant lodged a complaint against the plaintiff in the Magistrate's Court of Jaffna alleging that he intentionally and wrongfully confined her two months' old baby and prevented her from feeding her infant child. That complaint was withdrawn in that month itself. On the day that complaint was withdrawn the witness K. V. Kandiah a mutual friend sought to bring the parties together. The plaintiff wanted the defendant to live with him at the Colombagam Road house and the defendant wanted him to come to her father's house a part of which had been dowried to her. On the same day that she lodged the complaint in the Magistrate's Court, namely 5th March 1956, the defendant made a *habeas corpus* application to the Supreme Court in which she asked for the custody of her child Madhumalar Rasakularanee whom she alleged the plaintiff was keeping in unlawful confinement. That petition was withdrawn on 24th March 1956. The record reads as follows :—

“ The petitioner states that she has now made up with her husband, the respondent, and desires to withdraw this application.”

As the defendant was unwilling to come to the Colombagam Road house the plaintiff gave up that house and in April 1956 went to live with his parents at Nunavil. While the plaintiff was living with his parents on 5th January 1957 the defendant made an application for maintenance. That application was withdrawn on 23rd February 1957 as the plaintiff offered to maintain her. The minute dated 6th February 1957 reads as follows :—

“ It appears that a reconciliation has been brought about between the parties and the applicant desires to go with the defendant and give him an opportunity of proving his *bona fides* in the matter.”

To give effect to the offer made by him in the maintenance case about February 1957 the plaintiff took on rent his sister Ponmany's house adjoining his parents' house and the defendant lived there with him till the date of the alleged desertion. While they were living in Ponmany's house the plaintiff was appointed to the accountants' service and was transferred to Colombo in October 1957. He went to Colombo leaving his wife behind ; but visited her regularly. In 1957 he visited her on three occasions and in 1958 on sixteen occasions. Even at the date of the alleged desertion he had made no arrangements to take his wife to Colombo. He attributed his failure to do so to the housing shortage. When the plaintiff left, the defendant persuaded her mother to stay with her as she was alone.

The defendant owned a half share of her father's house which had been dowried to her. That half share had not been divided and for a long time the question of going to reside in that house was under discussion but it never took place because the plaintiff disliked his father-in-law and his wife's grand-aunt Ponnammah who lived in a house in the same compound. He also stipulated that as a condition precedent to his going there the house should be divided to his satisfaction. The defendant was anxious to go to her dowried house and in consequence of certain arrangements made the house was divided by her father but the plaintiff disapproved of his division and refused to go into residence. On the last visit of the plaintiff which was round about 10th November 1958 he and his wife gave a proxy to Proctor Thiraviyanayagam to institute a partition action in respect of the defendant's dotal property. The proxy was signed in their house in the presence of the proctor. This appears to have been the immediate cause for the defendant's departure from Ponmany's house to her father's house. The partition action appears to have been distasteful to the daughter and the father for according to proctor Thiraviyanayagam the defendant's father came and asked him not to file the partition action. The defendant says that she did not favour the institution of a partition action and that she was forced to sign the proxy. It was shortly after that that she moved to her father's house. Although the plaintiff disliked the place the defendant's portion of her parental home had three rooms.

The defendant's story is that she was kept virtually a prisoner by the plaintiff, but the learned District Judge has rejected that evidence. But whether she was a prisoner or not, the blame for her departure on 12th or 13th or 16th November—all three dates are mentioned in the evidence—has been fixed on the plaintiff's parents who it is alleged made life intolerable for her. Consequent on the defendant's going to her parents' house, the plaintiff's father telephoned the plaintiff and he came down to Jaffna. Both parties were summoned, perhaps in consequence of complaints made to him, by the Inspector of Police who sought to bring about a reconciliation. The plaintiff insisted on the defendant's coming back to Ponmany's house while the defendant invited him to come to her dotal house. In the course of the discussions at the Police Station the Inspector says that the defendant addressed her husband as follows:—"Why don't you come to my house, have a cup of tea and then take me to your house?" 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; but the husband wanted the wife to come to his house while the wife wanted the husband to come to her house.

The only question is whether the learned District Judge is right in the conclusion which he has formed that the facts establish malicious desertion on the part of the defendant. "Malicious desertion" is defined by a number of authorities, but it is sufficient for the purpose of this case to cite from the case of *Boyer v. Boyer*¹ which defines "malicious desertion" as the wilful absenting himself or herself, by one spouse, from the society of the other, against the desire of the latter, with the deliberate intention of abandoning conjugal rights. It is necessary that the deserter must actually and wilfully bring to an end the existing state of co-habitation with the deliberate purpose of abandoning conjugal society (*James v. James*²). Now when one looks at the evidence in the light of the above definitions of malicious desertion the defendant's departure from Ponmany's house in November 1958 is not malicious desertion.

It would appear that in July 1958 the plaintiff and the defendant had arranged to move into their dotal house. They were looking forward to going there. In one of her letters to the plaintiff on 21st July 1958 (P13) the defendant wrote, "The portion of the house as well as the compound has been divided. Therefore you need not worry about anything. It is better if we shift to that house." In a post-script she added, "Anton is packing his little suit case to shift to that house." As stated above the plaintiff's disapproval of the division and his obsession

¹ 15 *Natal Law Reports* 124.

² 22 *Natal Law Reports* 265.

about the defendant's grand-aunt Ponnammah stood in the way of the fulfilment of this arrangement. The plaintiff's attitude is shown in the following statements made in the course of his evidence :—

“ If it was partitioned satisfactorily I would have gone and lived with the defendant. At the meeting of Inspector Moorthy, if the division of house had been done satisfactorily I would have acceded to the request of the defendant and gone there.”

“ I went to the house and found that the partition was not satisfactorily done. I do not know whether the Surveyor had been brought there to partition that. If I had got half the house I would have lived with my wife there. It is in those circumstances that I told my wife to come and live with me in Ponmany's house.”

The following answers to questions by the Judge reveal that it was not the defendant but the plaintiff who wanted to abandon conjugal society :—

“ *To Court* : Ponmany's house is there even now. Nobody is occupying that house now.

Q. Is it possible for you Mr. Sunthararasa, in the interests of your children, if the *status quo* is restored, by the lady coming over to Ponmany's house and living there ?

A. No.

Q. You want nothing else than a divorce ?

A. I cannot live with her. It is impossible.

Q. You have lost your patience because your wife has been going against you ?

A. Yes.

I do not make any charge against my wife. By “ going against me ” what I meant was her listening to her father and working to my detriment.

Q. You know that her father is dead now ?

A. All the people there have control over my wife.

Q. Your wife has been very loving towards you ?

A. Yes.

Q. She is not a quarrelsome lady ?

A. She is not.

Q. If anything she is very gentle and very quiet disposition ?

A. Yes.

To Court : I loved her because of these very good qualities.”

These answers reveal the plaintiff's unreasonable attitude. The following further evidence shows how uncompromising he was.

“ It is on 12.11.58 that she finally got away. Thereafter I saw her at the police station and in the presence of Inspector Moorthy I beseeched her to come. I met her at the Chavakachcheri Police

Station on the 16th morning. She had gone to the Police Station on her own and I had gone on my own. I asked her to come back to Nunavil but she refused.

Q. What exactly did she tell you ?

A. I cannot come with you. If at all you come and live with me where I am now.

To Court : That is across the road ?

She did not tell me anything about the ill-treatment of my sister.

Q. What is your position witness now ? Do you want to live with your wife ?

A. It is impossible to live with her. I do not want to live with her.

Q. Why is it impossible ?

A. She is always prepared to go against me and I was unnecessarily getting embarrassed."

It would appear therefore that both parties were anxious to resume their conjugal life. The facts as found by the learned District Judge on this material do not in our view warrant the inference that the plaintiff has established clearly, as is required by law, that the defendant left the house with the intention of bringing the marriage to an end. In fact the plaintiff is the person to blame for the situation in which he found himself. He confessed in the course of his evidence: " Things would have been very different if I had taken a house in Colombo and taken her to Colombo." Even though he realised this he made no attempt to put matters right. He did not offer to take his wife to Colombo away from his parents and sister to whom the defendant objected and with whom she did not get on. Such an offer may have ended the deadlock over the question of their residence. The proper approach to the question of malicious desertion is in our view set out in the following passage from Van Zyl's *Judicial Practice* Vol. II p. 662-663 :—

" The tendency of modern decisions is rightly to look not to one isolated act, or the act of desertion by itself, but to take ' all the circumstances ' into consideration, and to deduce therefrom, if it can reasonably be done, the act of desertion. Of course if there is clear evidence of the refusal of the party to return, it is an act of desertion and the decree must be granted It is a matter very much in the discretion of the Court, and in judging of such conduct every ingredient should be taken into consideration ; such as the pecuniary means and social position of the parties, their habits and customs, the primary cause of the defendant's absence, under what circumstances he or she left, to or from what place, to a great distance or close by, to a foreign country or not, to a civilised country or a barbarous or sparsely populated one, the means of communication, the cause of the continued absence, the correspondence or not

between the parties, the contribution by the one towards the other's support; also the efforts made by either to induce the other to return, or by a husband to induce his wife to follow him, or the means adopted, or steps taken by the innocent party to discover the whereabouts of the other, the unexplained absence, and the defendant's silence."

On the material before us we are unable to accept the submissions of learned counsel for the respondent. In our opinion the conclusion reached by the learned Judge that the evidence established an act of malicious desertion is wrong. The appeal must therefore be allowed.

The defendant asked in her prayer that the plaintiff's action be dismissed and that a decree for separation *a. mensa et thoro* be entered.

The learned counsel for the appellant does not in appeal ask for a *separatio mensa et thoro* as stated in the prayer of the appellant. We therefore set aside the judgment of the learned District Judge and dismiss the plaintiff's action with costs in both Courts.

HERAT, J.—I agree.

Appeal allowed.
