

1961

Present : Sansoni, J. and Tambiah, J.

N. J. CANEKERATNE, Appellant, and
MRS. R. M. D. CANEKERATNE, Respondent

S. C. 139—D. C. Colombo, 3732/D

Divorce—Consensual separation of spouses—Malicious desertion thereafter—Proof—Relevancy of conduct of parties pending action.

A consensual separation between husband and wife can change its quality and malicious desertion can supervene if an *animus deserendi* supervenes.

When either spouse has made an offer to resume cohabitation after a separation has taken place, a rejection of it by the other will turn him or her into a deserter.

Divorce should not be granted while there remains a hope of reconciliation. The conduct of the parties up to and including the time of the trial is relevant to the question of malicious desertion.

APPEAL from a judgment of the District Court, Colombo.

Colvin R. de Silva, with M. L. de Silva, for the Defendant-Appellant.

C. Ranganathan, with S. C. Crossette-Thambiah and K. Ilayperuma, for the Plaintiff-Respondent.

Cur. adv. vult.

May 17, 1961. SANSONI, J.—

In this action brought by the wife who claimed a divorce on the ground of malicious desertion, the husband counter-claimed a divorce on the same ground. After a lengthy trial, the learned District Judge

decided in favour of the plaintiff and granted her prayer : he also gave her the custody of the two children of the marriage. The defendant has appealed and we have heard counsel on both sides fully. In view of the order which we propose to make, we refrain from expressing our opinions on the questions of fact which are in issue between the parties ; but as we are setting aside the judgment of the learned Judge it is necessary that we should indicate our reasons for doing so.

The parties were married on 20th December, 1950 and they separated on 18th December, 1954. On that date the husband, taking the elder child with him, moved into his parents' house, leaving his wife and the younger child in the flat which had hitherto been their matrimonial home. This was done in consequence of an arrangement made between the lawyers of the respective parties, and was intended to last only until the difficulties which had arisen between them were settled. Thereafter letters passed between the lawyers, in which the grievances of the respective spouses were set out, with a view to effecting a reconciliation.

At an early stage Mrs. C. B. E. Wickremasinghe, who knew both parties, made some efforts to bring about a settlement, but it seems fairly clear that the parties preferred to deal with the matter either directly with each other or through their lawyers. The defendant certainly does not appear to have taken kindly to Mrs. Wickremasinghe's intervention, and even the plaintiff, to judge by the letter P. 50 dated 4th January, 1955, written by her proctor, was not eager to avail herself of this lady's services. Anyway, Mrs. Wickremasinghe dropped out of the picture in February, 1955, after forming a definitely uncomplimentary opinion about the defendant. The learned Judge has laid much stress on Mrs. Wickremasinghe's evidence, and this has in turn led him to form an unfavourable opinion of the defendant. It might have been better if the learned Judge had paid less attention to Mrs. Wickremasinghe's efforts to bring about a settlement.

On the other hand we think that the learned Judge has paid insufficient attention to the letters written by the lawyers. They undoubtedly throw light on the question as to why a reconciliation was not effected. He has practically ignored them, although a careful perusal of them would show how the points in dispute were being narrowed, and how efforts were made to iron out the differences which had arisen. They seem to us to give a true picture of the negotiations for a settlement, and to contain a full and accurate record of those negotiations.

After the lawyers desisted from trying to settle this dispute, Mr. I. S. de Saram, at the plaintiff's request, interviewed the parties in November and December, 1955. Since this action was filed in March, 1956, Mr. de Saram's evidence was clearly of importance ; but it has not received adequate attention in the judgment under appeal.

Even though the separation which took place on 18th December, 1954 was consensual, it can change its quality and malicious desertion can supervene if an *animus deserendi* supervened. It is the case of either party that the other entertained such an *animus*. To decide this question it was necessary to ascertain who was responsible for the failure of the attempts to bring about a reconciliation. We think that the learned Judge has failed to give careful consideration to this question.

When considering this question, it should also be remembered that a spouse may offer to resume cohabitation after a separation has taken place, but it is for the Court to decide whether the offer is genuine. It is only genuine if there is "a fixed and settled intention to offer a resumption of marital life under reasonable conditions"; and it will not be a fixed and settled intention if it is a mere "fluctuating desire to resume cohabitation". When either spouse has made such an offer, a rejection of it by the other will turn him or her into a deserter. With these matters in mind, the learned Judge should have considered carefully why the parties are still living apart. The case of both sides must receive equal consideration before one or the other spouse is held to be in desertion. We are not satisfied that the learned Judge has paid sufficient attention to these aspects of the law.

In sending this case back, we also wish to point out that the theory of our law has always been that "divorce should never be granted while there remains a hope of reconciliation". While we have not adopted the South African procedure which prescribes that there should be a preliminary order for restitution of conjugal rights failing compliance with which only is a decree for divorce granted, or the original practice under which two separate and distinct actions had to be brought, it is correct to say that the conduct of the parties up to and including the time of the trial is relevant when the Court has to decide who is to blame. Certainly up to the stage of entering decree nisi it is the duty of each party to provide a reasonable opportunity for a resumption of married life, and the party who deliberately and unreasonably refuses to accept that opportunity will be guilty of malicious desertion.

We therefore set aside the judgment of the learned Judge. We regret that the parties should have to undergo the harassing experience of a fresh trial, but we cannot see any other way out of this unfortunate situation. We make no order as to costs, either of the appeal or of the proceedings in the lower Court.

TAMBIAH, J.—I agree.

Sent back for fresh trial.