1951 *Present :* **Gratiaen J. and Gunasekara J.**

V. R. SINNATHAMBY, Appellant, *and* ANNAMMAH, Respondent

S. C. 60—D. C. Jaffna, 558

Divorce—Malicious desertion—Proof—Mutual aversion to marital relations—Is there constructive malicious desertion ?

There were many disputes between a husband and his wife because the wife insisted that her brother should remain in the house contrary to the desire of the husband. There was evidence that the husband was assaulted on two occasions by the wife's brother and that, on the second occasion, the husband left the home.

Held, that in the circumstances the husband's departure from the home did not constitute malicious desertion on his part.

Further, the wife claimed divorce from her husband on the ground of constructive malicious desertion " in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties ". She admitted, however, that she herself would not have agreed to sexual intercourse.

Held, that the legal concept of constructive malicious desertion was not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained.

APPEAL from a judgment of the District Court, Jaffna.

C. Renganathan, with *A. Nagendra* and *E. B. Vannitamby*, for the defendant appellant.

No appearance for the plaintiff respondent.

Cur. adv. vult.

July 27, 1951. GRATIAEN J.—

The plaintiff and her husband the defendant are both retired members of the teaching profession. They married in January, 1920, taught at the same school, pooled their salaries for their joint benefit, and admittedly lived happily together for at least 19 years. By this time their ages were 42 and 46 respectively. It was a childless marriage but later, apparently, they adopted a son called Jayadeva who was at the time of the trial being educated in Colombo.

It cannot be pretended that the marriage was not punctuated by occasional quarrels followed by the usual reconciliations. The wife would complain that her husband was extravagant. She would sometimes complain that he drank rather too much. All that it is necessary to point out in this connection is that there is such a thing as " give and take " in any matrimonial home, and that the law does not recognise such lapses as giving rise to a cause of action for divorce. Besides, the allegations to which I have referred, such as they were, have clearly been exaggerated. The plaintiff herself called as a witness the parish priest who almost invariably helped them to smoothe over their differences. He said, in answer to a question put to him by the learned Judge, that the defendant was " not addicted to liquor ". With regard to the allegation that the defendant was unreliable in matters of finance, he seems at any rate to have been regarded as a suitable person to be entrusted with the responsibilities of Treasurer of the Parish Church.

In 1942 the position deteriorated. This circumstance synchronised with the arrival in the matrimonial home of the plaintiff's younger brother Daniel. It is common ground that from that time there were many disputes between the parties because the defendant demanded that Daniel should take up residence elsewhere, while the plaintiff was adamant that he should remain where he was. Admittedly, Daniel was prone to the thoroughly nasty habit of carrying tales to the plaintiff about the alleged " goings on " of her husband in the village. The defendant says that this idle gossip was entirely without foundation. Daniel did not give evidence on the point, so that the tales which Daniel conveyed have not been substantiated. Nevertheless the learned Judge appears to think that they were probably true merely because the plaintiff at any rate believed them.

In 1943 Daniel assaulted the defendant, who prosecuted him in the Magistrate's Court at Mallakam. The proceedings were later withdrawn at the plaintiff's request, and Daniel for sometime left the home in which he had been such an unwelcome guest to the master of the house. Later,

however, he returned and the troubles and gossip started all over again. The learned Judge seems to have taken the view that it was unreasonable conduct on the part of the defendant to object to giving shelter to a brother-in-law who delighted in carrying tales about his host to his host's wife. It is a matter of opinion, I suppose. For myself, I think that any man would reasonably have regarded such a situation as quite intolerable, and that any woman who did not agree to send away a brother so addicted to inquisitiveness was only asking for trouble. In 1945 the defendant left his home by way of protest. There was another reconciliation at the instance of the parish priest. Until June, 1949, husband, wife and brother-in-law lived together, after a fashion, under the same roof. But during this final period the husband spent most of his time in philosophic detachment in a separate room of his own. He now occupied the position of an unwanted guest himself rather than the master of his own household.

The culminating episode took place on 29th June, 1949. On that day the adopted son Jayadeva had sent an urgent telegram to the defendant from Colombo. A postman took it to the matrimonial home at a time when only Daniel and the plaintiff were in. They refused to accept it. Later in the day the defendant was informed of this incident by the postman. He was naturally incensed, and remonstrated with Daniel and the plaintiff, whereupon he was assaulted by Daniel. The plaintiff complains that the defendant finally left the home after this incident. I really do not know what else a man in his position could have been expected to do.

The evidence of the parish priest is to the effect that on more than one occasion after this incident the defendant had expressed his willingness to resume cohabitation with his wife provided that Daniel, who by now had twice laid hands on him, would remove himself from the scene. This condition was rejected by the plaintiff. Instead, she sued him on 15th August, 1949, for a decree of divorce *a vinculo matrimonii* upon two causes of action.

The second cause of action, which can more conveniently be disposed of at this stage, alleges that the defendant "maliciously deserted" the plaintiff on 29th June, 1949, after what I would refer to as the "telegram incident". The learned Judge's findings on this issue are in accordance with the facts which I have already described. I shall quote the relevant passage of the judgment appealed from :—

> "There remains the question whether the defendant finally left the plaintiff in June, 1949. This is connected with the incident of the telegram. Here too assuming that the defendant is speaking the truth in regard to the incident of the telegram and that the plaintiff and Daniel spitefully refused to accept the telegram and deliver it to him I am inclined to think that there was a sufficient ground for the defendant to take the initiative for a quarrel. The evidence of the Kirama Vidane who inquired into the respective complaints of the parties shows what either party had to say. Perhaps the defendant himself got the worse of the quarrel and it was this reason that compelled

him to leave the house finally. He may have considered that discretion was the better part of valour. I am satisfied that the defendant never came back to the plaintiff after the incident of June, 1949, and that he did so with a view to leave the plaintiff alone."

In another part of the judgment the learned Judge says with reference to Daniel's continued presence in the house in the combined role of unwelcome guest and gratuitous informant :—

"If in the course of these troubles Daniel did use violence on the defendant, the defendant was himself to blame if he got the worse of it".

I am content to say that on the *facts* relating to the second cause of action, the learned Judge was clearly not entitled to hold that *in law* the defendant had maliciously deserted his wife.

There remains for consideration the plaintiff's first cause of action, which alleges, according to issue (3) as framed by counsel who appeared for her at the trial, that the defendant was "guilty of constructive desertion since 1939"—i.e., no less than 10 years before the institution of this action—"in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties".

I should have been inclined to regard this allegation as ambiguous except for the fact that it was clearly understood by the parties, their respective counsel, and by the learned Judge himself as the complaint of a frustrated female spouse that, after 19 years of connubial happiness, her husband had wilfully and maliciously ceased to have sexual relations with her. It is not necessary to decide whether such an allegation, if true, could by itself support a charge of *constructive* malicious desertion—and whether relief in such a situation would in any event be available 10 long years after the alleged cause of action had first accrued. All that I need say is that the plaintiff herself has by her own evidence rendered academic any legal issue which might have arisen from this aspect of the case. I shall quote three passages of what she said :—

"*Q.* Did the defendant fail to have marital relations with you after 1939 ?

A. We had no intercourse after 1939.

Q. After 1939 did the defendant request you for marital intercourse ?.

A. I have no recollection of his having asked me.

Q. Why did he keep away like that ?

A. He did not like me so he did not ask".

. . . . . .

Q. Do you like the defendant ?

A. Now I have no love for him.

Q. From when was that ?

A. From 1939.

Q. Have you ever asked him after 1939 to have sexual intercourse with you ?

A. No.

Q. You did not desire it ?

A. I did not like it.

To Court.

Q. You did not like it ?

A. Yes.

Q. Is it because you did not want it or you did not ask for it ?

A. I did not like him. I hated him.

Q. So that even if he had asked you you would have refused ?

A. He did not ask. Even if he did I would not have consented ".

. . . . . .

Q. Since 1939 if the defendant had invited you affectionately to have intercourse with him would you have agreed ?

A. No."

In spite of these very frank admissions, the learned Judge took the view that constructive malicious desertion was established against the defendant because " the plaintiff's attitude of mind which she explained at the trial is not relevant to this particular issue, for the only question which arises is whether the defendant intentionally ceased to cohabit with her ". Once again, I am content to say that, in my opinion, the legal concept of constructive malicious desertion is not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained.

In my opinion the judgment appealed from should be set aside, and I would make order dismissing the plaintiff's action. As the evidence recorded in certain incidental proceedings discloses the fact that the plaintiff is possessed of property of her own, I think that this is a case in which she should be ordered to pay the defendant's costs both in this Court and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.