1963 *Present :* **Sansoni, J., and L. B. de Silva, J.**

G. GUNAWATHIE DE SILVA, Appellant, and **H. K. O. M. RAJAPAKSA,** Respondent

S. C. 541-D. C. Galle, 2513/X

Divorce-Malicious desertion-Quantum of evidence,

Plaintiff sued his wife for a divorce on the ground of malicious desertion. The evidence, however, showed that the defendant had no objection to cohabiting with the plaintiff and that in fact intercourse took place up to almost the very day of the alleged final act of desertion. There was no proof of intention on the part of the defendant to bring the marriage to an end.

Held, that there was no malicious desertion. As there was no desertion at all before the action was filed, the fact that at the trial the defendant refused to go back and live with the husband was not material.

APPEAL from a judgment of the District Court, Galle.

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

W. D. Gunasekera, with K. Jayasekera, for the Plaintiff-Respondent.

Cur. adv. vult.

March 14,1963. **L. B. DE SILVA, J.-**

The plaintiff-respondent sued the defendant-appellant for a divorce on the ground of malicious desertion. The parties were married on 4th February, 1955 and two children were born to them before this action was filed and their third child was born on 2nd September, 1959 pending this action, which was filed on 25th March, 1959.

The plaintiff alleged in his plaint that they lived as husband and wife up to 22nd November, 1958 when the defendant left him. He invited the defendant on several occasions to resume conjugal relations and to reside with him at his house but the defendant maliciously and without good cause refused to do so and on 31st January, 1959 finally refused to live with him and repudiated the marriage contract. The plaintiff was living with his parents at his parental home at Ratgama.

The defendant denied that she had maliciously deserted the plaintiff. In her answer she alleged that she left the plaintiff's house where they were living, about July 1958 and came to her parental home in Kalupe for her second confinement. The second child was born at a Nursing Home in Colombo on 1st September, 1958. Thereafter she went to her parental home andreturned to her husband's house on 18th January, 1959. They lived together as husband and wife till 11th February, 1959 when the plaintiff threatened to kill her and through fear, she left for her parental home. She expressed her willingness to return to the plaintiff and live with him.

When the case came up for trial on 21st September, 1960, the defendant's Counsel informed Court that the defendant was willing to go back and live with the plaintiff and the plaintiff expressed his willingness to take her back. Then the defendant stated to Court that she was not willing to go back to the plaintiff as he has a child by another woman. The case then proceeded to trial.

The plaintiff gave evidence that the defendant left him on 22nd November, 1958 and went to her house. He went there on four or five occasions and called her back. On 31st January, 1959, he sent a person to the defendant asking her to come back but she did not come back. He made a complaint on that day to the Village Headman of Kalupe that the defendant came to her village about six months earlier and was staying there. He called his wife several times but that she was not willing to come.

Plaintiff's Counsel stated at the bar in the course of this appeal that the statement in the plaint and in plaintiff's evidence that the defendant left the plaintiff on 22nd November, 1958 was a mistake and that the defendant had gone to her home for her confinement in July, 1958. He admitted that it was not unusual for the defendant to go to the parental home before her confinement as she did so for her first confinement too.

In cross-examination, the plaintiff admitted after some evasion, that the defendant came to his house in connection with a wedding. That wedding was on 18th January, 1959. They attended that wedding at Galle together and thereafter they lived together as husband and wife at his house for a few days. Plaintiff stated that she did not stay for more than a week. He further stated that she left his house for no other reason but her wickedness. He asked her to stay but she refused. She called him also to go with her to Kalupe when he asked her not to go.

He further stated that after she left him, she did not come back but she wrote letters to him. None of these letters have been produced by the plaintiff. If they were produced, they would have given the Court a very clear idea of the relations that existed between the parties at this crucial time.

He further stated that he went to Kalupe after the defendant went to her home. He did not want to go to her parental house. He went to her brother's house. Defendant too came there and they lived as husband and wife for one or two days. He called her to come back to his parental house but she refused.

It is quite clear from the plaintiff's own evidence that the defendant had no objection to co-habiting with the plaintiff and that in fact they did co-habit up to almost the very day of the alleged final act of desertion. The person whom the plaintiff alleged he sent to the defendant on Slat January, 1959 to ask her to comeback, has not given evidence in this case.

In Rajeswararanee v. Santherarasa [1(1962) 64 N. L. R. 366.] Basnayake C. J stated at page 369, " 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 home." He further stated at page 371, " 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 this case too, on the plaintiff's own evidence, there was no intention on the part of the

defendant to bring the marriage to an end.

Counsel for the plaintiff-respondent relied on the decision in Whitney v. Whitney [(1951) 1 A. E. R. p. 301.]. In that case, Willmer, J. after consideringthe previous authorities, held ' I am satisfied that, on a true view of the law, notwithstanding the periodical visits by the husband for the purpose of effecting reconciliation, and notwithstanding the fact that intercourse, took place during these visits, in law the desertion started by the wife in December, 194-5, has never ceased to run, but continued running for a period exceeding three years immediately preceding the presentation of the husband's answer".

At page 304, he also cited Lord Merrivale who said that desertion was a withdrawal, not from a place but from a state of things-Pulford v. Pulford[3 (1923) P. 18 at p. 21 and 128 L. T. 256.]. He also said, "At least, a resumption of co-habitation must mean resuming a state of things-that is to say, setting up a matrimonial home together ".

In the present case, the plaintiff has completely failed to prove that the defendant deserted him on 31st January, 1959 or at any time before he filed this action. In these circumstances, the decision in Whitney v. Whitney does not help the plaintiff. The fact that the defendant refused to go back to the plaintiff and to live with him when the plaintiff accepted the offer made by defendant's Counsel at the commencement of the trial in this case, cannot help the plaintiff in this case.

If desertion by the defendant before action was filed had been proved in this case, the fact that she refused to go back and live with him, would be a strong circumstance in considering if the desertion was malicious in the sense that there was a deliberate intention of abandoning conjugal rights, at the time of the desertion.

It is not necessary to consider the defence put forward at the trial, which was rejected by the learned District Judge. Even if that defence is considered, it does not help the plaintiff's case.

For the reasons set out, we hold that the plaintiff has failed to prove that the defendant maliciously deserted the plaintiff on or about 31st January, 1959. We, therefore, set aside the judgment and decree of the District Court and dismiss plaintiff's action with costs in both Courts.

SANSONI, J.-I agree.

Appeal allowed.

- End -