

PUSHPAKUMARA
v
MARMET AND ANOTHER

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. NO. 1010/99F
D.C. BALAPITIYA NO. 1582/D
JULY 19,
AUGUST 19, AND
SEPTEMBER 2, 2002

Divorce – No specific issue on malicious desertion – Is the plaintiff entitled to succeed ? – Civil Procedure Code, sections 146 and 146(2) – Evidence Ordinance, section 114 – presumption of sexual relationship – Adultery – Proof of same – Ingredients of the offence.

The plaintiff-respondent instituted action seeking a divorce against the 1st defendant-appellant on the ground of malicious desertion and adultery and sought a certain sum as permanent alimony and further sought damages from the 2nd defendant-respondent for breaking down her marriage by her committing adultery with the 1st defendant-appellant.

The trial court held with the plaintiff-respondent. It was contended that court could not have granted a divorce on the ground of malicious desertion as there was no issue framed on malicious desertion and there was no evidence to establish adultery beyond reasonable doubt.

Held :

- (i) Issues are framed under section 146. Under section 146(2) it is incumbent on court to ascertain upon which material propositions of fact or of law that the parties are at variance, and shall proceed to record the issues on which the right decision of the case appears to the court to depend.
- (ii) There is no legal requirement that the Issues so framed should expressly and specifically refer to legal terms (grounds) on which the relief is sought.
- (iii) Despite the fact that the legal term malicious desertion is not referred to in the said issue, however the issue raises the factual question as to whether the 1st defendant's conduct amounted to constructive malicious desertion.

- (iv) A presumption could be drawn that a sexual relationship exists between married parties under section 114 of the Evidence Ordinance.
- (v) As essential ingredient of the matrimonial offense or adultery is that it involves sexual intercourse with a person out of wedlock.
- "Direct evidence or eye witness evidence of sexual intercourse is very rare in matrimonial actions."
- (vi) It is a well recognized principle of law that direct evidence of adultery is not necessary to prove adultery. It is well accepted that an inference of an act of adultery could be drawn from the circumstances of each case.

APPEALS from the judgement of the District Court of Balapitiya.

Cases referred to :

1. *Fernando v Marshall* – 2 NLR 257
2. *Ebert v Ebert* – 22 NLR 310
3. *Allen v Allen & Bell* – (1894) LR CA Pro. 248 at 251-252
4. *Lovenden v Lovenden* – Hagg Cons page 2

Wijayadasa Rajapakse, P.C. with *Kapila Liyanagamage* for 1st defendant-appellant and 2nd defendant-appellant.

Kuwera de Zoysa with *S. Fonseka* for the 2nd defendant-respondent and 2nd defendant-appellant.

J.C. Weliamuna with *S. Jayawardena* for plaintiff-respondent in both matters.

Cur.adv.vult

October 25, 2002

DISSANAYAKE, J.

The plaintiff-respondent instituted this action seeking a divorce *'vinculo matrimonii'* against the 1st defendant-appellant on the ground of malicious desertion and adultery and seeking a sum of Rs. 2,000,000/- as permanent alimony from the 1st defendant-appellant and a sum of Rs.200,000/- from the 2nd defendant-respondent as damages for breaking down her marriage by her committing adultery with the 1st defendant-appellant. 01

The 1st defendant-appellant and the 2nd defendant-respondent by their separate answers whilst denying the averment in the plaint, prayed for dismissal of the action. 10

The case proceeded to trial on fifteen issues and the learned District Judge entered judgment in favour of the plaintiff-respondent granting a divorce *a vinculo matrimonii* and awarding a sum of Rs. 1,000,000/- as permanent alimony and a sum of Rs. 10,000/- as damages against the 2nd defendant-respondent.

It is from the aforesaid judgment that the 1st defendant-appellant preferred this appeal and the 2nd defendant-respondent preferred appeal bearing No. CA. 1011/99(F).

Both appeals were taken up together.

In the argument of the appeals before this Court learned President's Counsel appearing for the 1st defendant-appellant contended that the learned District Judge erred in entering judgment in favour of the plaintiff-respondent. 20

The contention of learned President's Counsel was based on the following grounds :

(a) the learned District Judge misdirected himself in granting a divorce on the ground of malicious desertion despite there being no issue framed on malicious desertion;

(b) In the absence of evidence to establish adultery beyond reasonable doubt, the learned District Judge misdirected himself in entering judgment in favour of the plaintiff-respondent on the ground of adultery. 30

It was the position of the plaintiff-respondent who was a German citizen, that she came to Sri Lanka in April 1991 for a short holiday of 3 weeks and she met the 1st defendant-appellant who was working as a steward in a tourist hotel. They became close friends. After her brief holiday the plaintiff-respondent left for Germany. She came back once again for a short holiday, either at the end of 1991 or the beginning of 1992 and the 1st defendant-appellant arranged for her to stay in a small tourist hotel at Induruwa, which was about 10 kilometers away from the Hotel Long Beach where the 1st plaintiff-appellant was employed as a steward. 40

The 1st defendant-appellant visited the plaintiff-respondent frequently resulting in a regular sexual relationship. They travelled extensively in Sri Lanka and visited many a tourist destination.

According to the plaintiff-respondent she divulged details of her personal life to the 1st defendant-appellant including the fact that she was married before and had a child and that she lost both her husband and the child as a result of an accident. She also divulged that she lost both her parents and that she inherited their property. 50

The plaintiff-respondent wanted to purchase a house and property in Sri Lanka for her to stay whenever she visited Sri Lanka on holiday. The 1st defendant-appellant also indicated his desire to run a tourist hotel at the house she planned to buy.

At the end of her four month holiday the plaintiff-respondent left once again to Germany.

She returned shortly to Sri Lanka and rented out a house at Induruwa where they lived together for about 6 months.

Thereafter she left for Germany and took the 1st defendant-appellant with her having spent for his air ticket etc. The 1st defendant-appellant stayed at the plaintiff-respondent's apartment in Germany for about 2 months and all his expenses were met by the plaintiff-respondent. After 2 months, on his journey back to Sri Lanka he met another German tourist by the name of Carmen Spath travelling in the same plane with whom he commenced yet another romantic relationship during her short stay here. 60

The 1st defendant-appellant was taken to Germany once again by the plaintiff-respondent at her expense after her next visit. During this period the 1st defendant-appellant spent more time with Carmen Spath, without arousing the suspicion of the plaintiff-respondent. 70

Carmen Spath gave birth to a child fathered by the 1st defendant-appellant and the child was named Kevin Spath. By this time the 1st defendant-appellant had returned to Sri Lanka. By and by these matters came within the knowledge of the plaintiff-respondent.

The plaintiff-respondent came back to Sri Lanka in 1994 and purchased a house at Induruwa and a threewheeler both in the 1st defendant-appellant's name and they lived in that house until 1995. Thereafter on the 4th of May 1995 they registered their marriage and became lawful husband and wife. 80

During subsistence of their marriage the 1st defendant-appellant had met the 2nd defendant-respondent who was a younger woman and having got infatuated by her, married her on 22.6.1995 as evidenced by the Certificate of Marriage (P2).

The plaintiff-respondent was away in Germany at this time. When she came back on 24th August 1995 she found that the 1st defendant-appellant had contracted another marriage and was living with the 2nd defendant-respondent at his mother's house. The plaintiff-respondent took up the position that after they became intimate lovers in 1991, the 1st defendant-appellant was solely dependent on her for his living. This conduct of the 1st defendant-appellant described in her own words was that he was dependent on her "to purchase things from his pair of spectacles to his underwear" and he lived virtually on her money from 1991 onwards. She had taken him to Germany on two occasions at her expense.

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The position of the 1st defendant-appellant was that his relationship with the plaintiff-respondent commenced as a response to overtures made by her and her insistence to have regular intercourse with him.

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According to the 1st defendant-respondent after their marriage and when they were resident in the house at Induruwa, the plaintiff-respondent was visited by a person named Peter Oliver Brittolli with whom she has had sexual relations before while they were living in Germany. Despite her undertaking to stop this affair she had continued heedless according to the 1st defendant-appellant. Over this displeasure started between them resulting in a quarrel after which he was ordered to leave the house by the plaintiff-respondent.

After some time the plaintiff-respondent had left for Germany. It was the position of the 1st defendant-appellant that after he left her he met the 2nd defendant-respondent and married her in June 1995.

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The 1st defendant-appellant stated that since he did not have a house of his own he did not consummate the second marriage. He stated that he consummated his marriage to the 2nd defendant-respondent only in 1997. He denied that he had a sexual relationship with Carmen Spath.

Under cross-examination the 1st defendant-appellant conceded the following matters :

- (a) that the plaintiff-respondent told him that her former husband and child had died in 1970 as a result of an accident; 120
- (b) that the house at Induruwa was bought by the plaintiff-respondent in the 1st defendant-appellant's name;
- (c) that Case No. 1800 was pending and the said case was instituted by the plaintiff-respondent on the basis that the 3-wheeler was bought by her in the name of the 1st defendant;
- (d) that the plaintiff-respondent took him to Germany along with her and that he lived with her in Germany;
- (e) that while in Germany that he had lived with Carmen Spath and had a child by her; 130
- (f) that letters P6 to P50 and P53 were written by him to the plaintiff-respondent and letters P51 to P52 were written by him to witness Roshan and another friend.

The 1st defendant-appellant's testimony in evidence in chief to the effect that the plaintiff-respondent did not tell him that she was married before and had a child and that she lost them both as a result of an accident was contradictory to his evidence under cross-examination.

His evidence that he purchased the house at Induruwa with funds provided by his father and making use of his savings was belied by his admission in cross-examination where he admitted that it was the plaintiff-respondent who bought the house in his name. 140

His denial in the evidence that he received a Court order (P32) from a German court to pay maintenance in respect of the child of Carmen Spath and that he sought the assistance of the plaintiff-respondent is contradicted by his letter produced marked P33 in which he had requested the plaintiff-respondent to translate the order of the court and sent it to him. 150

The evidence of the 1st defendant-appellant that the conduct of

the plaintiff-respondent in carrying on a sexual relationship with Peter Oliver Brittolli was the cause of the breakdown of the marriage is belied by the contents of letters P6 to P50 and P53 sent to the plaintiff-respondent. In none of these letters has the 1st defendant-appellant made this accusation against the plaintiff-respondent. All these letters have been expressions of unreserved love for the plaintiff-respondent.

On the contrary in letter P52 written by the 1st defendant-appellant to witness Roshan about his relationship with Carmen Spath he has stated thus: "As I know that Teena (the plaintiff-respondent) loves me, that is why I am sad, as I have committed a big offence....." 160

"Roshan I have played out Teena. What to do sometimes I feel sorry. Teena has done everything to me.... I beg the pardon from God for all my bad work."

Despite the overwhelming evidence available in this case which establishes constructive malicious desertion the question arises whether in the absence of an issue specifically using the term 'constructive malicious desertion' the plaintiff-respondent is entitled to succeed on that ground. 170

It is apparent that issue No.2 which is to the effect that when the plaintiff-appellant returned to Sri Lanka on 25.08.1995 the 1st defendant-respondent chased her out stating that he was living as man and wife with the 2nd defendant-respondent had put constructive malicious desertion as an issue though not specifically stated.

Despite the fact that the legal term malicious desertion is not referred to in the said issue however the issue raises the factual question as to whether the 1st defendant-respondent's conduct amounted to 'constructive malicious desertion'. 180

Issues are framed under section 146 of the Civil Procedure Code. Under section 146(2) it is incumbent on court to ascertain upon which material propositions of fact or of law that the parties are at variance, and shall proceed to record the issues on which the right decision of the case appears to the Court to depend.

Therefore it appears that there is no legal requirement that the

issues so framed should expressly and specifically refer to legal terms (grounds) on which the relief is sought.

In the case of *Fernando v Marshall*⁽¹⁾ the plaintiff instituted an action seeking a declaration of title to a parcel of land and to recover possession of it. The plaintiff averred possession upwards of ten years of the land on the part of the plaintiff and his predecessors in title. The issues framed and agreed to at the trial were as to such possession. They did not expressly refer to a decree under the Prescription Ordinance. Bonser, CJ held that the omission to expressly refer to the Prescription Ordinance was not prejudicial to the defendant and as the plaintiff had discharged his burden on the issues as to possession he is entitled to the parcel of the land he claimed.

Therefore I am of the view that issue No. 2 has adequately set out the issue of constructive malicious desertion on the part of the 1st defendant-appellant. In any event even if an issue using the specific term "constructive malicious desertion" has been framed the evidence led is adequate to feed the issue and no prejudice has been caused to the defendant-appellant.

The plaintiff-respondent relied on the following items of evidence to establish adultery between the 1st defendant-appellant and the 2nd defendant-respondent :

- (a) The admission in evidence by the 1st defendant-appellant that he entered into a marriage with the 2nd defendant-appellant on 22.06.1995. The marriage certificate produced (P2) too establishes this.
- (b) The admission in evidence by the 2nd defendant-appellant of this fact.
- (c) The evidence of the plaintiff-respondent that she saw the 2nd defendant-appellant at the 1st defendant-appellant's mother's house when she came back from Germany.
- (d) The admission in evidence by the 2nd defendant-appellant that she got to know each other in June 1994 and in early 1995 they decided to marry.

The only inference that can be drawn from the above men-

tioned items of evidence is that the 1st defendant-appellant started cohabitation with the 2nd defendant-appellant soon after their marriage on 22.06.1995. The version of the 1st defendant-appellant and the 2nd defendant-respondent that they started cohabitation only in January 1997 is unacceptable.

A presumption could be drawn that sexual relationship exists between married parties, under section 114 of the Evidence Ordinance.

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Section 114 of the Evidence Ordinance provides as follows :

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of a particular case."

Unless it is rebutted by cogent evidence the presumption of a sexual relationship between married parties could be drawn by a Court.

The next question that has arisen is whether on the evidence led in this case has the plaintiff-appellant established the offense of matrimonial adultery.

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An essential ingredient of the matrimonial offence of adultery is that it involves sexual intercourse with a person out of wedlock. Direct evidence or eye witness evidence of sexual intercourse is very rare in matrimonial actions.

It is a well-recognized principle of law that direct evidence of adultery is not necessary to prove 'adultery'. It is well accepted that an inference of an act of adultery could be drawn from the circumstances of each case.

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In the case of *Ebert v Ebert*⁽²⁾ where in a maintenance action the refusal of the wife to live with the husband on ground of his adultery it was held that to establish adultery it is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place. The fact may be inferred from circumstances which lead to it by fair inference as a necessary conclusion, Schneider, AJ at page 312 stated thus, "To lay down any general

rule, to define what circumstances would be sufficient and what are insufficient upon which to infer the fact of adultery is impossible".

Schnieder, A.J. at page 312 went on to quote with approval the following from the judgment of Lopes, L.J. in the case of *Allen v Allen and Bell*⁽³⁾ at 251-252. 260

"It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place because, to use the words of Sir William Scot in *Lovenden v Lovenden*,⁴ "If it were otherwise, there is not one case in a hundred in which that proof would be attainable: It is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion; and unless this were so held, no protection whatever could be given to marital rights". 270

Inherent in the fact of the 1st defendant-appellant contracting a subsequent marriage with the 2nd defendant-respondent on 24.06.1995 is the culpability of the 1st defendant-appellant in committing malicious desertion constructively in relation to the plaintiff-respondent.

Taking into consideration the totality of the evidence, which reveals the conduct of the 1st defendant-appellant, he has not only committed adultery but also had wilfully created a situation for the plaintiff-respondent to leave her matrimonial home. 280

Therefore I am of the view that the 1st defendant-appellant is guilty of both malicious desertion and having committed adultery with the 2nd defendant-respondent, and the plaintiff-respondent is entitled to a decree of divorce *a vinculo matrimonii*.

Learned counsel appearing for the 2nd defendant-appellant in Appeal No.1011/99 (F) contended that the learned District Judge erred in entering judgment against the 2nd defendant-appellant merely because she contracted a marriage with the 1st defendant-respondent on 24.06.1995. He further contended that the learned District Judge did not consider her following evidence : 290

1. that the 2nd defendant-appellant was not aware of the first marriage,

2. that the evidence that she did not consummate the marriage till 1977.

It is pertinent to observe that the learned District Judge rejected her evidence that she was not aware of the fact that the 1st defendant-respondent was already married to the plaintiff-respondent and accepted the evidence of Dhammika Roshan who was a close friend of the 1st defendant-respondent and whose wife was a good friend of the 2nd defendant-appellant. The closeness of the friendship between the 1st defendant-respondent and Dhammika Roshan is established by the contents of letter P51 whereby the 1st defendant-respondent had confided in him his confidential details relating to his sexual relationship with the plaintiff-respondent and Carmen Spath. 300

In the backdrop of the evidence of the plaintiff-respondent's testimony that when she came back from Germany in 1996, that she observed that the 1st defendant-appellant had moved out of their matrimonial house taking all his belongings and on her visiting his mother's house that she observed the 2nd defendant-appellant living in his mother's house, was accepted by the learned District Judge after a proper analysis and evaluation of the evidence in the case, to come to the findings that he did come in this case. 310

Despite the plaintiff-respondent claiming Rupees two million as permanent alimony from the 1st defendant-appellant and Rupees two hundred thousand as damages from the 2nd defendant-respondent, the learned District Judge awarded a sum of Rupees One million as permanent alimony as against the 1st defendant-appellant and a sum of Rupees ten thousand as damages against the 2nd defendant-respondent. 320

Having examined the evidence and the judgment, I see no basis to interfere with the judgment of the learned District Judge.

Therefore I dismiss both appeals of the 1st and 2nd defendant-appellants with costs.

SOMAWANSA, J. - I agree.

Appeals dismissed .