

**ANULAWATHIE**  
**v.**  
**GUNAPALA AND ANOTHER**

COURT OF APPEAL  
WIGNESWARAN, J.,  
WEERASURIYA, J.  
C.A. No. 414/94(F)  
D.C. 2325/D, KULIYAPITIYA  
OCTOBER 23, 1997.

*Divorce – Constructive malicious desertion – Review of findings by an Appellate Court – Permanent alimony.*

The plaintiff-appellant instituted action seeking dissolution of the marriage on the ground of constructive malicious desertion, upon his adulterous association with the 2nd defendant-respondent. The action was dismissed.

**On Appeal–**

**Held:**

- (1) It is manifest that the finding of the trial Judge that the plaintiff-appellant had failed to prove constructive malicious desertion stems from the contradictory positions adverted to by the plaintiff-appellant and her father with regard to the specific period of her leaving the matrimonial home.
- (2) The learned District Judge had failed to consider other expulsive circumstances which the plaintiff-appellant had placed before him which culminated in the act of desertion.

Per Weerasuriya, J.

"It is to be observed that when a party seeks a divorce on the ground of constructive malicious desertion what is required to be proved is that, the innocent party was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the other party."

- (3) Sole contention upon which alimony should be quantified is the financial status of the defendant.

**APPEAL** from the Judgment of the District Court of Kuliyaipitiya.

**Cases referred to:**

1. *De Silva v. Seneviratne* – 1981 2 SLR 7.
2. *Wijeratne v. Wijeratne* – 73 NLR 546.

*Chula Bandara* with *D. K. Danapala* for plaintiff-appellant.

*W. Dayaratne* with *Nimal Jayasinghe* for 1st defendant-respondent.

*Cur. adv. vult.*

December 01, 1997

**WEERASURIYA, J.**

The plaintiff-appellant by plaint dated 17.09.1991 instituted action against the 1st defendant-respondent seeking dissolution of the marriage contracted with him on 07.09.1978 on the ground of constructive malicious desertion upon his adulterous association with the 2nd defendant-respondent, for the custody of the children and permanent alimony. The defendant-respondents in their answers filed separately denied the allegations and prayed for the dismissal of the action. The case proceeded to trial on 14 issues and the District Judge by his judgment dated 20.05.1994 dismissed the action. This appeal has been lodged against the aforesaid judgment.

The main ground urged by learned counsel for the plaintiff-appellant in this appeal was that the trial Judge had misdirected himself in coming to a finding that the allegation of constructive malicious desertion has not been proved. He contended further that the trial Judge was in error when he failed to adduce reasons for rejecting the evidence of the plaintiff-appellant and accepting the evidence of Rattarana, her father.

It is manifest that the finding of the trial Judge that the plaintiff-appellant had failed to prove constructive malicious desertion stems from the contradictory positions adverted to by the plaintiff-appellant and her father Rattarana with regard to the specific period of her (plaintiff-appellant) leaving the matrimonial home. The plaintiff-appellant testified that she left the matrimonial home on 07.09.1991, while her father stated that she came to reside in the ancestral home in January 1992, having earlier said as 1991. The trial Judge in the face

of this confusion had disbelieved the plaintiff-appellant on the question of her leaving matrimonial home on 07.09.1991. Rattarana, a cultivator in a remote village could have been confused on the precise date on which his daughter returned home but the question that arises for consideration is, how the trial Judge believed him in preference to the plaintiff-appellant on this crucial matter. There is no justification to reject the evidence of plaintiff-appellant in toto due to a single contradiction *inter se* with regard to the date of leaving the matrimonial home. He had failed to consider other expulsive circumstances which the plaintiff-appellant had placed before him which culminated in the act of desertion.

The trial Judge had not appreciated the fact that all that was placed before him was the evidence led on behalf of the plaintiff-appellant to decide the issues and consequently failed to give due weight to the uncontroverted testimony of the plaintiff-appellant and her witnesses. In the circumstances, there is force in the contention of Counsel for the plaintiff-appellant, that the trial Judge had misdirected himself in coming to a finding that the plaintiff-appellant had failed to prove constructive malicious desertion.

In *De Silva v. Seneviratne*<sup>(1)</sup> it was held that where an appellate Court is invited to review the findings of a trial Judge on questions of fact the principles that should guide it should be as follows:

(a) where the findings on questions of fact are based upon the credibility of witnesses on the footing of the trial Judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the appellate Court that the trial Judge has failed to make full use of his advantage of seeing and listening to the witnesses and the appellate Court is convinced by the plainest considerations that it would be justified in doing so;

(b) that however, where the findings of fact are based upon the trial Judge's evaluation of facts, the appellate Court is then in as good a position as the trial Judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial Judge; and

(c) where it appears to an appellate Court that on either of these grounds the findings of fact by a trial Judge should be reversed then the appellate Court "ought not to shrink from that task".

Having examined the evidence, with great care, it seems to me that the plaintiff-appellant had placed sufficient material to come to a finding on constructive malicious desertion in favour of the plaintiff-appellant. It is to be observed that when a party seeks a divorce on the ground of constructive malicious desertion what is required to be proved is that, the innocent party was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the other party.

In the instant case, there was evidence that the plaintiff-appellant had left the matrimonial home on 07.09.1991, due to the ill-treatment and harassment at the hands of the 1st defendant-respondent consequent upon the assault of the 2nd defendant-respondent by the plaintiff-appellant for staying in the boutique with the 1st defendant-respondent. The uncontroverted testimony of the plaintiff-appellant had been that since the incident of assault on the 2nd defendant-respondent, 1st defendant-respondent harassed her and ill-treated her and even beaten her, making her difficult to continue to live in the matrimonial home until she left the same in desperation to stay with her parents. It also transpired in evidence that the 1st defendant-respondent had failed to maintain the family during this period.

It is to be noted that Tikira who was employed by the 1st defendant-respondent to attend to the work at the rice mill had testified that the 2nd defendant-respondent stayed in the boutique, did the cooking and even helped him in the work of the rice mill. The ground on which the plaintiff-appellant had relied for a divorce was on the basis of constructive malicious desertion, even though it was disclosed that 2nd defendant-respondent had been living with the 1st defendant-respondent in the same boutique.

Learned trial Judge had ordered that the custody of the two children be given to the plaintiff-appellant. Insofar as the question of alimony is concerned in *Wijeratne v. Wijeratne*<sup>(2)</sup> it was held that sufficient ground must be shown before the court can award as permanent alimony, a sum in excess of the amount claimed by the wife as alimony pendente lite and consequently the plaintiff's claim for a sum in excess

of that awarded as alimony pendente lite was refused. Thus, it would appear that the sole criterion upon which alimony should be quantified is the financial status of the defendant. In the instant case, no evidence had been led to establish the financial status of the 1st defendant-respondent. It was revealed that in case No. 3427 of the Magistrate's Court of Kuliyaipitiya, the 1st defendant-respondent was ordered to pay Rs. 500/- monthly for each child as maintenance which would remain in force in the absence of any order to the contrary in divorce proceedings. Besides it is well to remember that wide discretionary powers have been conferred on the District Court which may if it thinks fit, upon pronouncing a decree of divorce order alimony for the benefit of either spouse. Having considered the fact that no evidence had been placed in regard to the financial status of the 1st defendant-respondent and in the absence of an order for alimony pendente lite it would be inappropriate to make an order for permanent alimony for the benefit of the plaintiff-appellant.

For these reasons, I set aside the judgment of the learned District Judge dated 20.05.1994 and enter judgment in favour of the plaintiff-appellant in terms of prayer 'A' and 'B' of the plaint with incurred costs. The plaintiff-appellant will also be entitled to costs of this appeal. Enter Decree Nisi accordingly.

**WIGNESWARAN, J.** – I agree.

*Appeal allowed.*