

NILANTHIE SIRIWARDANE
v
KRISHANTHA

COURT OF APPEAL
SALAM, J.
CA 347/04 (F)
DC TANGALLE 1281/D
JUNE 28, 2005

Constructive Malicious Desertion – Date on which malicious desertion took place not specified – Is it fatal? – Issue raised giving the exact date – Permissibility? – Evaluation and analysis of evidence? – Observations regarding credibility – Warranted?

The District Court granted a divorce in favour of the plaintiff-respondent on the ground of malicious desertion.

It was contended by the defendant-appellant that, the trial Judge has accepted an issue relating to malicious desertion totally outside the pleadings indicating the exact date of desertion, when the pleadings were silent on the 'date' of desertion. It was also contended that, the trial Judge has failed to evaluate and analyze the evidence in the correct perspective.

Held:

- (1) The failure of the plaintiff-respondent to specify the exact date or probable date of desertion is important in the light of the defence raised by the defendant in that she took up the position that she never deserted her husband.
- (2) Since the defendant-appellant has denied the allegation of malicious desertion and made a counter allegation specifying the exact date that the plaintiff chased her out of the matrimonial house, the trial Judge should have been cautious in allowing the plaintiff to introduce the date of desertion for the first time – in the issues.
- (3) The trial Judge has erred himself in not taking into consideration, the balance of probabilities as between the version of the plaintiff and that of the defendant by weighing the evidence relating to malicious desertion and constructive malicious desertion.

Held further:

- (4) The transfer of the title of the matrimonial house to his mother was a ruse adopted by the plaintiff, it is more so when the plaintiff has given it on rent to an outsider, moreover the mother of the plaintiff-respondent has later transferred the rights in the matrimonial house for valuable consideration to an outsider – the day on which it is alleged that the defendant-appellant maliciously deserted him, the house in which they lived as husband and wife had been transferred to his mother and was not available for the occupation of the respondent.

Per Abdus Salam, J.

"Had the learned District Judge addressed his mind as to which version is more probable in the light of the evidence led before him he would certainly not have concluded that the defendant is guilty of malicious desertion – on the contrary, the totality of the evidence indicates constructive malicious desertion of the defendant by the husband".

APPEAL from the District Court of Tangalle.

Cases referred to :

- (1) *Pathmawathie v Jayasekera* 1997 1 Sri LR 248.

Anoma Gunatilake for defendant-appellant.

Mohan Peiris PC with *Widura Ranawaka* for plaintiff-respondent.

July 27, 2007

ABDUS SALAM, J.

This is an appeal from the judgment of the learned District Judge of Tangalle, granting a divorce (*a vinculo matrimonii*) in favour of the plaintiff-respondent (As and when the context so requires hereinafter referred to as the "plaintiff") from the defendant-appellant (hereinafter similarly referred to as the 1st defendant) on the ground of malicious desertion.

It was not contested that the parties entered into the matrimonial bond on 7th September 1995 and that they elected the house belonging to the plaintiff at Medaketiya in Tangalle as their matrimonial home. It was also common ground that the parties were blessed with a son named as Sooriya Krishna born on 23rd of October 1996, by the said marriage.

The plaintiff who is an engineer by profession, left for Japan in October 1997, for purpose of employment and returned to Sri

Lanka on 15 December 2001. The plaintiff claimed that he made remittances at various times, in favour of the defendant, from Japan aggregating to Rs. 2,800,000/- (2.8 million). Upon his return, he claims to have requested from the defendant a part of the money so remitted to enable him to engage in a business. The defendant having refused to accede to the request is said to have fallen out with the plaintiff then avoided payment and thereafter maliciously deserted him.

The plaintiff maintained that subsequently the defendant had come to his residence on several occasions in the company of her brother and threatened to kill him. For purpose of convenience paragraphs 8, 9 and 10th of the plaint are reproduced below as have been pleaded in Sinhala.

8. එසේ ශ්‍රී ලංකාවට පැමිණ රැකියාවක් සොයාගැනීමට උත්සාහ දරන ලද නමුත් සාර්ථක නොවීම නිසා පැමිණිලිකරු විත්තිකාරියට එවන ලද මුදලින් ව්‍යාපාරයක් පටන් ගැනීමට අපේක්ෂාවෙන් ඇයගෙන් මුදල් ඉල්ලා සිටියත් ඇය එය ප්‍රතික්ෂේප කරන ලද අතර, පැමිණිලිකරුට ජීවත් වීමටවත් එම මුදලින් කීයක් වත් ලබා නොදෙන ලදී.

9. ඉන් පසුව විත්තිකාරිය එම මුදල් පැමිණිලිකරුට දීම මඟහැරීමට පැමිණිලිකරු හා අමනාපව ද්‍රාවේශසහගතව අහඹුර ගොස් ඇයගේ දෙමාපියන් සමඟ ජීවත්වේ.

10. ඉන් පසුව පැමිණිලිකරු සහ ඔහුගේ දෙමව්පියන් විත්තිකාරිය කැඳවාගෙන ඒමට උත්සාහ කරන ලද නමුත් එය ප්‍රතික්ෂේප කරමින් පැමිණිලිකරුට දික්කසාද වන ලෙසට දන්වන ලද අතර ඊට අමතරව විත්තිකාරිය ඇයගේ සහෝදරයා සමඟ පැමිණිලිකරුගේ නිවසට පැමිණ ඔහු මරන බවටද තර්ජනය කරන ලද අතර මේ පිළිබඳව පැමිණිලිකරු 2001.01.11 දින නැගල්ල පොලීසියට ද පැමිණිලි කරන ලදී.

It is quite clear from the averments quoted above that the plaintiff had based his cause of action on the malicious desertion of the plaintiff motivated by her desire to avoid payment of money requested by the plaintiff from and out of the remittances made to the defendant from Japan. A glaring omission in the averment regarding the malicious desertion is the failure on the part of the plaintiff to set out as to exact or probable point of time at which the defendant (wife) deserted him. However, the plaintiff maintained that the defendant is guilty of malicious desertion and the matrimonial bond should no longer be regarded as in existence.

On the contrary, the defendant took up the position in her answer that she never deserted the plaintiff. Further answering she maintained the position that on the 31st January 2002, the plaintiff having chased her and the only child of the marriage away, rented out the matrimonial home to an outsider. The defendant further alleged that the plaintiff subsequently sold the house to third party, thus depriving them of the right to have a shelter. Even though the allegation of the defendant tantamount to constructive malicious desertion on the part of the plaintiff, she did not seek a counter divorce. The defendant in her answer only sought a dismissal of the plaintiff's action.

The learned District Judge after trial arrived at the conclusion that the plaintiff has proved the allegation of malicious desertion and that the version of the defendant is unacceptable. Hence, he granted a divorce as prayed for in the plaint and legal custody of the child to the defendant.

It was strongly urged by the defendant that the learned District Judge has erred in coming to the conclusion that the plaintiff has proved the charge of malicious desertion levelled against her. The learned Counsel of the defendant has drawn the attention of court to the pleadings of the plaintiff, where he has failed to specify the exact date or period of the alleged malicious desertion.

As far as the plaint is concerned, admittedly the plaintiff has not specified the date on which he alleges malicious desertion took place nor has he explained the reason as to why he cannot give the date of desertion. The failure of the plaintiff to specify the exact or probable date of desertion is important in the light of the defence raised by the defendant, in that she took up the position that she never deserted her husband.

However, the learned District Judge accepted an issue relating to malicious desertion totally outside the pleadings, as suggested by the plaintiff indicating the exact date of desertion. Even though the said issue has not been objected to by the defendant, it is contended on behalf of the defendant that the learned District Judge has failed to ascertain exactly material proposition of facts on which the parties were at variance.

Learned Counsel of the defendant has adverted to the decision of this Court in *Pathmawathie v Jayasekara* (1), where it was held that though in practice Counsel appearing for the plaintiff or defendant to suggest the issues, it is the prime responsibility of the Judge to frame issues. It is more so, because it is ultimately the Judge who should make a finding and without clear understanding of the dispute and the issue that he has to determine, it would be a most dangerous exercise to embark upon a voyage of discovery. Since the defendant in this case has denied the allegation of malicious desertion and made a counter allegation specifying the exact date that the plaintiff chased her out of the matrimonial home, the learned District Judge should have been cautious in allowing the plaintiff to introduce the date of desertion for the first time.

The learned Counsel of the defendant has submitted that in accepting issue No. 8 the learned District Judge has entertained a purported issue, which is very different to the dispute placed before court for adjudication on the pleadings. By allowing, the plaintiff to introduce the alleged date of desertion the learned District Judge has in fact permitted the defendant indirectly to raise an issue, which had the effect of allowing an amendment to the plaint that, was only possible if the plaintiff was not guilty of laches. Even if the plaintiff amended the plaint, yet the defendant would have had the opportunity of replying to it by way of an amended answer.

Let us examine for a moment, as to what really was the main dispute presented for the adjudication, between the parties on the pleadings. According to paragraphs, 9 and 10 of the plaint the defendant deserted the plaintiff and thereafter came to reside at the residence of her mother and later in the company of the brother came back to the house of the plaintiff and threatened him with death. The plaintiff has complained of alleged threat to the police on 11.01.2001. According to the police complaint marked as p22 the defendant has deserted the plaintiff on the 4th of January 2002. It is further confirmed by paragraph 10 of the plaint that the defendant has come to the house of the plaintiff in the company of her brother on the 11th of January 2001. However, the issue raised is whether the defendant has deserted the plaintiff on the 14th of January 2002.

On the contrary, the position taken up by the defendant is that

the plaintiff chased both the defendant and the child from the matrimonial home on the 31st January 2002. The result in position would be summarised as follows.

1. The plaintiff never specified the date of desertion in the plaint.
2. In any event, by paragraph 10 of the plaint the defendant has indirectly admitted that the date of desertion had occurred prior to the 11/1/2001.
3. The defendant's position is that the constructive malicious desertion on the part of the plaintiff had taken place on the 31st of January 2002.
4. According to p22, the complaint made to the police by the plaintiff on 11/1/2002 the malicious desertion has taken place on 4/1/2002.
5. According to issue number 8, which is answered by the learned District Judge in the affirmative the defendant has deserted the plaintiff on 14/1/2002.

In the light of the above it would be seen that the learned District Judge has not only misdirected himself completely with regard to the date and time of the alleged desertion but had exceeded the limits of his jurisdiction as decided in the case of

Pathmawathie v Jayasekara (supra).

Even as regards the reasons for the finding that the defendant has deserted the plaintiff on the 4th of January 2002, the learned District Judge has erred with regard to the facts that were disclosed at the trial. At page 162 of the judgment, the learned District Judge has stated as follows:

2002.01.04 වන දින ආල්ල ප්‍රයිකෝ ආයතනයට ගොස් එතරිට ඇය කිව්වේ බඩු බාහිරාදිය රැකගත නිවසින් පිටව ගොස් ඇති බව පැමිණිලිකරු සාක්ෂියෙන් කියා ඇති බවත් විනිකාරියගේ මව කියා පිටියේ දරුවාට ප්‍රතිකාර ගැනීමට ආල්ල ගිය බවත් විනිකාරිය කියා පිටියේ දරුවාට ප්‍රතිකාර ගැනීමට තමා සමඟ ආල්ලේ ගිය බවත් අසා එය ප්‍රතික්ෂේප කරන බවත් ප්‍රකාශ කර ඇත.

The passage quoted from the judgment of the learned District Judge is confusing as to its meaning. Even if it is regarded, as contradictions arising from the evidence of the defendant and that of her mother, yet the observations of the learned District Judge,

do not appear to be in accordance with the evidence led at the trial. As far as the evidence goes, the plaintiff's version is that he proceeded to Galle on 4 January 2002 and the defendant and the child were missing from home from that day. On the contrary, at the evidence of the defendant was that she was at home when the defendant returned from Galle on the 4th of January 2002. The evidence of the mother of the defendant was that they went to Galle to obtain treatment for the ailment of the child on the 8th January 2002. In the light of the evidence given by the defendant and her mother the observation of the learned District Judge, made with regard to the credibility of the evidence of the defendant and her mother appear to be highly unwarranted and does not stand to reasons.

The learned Counsel of the defendant has argued that the transfer of the title of the matrimonial home was a ruse adopted by the plaintiff. It is more so when the plaintiff has given it on rent to an outsider. Moreover, the mother of the plaintiff has later transferred the rights in the matrimonial home for valuable consideration to an outsider. As has been admitted by the plaintiff under cross-examination on the 4th of January 2002, the matrimonial home was not available to the defendant and the child to live. He has admitted that the day on which alleged that the defendant maliciously deserted him, the house in which they lived as husband and wife had been transferred to his mother, and was not available for the occupation of the defendant.

The learned Counsel of the defendant has submitted that the plaintiff has well planned a scheme within a matter of 20 days and systematically chased the defendant away from the matrimonial home and immediately thereafter obtained vacant possession and then leased it out. Added to it the plaintiff has transferred the rights in the house to his mother on document marked as D1.

Taking into consideration all these matters, the evidence adduced by both parties on a balance of probability shows that the version of the plaintiff is highly improbable. The learned District Judge has not taken into consideration the peculiar circumstances in which the plaintiff has leased out the property in question to an outsider at the crucial point of alleged desertion.

Further the intention and the scheme of the plaintiff is quite clear when the mother had sold the property to an outsider. If the intention of the plaintiff in transferring the rights in the matrimonial home to his mother was the threat, there was no necessity for the mother to have re-transferred the property to an outsider.

These circumstances clearly indicate the *malafides* of the plaintiff and the scheme he has put into effect to chase out the defendant, in the guise of malicious desertion. The learned District Judge has erred himself in not taking into consideration, the balance of probabilities as between the version of the plaintiff and that of the defendant by weighing the evidence relating to malicious desertion and constructive malicious desertion.

The learned District Judge has failed to evaluate the version of the defendant as has been disclosed in the evidence. As regards the allegation of constructive malicious desertion, the learned District Judge has failed to properly analyse the evidence adduced by both sides, before he concluded that the defendant is guilty of malicious desertion.

The evidence adduced by the plaintiff does not indicate the mental or Physical element on the part of the defendant to maliciously desert the plaintiff. On the contrary, the totality of the evidence indicates constructive malicious desertion of the defendant by the plaintiff.

Moreover, the evidence led in the case, does not appear to warrant the conclusion that the District Court has finally arrived at. The transfer of the matrimonial home in the name of the mother of the plaintiff and the fact that the defendant rented it out to a third-party, clearly indicates the mind of the plaintiff to desert the wife than the defendant to desert her husband. Had the learned District Judge addressed his mind as to which version is more probable in the light of the evidence led before him, he would certainly not have concluded that the defendant is guilty of malicious desertion.

The judgment of the learned District Judge therefore seems to be perverse. His judgment does not appear to me as based on facts nor is it consistent with the evidence led in the case. Upon a consideration of the totality of the evidence, the only decision

the learned District Judge could have come to is to disbelieve the plaintiff's evidence and dismissed the plaintiff's action.

For the above reasons the judgment and decree of the learned District Judge, are set-aside. Hence, the plaintiff's action in the original court should be deemed as having been dismissed.

The appeal is allowed with costs.

Appeal allowed.