

1933

Present : Dalton A.C.J. and Drieberg J.

RAMALINGAM *v.* RAMALINGAM *et al.*

121—D. C. Colombo, 35,720.

Divorce—When desertion is malicious—Hope of reconciliation—Claim in reconvention—Costs.

Where a woman leaves her husband finally against his will and without legal justification, her desertion would in law be malicious.

In Roman-Dutch law no divorce should be granted on the ground of malicious desertion whilst there remained any hope of reconciliation.

Where a defendant made a claim in reconvention which was abandoned but which necessitated enhanced stamp duty on the plaint and other documents filed by the plaintiff and the action was dismissed as against him, such defendant must pay all the additional costs incurred by the plaintiff and the other defendants as a result of his claim.

A PPEAL from a judgment of the District Judge of Colombo.

Hayley, K.C. (with him *Tisseverasinghe* and *Gratiaen*), for plaintiff, appellants.

No appearance for first defendant, respondent.

N. E. Weerasooriya, for second defendant, respondent.

Abeysekera, for third defendant, respondent.

July 7, 1933. DALTON A.C.J.—

The plaintiff (appellant) sought to obtain a divorce from the first defendant (respondent) his wife, by reason of her alleged adultery with the second and third defendants (respondents) from whom he claimed Rs. 1,000 damages. He also sought to obtain a divorce on account of malicious desertion on the part of the first defendant. First defendant denied the adultery and desertion, and herself claimed a judicial separation from plaintiff on account of his alleged adultery. Second defendant denied the adultery, as did the third defendant, but the third defendant claimed the sum of Rs. 2,000 in reconvention from the plaintiff, alleging he had suffered pain of body and mind, and been injured in his credit and reputation by what he called the frivolous action of the plaintiff.

On the issues (1) and (2) as to whether the first defendant had committed adultery with either the second or third defendant or with both the learned trial Judge found in first defendant's favour, although he most adversely comments upon her lax and callous conduct. There is an appeal from this finding, but, before us, counsel for appellant admitted that having regard to the evidence he could not ask the Court to say the learned trial Judge was wrong. The first defendant did not appear on the appeal.

On the issue as to malicious desertion, the learned trial Judge also holds against the plaintiff. It is this finding that is contested in the appeal. The learned trial Judge states that the issue was not seriously pressed. There is no doubt that the first two issues occupied most of the

time and attention of counsel and Judge at the trial, but I can see nothing to suggest that the third issue was not also relied upon by plaintiff. If he had succeeded on issue (1) or (2), it would not have been necessary to deal with the third issue, but it nevertheless remained throughout the trial one of the issues upon which plaintiff relied to succeed in his claim against the first defendant. She had pleaded (issue 6) that she was compelled to leave the plaintiff on August 19, 1929, on account of his continual cruelty and ill-treatment of her, and this issue was answered in her favour. The learned Judge however refers to only one act, the sending on an earlier occasion of a false telegram, which he says was a very cruel piece of work, but it is clear this act had nothing to do with the wife leaving her husband. There must have been occasions, the learned Judge states, on which the plaintiff treated his wife cruelly, but they are not specified. The wife does make some loose and general charges against him in this respect, but her evidence is most unreliable and exaggerated.

In these circumstances it is necessary to review the evidence upon which plaintiff relies to substantiate his claim that the first defendant has maliciously deserted him.

There is no doubt that the first defendant left her husband on August 19, 1929, when she went to Badulla. In one statement the date is said to be August 24. The plaintiff undoubtedly, as the trial Judge finds, had cause to complain of her behaviour with men before that, although he did not suggest any immorality until later. He states he first became aware of her unseemly conduct with the second defendant about November, 1928. His work kept him in the Fort from early morning until evening, and hence he was unable to be at home during the day. As a result, in January he told her he was going to consult a proctor and about January 9 he took his wife with him to the proctor's office. There he states first defendant admitted her friendship with the second defendant. There cannot be any doubt about the interest of the second defendant in the first defendant. The learned trial Judge is satisfied the card P8 was written by him to her, addressed to her as Mrs. Sakuntala, the name, it is stated, of a beautiful goddess. As a result of what took place at the proctor's, husband and wife agreed to separate, and the proctor was to draw up the separation deed which was to be ready for signature on January 15. On January 14, plaintiff says she ran away to her brother, Dharmalingam's house. She was however brought back on January 18, and it would seem that as a result of the efforts of Dharmalingam and other relatives, the deed of separation was not signed. Her explanation of her leaving her husband on this occasion is that her husband was then openly keeping Nagamany as his mistress, but this is obviously an afterthought and untrue. It is with her that first defendant accuses her husband with committing adultery. The learned trial Judge states however that no evidence worthy of the name was led on this issue, and he finds in favour of the plaintiff. Thereafter, husband and wife continued to live together in the same house with Suppiah's family until March when they moved from the house in Barber street to Prakrama road. In March the first defendant paid a visit to Badulla in connection with her sister's daughter attaining age. Plaintiff says

he was on quite happy terms with his wife at this time; that he made the arrangements for this visit, although he did not see her leave, and that she promised to return in three days' time. She states she promised to return in ten days' time. The date of her departure from Colombo is uncertain. Plaintiff says she left about March 24 or 25, but it may have been a day or two earlier, since he says he received some information from the witness Baliya two days after she left. He says she did not return within the three days, and on March 25 he received some information from Baliya to the effect that when she had left Colombo for Badulla she had travelled with the third defendant and others. The third defendant is a connection by marriage of an uncle of the first defendant and lived at Badulla, although there is evidence to show that he worked at times in Colombo and visited the plaintiff's house in Barber street. There can be no doubt that about this date plaintiff received some disconcerting news about his wife, for he sent off on March 25 two telegrams asking her to return at once, the first stating that their son had met with a serious accident and the second that he had died. These statements were both false, and the sending of the telegrams was, as the learned trial Judge states, a cruel piece of work. They do however support plaintiff's statements that he had received information about his wife which might confirm his suspicions as to her continued absence beyond the date on which she had promised to return. In spite of the fact that plaintiff states he had reason to think she would not come back, believing the telegram she returned at once, but there can be no doubt that unpleasantness resulted on both sides although they continued to live together as husband and wife. He suspected her now in connection with the third defendant, and she, callous as the learned trial Judge finds her to have been over the welfare of her children, must nevertheless have suffered to some extent over the false telegrams and have been much annoyed at the further suspicions of her husband. He further admits he took all her jewellery and locked it up as he thought she would not go away again without it.

In May the girl Nagamany disappeared from the house in Prakrama road where her father and sisters were living with plaintiff and his wife. The disappearance of Nagamany is stated by first defendant to be due to her being kidnapped at the instance of plaintiff, and plaintiff was actually arrested, but there is no evidence to show he was charged with the offence. Why the plaintiff should want to kidnap the girl if he was openly living with her as his mistress as she alleges, defendant does not say. The learned trial Judge finds it to be an elopement, but it would seem not with the plaintiff. After the alleged kidnapping of Nagamany, Suppiah and his other daughters left the house. There is nothing in Suppiah's first statement (D4) to the Police at the time of Nagamany's disappearance to show that he suspected plaintiff as being responsible for it. In a subsequent statement he charges "one Nagalingam" with kidnapping her. That is not, I assume, the way he would describe the plaintiff, although plaintiff does say that Suppiah wanted to entangle him in the incident owing to some money troubles between them. Some days after Nagamany's disappearance she reappeared at plaintiff's house, brought there by the first defendant, so plaintiff states, and the learned

trial Judge appears to have accepted this evidence. Her father then came and took her away. There is no evidence, apart from the first defendant's own unsatisfactory statement, to show that she ever objected to the presence of Nagamany and her sister in the houses the two families occupied together, and although the learned Judge finds that a high moral atmosphere did not pervade this joint home, there is I think no reason to doubt the truth of plaintiff's evidence on this point as to the disappearance of Nagamany.

The plaintiff and his wife continued thereafter to live alone and apparently on amicable terms until August, when the first defendant's father died in Badulla. In spite of her denial, there is no doubt on the evidence that up to her departure for Badulla in August they were living together as husband and wife. This was admitted by her counsel at the outset of the case, and there is no suggestion, in the cross-examination of the plaintiff, of the charges of cruelty and allegations of interrupted marital relations as deposed to by her in her evidence. The learned Judge states that throughout the proceedings she made a bad impression upon him.

There is I think no doubt that the departure of the wife to Badulla with her children on August 19 or 24, whichever date is correct, was ostensibly in connection with her father's death and not in any way as the result of the cruelty and ill-treatment alleged. But it is I think quite clear that having left her husband in this connection, she declined thereafter to return to him, in spite of the efforts of her husband to get her back. He went to Badulla himself on September 6, but she refused to come back to him. According to his statements, she said she loved someone else. There was no doubt as to the presence of the third defendant in Badulla at the time, and his evidence that he had never been in first defendant's house there is inconsistent with the evidence of the police constable who was called. His interest in the subsequent proceedings between husband and wife is clear also from the correspondence. The learned trial Judge has declined for good reason to accept the evidence of alleged acts of adultery between the first and third defendants in Colombo, but there is very good ground for coming to the conclusion that first defendant refused to return to her husband in August, as he states, because she preferred someone else. On September 7, on her refusal to return to him, he made a complaint at the Police Station, Badulla (P 3), which bears out his evidence. It speaks of his request to her to return to him, her refusal to do so, her desire to divorce him, his suspicions of the second and third defendants, and his taking his children back with him to Colombo. Thereafter the parties did not meet again. Inquiries were instituted, plaintiff states he then obtained the evidence given at the trial in respect of the alleged adultery with the second and third defendants, and these proceedings for divorce on the grounds of adultery and malicious desertion were commenced.

Malicious desertion on the part of the husband is defined in *Brouwer, De Jure Connub.* (11. 12. 12). The passage referred to is set out in *Webber v. Webber*¹ and in *Silva v. Missinona*². The same principle applies in the case of the wife. In the view of Bertram C.J. the term implies a

¹ (1916) A. D. South Africa, at p. 246.

² 26 N. L. R. at p. 117.

deliberate, wholly unreasonable, definite and final repudiation of the obligations of the marriage state. In the view of Innes C.J., if a woman left her husband finally, against his will, and without legal justification, her desertion would in law be malicious.

Applying the law there set out to the case before us, there is no evidence, as I have stated, to support first defendant's plea that she had legal justification for leaving her husband. Her refusal to return and live with him was clearly against his will. His statement in the witness box at a date long afterwards, that he did not then want her back, was made in view of his belief in the truth of the charges of adultery. The learned trial Judge seems to have been satisfied that plaintiff justifiably believed his wife had been unfaithful to him. On this point it is to be noted that in parts of South Africa the action for restitution of conjugal rights is a preliminary to the action for divorce. Van Zyl in his *Judicial Practice* (2nd ed. p. 489) calls it a fictitious preliminary to the action and adds that a malicious deserter would not be sued to return, if the object was not a divorce. On the facts before us, however, I have no doubt that on September 6 plaintiff made a genuine request to his wife to return to him and that she deliberately, unreasonably, and definitely refused to do so.

Was this in addition a final repudiation by her of her obligations in the married state? The theory of the Roman-Dutch law is that divorce should never be granted on the ground urged here, whilst there remained any hope of reconciliation (*Silva v. Missinona* (*supra*)). This theory has I think always been given effect to. In some systems of procedure it is effected by requiring that first of all a decree of restitution of conjugal rights be obtained. The procedure in Ceylon, as Bertram C.J. points out, gives an opportunity for the application of the same principle through the fact that in the first place the decree is a decree *nisi*. That however does not relieve the Court of the duty of being reasonably satisfied upon the evidence that the desertion was final, and that no hope of reconciliation remained. The case of *Wentzel v. Wentzel*¹ is an instance in which the Court of Appeal, reversing the decision of the lower Court, held that although the wife had left her husband six months before the institution of the action, the evidence did not establish the charge of malicious desertion made by her husband against her. She had thought her departure from him was justified, but the trial Court held it was not. The Court of Appeal therefore was of opinion that it could not be said she had finally and definitely refused to return until a longer period of time elapsed and she had full opportunity of considering the situation and that finding. The appeal was therefore allowed and the judgment altered to one of absolution from the instance. The case of *Mostert v. Mostert*², on the other hand, is a case in which a decree was granted where the wife had been absent for only six days before issue of summons. The majority of the Court held that the desertion was clearly wilful, but Bell J. in a dissenting judgment stressed the necessity of being fully satisfied that all hope of reconciliation was at an end.

On this last point, after a consideration of the evidence, and especially having regard to the previous conduct of the wife, I have come to the

¹ (1913) A. D. 55.

² 2 Searle 128.

conclusion that her refusal to return to her husband on September 6 was a final repudiation by her of her obligations in the married state, without hope of reconciliation. In that event the 3rd issue must be answered in favour of the plaintiff, and he is entitled to the relief which the law gives him.

A further point remains for consideration. The case as instituted by plaintiff falls within Class 1 as it is now amended by Ordinance No. 19 of 1927. The third defendant brought a claim in reconvention which at the trial was virtually abandoned, no issue being framed in respect of it. That claim necessitated, however, enhanced stamp duty on the plaint and other documents filed by plaintiff and the other defendants, and also further costs and charges, as a result of the case falling by reason of the claim in reconvention into Class 2 and not Class 1. It is clear that the third defendant must pay all the additional costs incurred by plaintiff and the other defendants as a result of his claim being made. The plaintiff will pay third defendant's costs in the lower Court, apart from the additional costs referred to which must be paid by the third defendant. The first and second defendants will have all their costs in the lower Court from plaintiff, but the third defendant must also pay to plaintiff the additional costs of the first and second defendants that plaintiff has to pay, as a result of the case falling in Class 2. The decree entered must be set aside, and a fresh decree must be entered in terms of this judgment.

The second and third defendants are entitled to the costs of this appeal.

DRIEBERG J.—I agree.

Decree varied.
