

PATHMAWATHIE  
v.  
JAYASEKARE

COURT OF APPEAL.  
WEERASEKERA, J.,  
WIGNESWARAN, J.  
C.A. 30/91 (F)  
D.C. COLOMBO 14517/D  
JANUARY 2, 1996  
JANUARY 13, 1997.

*Divorce – Malicious desertion – Issues – Duty of the Judge – Jurisdiction circumscribed by dispute.*

The plaintiff respondent was granted a Divorce on the ground of malicious desertion, the defendant-appellant was denied alimony on the ground that she was guilty of malicious desertion. The custody of the child was given to the defendant-appellant.

It was contended in appeal that the plaintiff-respondent prayed to Court to determine the bonds of his marriage by reason of alleged acts of cruelty by the defendant-appellant culminating in an incident on 29.10.89, by which the plaintiff respondent was forced to leave the matrimonial home, but issue No. 1 was completely different, to what was pleaded and was in fact completely different to the dispute placed before court for adjudication, and it was further contended that court had not only misdirected itself but also exceeded the limits of its jurisdiction with regard to the dispute.

**Held:**

"It must always be remembered by Judges that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties.

Our civil law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make a findings as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or Judge is duty bound to determine the dispute presented to him and his jurisdiction is circumscribed by that dispute and no more."

**Per Weerasakera, J.,**

"Though in practice Counsel appearing for the plaintiff or defendant do suggest the issues, it is the prime responsibility of the Judge to frame issues, this is more

so because it is ultimately the Judge who should make a finding and without clear understanding of the dispute and the issues that he has to determine it would be a most dangerous exercise to embark upon: "

**Held further:**

(i) Even if issue (1) with its inherent infirmity is considered the plaintiff respondent had failed to satisfactorily establish that on 29.10.89, he was forced to leave the matrimonial home as alleged by him.

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

*M. H. B. Morais* for defendant-appellant

No appearance for plaintiff-respondent.

**Cases referred to:**

1. In the matter of the Estate and Effects of Don Cornelis Warnasuriya – 2 NLR 144.

*Cur. adv. vult.*

February 06, 1997

**WEERASEKERA, J.**

This is an appeal from the judgment of the learned Additional District Judge of Colombo dated 01.02.91. By the said judgment the plaintiff-respondent was granted a divorce on the ground of malicious desertion whilst the custody of the only child Deepthi was given to the defendant-appellant and an order for maintenance in favour of the said child payable by the plaintiff-respondent in a sum of Rs. 1,250/- per month was made. The defendant-appellant was denied alimony on the ground that she was guilty of malicious desertion.

The plaintiff-respondent was noticed to appear and was represented on some days but was absent and unrepresented on the day the appeal was fixed for argument and thereafter. Written submissions were filed on behalf of the defendant-appellant who was represented by Counsel after making initial oral submissions.

I have considered very carefully the pleadings, issues, evidence the oral and written submissions of Counsel for the defendant-appellant and the judgment of the learned Additional District Judge.

I regret to state that the learned Additional District Judge has completely misdirected himself from the very commencement of the trial not only with regard to the dispute that was before him for adjudication but also with regard to the reliefs prayed for.

**It must always be remembered by judges that the systems of Civil Law that prevail in our country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties. For example, the plaintiff presents to Court a dispute and prays for adjudication and the defendant or party from whom a relief is sought denies or opposes the claim of the plaintiff. The adjudicator or judge thereafter proceeds to determine the issues in conflict. After deciding as to who should prove what is asserted he proceeds to receive evidence *viva voce* and/or documentary and thereafter evaluate the evidence of facts and law and proceeds to give his finding. In that situation our Civil Law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make a finding as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or judge is duty-bound to determine the dispute presented to him and his jurisdiction is circumscribed by that dispute and no more. The exception to this rule may be where parties waive irregularity in proceedings and co-operate to call upon Court to adjudicate. (Vide In matter of the Estate and Effects of Don Cornelis Warnasuriya)<sup>(1)</sup>.**

In this instance the learned Additional District Judge has completely failed to understand what his duty was when this dispute was presented to him for determination and has therefore misdirected himself.

By his plaint dated 21st June 1989 the plaintiff-respondent alleged cruelty on the part of the defendant-appellant and in paragraphs 8 and 9 thereof pleaded specifically that on 29.04.89 he was abused and ordered out of the matrimonial home at 6A, Torrington Flats and that he left the matrimonial home. He alleged that this act of the defendant-appellant amounted to constructive malicious desertion and claimed a divorce from her on the ground of constructive malicious desertion. The defendant-appellant denied this allegation

and alleged that the plaintiff-respondent developed a clandestine liaison with one Pushpa and that the allegation of cruelty by the defendant-appellant was a ruse to be separated from her.

This was the dispute before Court. But unfortunately the issues on which the trial proceeded were as follows:

I quote the relevant issues 1 and 6(අ) as they were recorded in Sinhala.

1. විත්තිකාරීය පැමිණීමලල 5-9 දක්වා වූ ජෙදුවල කඳහක් විත්තර පරිදි පැමිණිලිකරුවා දුටුව කහතම ලෙස අතහැර ගියේද?
- 6(අ) ගෙයට වෙනත් අධිකරණය දික්කතාදහක් තිත්ද කරගොත් විත්තිකාරීයට කුමන ස්ථිර දික්කතාද දීමනාවක් ගිමිකල යුතුද?

The facts pleaded in paragraphs 5 to 9 of the plaint alleged constructive malicious desertion on the ground of cruelty.

The answer to issue one (1) was in the affirmative and the answer to issue 6(අ) was that "as the defendant was guilty of malicious desertion she was not entitled to alimony".

Though in practice Counsel appearing for the plaintiff and defendant do suggest the issues it is the prime responsibility of the judge to frame issues. This is more so because it is ultimately the judge who should make a finding and without a clear understanding of the dispute and the issues that he has to determine it would be a most dangerous exercise to embark upon. A misunderstanding of what is expected of him gives no other result but an incorrect finding and a bad judgment. In this instance the parties to the dispute namely the plaintiff-respondent prayed to Court to determine the bonds of his marriage by reason of alleged acts of cruelty by the defendant-appellant culminating in an incident on the 29th of October, 1989 by which the plaintiff-respondent was forced to leave the matrimonial home. Issue No. 1 was completely different to what was pleaded and was in fact completely different to the dispute placed before the learned Additional District Judge for adjudication.

I am of the view that the learned Additional District Judge had not only misdirected himself completely but also exceeded the limits of

his jurisdiction with regard to the dispute which he had to adjudicate upon. For this reason alone the appeal must be allowed.

Moreover even taking the issues as they are there is no evidence at all on an examination of the evidence of the plaintiff-respondent and that of the defendant-appellant to support a finding that the defendant-appellant was guilty of malicious desertion. The evidence of the plaintiff-respondent was that he was subject to acts of cruelty by the defendant-appellant as evidenced by P2, P3, P4 and P5 and that he was forced to leave the matrimonial home which was 6A, Torrington Flats on 29.10.89. The evidence was not that the defendant-appellant left the matrimonial home. The affirmative finding on issue 1 therefore, which I am of the view is a misdirection by itself, cannot be supported by the evidence to establish either constructive or malicious desertion by the defendant-appellant. Thus even if issue 1 with its inherent infirmity is considered the plaintiff-respondent failed to satisfactorily establish that on 28.10.89 he was forced to leave the matrimonial home as alleged by him. To accept P2 to P5 mainly because they were statements made to the police by the plaintiff-respondent is but a puerile and fallacious exercise. In any event it was no one's case that extreme cruelty was the ground for divorce. The close temporal proximity in which P2 to P5 had been made and that too just before action was filed does lead them to be viewed with care and circumspection. They may have been made with a view to bolster a case. Furthermore it was unreasonable on the part of the Court to have expected the defendant-appellant to produce documentary evidence with regard to plaintiff-respondent's intimacy with Pushpalatha.

For these reasons I allow the appeal and set aside the judgment of the learned Additional District Judge dated 01.02.91. The plaintiff-respondent's action is dismissed with costs. The defendant-appellant will be entitled to taxed costs on account of this appeal.

**WIGNESWARAN, J.** – I agree.

*Appeal allowed.*