

1946

*Present : Jayetleke and Canekeratne JJ.*

WIJERATNE, Appellant, and WIJERATNE, Respondent.

6—*D. C. Colombo, 697.**Divorce—No consummation of marriage—Wilful refusal of husband to copulate—Sufficient ground for dissolution of marriage.*

Where there was no consummation of a marriage owing to the wilful refusal of the husband to copulate—

*Held*, that the wife was entitled to have the marriage dissolved on the ground of malicious desertion.**A** PPEAL from a judgment of the District Court of Colombo.*H. V. Perera, K.C.* (with him *N. Nadarajah, K.C., E. B. Wikramanayake* and *D. W. Fernando*), for the defendant, appellant.*E. G. Wikramanayake* (with him *H. W. Jayewardene*), for the plaintiff, respondent.*Cur. adv. vult.*

April 11, 1946. CANEKERATNE J.—

The action was brought by the respondent, the wife, against her husband, the appellant, for a decree of divorce on the ground of impotency and alternatively a decree of divorce on the ground of desertion, the desertion being a wilful and malicious refusal of carnal intercourse.

The parties were married on February 1, 1940 ; the respondent remained with the appellant till the evening of February 1, 1941, when she left the appellant's house and went to Nugegoda, the residence of her mother. She did not return to the appellant's house again. Since then the parties have not met and the present action was instituted. It is not a matter of controversy between the parties that there never has been actual consummation of the marriage.

The case was defended by the appellant who denied that he was impotent or that he deserted the respondent : he contended that there was malicious desertion on the part of the respondent.

The evidence shows that the respondent was a virgin at the time when she came into Court. She described her married life ; her evidence in the main was accepted by the learned trial Judge. The appellant gave evidence to show that he refrained from carnal intercourse on account

of her aversion to it. The medical witness called by the appellant showed that there was no sign of organic impotency on the part of the appellant : he hazarded the opinion that the appellant would be able to consummate the marriage. The respondent had objected to the appellant calling a medical witness at that stage but the objection was overruled.

The learned Judge held that impotency on the part of the appellant was proved and that there was no malicious desertion by the respondent. Great stress was laid by counsel for the appellant on the shortness of the period as inadequate to give a full trial and we were reminded of the three years' rule as demanded by the Canon Law. He contended that the evidence does not show impotency on the part of the appellant. Counsel for the respondent contended that he should be given an opportunity to lead medical evidence in this Court or in the District Court.

Counsel for the appellant does not contend that there was no malicious desertion on the part of the defendant ; he was, according to his evidence, at all times capable of consummating the marriage : the reason given by him for exercising restraint has been found, by the learned trial Judge, to be untrue. The fact that there has been no copulation can be considered to be due to wilful refusal on his part. The case can be decided on this view ; in these circumstances it seems unnecessary to make a pronouncement on the first issue.

The respondent is entitled to have her marriage dissolved on the ground of malicious desertion by the appellant. The judgment of the learned Judge is set aside. The appellant should pay the respondent the costs of the action and of the appeal. The parties are at liberty to make an application to this Court or to the District Court to have the amount of alimony, if any, agreed upon by them, made part of the decree or made an order of Court : in the alternative the parties may make an application to the District Court to fix the amount of alimony.

JAYETILEKE J.—I agree.

*Judgment varied.*

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