

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In an application for leave to Appeal in terms of  
Section 5(c) (1) of the High Court of the  
Provinces (Special Provisions) (Amendment)  
Act No.54 of 2006 read together with Article  
127 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka.

**SC/Appeal No. 0074/2025**  
**SC HCCA/LA /98/2022**  
**NWP/HCCA/KUR/**  
**65/2018(F)**  
**D.C. Mahawa Case No.**  
**D/9894**

Rathnayake Mudiyanseelage Sunil Rathnayake  
Kumbukulawa,  
Polpithigama.

**PLAINTIFF**

vs

Siriwardhana Kasee Brahmana Ralalage Lalitha  
Kumari,  
Kumbukulawa,  
Polpithigama.

**DEFENDANT**

**AND THEN**

Rathnayake Mudiyanseelage Sunil Rathnayake  
Kumbukulawa,  
Polpithigama.

**PLAINTIFF–APPELLANT**

vs

Siriwardhana Kasee Brahmana Ralalage Lalitha  
Kumari,  
Kumbukulawa,  
Polpithigama.

**DEFENDANT-RESPONDENT**

**AND NOW BETWEEN**

Siriwardhana Kasee Brahmana Ralalage Lalitha  
Kumari,  
Kumbukulawa,  
Polpithigama.

**DEFENDANT-RESPONDENT-PETITIONER-  
APPELLANT**

vs

Rathnayake Mudiyanseelage Sunil Rathnayake  
Kumbukulawa,  
Polpithigama.

**PLAINTIFF- APPELLANT – RESPONDENT -  
RESPONDENT**

**BEFORE**

: Yasantha Kodagoda, P.C., J.  
.Kumudini Wickremasinghe, J &  
M. Sampath K. B. Wijeratne J.

**COUNSEL** : Dushantha Kularathna with Mahada Fernando for the Defendant-Respondent-Petitioner-Appellant.

Aravinda R.I. Athurupane with G.K.W. Nissanka for the Plaintiff-Appellant-Respondent-Respondent.

**ARGUED ON** : 26.08.2025

**DECIDED ON** : 15.10.2025

**M. Sampath K. B. Wijeratne J.**

### **Introduction**

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as 'Plaintiff-Respondent') instituted this action against the Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as 'Defendant-Appellant') in the District Court of Mahawa seeking *inter alia* a divorce, a *vinculo matrimonii*, dissolving the marriage between the Plaintiff-Respondent and the Defendant-Appellant on the ground of constructive malicious desertion of the Defendant-Appellant. The learned District Judge delivered his judgment on February 8, 2018 in favour of the Defendant-Appellant on the premise that Plaintiff-Respondent has failed to attribute matrimonial fault to the Defendant-Appellant as required by the law and that the matrimonial fault in fact lies with the Plaintiff-Respondent and not the Defendant-Appellant.

Being aggrieved by the judgment of learned District Judge, the Plaintiff-Respondent preferred an appeal to the High Court of Civil Appeal where learned Judges of the High Court held in favour of the Plaintiff-Respondent allowing the appeal.

This appeal by the Defendant-Appellant is against the judgment of the High Court of Civil Appeal.

Having considered the submissions, this Court granted leave to appeal on two questions of law, one set out in paragraph 11(a) of the Petition and other formulated.

The question of law set out in paragraph 11(a) of the Petition reads as follows;

*“11(a)- Did the High Court of Civil Appeal err in law by concluding that the learned District Judge misdirected by analysing the evidence regarding the child fathered by the Respondents as a result of an adulterous affair?”*

In addition to the above question of law, the Court also decides to grant leave to appeal on the following question;

*“(1) Did the High Court of Civil Appeal err in law by deciding to set aside the Judgment dated 08/02/2018 pronounced by learned District Judge of Mahawa having arrived at a conclusion that the Defendant has not committed matrimonial offense on her part (page 5 of the Judgement of the Provincial High Court)?”<sup>1</sup>*

## **Factual Background**

According to the Plaintiff-Respondent, The Plaintiff-Respondent and Defendant-Appellant married in the year 1998 and after twelve years of successful marital life, disputes began to erupt in their marital relationship due to alleged unfounded suspicions and accusations of the wife against the husband of an adulterous relationship. Amidst of such disputes, things turned to worse when wife’s brother got involved in the family altercations by forcibly closing and locking the boutique which was being managed by the Plaintiff-Respondent but owned by wife’s

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<sup>1</sup> Journal entry dated 27.05.2025.

family. At this time the two parties, despite their sour relationship was living under the same roof.

However, on or around November 19, 2010, when Plaintiff-Respondent returned home after visiting Mahawa town in the morning, found himself prevented from entering the house by the wife who had padlocked the gate to the compound on which the matrimonial house stood. Since nobody responded to the Plaintiff-Respondent's request to open the gate, the Plaintiff-Respondent had no choice, but to leave the premises. Thereafter he had spent the night at one Muthubanda's house who is a distant relative of him.

The following morning the Plaintiff-Respondent visited the matrimonial home and upon finding that the gate was still locked, went to the Police station and made a complaint as to what had transpired in the previous night. When the Defendant-Appellant was called upon, she maintained that husband can collect his medicine and clothes when he wished to. The Plaintiff-Respondent thereafter collected his belongings having gone to matrimonial home with the Police and stayed with said Muthubanda for about three months thereafter. He also rented an abandoned boutique from his sister-in-law and started a hardware business there.

Thereafter, Plaintiff-Respondent instituted an action against the Defendant-Appellant in the District Court of Marawila seeking a decree of divorce on the ground of constructive malicious desertion. The Defendant-Appellant sought to dismiss the action filed by the Plaintiff-Respondent on the ground that he was an innocent party, as the events giving rise to the instant action occurred as a result of the Plaintiff-Respondent's adulterous conduct.

After conclusion of the trial learned District Judge dismissed the Plaintiff-Respondent's action mainly relying on a birth certificate produced before the Court which contained Plaintiff-Respondent's name as the father of a child whose birth has taken place seventeen months after the institution of the action. The learned Judge also observed that there is no matrimonial fault on the part of the

Defendant-Appellant holding reason for the quarrels to be Plaintiff-Respondent's alleged adulterous affair.

However, the learned Judges of the High Court of Civil Appeal quash the decision of the learned District Judge on the ground that learned District Judge has misdirected himself in analysing the evidence and arriving at the particular conclusion and directed the learned District Judge to re-write the judgment.

### **Analysis**

The substantive and procedural law relating to dissolution of marriage in Sri Lanka are primarily laid down in Marriage Registration Ordinance No. 19 of 1907, as amended and the Civil Procedure Code.

Section 19 of the Marriage Registration Ordinance reads as follows:

*Section 19(1)- No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court.*

*Section 19(2) -Such judgment shall be founded either on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.*

*Section 19(3)-Every court in Sri Lanka having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on any such ground.*

Section 596 of the Civil Procedure Code specifies the procedure in matrimonial actions. It provides:

*Section 596 - In all actions for divorce a vinculo matrimonii, or for separation a mensa et thoro, or for declaration of nullity of marriage, the pleadings shall be by way of plaint and answer, and such plaint and answer shall be subject to the rules and practice by this Ordinance provided with respect to plaints and answers in*

*ordinary civil actions, so far as the same can be made applicable, and the procedure generally in such matrimonial cases shall (subject to the provisions contained in this Chapter) follow the procedure hereinbefore set out with respect to ordinary civil actions.*

Section 597 of the Civil Procedure Code provides that:

*Section 597(1) - Any husband or wife may present a plaint to the Family Court within the local limits of the jurisdiction of which he or she, as the case may be, resides, praying that his or her marriage may be dissolved on any ground for which marriage may, by the law applicable in Sri Lanka to his or her case, be dissolved.*

Section 602 of the Civil Procedure Code provides:

*Section 602 - When the court is satisfied on the evidence that the case of the plaintiff has been proved, the court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections 604 and 605.*

In Sri Lanka divorce is fault based. Therefore, only innocent spouse is entitled to a decree for divorce based on any one or more of the grounds provided in Section 19(2) of the Marriage Registration Ordinance.

In the case of ***Tennekoon vs Somawathie Perera alias Tennekoon***<sup>2</sup> Sharvananda J. quoting Hahlo on the ‘South African Law of Husband and Wife’ made the following observation.

*“Our common law of divorce is based on the 'guilt' and not on the marriage breakdown' principle ..... Adultery and malicious desertion are breaches of the fundamental obligations flowing from the marriage contract, for it is of the essence of the marriage relationship that the spouses should adhere to each other, being physically and spiritually 'one flesh'.....”*

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<sup>2</sup> [1986] 1 Sri LR 90.

Here in order to determine whether Plaintiff-Respondent is entitled to a decree of divorce, first it is needed to be ascertain with whom the matrimonial fault lies.

### **Matrimonial fault**

Section 19 (2) of the Marriage Registration Ordinance, lists “malicious desertion” as one of the three grounds on which a decree of divorce, a *vinculo matrimonii*, may be entered by a competent court. The malicious desertion may either takes the form of simple malicious desertion or constructive malicious desertion.

The basis of the plaint and issues of the Plaintiff-Respondent in the instant case had been on the constructive malicious desertion of the Defendant-Appellant.

In *Gomes vs Gomes*<sup>3</sup> Prasanna Jayawardena, PC, J. distinguishes between the simple malicious desertion and constructive malicious desertion in the following manner;

*“Simple malicious desertion or, as it is sometimes called, actual malicious desertion is where the spouse who is alleged to be guilty of malicious desertion physically separates from the matrimonial home or terminates matrimonial consortium, with the intention of deserting his or her spouse. .... Constructive malicious desertion is where the conduct or speech of the spouse who is alleged to be guilty of malicious desertion gives his or her spouse no reasonable alternative other than to depart from the matrimonial home or to cease matrimonial consortium.”*

Prasanna Jayawardena, PC, J. in the said case went on to expound the requisite factum and animus of constructive malicious desertion referring to various pronouncements of English courts.

*In this regard, Gorrel Barnes J. has commented in the early and often cited case of SICKERT vs. SICKERT [1899 Probate 278 at*

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<sup>3</sup> SC/ Appeal/123/14, SCM 07.06. 2018.



p.282], ‘In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.’. This led Lord Merriman to pithily observe in *LANE vs. LANE* [1951 P 284 at p.286] ‘Desertion is proved if the husband leaves the home, or drives the wife away from the home, with intent to bring the home to an end and without her consent or fault. It does not matter, therefore, on which side of the front door, so to speak, the spouses are found when they part.’.”

In the case of constructive malicious desertion, the spouse who is out of the matrimonial home must show that the other had acted with the intention of putting an end to the marriage and the burden of proving such to assert constructive malicious desertion is on the spouse who alleges constructive malicious desertion who in this case is the Plaintiff-Respondent husband.

Therefore, Weerasuriya, J. in the case of *Anulawathie vs Gunapala*<sup>4</sup> held that,

*“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 *Neville Fernando vs Chandrani Fernando*<sup>5</sup> Chandra Ekanayake, J. contended that,

*“To constitute the offence of constructive malicious desertion by the defendant (here the wife), the necessary conduct should be of grave*

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<sup>4</sup> [1998] 1 Sri LR 63.

<sup>5</sup> [2007] 1 Sri L.R 159.

*and convincing character. In this regard it would be pertinent to consider the decision in Edwards v Edwards [1949 - 21 ALL ER 145]. Their Lordships at 148: ‘.... but the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is a question of fact on which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home’.*”

In the case before us, it is pertinent to examine the actual facts of the case to ascertain whether the Plaintiff-Respondent was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the Defendant-Appellant spouse who said to have been at fault.

Perusal of the evidence of the Plaintiff-Respondent reveals that altercations between Plaintiff and the Defendant-Appellant started somewhere in 2010 on some alleged adulterous relationship of the Plaintiff-Respondent.

“ප්‍ර- නමුත් කියන ලෙස 2010 වර්ෂයේ ආරවුල් පැන නැගුනේ?

උ- ඔව්

ප්‍ර- මොකක්ද ආරවුල?

උ- මාගේ අනියම් සම්බන්ධතාවක් තියෙනවා කියලා ආරවුල් ඇති කර ගත්තා.”

(Cross examination dated 2013.07.15 page 114-15)

It is to be noted that the Plaintiff-Respondent was ousted from his business premises by the Defendant-Appellant with the involvement of her brother.

“මෙයා 2010.10.14 වන දින ගෙදරින් ගියා. 16 වෙනි දින තමා ආවේ. ඒ ඇවිල්ලා 3.30ට විතර කඩේට ඇවිල්ලා කඩේ වහන්සා කියලා තර්ජනය කලා සේවකයින් එළියට දාලා ලොරි දෙක ඇතුලට දැමීමා. ඒ ලොරියක වී පටවලා තිබුනේ. ඒක ඇතුලට දැමීමා. අනිකේ සිමෙන්ති පටවලා තිබුනා.

එයාගේ අයිතියන් එක්ක ඇවිල්ලා. රියදුරුට තර්ජනය කලා. ඒකත් ඇතුලට දැමීමා.  
දාලා ගේට්ටු වැහුවා. ඩයිවර්ට කියලා නමා වාහන ඇතුලට දැමීමේ. ඒ සම්බන්ධයෙන්  
පොලිසියට පැමිණිල්ලක් කලා”

(appeal brief page 83-84)

Over the time the Plaintiff-Respondent and the Defendant-Appellant have ceased to share the bed and have started living a separate life within the same roof, a fact which is also been admitted by the Defendant-Appellant herself during the cross examination as well as the Police complaints filed by her against the Plaintiff-Respondent. According to the Plaintiff-Respondent, the Defendant-Appellant has also ceased to perform duties expected of a wife.

In *Grobbelaar vs Havenga*,<sup>6</sup> Harcourt J. described the term “consortium” as “.... an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage.” Harcourt J. with reference to English authorities observed that it means the companionship, love, affection, comfort, mutual services, sexual intercourse, which all belong to the married state.

Similarly in *Peter vs Minister of Law and Order*<sup>7</sup> the Court observed that the concept of consortium is an abstraction which embraces intangibles such as loyalty and sympathy, care and affection, concern, as well as the more material needs of life such as physical care, financial support, the rendering of services in the running of a common household.

“වෛවාහක ජීවිතය තුළ ජීවිතය එපා කලා. කඩේ වහලා මාව එළියට ඇදලා දැමීමා නිවසින් එළියට දැමීමා. කඩේ වහන්න මගේ අදහසක් තිබුනේ නැහැ. මගේ ව්‍යාපාර සම්පූර්ණයෙන් කඩා කප්පල් කලා. මම ගරු අධිකරණයෙන් ඉල්ලා සිටින්නේ විත්තිකාරියගේ හැසිරීම එපා කලා. මා නිවසින් පිටව ගියා. මට ඉන්න දුන්නේ නැහැ. පොලිසියේ පැමිණිල්ලක් දැමීමා. ගෙදර අල්මාරිය කඩලා ලක්ෂ 7 ගන්නා කියලා බොරු පැමිණිල්ලක් කලා. විත්තිකාරිය මට පදම් විරහිත චෝදනා කරලා තියෙනවා.”

(Appeal brief page 143)

<sup>6</sup> [1964] S SALR (N) 522.

<sup>7</sup> 1990 (4) SA 6.

The said conduct of the wife supports the contention of the Plaintiff-Respondent that the Defendant-Appellant has intended to terminate the marriage consortium by the time.

It was the act of the Defendant-Appellant prevented the entry of Plaintiff-Respondent by locking the gate of the compound which the matrimonial house stood which culminated in the act of desertion which left her spouse no reasonable alternative other than to depart from the matrimonial home.

For the foregoing, I am of the view that the conduct of the Defendant-Appellant amply reveals her desire to terminate the marriage consortium between the parties and learned Judges of the High Court of Civil Appeal are correct in holding that the learned District Judge had not given sufficient reasons to arrive at the conclusion that the Defendant-Appellant has not committed any matrimonial offense on her part.

### **Has Adultery on the part of Plaintiff-Respondent been Established?**

The Defendant-Appellant contends that Plaintiff-Respondent's adulterous conduct as the reason for the breakdown of their marriage. However, the Defendant-Appellant's answer did not contain a cross claim for a divorce on the ground of adultery and merely stated that no cause of action has accrued in favour of the Plaintiff-Respondent against the Defendant-Appellant.

Further there were several contradictions in the statements of the Defendant-Appellant where Defendant-Appellant first accused the Plaintiff-Respondent of having an affair with one Chitra at the beginning of the cross examination and in the latter part of the cross examination it was suggested that he was having an affair with one Kumarihamy.

*“ප්‍ර.- ඔබලා දෙන්නා අතර මුල ඉඳලාම තිබුනේ දේපල පිළිබඳව හඬයක් නේද?*

*උ -නැහැ. ඔහුගේ අනියම් සම්බන්ධකම් තිබුනා.*

ප්‍ර.-අනියම් සම්බන්ධකම් තිබීම කිසිම කෙනෙක්ගේ නමක් තමන් පොලිස් පැමිණිලි වල කියලා තියෙනවාද ?

උ -එහෙමයි.

ප්‍ර -තමන් බෝගොල්ලේ චිත්‍රා පිළිබඳව සැකයක් තියෙනවා කිව්වා ?

උ -සැකය තමයි ඇත්ත වුනේ

ප්‍ර -එහෙම සැකයක් ඇති වුනා නම් මේ නඩුවේ දී ඒ අනියම කාන්තාව මේ නඩුවට සම විත්තිකාරියක් කරලා අරගෙන එන්න තිබුනා නේද?

උ -මම නීතිඥ මහතාට කිව්වා නම ඉදිරිපත් කරන්න කියලා. එයා කිව්වා ඔයා එයා ඉදිරිපත් කරලා මොනවා කරන්නද, බබා හම්බ වුනාම බබාගේ උප්පැන්න සහතිකය ඉදිරිපත් කරන්න කියලා මට කිව්වා.

ප්‍ර- ඔබ කියන්නේ බෝගොල්ලේ චිත්‍රා පිළිබඳව නේද?

උ -නැහැ. මානෙල් ලංසක්කාර ගැන මම කියන්නේ.”

(Appeal brief page 206-07)

Notably, no specific act of adultery was alleged. Further, no evidence was offered by the Defendant-Appellant in support of allegation of adultery with any party that the Plaintiff-Respondent was having an adulterous affair except for the Birth Certificate in issue which I will be dealing later.

As observed by Prasanna Jayawardene PC, J. in *Weerasinghe vs Renuka*,<sup>8</sup>

*“There is a presumption of innocence not only in regard to the commission of a crime, but also in regard to any allegation of wrong doing or immoral conduct. There is a burden on the person who alleges immorality to prove it. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of”*

Therefore, in the instant case allegation of adultery need to be proven by Defendant-Appellant with positive evidence not by mere assertion. The degree of proof required in case of adultery has been a subject of controversy in Sri Lanka.

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<sup>8</sup> [2016] 1 Sri LR 57.

Generally, in civil cases the burden of proof is balance of probability. Under present Sri Lankan law adultery is no longer a Penal offence. Therefore, approach adopted in cases such as *Jayasinghe vs Jayasinghe*<sup>9</sup> and *Dharmasena vs Navaratna*<sup>10</sup> where Court adopted proof beyond reasonable doubt which is equivalent to burden of proof in criminal cases is no longer good law as also observed in cases such as *Alarmalammal vs Nadarajah*<sup>11</sup> and *Gunasekara vs Gunasekara*.<sup>12</sup>

In my view, although civil actions are determined on a preponderance of evidence, an allegation of adultery, being a matter of grave significance with serious consequences not only for the parties but also for their offspring and the community, requires a higher degree of proof.

Ranjith Silva J. in *Peiris and Others vs Siripala*<sup>13</sup> which concerns with an allegation of fraud in a civil action held as follows;

*"The standard of proof remains on a balance of probability although the more serious the imputation the stricter is the proof which is required"*

Lord Nicholls in *Re H (Minors)*<sup>14</sup> at 586 observed,

*"The balance of probability standard means that a court is satisfied an event occurred if the court considers that on "the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence, the*

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<sup>9</sup> 55 NLR 410.

<sup>10</sup> 73 NLR 419.

<sup>11</sup> (1972) 76 NLR 56.

<sup>12</sup> [1970] 79 CLW 71.

<sup>13</sup> [2009] 1 Sri LR 75.

<sup>14</sup> In *Re H(minors)*(1996J-AC 563) at 586.

*stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”*

Accordingly, he determined that, the more serious the civil offence, the stricter the standard of proof required. It seems like he preferred to hold the required burden of proof as per the nature and the gravity of each offence which can be considered as a more suitable approach.

Nonetheless in ***Pushpakumara vs Marmet and another***<sup>15</sup> Dissanayake, J. held that direct evidence of adultery is not necessary to prove adultery and that an inference of an act of adultery could be drawn from the circumstances of each case.

*“It is a well-recognized principle of law that direct evidence of adultery is not necessary to prove 'adultery'. It is well accepted that an inference of an act of adultery could be drawn from the circumstances of each case. In the case of Ebert v Ebert [22 NLR 310] where in a maintenance action the refusal of the wife to live with the husband on ground of his adultery it was held that to establish adultery it is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place. The fact may be inferred from circumstances which lead to it by fair inference as a necessary conclusion.”*

Whilst agreeing with the above dicta of Dissanayake, J. in the said Court of Appeal case, I am of the view that even if adultery could be construed from circumstantial evidence, such must be founded on clear and cogent evidence sufficient to establish a higher degree of proof rather than mere assumptions.

Thus, I hold that in the instant case the Defendant- Appellant has failed to establish the adulterous conduct of the Plaintiff- Respondent with higher degree of proof as required by law.

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<sup>15</sup> [2003] 2 Sri L.R 244.

## Relevancy of Birth Certificate in Issue

Defendant-Appellant relies extensively on the birth certificate of the child that one Kumarihamy has given birth to approximately seventeen months after the institution of this action to support her allegation of adulterous conduct of the Plaintiff-Respondent with one Manel Lansakkara. However, it is trite law that incidents occurred after the institution of action cannot be depended upon to arrive at a conclusion on the main issue of the action.

In the Court of Appeal case of *Jayaratna vs Jayaratna and Another*<sup>16</sup> where the issue before the Court was whether a cause of action based on adultery which has arisen after the Defendant-Appellant has filed his answer can be taken into consideration to determine the rights of the parties, Amaratunga J. observed that,

*“It appears that this decision has been based on the facts peculiar to that case and does not lay down a rule which operates as an exception to the general rule that the rights of the parties are to be determined as at the date of the plaint. On the other hand, even if it is held that the decision in that case is not limited to the particular circumstances of that case but is applicable as a general rule, still it is not applicable to the present case as the cause of action based on adultery has arisen after the answer was filed.”*

Rights of parties are determined as at the date of plaint, and the birth certificate of a child conceived after institution of the present action cannot said to have any probative value being an incident occurred after the date of filing the plaint.

For the reasons stated above, I am of the view District Court had completely misdirected himself in considering the relevancy of the said birth certificate to come to a decisive conclusion as to the existence of adulterous affair of the Plaintiff-Respondent.

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<sup>16</sup> [2002] 3 Sri LR 331



### **Is Plaintiff- Respondent entitled to a decree of Divorce?**

There was ample evidence on the analysis provided above, for the learned District Judge to have come to the finding of constructive malicious desertion on the part of Defendant-Appellant. But the learned District Judge merely dismissed the Plaintiff-Respondent's action for a divorce on the ground that he himself was guilty of adulterous conduct which the Defendant-Appellant has failed to establish with clear and cogent evidence as required by law.

Once the Plaintiff-Respondent establishes the Matrimonial fault on the part of the Defendant-Appellant under any one of the grounds laid down in section 19(2) of the Marriage Registration Ordinance, he is entitled to a decree of Divorce irrespective of whether he also has been guilty of any other matrimonial offense under the same section.

In the Court of Appeal case of *Sediris vs Somawathie*<sup>17</sup> Wimalaratne J. held that the Plaintiff being guilty of adultery during the subsistence of the marriage would not be a bar to his obtaining a decree for divorce where there were findings in his favour of malicious desertion and adultery on the part of the wife.

Considering the fact that marriage has been irretrievably broken down and the matrimonial fault of the Defendant-Appellant is established on preponderance of evidence, the Plaintiff-Respondent is entitled to a decree to be entered into dissolving marriage between the Defendant-Appellant and the Plaintiff-Respondent.

### **Conclusion**

In the instant case, the learned District judge's finding is primarily based on the evidence led on behalf of the Defendant-Appellant particularly the birth certificate in question which has no relevance to the case at hand for the reasons I have given

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<sup>17</sup> (1978-79) 2 Sri LR 140.

above. Moreover, the learned District Judge had failed to give due weight to the testimonies of the Plaintiff-Respondent and his witnesses.

Therefore, the learned Judges of High Court of Civil Appeal is correct in holding that District Judge misdirected by analysing the evidence regarding the child fathered by the Plaintiff-Respondent as a result of an adulterous affair and setting aside the order of the District Judge on the ground that he had misdirected himself to the conclusion.

For the foregoing reasons, both the questions of law are answered in negative.

I, accordingly, set aside the judgment and decree of the learned District Judge and order that Decree nisi be entered dissolving the marriage between the Plaintiff-Respondent and the Defendant-Appellant on the grounds of constructive malicious desertion of the Defendant-Appellant.

The judgment of the High Court of Civil Appeal be accordingly varied.

Parties must bear their own costs.

**JUDGE OF THE SUPREME COURT**

**Yasantha Kodagoda, P.C., J.**

I Agree.

**JUDGE OF THE SUPREME COURT**

**Kumudini Wickremasinghe, J.**

I Agree.

**JUDGE OF THE SUPREME COURT**