

the respondent refused to have sexual relationship with him since 2003, and that constituted the element of unreasonable behaviour by the respondent.

The respondent, in her testimony stated that she and the petitioner had sexual relationship even the day prior to his leaving the matrimonial home. She admitted that the petitioner came home to pick up the children to school, but denied that she had any sexual relationship with him since he left. She further stated that she was prepared to pardon him and take him back.

The Matrimonial Causes Act is no longer based on the "*guilt principle*", and is based on the principle of "*irretrievable breakdown of marriage*". In respect of the ground relied on by the petitioner in the instant case, the burden of proof lies with him to prove the behaviour of the other party and that he cannot reasonably be expected to live with her. Both elements must be established on a balance of probabilities.

In the present case, the petitioner relies only on one issue, namely, unreasonable refusal of sexual intercourse. In cases of this nature, the Court relies not on the categorisation of the conduct of a party, but on investigative evidence in the case. In the case of ***Hutchinson v. Hutchinson (1963) 1. A.E.R. 1***, which was a case based on the ground of constructive desertion, it was held that where the respondent would only occasionally have sexual intercourse with the petitioner, the refusal to have more regular intercourse justified the petitioner in leaving the matrimonial home, where the respondent must have known that the petitioner would, reasonably, in the circumstances of the case withdraw from cohabitation.

In the present case, the petitioner admitted that he had a relationship with another woman over one year before he left the matrimonial home to live with her. The parties had been married for over 20 years, before the petitioner left the matrimonial home. In these circumstances the decision in *Hutchinson* (*supra*) must be distinguished, as the only reason why the petitioner separated

was to have an extra marital relationship with the other woman with whom he is presently living. It would not have been the intention of the legislature, to permit a married spouse to leave the other in preference to a third person unless there was "*grave and weighty*" reasons to do so. In the present case it has not been established that the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with her. The Court is empowered to enter a decree of divorce on the basis of the irretrievable breakdown of marriage, only when the petitioner has established one of the grounds of divorce, set out in Section 4(1) of the Act.

Hence the petitioner cannot rely on ground 4(1) (b) of the Matrimonial Causes Act, and accordingly, the petition is dismissed with costs.

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A.R. PERERA

JUDGE

Dated this 28th day of February 2007