

CASE NO.:
Appeal (civil) 6534-6536 of 1995

PETITIONER:
ADHYATMA BHATTAR ALWAR

Vs.

RESPONDENT:
ADHYATMA BHATTAR SRI DEVI

DATE OF JUDGMENT: 06/11/2001

BENCH:
D.P. Mohapatra & Doraiswamy Raju

JUDGMENT:

D.P. MOHAPATRA, J.

These appeals, filed by the husband of the respondent are directed against the judgment of the Division Bench of the High Court of Andhra Pradesh in AAO Nos.365 and 718/91, in which the High Court allowed the appeal filed by the wife and dismissed the appeal filed by the husband and set aside the judgment passed by the Subordinate Judge, Narsapur.

The appellant Adhyatma Bhattar Alwar, and the respondent Adhyatma Bhattar Sri Devi were married on 22nd August, 1978 in Nalamvari Choultry at Rajahmundry. The couple stayed together in village Palacole where the parents of the husband reside. A female child was born to them on 12th December, 1979, whereafter they separated. The wife and daughter lived with her parents at Rajahmundry, while the husband continued to stay with his parents at Palacole. The husband filed a petition for dissolving the marriage under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) praying for a decree of divorce on the ground stated in sub-clause (ib) of Sub-section 1. In the petition it was alleged, inter alia, that the father of the respondent -wife had taken her to Rajahmundry for delivery and also stating that her mother was not well. After birth of the child, since the respondent did not return to Palacole, the appellant, his father and other relations made attempts to persuade the respondents father to send his daughter to Palacole. The attempts did not bear fruit as the respondent was insistent that the appellant should live separately from his parents in a separate house. Since the condition was not acceptable to the appellant, she refused to join him at Palacole. On 23rd May, 1981 the appellant went to Rajahmundry to bring the respondent but she was not sent and the appellant was informed that the respondent would be sent only after he got a job. It is relevant to state here that at the time of marriage, the appellant had graduated in Commerce (B.Com.); subsequently he completed M.A. in Hindi, but he was without a job. Since all attempts to persuade the respondent to come and live with him failed,

the appellant filed the petition on 21st February, 1984 for divorce on the ground of desertion by the wife for a period of more than two years.

Contesting the application for divorce, the respondent repudiated the allegations made by the appellant that she had voluntarily left her matrimonial home for staying with her parents. While admitting that she had gone to her parental home for birth of the child whereafter she had returned to her father-in-laws house where she faced a very embarrassing situation as her father-in-law made indecent advances towards her and her complaints to her husband about such incidents went unheeded. She also averred that her husband appeared to be a silent spectator to such incidents and did not even raise any protest against his fathers behavior towards his daughter-in-law. In the circumstances, the respondent pleaded that she had every justification to insist on her husband having a separate residence. It was further alleged by her that in the month of August, 1980 her father-in-law had made repeated attempts at molesting her and when she vehemently protested against such behaviour she got a severe beating from him. She also complained that her husband was ill-treating and assaulting her, believing the false stories and backbitings of his mother. She contended that it was she who was deserted by her husband and not vice versa.

Both parties led oral and documentary evidence before the Trial Court. The learned Subordinate Judge in the Judgment dated 8th December, 1989 held that the appellant had satisfactorily proved that the respondent was guilty of having deserted him for a continuous period of more than two years preceding the filing of the petition for divorce and that he was entitled to a decree for judicial separation under Section 10 of the Act instead of a decree for dissolution of marriage under Section 13(1)(ib) of the Act. Accordingly, the petition was allowed by granting a decree for judicial separation instead of a decree for divorce.

Both the parties challenged the judgment of the trial Court by filing appeals. The husband filed the appeal - AAO No.365/91, while the appeal filed by the wife was registered as AAO 718/91. As noted above, the High Court, in the judgment rendered on 14th July, 1993, set aside the judgment and decree of the trial Court, allowed the appeal filed by the wife and dismissed the appeal filed by the husband. The High Court held that the wife did not have at any time the necessary animus to put an end to the matrimonial relationship and never intended to desert her husband. Hence, these appeals by the husband.

Section 13(1)(ib) of the Act reads as follows:

Divorce.- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

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(ib) has deserted the petitioner for a continuous period of not less than two

years immediately preceding the presentation of the petition; or

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Explanation In this sub-section the expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

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Desertion in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are :

1. The factum of separation;
 2. The intention to bring cohabitation permanently to an end animus deserendi;
 3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;
- The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include willful neglect of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes willful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.

This Court in the case of Bipin Chander Jaisinghbhai Shah vs. Prabhawati, 1956 SCR 838, observed :

..... Thus the quality of permanence is one of the essential elements which differentiates desertion from willful separation. If a spouse abandons the other spouse in a state of

temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely; (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they should commence at the same time. The *de facto* separation may have commenced without the necessary *animus* or it may be that the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the *locus poenitentiae* thus provided by law and decides to come back to the deserted spouse by a *bona fide* offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings

for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.....

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But it is not necessary that at the time the wife left her husbands home she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case, even if she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of 1955 A.C.402 at p.417 (F) in an appeal from the decision of the High Court of Australia, to the following effect :-

Both in England and in Australia, to establish desertion two things must be proved : first, certain outward and visible conduct the factum of desertion; secondly, the animus deserendi the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple; it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the animus. Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?

(Emphasis supplied)

In the case of Lachman Utamchand Kirpalani vs. Meena alias Mota, 1964 (4) SCR 331, a Constitution Bench of this Court, considering the case of judicial separation on the ground of desertion without just cause held on facts that the respondent (wife) left the appellants matrimonial home on February 26, 1954 with the intention of permanently, breaking it up, and that such desertion continued during the requisite period of two years and that the appellants letter of 1st April 1955, did not constitute an interruption of the respondents desertion by its being a just cause for her to remain away from the matrimonial home; and that, in consequence, the appellant was entitled to a decree for

judicial separation under Section 10(1)(a) of the Hindu Marriage Act, 1955. It was observed that An offer to return to the matrimonial home after sometime, though desertion had started, if genuine and sincere and represented his or her true feelings and intention, would bring to an end the desertion because thereafter the animus deserendi would be lacking, though the factum of separation might continue; but on the other hand, if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing. In this connection, reference was also made to the decision in the case of Bipin Chander Jaisinghbhai Shah vs. Prabhawati (supra).

This Court in the case of Smt.Rohini Kumari vs. Narendra Singh, 1972(1) SCC 1, while considering the case of judicial separation on the ground of desertion under Section 10(1)(a) of the Act read with the Explanation, held :

.....The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of constructive desertion is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him.

In Lachman Utamchand Kirpalani v. Meena alias Mota, this Court had occasion to consider the true meaning and ambit of Section 10(1)(a) of the Act read with the Explanation. Reference was made in the majority judgment to the earlier decision in Bipin Chander Jaisinghbhai Shah v. Prabhawati, in which all the English decisions as also the statement contained in authoritative text books were considered. After referring to the two essential conditions, namely, the factum of physical separation and the animus deserendi which meant the intention to bring the cohabitation permanently to an end as also the two elements so far as the deserted spouse was concerned i.e. (1) the absence of consent and (2) absence of conduct giving reasonable cause to the

spouse leaving the matrimonial home to form the intention aforesaid, it was observed while examining how desertion might come to an end :

In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse.

(Emphasis supplied)

This Court in the case of Sanat Kumar Agarwal vs. Nandini Agarwal, (1990) 1 SCC 475, considering a case under Section 13(1)(ib) of the Act, held that it is well settled that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and expression of intention, both anterior and subsequent to the actual act of separation.

In a recent case in Chetan Dass vs. Kamla Devi, (2001) 4 SCC 250, this Court considered the question whether the offer made by the husband in this Court to keep his wife, was held to be not sincere and did not deserve to be seriously considered. In that connection, this Court held :

During the course of the arguments, learned counsel for the appellant, so as to show the allegations made against the appellant about having illegitimate relationship with Sosamma Thomas(sic.), submitted that the appellant is still prepared to keep the respondent Kamla Devi with him. According to him, the appellant never refused to live with her. In reply, learned counsel for the respondent submitted that the respondent was also prepared to live with the appellant provided that he discontinued his relationship with Sosamma Thomas. The hollowness of the submission that the appellant was still prepared to keep the respondent with him is quite apparent. It is on record that it was on the same (sic. Same) undertaking that the respondent was taken to Ganganagar by the appellant to live with him but there she was subjected to humiliating treatment meted out to her by the appellant himself having his food only in the room of Sosamma Thomas and staying there

during the night leaving his wife and sister alone on the ground floor. With this kind of attitude, the offer as made on behalf of the appellant is too shallow to deserve any serious thought. At the same time, the condition on which the respondent is prepared to live with him seems to be quite justified, that is to say, she is still prepared to live with him provided he behaves and snaps his relationship with the other woman. It is apparent that it is the own conduct of the appellant which led the respondent to live separate from the appellant. None else, but the appellant alone, is to be blamed for such an unhappy and unfortunate situation. The findings of facts, as recorded by the two courts below, do not deserve to be disturbed in any manner nor have they been seriously assailed before us.

Coming to the case at hand, it is revealed from the evidence on record, as discussed in the judgments of the Trial Court and the High Court that the respondent had gone to her parents house for birth of the child, which apparently cannot be construed as an expression of her desire to forsake her husband permanently; but after the birth of her child when attempts were made by the appellant, his parents and relations, she laid down a condition that the appellant should live in a separate house from his parents taking the plea that her father-in-law had attempted to molest her, which explanation she signally failed to establish. In the meantime, father of the appellant expired some time in 1988, putting an end to the so-called reason of misbehavior of her father-in-law. There is nothing on record that thereafter she expressed her desire to join her husband at the matrimonial home. It is relevant to state here that the appellant is the only son of his parents and as expected, he was not willing to establish a separate residence leaving his parents to live alone in their old age. The cumulative effect of the circumstances and the conduct of the respondent is that she had given expression of animus deserendi. Thus, the two ingredients of the matrimonial offence of desertion i.e. separation in fact and animus deserendi have been established by the appellant. The learned trial Judge, having regard to the facts and circumstances of the case, was right in recording the finding that the husband had successfully established the case of desertion by the wife and exercising the discretion vested under Section 13 A of the Act, the learned trial Judge had granted the decree of judicial separation instead of divorce. The High Court recorded the finding that in the absence of any evidence, direct or circumstantial, in support of her plea of alleged indecent behavior by her father-in-law, the Court was not prepared to accept the allegations made by her against her father-in-law; the Court without discussing any evidence, had observed that as the cause itself has disappeared or ceased to exist the wife had agreed to join the husband, and even before the death of the husband's father she was ready and lived with the husband indeed and arrived at the conclusion that the wife cannot be held to have the necessary intention to put an end to the matrimonial obligation and, therefore, could not be found guilty of deserting the husband. The High Court has not discussed whether the alleged offer by the wife to live with her husband after the death of her father-in-law was indeed a sincere move or merely a hollow expression bereft

of any sincerity. The High Court has also not discussed if she indeed had the desire to come and live with her husband what prevented her to request her parents to take necessary steps in the matter. In the absence of any such evidence the finding recorded by the High Court that the wife was not guilty of deserting her husband cannot be sustained. The failure on the part of the wife to substantiate a serious allegation of infamous conduct of indecent advances said to have been made to her by the father-in-law, taken together with the absence and omission from her side to demonstrate her readiness and willingness to discharge her continuing objection to return to the matrimonial home, establish sufficiently the animus deserendi, necessary to prove legal desertion as required under section 13(1) (ib). The conduct of the wife seems to be more indicative of a firm determination not to return to the marital home and discharge the obligations attendant thereto. Therefore, the judgment of the High Court is unsustainable and has to be set aside.

Accordingly, these appeals are allowed, the judgment of the High Court is set aside and the judgment of the trial Court is restored. There will, however, be no order as to costs.

..J.
(D.P.Mohapatra)

...J.
(Doraiswamy Raju)

Dated the 6th November, 2001