
DESERTION AS A GROUND FOR DIVORCE AND JUDICIAL SEPARATION IN INDIA

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ABSTRACT

To be together is to make a marriage; to be apart is to end a marriage. This apartness can also be desertion. Desertion is the intentional and unwarranted abandonment of the other party to the marriage against the will or without the consent of such party. It is a ground for divorce and judicial separation under family laws in India. Therefore, this research paper studies desertion as a ground for divorce and judicial separation in India. The researcher has adopted the doctrinal research method.

Keywords: Marriage, Consent, Desertion, Divorce.

Introduction

Desertion is a ground for divorce and judicial separation under Hindu,¹ Christian,² Parsi³ and Secular law.⁴ Despite not being a ground for divorce earlier, it was later incorporated into the laws. Prior to the 1976 amendment in the Hindu Marriage Act, 1955, desertion was only the basis for judicial separation.⁵ Similarly, before the 2001 Amendment, Christian law did not allow divorce based on desertion.

Nevertheless, in Muslim law, this ground for divorce has not been expressly provided, but the wife can seek divorce on the grounds of desertion under section 2(iv) of the Dissolution of

¹ The Hindu Marriage Act, 1955; ss. 13(1)(i-b), 10 says:

s.13(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—

[(i)

(ia)

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. And;

s.10[(1) Either party to a marriage, whether solemnised before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.]

² The Indian Divorce Act, 1869; ss. 10(1)(ix), 22 says:

s.10(1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-

.....

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition.

s.22. No decree shall hereafter be made for a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion for two years or upwards, and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as here in after mentioned.

³ The Parsi Marriage and Divorce Act, 1936; ss. 32(g), 34 says:

s. 32. Any married person may sue for divorce on any one or more of the following grounds, namely:--

.....

(g) that the defendant has deserted the plaintiff for at least [two years].

s. 34. Any married person may sue for judicial separation on any of the grounds for which such person could have filed a suit for divorce.

⁴ The Special Marriage Act, 1954; ss. 27(1)(b), 23(1)(a) says:

s. 27(1) Subject to the provisions of this Act and to the rules made there under, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent-

(a).....

(b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

s. 23(1) A petition for judicial separation may be presented to the district court either by the husband or the wife,-

(a) on any of the grounds specified [in sub-section (1) [and sub-section (1A) of section 27] on which a petition for divorce might have been presented;

⁵ s. 10(1)(a).

Muslim Marriages Act, 1936, which provides that the husband has failed to perform his marital obligation for a period of three years without reasonable cause.⁶

It is challenging to define desertion precisely because it is a variable and dynamic concept that changes with time. Desertion was never defined by Statutes in England. However, there have been attempts to define it in several English cases, but later on, their attitude became liberal. In the case of *Fitzerald v. Fitzerald*⁷, Lord Penzance provided a negative definition of desertion as follows:

“None can desert who does not actively and wilfully put to an end to an existing state of cohabitation.”⁸

In the case of *Reg v. Lersche*,⁹ Lopez, J. observed, “Wilful absenting of the husband from the society of his wife in spite of her wishes, etc. is desertion.” Similarly, Sir James Hanen in the case of *Townsend v. Townsend*¹⁰ defined desertion as “voluntary abandonment by the husband of society of his wife against her will.”

In India, the Indian Divorce Act also left it undefined. However, the Hindu Marriage Act and the Special Marriage Act have included explanations about it. The explanation to section 13(1)(vii) of the Hindu Marriage Act, 1955, defines desertion as follows:

“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 wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.”

Similarly, in section 27 of the Special Marriage Act, 1954, the explanation is identical and need not be reproduced.

In its literal sense, the term desert means to abandon, to leave or to withdraw one’s help or

⁶ There is no provision for judicial separation in Muslim Law.

⁷ (1869) LR 1 P&D 694.

⁸ *Foster v. Foster*, AIR 1937 Oudh 116.

⁹ (1891) 2 QB 418.

¹⁰ (1873) 42 LJ P&H 71.

attendance.¹¹ As per section 2(3) of the Parsi Marriage and Divorce Act, 1936¹², to “desert” together with its grammatical variations and cognate expressions, means to desert the other party to a marriage without reasonable cause and without the consent, or against the will of such party. The courts also have consistently refused to define “desertion” in India.

In the case of *Prabhakar Govindrao Bokade v. Mangala Prabhakar Bokade*,¹³ the High Court held that “the term ‘desertion’ cannot be said to have an exhaustive definition and facts and circumstances of every case need not be considered accordingly in order to find out whether desertion is made out within the meaning of section 13(1)(ib) of the Act.” It is easier to describe desertion than to define. The Apex Court in the case of *Lachman Utamchand Kirpalani v. Meena alias Mota*,¹⁴ held that “desertion in its essence means the intentional permanent forsaking and abandonment by one spouse of the other without that other’s consent and without reasonable or just cause or justification.” Similarly, as pointed out by the Andhra Pradesh High Court in *Chintala Venkata Satyanarayana Rao v. Chintala Syamala*,¹⁵ that “desertion for the purpose of seeking divorce under the Hindu Marriage Act means the intentional, permanent forsaking and abandonment of one spouse by the other without others consent and without reasonable cause.” As expressed in *Kako v. Ajit Singh*¹⁶, “desertion means abandonment and implies an action of withdrawal from cohabitation that exists.” In the case of *Savitri Pandey v. Prem Chandra*,¹⁷ the Supreme Court interpreted that “desertion is a total repudiation of the obligation of marriage.” Therefore, in other words, it means wilfully and unreasonably permanently abandoning the other spouse against the will or without consent.

Elements of Desertion

To constitute desertion, the following main elements must be present:

- i. *Factum deserendi*, i.e. the fact of separation;
- ii. *Animus deserendi*, i.e. the intention to desert;

¹¹ Abhinandan Malik (ed.), *(I) B.M.Gandhi’s Family Law* 196 (Eastern Book Company, Lucknow, 2nd edn., 2019).

¹² The Parsi Marriage and Divorce Act, 1936 (Act no. 3 of 1936).

¹³ 1992 Mah LJ 1098 (Bom).

¹⁴ AIR 1964 SC 40.

¹⁵ 2003 (2) HLR 237 (AP)(DB).

¹⁶ AIR 1960 Punj. 328.

¹⁷ (2002) 2 SCC 73.

- iii. Lack of reasonable cause;
- iv. Absence of consent or against the wish of the other party; and
- v. The Statutory period of desertion.

Factum deserendi

Desertion requires a separation between spouses, which can be actual or implied. Living under the same roof may or may not be considered separation, depending on the circumstances. The key factor in determining desertion is the renunciation of conjugal duties.

As said by the Supreme Court, “Desertion is not the withdrawal from a place, but from a state of things.”¹⁸ Thus, the law does not deal with the mere matter of place. It seeks to enforce is the recognition and discharge of the common obligations of the married one. The implication of desertion is the rejection of all obligations of marriage. Thus withdrawal from cohabitation must be complete, and there cannot be desertion, if the parties continue to perform even some of their marital obligation. In the case of *Bhagawanti v. Sadhu*,¹⁹ it was held that a wife’s mere refusal of a matrimonial bed is no desertion.

There may be desertion, although husband and wife are living in the same house if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses were living separate and apart from one another. The husband, who shuts himself in one or two rooms of his house, and ceases to have anything to do with his wife, is living separately and apart from her as effectively as if the outer door of a flat separated them.²⁰

Animus deserendi

For a separation to be considered desertion, it is necessary for the spouse who is at fault to have the deliberate intention of remaining permanently separated from their partner. It was held in the case of *Bipinchandra Jaisinghbai Shah v. Prabhavathi*,²¹ that two elements required to be present on the side of the deserting spouse to constitute desertion are the *factum* of separation, and the *animus deserendi* or intention to bring the cohabitation permanently to an end. There

¹⁸ *Ibid.*

¹⁹ AIR 1961 Punj. 181.

²⁰ *Hopes v. H* (1949) 227 (C.A.).

²¹ AIR 1957 SC 176.

is, therefore, the possibility of a *de facto* separation without the *animus* to desert, in which case it cannot be held that the spouse charged with desertion is guilty of desertion. The fact of separation without intention to desert permanently does not constitute desertion. The abandonment must be intentional and deliberate. The mere fact that the husband wrote a letter in anger to the wife saying that he would have nothing to do with her is no evidence of desertion by the husband.²²

In the case of *Bipinchandra v. Prabhavati*,²³ the husband and the wife were married on 20th April 1942 at Patan(Gujarat), according to Hindu customs of the Jain community and a son named Kirit was born to them in 1945. Both parties were living happily in Bombay until a third person, Mahendra, a family friend, came into the picture sometime in 1946, after his discharge from the army and started residing with the family in their Bombay flat. In 1947, when the husband was out of Bombay on business, the wife got intimate with the Mahendra. When the husband came to know about wife's reprehensible conduct after returning from London, the wife left her husband's house in shame. The evidence showed that she had no intention to leave permanently and had tried to bring about reconciliation on a number of occasions. It was held by the Apex Court of India that she was not guilty of desertion.

In *Jivubai v. Ningappa*,²⁴ a wife went to her father's house with the knowledge and consent of her husband and at one stage expressed her desire to rejoin her husband but later deliberately stayed away, even though the husband offered to take her back, it was held that her deliberate act of staying on, after her husband had called back, amounted to desertion. However, in the case of *Suryaprakasa v. Venkata*²⁵, the wife was taken away by her father from the husband's house with the consent of the husband. It was held that there was nothing in the attendant circumstances to warrant an inference that the wife desired to reside away from her husband or that her separate living was attributable to an *animus deserendi* but she might become guilty of desertion later, if she indicated an intention to live away from him permanently.

Absence of consent or against the wish of the other party

In order to complete the offence of desertion two elements within the control of the deserted spouse are necessary; absence of consent on his or her part, and absence of conduct giving

²² *Rukman v. Faquir*, AIR 1960 Punj. 493.

²³ AIR 1957 SC 176.

²⁴ AIR 1963 Mys. 3.

²⁵ AIR 1961 A.P. 404.

reasonable cause to the spouse in desertion.²⁶ To be in desertion a spouse must be living separate and apart without the consent of other, as there is no desertion if the separation is consensual.

In the case of *Rajalakshmi v. Fambulinga*,²⁷ where the wife left her husband with his consent, and there was no evidence that she formed the intention to desert permanently at any subsequent stage, it was held by the Madras High Court that there was no desertion, the separation being consensual. In *Perumal v. Sithalakshmi*,²⁸ the wife left the husband's house with all her clothes with the intention to live permanently with her parents and this action was approved by the husband and he never called her back. There was evidence that the husband was trying to get rid of the wife because of some congenital defect in her leg and was planning to remarry. It was held by the High Court that the wife did not leave her husband's house or continue to stay at her parent's place without his consent or against his will but with his permission. Under the circumstances, the wife was not staying apart from the husband without his consent; consequently, there was no desertion.

The party seeking to prove desertion must give evidence of conduct on his or her part, showing unmistakably that such desertion was against his or her will. It is not enough to show that he or she was unwilling that his wife or her husband should go away and stay from him or her. It is further necessary to prove that he or she had expressed his or her wishes by calling back or otherwise giving him or her to understand that his or her absence was against her or his wish.²⁹ In the case of *Suryprakasa v. Venkata*,³⁰ the court held that the petitioner must prove that he was always willing to fulfil his marital obligations and that the respondent left against his will.

It further requires that to succeed; a petitioner must come into court with clean hands, i.e., free from own matrimonial misconduct. In the case of *Mato v. Sadhu*,³¹ a wife demanded sexual intercourse from her husband with the threat that she would receive it from other men if she did not get it. The husband refused. She left him and petitioned for a decree of judicial separation on the ground of desertion, alleging that his refusal led to her adultery with one or

²⁶ *Supra* note 21.

²⁷ AIR 1965 Mad. 195.

²⁸ AIR 1965 Mad. 415.

²⁹ *Kantilal v. Indumati*, AIR 1956 Saur, 115.

³⁰ *Supra* note 25.

³¹ AIR 1961 Punj. 152.

more persons. The court held that she was not entitled to any relief because, of her own promiscuous behaviour.

Lack of reasonable cause

If one party has reasonable or just cause for leaving the other, the separation is justifiable and there will be no desertion on his part. Such reasonable cause may be cruelty, adultery or grave and weighty matter. In the case of *Bai Jamna v. Dayalji*,³² a husband accused his wife of immorality and also wrote obscene letters. It was considered a sufficiently grave and weighty matter to entitle the wife to live separately. The husband has been outcaste or has changed his religion. The wife has a reasonable cause to withdraw from cohabitation.³³

In the case of *Shankuntala v. Baburao*,³⁴ the wife was living in Indore on the bounty of her aunt, while the husband had to live in Bombay at his place of employment. The wife refused to join him there. It was held that the wife was living away from him without just cause. The husband was not in desertion, because he had gone to Bombay not with the *animus deserendi* but to earn his livelihood.

The Statutory period of desertion

Desertion is complete when the statutory period ends and the petition for remedy on its ground is filed. The Hindu Marriage Act, Special Marriage Act, Parsi Marriage and Divorce Act, and the Indian Divorce Act prescribe two years, while the Dissolution of Muslim Marriage Act prescribes a three-year period, before which no petition can be filed.

In the case of *Santosh Kumari v. Shiv Prakash Sharma*,³⁵ the High Court held that where the prescribed period in the statute did not elapse since the alleged desertion, the petition for divorce on this ground will not be entertained. Similarly, in the case of *Santhosh Kumar S. v. Jayasree Damodaran*,³⁶ the Kerala High Court held that the Hindu Marriage Act does not permit a spouse to sue for divorce on the ground of desertion before a continuous period of desertion complete two years.

³² (1920) 22 Bom. L.R. 214.

³³ *Paigi v. Sheonarain*, (1866) 8 All. 78.

³⁴ AIR 1963 M.P. 10.

³⁵ AIR 2001 Del 376.

³⁶ 2020(2) HLR 147 (Ker.).

The period of two years should be continuous without a break immediately preceding the presentation of the petition. Thus, desertion should continue for two years or more before the divorce petition.

Kinds of Desertion

Desertion is mainly of two kinds; it may be an actual, or it may be constructive. In actual desertion, the spouse is abandoned physically. In constructive desertion, one spouse is forced to leave the matrimonial home because of the other's conduct.³⁷ Where one spouse by, his or her conduct, drives the other out of the home, he or she becomes guilty of constructive desertion, although it is the latter that leaves the home physically.

In the case of *T. Rangaswami v. T. Aravindammal*,³⁸ the High Court held that "In certain circumstances the deserting spouse may not be the person who actually leaves the matrimonial home. The actual parting may be due to the deserting spouse making continued joint life impossible and thus compelling the deserted spouse to leave the matrimonial home. In such cases the actual abandoning of the matrimonial home is not the act of the person against whom the allegation of desertion is made, but the act of the person making the allegation. The test by which the offence is judged is not the abandoning of the matrimonial home, but the fact that the other party has caused such abandonment by his actions, since he must be taken to intend the consequence of such actions. If it is a natural consequence of the behaviour of one spouse that the other will leave the matrimonial home, the offending spouse must be presumed to have intended that this should happen. Cases in which the parting of the spouses has arisen in these circumstances are sometimes called "constructive" desertions."

The principle of constructive desertion was applied in the case of *Stree v. Stree*.³⁹ Here, the husband brought a concubine into the house where his wife lived with him, and she had to leave the house accordingly. The court held that such conduct as that of the husband amounted to desertion. Similarly, in the case of *Harish Taneja v. Nidhi*,⁴⁰ a husband had filed a petition for a decree of divorce on the ground of desertion, alleging that the wife's behaviour was cruel to her mother-in-law and that she often misbehaved. Even she used unparliamentary language against her husband. The High Court held that the husband was not entitled to a decree of

³⁷ *Jyotish Chandra Guha v. Meera Guha*, AIR 1970 Cal 266.

³⁸ AIR 1957 Mad. 243.

³⁹ AIR 1935 Mad. 541.

⁴⁰ 2020(2) HLR 283 (P&H).

divorce because the husband was himself responsible for creating circumstances forcing the wife to stay away from the matrimonial home; on the other hand, the husband was in constructive desertion because the husband did not make any effort to bring the wife back to the matrimonial home. The court further observed that occasional disagreements and quarrels between the spouses and his mother are minor domestic disputes which occur in every marriage.

Desertion, divorce and judicial separation

In the case of *S. Natarajan v. Koteswari*,⁴¹ a husband had filed a petition for a decree of divorce on the ground of desertion, alleging that the wife was not ready and willing to cohabit and had indulged in cruelty. The wife and her family members also threatened to kill the husband by mixing poison in his food. It was held that the husband was entitled to a decree of divorce as the parties had been living separately for more than a decade. The wife had also not filed any petition for restitution of conjugal rights.

In *G. Senthil Iyappan v. S. Kavitha*,⁴² the wife had a medical problem. Only to hide her illness, she had avoided cohabitation and refused to cooperate with her husband to lead a married life. She also left the matrimonial home just within four months from the date of marriage, and they were living separately for over a period of seventeen long years. In this way, the High Court considered the desertion proved and held the husband entitled to divorce.

In the case of *P.C. Kunhinarayanan v. Vijaya Kumari*,⁴³ a husband filed a petition for divorce on the ground of desertion, alleging that the wife intentionally did not return to the matrimonial home without any reasonable cause and, thus, deserted the husband. On the other hand, it was the wife's allegation that the husband had treated her with cruelty when they were living together; moreover, the husband had remarried and was living with the woman. Thus, the wife had given a proper cause for her separation. It was held by the High Court that apart from the mere allegation that the husband had subjected the wife to cruelty, there was no evidence to show that the husband had subjected the wife to any cruelty. Thus, the ground stated by the wife for living separately had no basis. On the other hand, the wife was in constructive desertion because when the husband proposed to resume the conjugal relationship, the wife opposed the

⁴¹ 2020(2) HLR 406 (Mad.).

⁴² 2021(2) HLR 576 (Mad.).

⁴³ 2022(1) DMC 180, 2022(1) Civil L.J. 78.

same without any reasonable cause and failed to resume cohabitation. With this, both the parties were living separately for more than 25 years. Therefore, the husband was entitled to a decree of dissolution of marriage on the ground of desertion.

In the case of *V. Saritha Kumari v. S. Anbarasu*,⁴⁴ the wife had left her matrimonial home 41 days after the marriage without any reasonable ground and did not return after that. Even in these 41 days, the wife stayed with her husband for only three weeks. Later the wife also opposed the husband's prayer to live with her and expressed her reluctance to live with the husband. On this, the High Court held the wife guilty of desertion and granted a decree of divorce to the husband on the ground of desertion.

In *Deo Kumar Sah v. Anjali Kumari Sah*,⁴⁵ the wife was found living apart from the husband for a period of 2 years. The court held that at this juncture, the wife cannot claim resumption that she intends to resume cohabitation with her husband. The court, therefore, granted divorce to the husband based on desertion.

In the case of *Srinivasan v. Padma*,⁴⁶ the wife and husband had been living separately for more than two decades, and the wife was not even willing to live with her husband. At the same time, the wife had also made many allegations against the husband, which the wife could not prove. As a result, the High Court granted a decree of divorce to the husband on the ground of desertion. In the case of *Chintala Venkata Satyanarayana Rao v. Chintala Shyamala*,⁴⁷ the wife left the matrimonial house with the intention to forsake the matrimonial union permanently. The Patna High Court held that the husband was entitled to decree of divorce on the ground of desertion.

In the case of *Leela Devi v. Suresh Kumar*,⁴⁸ a petition for divorce was filed by the husband on the ground of his wife leaving the house, which he withdrew after receiving an assurance from the wife that she would join his company. However, after that, she would not be with him even a day. After that, a fresh petition for divorce was again filed by the husband. Apart from this, the wife had also expressed her reluctance to live with her husband. To this, the court held that her conduct of leaving the house showed an implied intention not to live, and the expression of

⁴⁴ 2021(2) HLR 382 (Mad.).

⁴⁵ AIR 2009 Pat 4.

⁴⁶ 2020(2) HLR 286 (Mad.).

⁴⁷ AIR 2003 AP 322.

⁴⁸ AIR 1994 Raj 128.

reluctance was a clear expression of her intention to leave the house. Therefore, the husband was considered entitled to divorce on the ground of desertion.

In the case of *Geeta Jagdish Mangtani v. Jagdish Mangtani*,⁴⁹ the husband was abandoned by his wife, citing that he had a low income. She left her matrimonial home in Bombay and went to her parent's house in Gujarat, where she gave birth to a child. Before marriage, the wife being aware of low income and did not serve as a reasonable cause to desert. Thus, the husband was held entitled to a decree of divorce on account of the wife's desertion.

It can be conclude by saying that desertion is the way to the end of a marriage. It is the basis for divorce and judicial separation under almost all matrimonial laws in India. Nevertheless, desertion was not a ground for divorce in the beginning; it was included later. This paper revealed that the court grants divorce and judicial separation on the ground of desertion only when the petitioner proves both the fact of separation and the intention of the desert. Along with this, the petitioner has to prove that he or she did not consent to the desertion and that the respondent deserted the petitioner without any reasonable cause. It is also important to note that desertion can only be considered a valid reason for divorce if abandonment or separation has occurred for a continuous statutory period. However, completing the statutory period can be a challenge for the abandoned spouse as he or she is left with no choice but to wait for the deserting spouse to approach the court.

⁴⁹ AIR 2005 SCC 3508.