

Desertion under Hindu Law

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Desertion under Hindu Law

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Living together is the essence of marriage, living apart is its negation. This negation of the very essence of marriage is that the law terms as desertion. Desertion is a ground for divorce under section 13 (1)(i-b) of Hindu Marriage Act, 1955. The word desert means to abandon, cease to frequent, withdraw one's held or attendance. The court held that desertion means abandonment and implies an action of withdrawal from a cohabitation that exists.¹ The Explanation to Section 13 (1) defines desertion as, '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. When one spouse leaves the other in a manner which is not justifiable, the deserted spouse has a remedy by way of matrimonial relief's. However It is not defined in the Act purposely because the concept varies from time to time and place to place. It is a variable concept in a progressive society and its meaning changes with time. It is a dynamic concept. There has been a plea for providing an appropriate definition of the term 'Desertion',² but it has not been accepted uptill now. It is easier to describe desertion than to define it in precise words. Desertion refers to total abandonment of matrimonial obligations. It means permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other i.e., running away from the matrimonial life. It refers to total repudiation of marital obligations and permanent abnegation from the conjugal life. Desertion becomes a matrimonial offence, when it is without a reasonable cause and without the consent of other party to marriage, provided it continues for a period of two years immediately preceding the presentation of the petition in the court. As pointed out by the Supreme Court in Savitri Pandey v. Prem Chandra³ :

Desertion for the purpose of seeking divorce under the Act means the intention permanent forsaking and abandonment of one spouse by the other without that other's, consent and without reasonable cause. In other words, it is a total

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¹ Kako v Ajit Singh, AIR 1960 Punj 328.

² Sec.10 (1) (i) of the Hindu Marriage Act, 1955

³ (2002) 2 SCC 73

repudiation of the obligation of marriage. Desertion is not the withdrawal from a place, but from a state of things..... Desertion is not a single act complete in itself, it is a continuous cause of conduct to be determined under the facts and circumstances of each case.

In an another important case, which was a case under the Bombay Hindu Divorce Act, 1947, the court lucidly defined and explained the concept of desertion. It held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion.⁴

The following ingredients must be fulfill for the desertion :

1. Factum deserendi, The factum of separation i.e., the petitioner and the respondent should be either physically or mentally separated from each other.
2. Animus deserendi (an intention to desert the respondent for a permanent period.
3. Desertion should have been without any reasonable cause.
4. It should have been without the consent of the petitioner and
5. It should have been for a continuous period of two years, immediately preceding the presentation of the petition in the court.

The period of two years must be a continuous period and it must run upto the date of the filing of the petition in the court.

Desertion is completed, when the factum of separation and animus deserendi co-exist. Therefore, if factum of separation is there, without animus deserendi, the offence of desertion is not complete. And the vice-versa is also true i.e., if animus deserendi is there and the factum of separation is absent, the offence of desertion remains incomplete, barring the petitioner to claim any remedy under Sec.10 (a) of Hindi Marriage Act, 1955.

The factum of separation and animus deserendi may take place at the same time or the separation later on, may be joined with animus deserendi. In one case, the spouse leaves the matrimonial home, with an intention to leave the other spouse permanently and in the other, the spouse first

⁴ Bipinchandra Jai Singhbai Shah v. Prabhavati, AIR 1957 SC 176; Lachman Uttamchand Kirplani v. Meena, AIR 1964 SC 40

leaves the matrimonial home and then, after leaving it, decides, not to come back to the married life for ever. In both the cases, desertion would be complete.

To constitute desertion, factum and animus must co-exist and it is immaterial, whether former precedes the later or later precedes the former.

By the amendment of 1976, desertion has been for the first time included as a ground for divorce under Section 13 (1)(i-b) of Hindu Marriage Act. Before 1976, desertion was a ground for judicial separation but now it is also a ground for divorce.

Desertion is of two types namely :

1. Actual desertion, and
2. Constructive desertion.

In both types of desertion, the factum and animus must co-exist.

1. Actual Desertion

In actual desertion, the deserting party leaves the matrimonial home permanently i.e., with no intention to return back to the matrimonial home again.

In order to constitute actual desertion, the following fact should be established :

- a. The spouses must have parted or terminated all joint living.
- b. The deserting spouse must have the intention to desert the other spouse.
- c. The deserted spouse must not have agreed to the separation.
- d. The desertion must have been without reasonable cause, and
- e. The requisite duration must be fulfilled i.e., two years

Desertion is a continuing offence. To constitute desertion it is necessary that both factum of separation and animus deserendi should continue during the entire statutory period of two years immediately preceding the presentation of the petition. In *Shjamlal v. Leelavati*,⁵ the court held that desertion and cruelty are continuing wrong with each day giving a fresh cause of action.

⁵ AIR 2007 Raj. 93.

The offence of desertion commences when the facts of separation and the animus deserendi co-exists. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without necessary animus or it may be that the separation and animus deserendi coincide in point of time.

In *Durga Prasanna Tripathy v. Arundhanti Tripathy*,⁶ the petition for divorce filed by the husband on the ground that his wife deserted him after 7 months of marriage. Parties were living separately for about 14 years. Attempts were made by the husband and his relatives in getting back wife to matrimonial home with no success. Records showed that the parties disliked each other. There were no chances of reconciliation and then court granted divorce on the ground of desertion. In another same type of case the parties to the marriage were living separately for last more than decade. Attempts were made for reconciliation between them, but such attempts were of no effect. There was no chance of both living together to continue their marital life. In order to do justice between the parties the Supreme Court dissolved their marriage under Article 142 read with section 13 (1)(i-b) of the Hindu Marriage Act.⁷

Where a husband serving in the army goes to his house in Dehradun during vacation but the wife does not allow him to enter house and misbehaves with him. It was held that the husband was entitled to a divorce decree on the ground of wife's desertion.⁸

2. Constructive Desertion :

In constructive desertion, the deserted party is compelled to leave the matrimonial home with her/his consent and free will. In most of the cases, it is the wife, who is compelled to leave the matrimonial home, for no fault of her own, involuntarily. In desertion, the cohabitation ceases for a permanent period. It is brought to an end completely with no hope of its resumption in future. There is total repudiation of the matrimonial obligation and an end of marital life.

Desertion is not withdrawal from a particular place, but it is withdrawal from a particular state of things, i.e., cohabitation. Thus, the constructive desertion consists of that state of things where one party to marriage has been compelled to leave matrimonial home owing to repulsive

⁶ AIR 2005 SC 3297.

⁷ *Manju Kumari Singh v. Avinash Kumar Singh*, AIR 2018 SC 3629.

⁸ *Pramod Bijalwan v. Satendra Dutt*, AIR 2008 NOC 508

behavior of the other party and the party thus living separately cannot be held to be deserter but the party compelling her/him would be held to be the deserter.

Desertion is never accompanied with an intention to resume and restore cohabitation. It is always done to destroy it and damage the conjugal life irreparably and permanently. Desertion is never abrupt; it is well thought and sometimes will planned and committed with a view to disrupt the matrimonial life for ever. Where the party in desertion expresses his/her desire to return to the matrimonial life again or even offer to reconciliation too, bring desertion to an end provided the offer is reasonably just and acceptable to the aggrieved party. Marriages, as they define, are made in heaven and solemnized on earth. It is a sacrament for Hindus, a sanctified contract for Muslims and a sacred knot for Christians. Husbands and wives vow for each other, yet there have been innumerable cases of betrayals by the spouses.

In the context of desertion, a mention may be made of a judgment of the Supreme Court,⁹ wherein it has been held that when a petition is filed on the ground of desertion, previous cohabitation between the parties must be established, except in cases of mental or physical incapacity. According to the court, cohabitation by the parties is an essential requirement of a valid marriage, and there can be no desertion without previous cohabitation by the parties. In this case, there was evidence indicating that the wife did not permit the husband to cohabit with her, and there was nothing on record showing that the husband had ever refused to cohabit with her. It was accordingly held that the appellant wife was disentitled to claim divorce on the ground of desertion. Granting her divorce would result in allowing her to take advantage of her own wrong, the court held.

In *Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi*,¹⁰ the elements of desertion had been laid down as under :

- a. The fact that the husband and the wife live apart.
- b. An intention to bring an end permanently to their sexual relation.
- c. These two elements must be present/in existence during the statutory period shown in the law.¹¹

⁹ *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 SCC 73

¹⁰ (2002) 1 SCC 308. *Om Prakash Narang v. Prabha Narang*, AIR 1978 Del 240.

The Karnataka High Court held that it is not necessary to prove that one of the parties to marriage is living separately from the other. Merely to prove that one of the parties to marriage is not fulfilling the duties and responsibilities towards the other, is sufficient to establish desertion, provided such neglect in the discharge of matrimonial duties is gross and deliberate.¹²

Reasonable cause of desertion : If a man persists in doing acts which he knows his wife will probably not tolerate or which no ordinary woman would tolerate, without justifiable cause, and she leaves, then it is he who is deemed to have deserted her whatever his desire or intention might have been. In *Rohini Kumari v. Narendra Singh*,¹³ the Supreme Court has made it clear that 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 *Om Prakash v. Madhu*,¹⁴ the wife had to stay away from the husband as he refused to allow her to come because he wanted to complete his studies. It was held that there was no desertion on the part of the wife. The husband's contention that the fact that they have been living separately for 16 years constituted the *factum* and the wife's refusal to receive notices sent to her for returning constituted *animus*, were rejected.

The Supreme Court in *Chetan Das v. Kamla Devi*,¹⁵ observed that when the husband continued to have illicit relations with another woman, the court refused to grant decree of divorce in favour of the husband. The husband's offer to keep the respondent wife with him was not accepted as genuine, and the court held that none else but the appellant husband alone is to be blamed for the unhappy and unfortunate situation, and so he could not be entitled to seek divorce.

Where the respondent wife failed to substantiate allegation of immoral advances by the father-in-law and ill-treatment by the husband, nor demonstrated willingness to return to the matrimonial home after the death of the father-in-law, the Supreme Court restored the trial court order granting judicial separation to the husband on ground of the wife's desertion. In this case, the respondent wife had gone to her parent's house for delivery, which obviously was not construed

¹¹ *Praveen Mehta v. Inderjit Mehta*, (2002) 5 SCC 706.

¹² *Dr. Srikant Rangacharya v. Smt. Anuradha*, AIR 1980 Karn. 8.

¹³ AIR 1972 SC 459

¹⁴ AIR 1997 Raj 214

¹⁵ (2001) 4 SCC 250

as desertion, as she had no animus at that time to leave the matrimonial house for good. The element of desertion came later when she refused to come back and join her husband.¹⁶

In *P.Kalyanasundaram v. K.Paqualatchamy*,¹⁷ the husband contended that the wife had an overwhelming attachment towards her father and her continued stay with her father is willful and intentional and amounts to desertion. The court denied it as desertion by saying that without any reason, simply for the love and affection towards the father, no married daughter would stay with her father abandoning her husband. The theory of abnormal relationship has not been established by the petitioner.

What kind of conduct affords a reasonable cause for fleeing from the other spouse? The answer to this question depends upon the impact of that conduct on the mind of the other party. The conduct of the same type may evoke different reactions from different persons. Hence, it cannot be said in general terms that this or that behaviour gives reasonable cause for desertion.

The following have also been held to amount to reasonable cause for desertion:

- (i) Character assassination by the husband, refusal to keep her with himself even after she leaves service,¹⁸
- (ii) Living separately for the education of children.¹⁹

Legal duration of desertion: Desertion is a continuing offence. It is complete when the period prescribed by the law ends and the petition for remedy on its ground is filed. The Hindu Marriage Act prescribes two continuous years for it and no petition can be filed before the expiry of this period. The offence is not complete even on the expiry of that period until the petition for divorce is made. Desertion is thus different from cruelty and adultery. They are completed even by the commission of a single act, but desertion is not completed with the forsaking of the matrimonial home.²⁰ The deserter can avail himself of these circumstances. If he comes back before the expiry of that period, desertion ends. If the deserted spouse refuses to receive the

¹⁶ *Adhyatma Das v. Kamla Devi*, (2001) 4 SCC 250

¹⁷ AIR 2004 Mad 43.

¹⁸ *Ritu Shobha v. Dharampal*, 1980 HLR 355 (P&H)

¹⁹ *Kalawanti v. Jeet Singh*, 1980 HLR (P&H)

²⁰ *Sitabai v. Ramchandra*, AIR 1958 Bom 116

deserting spouse, the tales are turned. The deserted becomes the deserter. Even if the deserting spouse merely proposes to return, the desertion is put an end to.²¹ But this proposal must be sincere.

Likewise, if the deserted spouse does some act before the fixed period of desertion which gives the deserting spouse a reasonable cause for not coming forward for reconciliation, then also the desertion ends. What conduct affords such reasonable cause cannot be ascertained *a priori*. This depends on the sum total of circumstances, behaviour of the deserted spouse and its impact on the mind of the deserting spouse. If a behaviour fails to produce an adverse effect on the mind of the deserting spouse, desertion does not come to an end.²² It is not the obligation of the deserted party that he or she should make efforts to bring an end to desertion.²³ Therefore, that the deserted spouse did not call or cajole the deserting spouse to come back is not a good reason for remaining away.

It may conclude by saying that desertion is the negation of togetherness, which is the basis of conjugal relationship. It is a ground for divorce under all matrimonial laws and intention to desert and the factum of desertion are both required to prove desertion. A party physically leaving the other may not necessarily be the one guilty of desertion, if the non-withdrawing spouse has impelled the other spouse to leave because of his/her behavior, it is the former who would be guilty.²⁴

Note : Books consulted are as follows : Dr.R.C.Nagpal, Hindu Law, Mulla Principle of Hindu Law, K.C.Srivastava, Hindu Law, Prof.Kusum, Family Law Lecture and R.K.Agrawal, Hindu Law, B.H.Gandhi's, Family Law

²¹ Om Prakash Narang v. Prabha Narang, AIR 1978 Del 240

²² Lachman v. Meena, AIR 1964 SC 40

²³ Bipin Chandra v. Prabhawati, AIR 1957 SC 176

²⁴ Prof.Kusum, Family Law Lectures, 3rd edi., 2011 p.86-87.