

DESERTION

Pradeep Kumar Mani
Family Judge
Tehri Garhwal

इस इन्तिहाए—तर्के—मुहब्बत के बावजूद,
हमने लिया है, नाम तुम्हारा कभी—कभी ।

'अर्श' मलिसयानी

Hindu Marriage Act, 1955

Section 10. Judicial separation

(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).....

Section 13. 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—

(i).....

(ia).....

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

(ii).....

(iii).....

(iv).....

(v).....

(vi).....

(vii).....

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

(i-a).....

(i).....

(ii).....

(2).....

The Hindu Adoptions And Maintenance Act, 1956

18. Maintenance of wife

(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance-

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b).....

(c).....

(d).....

(e).....

(f).....

(g).....

(3).....”

Criminal Procedure Code, 1973

Section 125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct;

Provided that.....

The Protection of Women from Domestic Violence Act, 2005

Section 3. Definitions of domestic violence

For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

(a).....

(b).....

(c).....

(d).....

What is desertion?

"Rayden on Divorce" at p.128 (6th Edn.)

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

Halsbury's Laws of England (3rd Edn.), Vol. 12, paras
453 and 454 at pp. 241 to 243

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause.

Cont'd.....

Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'.

Cont'd.....

There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party.

Cont'd.....

Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Bipinchandra Jaisinghbai Shah vs. Prabhavati

AIR 1957 SC 176

"Two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Desertion is a matter of inference to be drawn from the facts and circumstances of each case.

Cont'd.....

Their Lordships have held as under :-

That the quality of permanence is one of the essential elements which differentiates desertion from wilful 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.

Cont'd.....

It can be concluded that 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).

Cont'd.....

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.

Cont'd.....

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.

Cont'd.....

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.

Cont'd.....

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.

Lachman Utamchand Kirpalani vs. Meena alias Mota,
AIR 1964 SC 40

It was held that If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without in sending permanently the cease cohabitation, it will not amount to desertion.

Cont'd.....

For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the Intention of bring cohabitation permanently to an end (animus deserendi).

Cont'd.....

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...

Cont'd.....

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.

Cont'd.....

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 coexist. But it is not necessary that they should commence at the same time.

Smt. Rohini Kumari vs. Narendra Singh, AIR 1972 SC 459

It was held as :-

“According to the Explanation the expression **"desertion"** with its grammatical variation and cognate expression 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.

Cont'd.....

There must be two elements present on the side of the deserting spouse namely, **the factum**, i.e. physical separation and **the animus deserendi** i.e. the intention to bring cohabitation permanently to an end.

Cont'd.....

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.

Cont'd.....

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 in this case.

Cont'd.....

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.

Cont'd.....

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."

Debanand Tamuli vs. Smt. Kakumoni Katakya
(2022) 5 SCC 459

It was observed as under:- Para 7

The law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause.

Cont'd.....

The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end.

Cont'd.....

In other words, there should be animus deserendi on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home.

Conclusion

It can be concluded that the reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence.

I can conclude myself by saying---

दुश्मनी लाख सही खत्म न कीजै रिश्ता ।
दिल मिले ना मिले हाथ मिलाते रहिए ॥

निदा फ़ाज़ली

THANKS