

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No.52 of 2003

Judgment Reserved on : 1.8.2017

Judgment Delivered on : 6.10.2017

Sushil Chandra Sen, S/o Shri V.V. Sen, aged about 38 years, R/o Satipara, Thana Ambikapur, District Surguja, Chhattisgarh, Office District Indian Life Insurance Company, Mahamaya Road, Ambikapur

---- Appellant

versus

Smt. Champa Sen, aged about 32 years, W/o Sushil Chandra Sen, R/o Near Jalaram Mandir, Tikarapara, Ramdas Nagar, Bilaspur, District Bilaspur, Chhattisgarh

--- Respondent

For Appellant	:	Shri Vikram Dixit, Advocate
For Respondent	:	Shri V.G. Tamaskar, Advocate

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This is husband's appeal under Section 28 of the Hindu Marriage Act, 1955 (henceforth 'the Act of 1955') assailing the legality and validity of the judgment dated 31.10.2002 rendered in Civil Suit No.91-A of 2002 by the 5th Additional District Judge, Bilaspur allowing the wife's application under Section 13(1)(i-b) of the Act of 1955 for grant of divorce on the ground of desertion.
2. The wife/Respondent moved the subject application with the averment that she and the husband/Appellant were married at Bilaspur on 19.2.1995. Thereafter, she came to her matrimonial house at Ambikapur, but within a short period of 30 days, she was driven out of her matrimonial house because her parents could not

fulfill the demands made by the husband/Appellant. Thereafter, she filed a suit, being Civil Suit No.10-B of 1999 for recovery of dowry items and *Stridhan* which was decreed in her favour and the husband was directed to pay her Rs.45,000/- in cash and return her jewellerys. A monthly maintenance of Rs.2,000/- was also decreed in her favour. A case was also registered against the husband under Section 498-A of the Indian Penal Code read with Section 3/4 of the Dowry Prohibition Act. However, vide judgment dated 7.3.2002, the husband was given benefit of doubt and acquitted of the charges. The husband deserted the wife/Respondent with effect from 11.3.1995. Thereafter, the husband/Appellant has not taken any step to reconcile the issue.

3. The husband/Appellant contested the suit and denied the plaint allegations. It was pleaded by the husband that the wife told him that as per the family rituals a newly married wife does not stay at her matrimonial house on the occasion of Holi festival and, therefore, she requested that she be sent to her maternal house. At her own request, he sent her to her maternal house with his younger brother. At that time, along with her, she took her all belongings including jewellerys to her maternal house. It was further pleaded that the wife instituted the suit on false grounds. He also preferred an appeal against the judgment delivered in the said civil suit, which is still pending. In the criminal case registered against him for offence punishable under Section 498-A of the Indian Penal Code, he has been acquitted. After 11.3.1995, he went to bring the wife/Respondent back many times and also wrote her letters and made telephonic requests in this regard, but she refused to come and did not return. It was the further pleading of

the husband that she herself is separately residing at her maternal house without any reasonable ground.

4. Both the parties got their witnesses examined. The wife got herself examined as Plaintiff Witness No.1. Per contra, the husband got himself examined as Defendant Witness No.1 and his brother Ram Chandra Sen as Defendant Witness No.2.
5. The Court below, after hearing the parties and appreciation of the evidence on record, allowed the application for divorce in favour of the wife. Hence, this appeal by the husband.
6. I have heard Learned Counsel appearing for the parties and perused the record including the impugned judgment with utmost circumspection.
7. According to PW-1, Smt. Champa Sen (wife/Respondent), on 20.2.1995, she went along with the husband/Appellant/defendant to her matrimonial house at Ambikapur where she was beaten by the husband for demand of dowry and when she could not fulfill his demands, she was expelled by him from his house on 11.3.1995. In spite of that, she went to the house of the husband at Ambikapur along with her brother, mother and father 3–4 times, but the husband refused to keep her at his house. She further deposed that thereafter she lodged a report for demand of dowry in the police station and also preferred a civil suit against the husband. She further deposed that she wrote letters to the husband several times requesting him to take her back to her matrimonial house, but he did not come.

8. DW-1, Sushil Chandra Sen (husband/Appellant) deposed that he had sent the wife/Respondent/plaintiff to her maternal house at her own request along with his younger brother before the Holi festival and at that time she had gone along with her all belongings including jewellery. He further deposed that he had gone to the house of his wife many times to bring her back and had also written her letters and made telephonic requests in this regard, but she refused to return saying that she will reside with him only if he lives separately from his brothers or he lives at Bilaspur. The above statement of the husband is duly supported by his brother Ram Chandra Sen, DW-2.
9. In a recent judgment dated 13.9.2017 delivered in **First Appeal (M) No.102 of 2012 (Som Kumar Bahidar v. Smt. Jyoti)**, this Court observed thus:

“21. In Bipinchandra Jaisinghbhai Shah v. Prabhavati, AIR 1957 SC 176, history and development of a concept of “desertion” as a cause of action for grant of decree of divorce has been spelt out. Quoting English authors and Halsbury's Laws of England, the Supreme Court observed thus in para-10:

“(10) What is desertion? “Rayden on Divorce” which is a standard work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:

“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.”

The legal position has been admirably summarised in paras 453 and 454 at pp. 241 to

243 of Halsbury's Laws of England (3rd Edn.), Vol. 12, in the following words:

“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. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.”

Desertion is not the withdrawal from a place but from a 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'. 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. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a cross-charge, of the answer. 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.”

The Supreme Court thereafter in the same paragraph held that 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 house to form the necessary intention aforesaid. The petition for divorce bears the burden of proving those elements in the two spouses respectively.

It was further observed that the 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 the 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. 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 any 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.

23. In *Lachman Utamchand Kirpalani v. Meena @ Mota*, AIR 1964 SC 40, the Supreme Court has held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause.

24. In *Smt. Rohini Kumari v. Narendra Singh*, AIR 1972 SC 459, the Supreme Court yet again held that desertion does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation.

25. In *Geeta Jagdish Mangtant v. Jagdish Mangtant*, AIR 2005 SC 3508, the Supreme Court, after narrating the evidence available in the case, held that the conclusion is inevitable, that there was never any attempt on the part of the wife to go to husband's house, therefore, from this fact alone *animus deserendi* on the part of the wife is clearly established. She has chosen to adopt a course of conduct which proves desertion on her part and that it was without a reasonable cause. Such a course of conduct over a long period indicates total abandonment of marriage. It also amounts to willful neglect of the husband by the wife.”

10. Having summarised the settled legal position as to the nature of marital offence of desertion and when the said ground can be said to have been established by the deserted spouse, I shall now consider the evidence on this aspect.
11. It is undisputed in the instant case that in the criminal case registered for the offence punishable under Section 498-A of the Indian Penal Code, the husband is acquitted by the Trial Court. As per the statement of the wife, she was expelled by the husband from his house on 11.3.1995. Per contra, the husband has deposed that he himself had sent the wife to her maternal house and that too at her own request. The above statement of the husband was not challenged. The wife has admitted in her cross-examination at paragraph 9 that at the time of Holi festival, the husband, saying that Holi festival will not be celebrated by them this year because his father had expired, had sent her to her maternal house with his younger brother. Therefore, her earlier statement that the husband had expelled her from his house on 11.3.1995 is not reliable.
12. As per the statement of the wife, after 11.3.1995, she had gone to the husband's house along with her brother, mother and father 3-4 times, but he did not keep her with him at his house. In support of this statement, she has not examined her parents or brother. It is also apparent from the evidence on record that after 11.3.1995, no application for restitution of conjugal rights under Section 9 of the Act of 1955 was filed by the wife. Rather, she filed the civil suit for recovery of the dowry items and *Stridhan*.

- 13.** It is also evident from the evidence led by the wife that on 17.2.1996, i.e., after about a year from her expulsion from the house of the husband, she lodged the report against the demand of dowry. The husband has been acquitted of the charge in that criminal case. Had the demand of dowry been really made by the husband, the wife would have immediately after 11.3.1995 lodged a report in this regard, but she did not do so and lodged the report after about a year from 11.3.1995.
- 14.** The suit under Section 13 of the Act of 1955 was filed by the wife on 1.8.2002. It is also evident from the record that the statements of the witnesses were recorded on 29.10.2002 and on 31.10.2002 the impugned judgment was delivered. The wife has admitted in her cross-examination at paragraph 16 that her second marriage was fixed for 1.11.2002, therefore, she wanted divorce from the husband/Appellant. It is also clear from her statement that since her second marriage was fixed, she had taken the ground of desertion for obtaining divorce from the husband/Appellant.
- 15.** From the above discussion, it is clear that there is nothing on record from which it could be inferred that the husband deserted the wife. Rather, it seems that it is the wife who deserted the husband. Therefore, the impugned judgment and decree deserves to be set aside.
- 16.** In the premises of aforesaid, the appeal is allowed. The judgment and decree under challenge is set aside.

17. A decree be drawn up accordingly.
18. Record of the Court below be sent back along with a copy of this judgment for information.

Sd/-

(Arvind Singh Chandel)
JUDGE