

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal (M) No. 67 of 2015

- Smt. Dumeshwari (Leeleshwari) Dewangan, W/o Shri Devendra Kumar Dewangan, aged about 27 years, D/o Shri Gunnalal Dewangan, R/o Gunna Kirana Dukan, Village and Post Office- Kunrra, Police Station and Tahsil- Dharsiwa, District- Raipur, Chhattisgarh.

---- Appellant

Versus

- Devendra Kumar Dewangan, S/o Shri Rooram Dewangan, aged about 31 years, R/o Village and Post Office - Hasda, Police Station and Tahsil - Berla, District - Bemetara, Chhattisgarh.

---- Respondent

For the Appellant	:	Mr. Shivendu Pandya, Advocate.
For the Respondent	:	Mr. Sunil Verma, Advocate.

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Order on Board by Justice Manindra Mohan Shrivastava J.

01.10.2019

1. This appeal is directed against impugned judgment and decree dated 25.04.2015 by which the learned Family Court has granted decree of divorce in favour of respondent/husband both on the ground of cruelty as well as desertion.

2. The respondent/husband filed an application seeking decree of divorce against his wife/appellant on pleadings of cruelty and desertion. It was pleaded that the respondent/wife indulged in repeatedly insisting him to frequently visit her parental house soon after her marriage. She also used to express anger, lose temperament and create an atmosphere of quarrel. It was further pleaded that she insisted her husband to move to her parental place and run the Kirana Shop. Further pleading was that

whenever the wife fell sick, she indulged in hurling abuses at the guests and not allowed the husband to have physical relations. It was further pleaded that in order to keep husband under control, the wife kept on adding some poisonous substance in the food due to which the health of the husband was adversely affected. This led to convening community meeting where wife admitted this mistake but despite that it was time and again repeated. In the pleadings, it was also stated that after giving birth to the third child, wife indulged in domestic disputes from April, 2011 onwards and went to her parental house and even when the husband went to her house along with other relatives and members of the community to bring her back, she refused to accompany him and since then she deserted the husband. It was also pleaded that the husband had moved an application for grant of decree for restitution of Conjugal Rights and in this proceeding wife refused to reside with the husband. Therefore, husband prayed for grant of decree of divorce.

3. Appellant/wife filed her written statement and while denying all the allegations made by the husband, she made counter allegations stating that her first and second issue could not survive and died because of negligence on the part of the husband. Thereafter, she was blessed with a son on 15.10.2011 and all the expenses regarding delivery were incurred by her father and not by her husband. The allegation of mixing poisonous substance in the food was specifically denied by her. She admitted that though the husband and her family members had come to take her back to matrimonial house, she stated that if a written assurance was given she would definitely go back to matrimonial house, but no such

assurance was given by the husband. The appellant/wife made allegation that she has been subjected to cruelty and because of harassment at the hands of husband she had to come to parental house. According to her, she was subjected to assault, abuses and her character was also doubted. It is averred by the wife that when her two children were born, the husband did not ensure proper treatment as a result of which, the children died soon after their birth and since then she was subjected to harassment and even assault coupled with serious allegation that she was responsible for the death of two children and she was even branded as witchcraft. According to her, while carrying three months pregnancy, she was sent to her parental house on the assurance that the husband would come after 15 days but nobody came to take care of her and when later on, they came along with members of the community and written assurance was sought, it was not given.

4. On the basis of the pleadings of the parties learned trial Court framed as many as four issues. Issues related to both the grounds of cruelty and desertion.

5. Learned trial Court after allowing the parties to lead evidence came to the conclusion that husband is entitled to decree of divorce both on the ground of cruelty and desertion. It is this decree which is under challenge in this appeal.

6. Learned counsel for the appellant would argue that the learned Family Court, without there being any clinching evidence much less specific pleading of cruelty, has recorded a conclusion that the appellant/wife subjected her husband to cruelty by mixing poisonous substance in his food and in making false allegation of

negligence regarding the death of two children. Learned counsel further argued that the evidence of the husband and his witnesses on the aspect of cruelty does not prove that any poisonous substance was recovered from the possession of the wife nor any medical report has been produced much less proved to support the allegation that some poisonous substance was being continuously added in the food which resulted in deterioration of the health of husband. Learned Court below, it is argued, has drawn inference of cruelty on the basis of vague and unsubstantiated allegation of appellant's mixing poisonous substance in the food. Next submission is that the death of two children at an early stage after birth also establishes the negligence and carelessness on the part of the respondent/husband which supports the allegation levelled by the wife.

On the issue of desertion learned counsel for the appellant, relying upon in **2017 (3) C.G.L.J 372 (DB), Yogesh Kumar Pandey Vs. Smt. Swati Pandey** and **2018 (1) C.G.L.J 294 (DB), Subodh Gupta Vs. Smt. Neetu Gupta**, contended that the appellant/wife had no intention of deserting her husband for all time to come as there is ample evidence to show that she was subjected to maltreatment and harassment by the husband. Further, the act of husband in not accepting the offer of the wife for giving the assurance of not repeating the cruel treatment towards her in future, negatives all inference of *animus deserendi* on the part of the wife. He would further submit that a very specific allegation has been levelled by the wife against the husband and evidence has also been led that when two children died, the husband subjected her to cruelty by hurling abuses and branding

her as witch. Because of this maltreatment she had moved out of her husband's house because at that time, she was carrying pregnancy and gave birth to the third male child in her parental house. Therefore, it is not the appellant/wife who has committed cruelty on respondent/husband but it is the husband himself who committed cruelty on her and, therefore, even if it is found that appellant/wife was not residing with her husband but was residing in her parental house, she had all the reasonable cause not to go back without written assurance of no further maltreatment, therefore, no case of desertion is also made out against the wife.

7. Learned counsel for the appellant, would also submit that wife was and is always willing to reside with the husband and to save the matrimonial life in the larger interest of her son who presently is residing with her and as she is serious enough for protection of her son, she has always made it clear to live with her husband.

8. On the other hand, learned counsel for the respondent would submit that the conduct of the appellant/wife, as stated by the witness, is contrary to her pleadings. He would argue that as far as allegation of cruelty is concerned, the husband has clearly pleaded and led specific evidence that the appellant/wife, apart from indulging in quarrelsome behavior, hurling abuses and insisting on frequent visits to parental house, kept on mixing poisonous substance in the food of the husband and one of the independent witness Gajadhar Dewangan (PW-3) in his evidence has stated that when community meeting was held, the wife admitted her mistake and thereafter, both of them were advised to live together but the appellant/wife again started indulging in the

same activity. Therefore, the finding of the learned Family Court with regard to cruelty does not warrant any interference.

9. On the aspect of desertion, learned counsel for the respondent would argue that the appellant/wife has clearly admitted that she is not residing with the appellant since long, more than two years prior to the date of filing of divorce application and even when the respondent/husband went along with relatives and villagers to offer her to come back to matrimonial place, she refused. It is also argued that in the proceedings initiated under Section 9 of the Hindu Marriage Act for restitution of Conjugal Rights, despite all efforts made, appellant/wife refused to go back to the husband which has been clearly recorded in the earlier proceedings. According to him, the allegation of cruelty made by the wife in written statement is vague as there is no evidence to substantiate the same. Therefore, the learned Court below has not committed any illegality in granting the decree of divorce in favour of the husband.

10. We have heard learned counsel for the parties and perused the record.

11. The family Court has granted decree of divorce in favour of the husband and against the wife both on the grounds of cruelty as well as desertion. While dealing with the cruelty meted out to the husband, the learned Family Court has relied upon the evidence in support of the pleading that the wife had indulged in mixing poisonous substance in the food which was being given to her husband which adversely affected his health. In Paragraph 7 of the plaint there is an allegation that in order to exercise effective control on her husband, the appellant/wife mixed a kind of

poisonous substance in the food due to which the husband suffered from various ailments. However, we do not find that in order to substantiate this allegation the husband led any clinching evidence. On mere statement that some poisonous substance was mixed in the food so as to make out a case of cruelty, the husband has not stated as to what was that substance which was being added in the food. Secondly, he does not say that he ever saw his wife adding something in the food and upon inquiry he discovered that the substance which was being added in the food was poisonous in nature. Father of the appellant, namely, Roop Ram Dewangan (PW-2) has also given a verbatim repetition of what has been stated in Para 7 of the plaint and Para 6 of the affidavit sworn by Devendra (PW-1) under order 18 Rule 4 CPC. If the pleadings are compared with the evidence, it becomes apparent that evidence is absolutely mechanical in nature. The affidavit referred to above is exactly the same as has been pleaded in the application. Both the application and the affidavit are absolutely vague with regard to the fact as to when poisonous substance was added as it was not seen either by respondent Devendra or his father Roop Ram. What was the name of substance and whether it was taken for any chemical analysis has also not been proved by the husband. No medical report regarding medical examination of the husband has been filed much less proved that some poisonous substance was found present in his blood or any other report to corroborate the allegation that the food which was being consumed by the husband had some poisonous content. True it is that in civil proceedings the degree of proof is not as high as required in criminal cases, nevertheless an inference based on preponderance of probability can be drawn only when appropriate evidence of

clinching nature is led before the Court. Making bald submission that the wife used to mix some poisonous substance adversely affecting the health of the husband without specific evidence is not enough. Therefore, this Court is of the opinion that the allegation made by the husband regarding cruelty meted out by his wife by mixing poisonous substance in the food is bereft of any material and the finding in this regard recorded by the Family Court is unsustainable both in law as well as on facts.

12. As regards the other ground of cruelty, as noticed by the learned Family Court that as the wife made false allegation against the husband that because of his negligent behavior his two children died caused pain and agony, this finding, in our opinion, is wholly baseless. The factum of death of first two issues, born out of the wedlock, of the parties soon after their birth, is not in dispute. True it is that evidence has come that children were taken to hospital and treatment was provided to them, allegation of negligence on the part of the husband in not properly treating the children, is just a bonafide impression though not a false allegation. For this reason also, this could not be treated to be a ground of cruelty.

13. As far as ground of desertion is concerned, the pleadings of the respondent/husband are that in April, 2011 wife left the matrimonial house on account of domestic disputes and when he went to take her back she did not come back. In support of this, orders of the Family Court in earlier proceedings under Section 9 of the Hindu Marriage Act have been placed on record which contains observation of the Court that the wife is not prepared to go back having made an allegation that she was unceremoniously

shunted out of the matrimonial house. The evidence of PW-1, PW-2 and PW-3 is that in the month of March, 2012 when the husband along with other persons including members of the community had gone to the house of the wife to take her back, she refused to come back. On this aspect the appellant/wife has denied all the allegations and has stated that when the husband had come to take her back, she asked for assurance in writing that she would not be subjected to maltreatment, harassment and torture but no such assurance was given and the husband went back. Thus as far as the husband going to the house of the wife some times in the month of March, 2012 to take her back is concerned, this is an admitted position. However, the dispute is as to whether the wife was justified in not coming back to her matrimonial house for any good reason.

14. The wife not only in her application but also in evidence has clearly stated that after first and second issue died in quick succession soon after their birth, harassment began and she was subjected to abuses, torture and was even branded as witch. It was this act of cruelty because of which, she had to leave the matrimonial house. Not only this, she has clearly stated in her affidavit which could not be rebutted in her evidence that though, she was prepared to go back to the matrimonial house, in the background of cruelty meted out to her in the past she *bona fide* put a precondition of giving assurance so as to secure life and limb.

15. From the evidence on record, we find that the wife despite various disputes, keeping in view that she had a small child, to secure his future, had accepted to go back to the matrimonial

house, but she, in order to save her own life and limbs, sought an assurance so that in future, she may not be subjected to cruelty. That is the reason, why the wife was not prepared to go back to the house of the husband, in our opinion, would not constitute *animus deserendi*. The decree of divorce on the ground of desertion can be granted only upon clinching evidence led by the party seeking decree on the ground that the other party with a clear *animus deserendi* in mind has decided to desert spouse with no intention to coming back to matrimonial house. This aspect was considered by Division Bench of this Court in the case of Subodh Gupta Vs. Smt. Neetu Gupta (Supra). The concept of desertion as meant under the provisions of law and ground for divorce was considered as below :-

“24. In Bipinchandra Jaisinghbai Shah Vs. 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 home to form the necessary intention aforesaid. The petitioner 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 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.”

“**25.** In *Lachman Utamchand Kirpalani Vs. 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.

26. In *Smt. Rohini Kumari Vs. 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.

27. In *Geeta Jagdish Mangtani Vs. Jagdish Mangtani* {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.

28. In a more recent judgment in the matter of *Malathi Ravi, M.D. Vs. B.V. Ravi, M.D.* {(2014) 7 SCC 640}, the Supreme Court has approved its earlier judgment on the point in the matter of *Savitri Pandey Vs. Prem Chandra Pandey* {(2002) 2 SCC 73} and has reiterated the same view regarding desertion and the nature of proof required in law to establish the marital offence.”

16. In the light of the aforesaid judicial pronouncement on the law with regard to desertion, its meaning and that unless *animus deserendi* is proved, mere physical separation and living separately by itself, would not provide a ground for divorce. We find that in the present case, the appellant/wife came out with the case that, though, she was prepared to live along with her husband, because of past experience which she had in the matrimonial house, she wanted a proper assurance so that the

same treatment may not be repeated after she goes back. In our considered opinion it cannot be said that the wife carried *animus deserendi* to desert and give up all her relations in the matrimony with her husband. Therefore, mere physical separation for certain period would not entitle the husband to a decree of divorce.

In view of provision contained in explanation to Section 13 also we find that where the wife sets-up the case of a reasonable cause, desertion cannot be said to be made out within the meaning assigned to it under Section 13. She has made various allegations of cruelty, maltreatment and harassment against her particularly, after death of first two sons in quick succession, soon after their birth and she has led emphatic evidence that she was subjected to maltreatment, torture by branding her as witch. In this background, appellant residing with him with infant child by itself, without anything more, would not make out a case of desertion.

17. While taking the aforesaid view we have kept in our mind the backdrop of incidents which led them to live separately, death of two issues in quick succession and then wife resided with her parents along with the third infant child and attempt made by husband to bring her back. All these factors having been taken into consideration, we are of the view that in the present case the learned Family Court could not have granted decree of divorce and left the parties to explore ways and means to bring about reunion not only to save the marital life but also to secure the future of their infant child who would be the biggest loser in the event the divorce takes place between the parents.

18. Keeping in view the over all material and the conclusion as we have drawn here-in-above, we find ourselves unable to uphold

the judgment and decree passed by the Family Court and set aside the same. We have also placed on record a clear statement made by the learned counsel for the appellant that wife is still willing to reside with her husband to secure future of the sole surviving son aged about 8-9 years and she is prepared to go to the house of the husband at this stage. It is also observed that she would not be insisting of any written assurance for returning back to the matrimonial house. Certainly, if the wife does not go back to the matrimonial house again for a period of two years, consequences under the law shall follow.

19. With the aforesaid observations the appeal stands allowed.

Parties to bear their respective costs. Let appellant decree be accordingly drawn.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Ajay

Sd/-

(Vimla Singh Kapoor)
Judge