

Desertion: A Ground for Matrimonial Relief

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THE LAW Commission in its *Fifty-ninth-Report* on the Hindu Marriage Act, 1955 and Special Marriage Act, 1954 has recommended certain guidelines for liberalising the divorce provisions of the Hindu Marriage Act. The law of desertion indeed forms a significant part of divorce provisions inasmuch as the phenomenon of separation is closely linked up with the anticipated divorce proceedings. This paper proposes to review the law of desertion as a ground for a matrimonial relief with a view to suggesting improvements in the existing law.

Under section 19 (1) (a) of the Hindu Marriage Act, desertion for two years is a ground for a decree for judicial separation. Under section 13 (1A) (i) of the said Act, it is competent for either party to present a petition for the dissolution of marriage, by a decree of divorce, on the ground that there has been no resumption of cohabitation between the parties to the marriage, for a period of two years or more after the passing of a decree for judicial separation.

Under the Special Marriage Act, desertion is a ground for judicial separation as well as for divorce. Section 27(b) provides that a petition for divorce may be presented on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. Under Section 23(1) (a) a petition for judicial separation may be presented on the above ground. By section 27(2)(i), the petition for divorce can be presented one year after the passing of a decree for judicial separation.

Section 28 of the Special Marriage Act lays down that a petition for divorce may be presented on the ground that parties have been living separately for a period of one year or more; that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. On the motion of both the parties made not earlier than one year after the date of the presentation of the petition, the decree will follow.

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The Law Commission has recommended in its report on the Hindu Act that :

(1) Like the Special Marriage Act 1954, the Hindu Marriage Act, 1955 should also be amended so as to enable the parties to initiate divorce proceedings one year after the passing of the decree for judicial separation.¹

(2) The following should be made a ground for divorce : that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 or in a proceeding under section 125 of the Code of Criminal Procedure, 1974 a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or more.²

It will be seen that the above stated law and recommendations speak of two things: (i) technical offence of desertion, and (ii) separation of parties resulting into cessation of cohabitation. In fact the latter is the part and parcel of the former, therefore, the distinction between the two lies not in the concepts of desertion and separation but between the effects of the two. Desertion itself is a ground for a matrimonial relief, whereas, separation not amounting to desertion asserts itself through mutual consent of the parties to take divorce or through the fact of a decree for maintenance. The existing law as to desertion being uncertain and incomprehensible need to be examined. The fact of actually living apart of the parties has not presented any problem. The proof of separation is simpler than the task of proving desertion. In order to enable the parties to seek divorce or judicial separation on the ground of desertion it is necessary that the current law on the subject is improved.

II

Now, after nearly twenty years of the working of the Special Marriage Act and the Hindu Marriage Act, we have at our disposal valuable judgments which will help us in tooling up and increasing the certainty of desertion as an effective ground for a matrimonial relief. It is submitted that any progress towards liberalisation of divorce provisions will be incomplete if care is not taken to simplify those provisions. For instance, it is recommended that the waiting period of two years after the passing of the decree of judicial

1. The Law Commission *Fifty-ninth Report* 22 (1974).

2. *Id.*, at 27-28.

separation should be reduced to one year. In order to make this provision effective, is it not necessary to provide that the grounds for obtaining judicial separation are made certain and understandable? The ground of desertion is so uncertain and ambiguous that more often than not it fails to get judicial separation.

The law does not give a definition of desertion. Perhaps the legislature was right in not attempting to define 'desertion' in the early fifties, as the subject is highly charged with emotions.

In *Bipin Chandra v. Prabhavati*³ the Supreme Court relied upon the English definition on the subject.

In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without reasonable cause. It is a total repudiation of the obligations of marriage.

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 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.⁴

It will be seen that the emphasis, in the above noted definition, is on the withdrawal of the respondent from the obligations of marriage notwithstanding the parties living under the same roof. Since desertion is a total repudiation of the obligations of marriage, it may be established by the petitioner on proof of wilful neglect on the part of the respondent. It follows, therefore, the petitioner has to prove that it was with a deliberate intention that fact of complete cessation of marital obligation was brought about by the respondent. In every case of desertion, it is incumbent for the petitioner to prove both the *animus* and *factum* of the cessation of marital life. Accordingly, the words desertion or separation have subjective meaning and are least related to the formal togetherness of the spouses.

Desertion cannot start unless the guilty party is capable of forming the intent to desert and that intention must continue lest the desertion comes to an end. A spouse who leaves the other when insane, or who becomes

3. A.I.R. 1957 S.C. 176.

4. XII *Halsbury's Laws of England*, 241-242, paras 453-454: (3rd ed., 1955); also see Lord Merrivale., in *Pulford v. Pulford*, (1922) (1972) All E.R. 121

insane later, cannot logically be in desertion. In *Tantra v. Tantra*,⁵ the husband was in desertion and was a victim of supervening lunacy for about two years. The wife's petition could succeed without difficulty on the ground of desertion which had run for three years prior to his becoming a mental patient. It is submitted that the law should attempt to clarify the position. Perhaps it will be desirable to regard desertion as continuing even if the deserter later becomes incapable of forming any intent to desert. However, an insane person cannot start desertion. Insanity of the respondent nullifies the petitioner's charge of wilful neglect in constructive desertion.

III

The concept of desertion has become complicated on account of the following factors :

(i) It is not clear as to what amounts to constructive desertion.

(ii) Law requires that desertion should be without a reasonable cause. It is difficult to specify as to what amounts to a reasonable cause.⁶

There has been a number of cases wherein the parties do not say even 'hello' to each other consequent upon a total rupture of family or communal life but still they continue to reside under the same roof for, the social and economic conditions do not permit the offended party to find an alternative settlement. The expression 'wilful neglect' in the explanation to section 10 of the Hindu Marriage Act obviously covers such cases often referred to as cases of constructive desertion. It is another thing that many Hindu women who though deserted by their husbands in the legal sense, are least inclined to get a matrimonial relief. They would rather seek a roof overhead and maintenance under the Hindu Adoptions and Maintenance Act, 1956 than go in for a *dejure* separation. It is not widely known that payment of maintenance is not a defence to a charge of desertion.⁷ The law should make it clear that payment of maintenance is not a defence to a charge of desertion.

In some sections of the Hindu community, the economically dependent party, invariably the wife, is thrown out of her matrimonial house. If she has no parents or place to go to she will either take recourse to suicide or will take refuge in some home for destitutes. In the absence of legal aid centres, marriage counselling and due to unambiguous law, many cases of constructive desertion are not brought to courts. It is submitted that the law should

5. 47 Bom. L.R. 819.

6. See explanation to s. 10 of the Hindu Marriage Act.

7. See *Crabtree v. C.*, (1953) 2 All E.R. 56 followed in *Kako v. Ajit Singh*, A.I.R., 1960 Punj. 328.

make it clear that legal desertion includes constructive desertion. The expression 'wilful neglect' has failed to make it abundantly clear to common people that the law takes care of such cases. Whether the offended party is forced to leave the house, or driven out of it or compelled by financial conditions to live under the same roof, the law must recognise in each of these cases the ground of constructive desertion for bringing about a matrimonial relief. The present day housing problem is so acute that even after divorce, parties live under the same roof at the same places.⁸

IV

It is said that marriage is one long conversation, chequered by disputes. The public policy for the preservation of the institution of marriage is least inclined to take cognizance of these disputes. However, the legislature and judiciary recognise the need to 'bury' a dead marriage when it becomes a source of grave hardship.

When a party is in desertion, the conduct of the other becomes important from legal point of view. The expulsive conduct of the respondent is described under the law as existence of a reasonable cause. The expression reasonable cause includes every cause which in a given situation appears to be reasonable to a court justifying a spouse to desert the other spouse.⁹ This view is consistent with the English law on the subject.¹⁰

Any matrimonial offence, if proved, is a ground for the other spouse withdrawing from cohabitation. Further, conduct which falls *short of a matrimonial offence*, is conduct not amounting to cruelty or adultery, may excuse desertion.¹¹

It will be seen that the meaning of the expression reasonable cause has been source of profuse litigation and has rendered the results of a petition uncertain. The case of *Lachman v. Meena*¹² would not have gone to the Supreme Court but for the uncertainty posed by this expression. The wife

8. Hedrick Smith, "Pressure on Housing in Russia Despite Massive Plans", *The Times of India* 16th Nov. 1974 (Bom. ed.).

9. *Lachman v. Meena*, A.I.R. 1964 S.C. 40.

10. *Supra* note 4 at 257.

11. See *Pratt v. Pratt*, (1939) A.C. 417, followed in *supra* note 9 at 53 (emphasis supplied).

12. See *supra* note 4 at 244 followed in *Bipinchandra Shah v. Prabhavati*, A.I.R. 1957 S.C. 176,

went abroad without telling the husband. They exchanged correspondence. The husband was telling her from his commanding position that she should give up her holiday and come back to him immediately and she, on her part, was persuading him in a subdued tone to permit her to stay for a few months and promising to come back thereafter. In reply to this the husband charged her with unchastity and leading a fast and reckless life. Even so, she sent a reply couched in a dignified and temperate language denying his allegations and stating that she would return in a few months. On her return to India, she expected that the husband would invite her or send somebody to take her back to his home as he used to do in the past and when the husband's sister got married she was not even invited by him. The Bombay High Court held that he had no good case for judicial separation on the ground of her desertion because the letter accusing her of leading an immoral life constituted a reasonable cause for her being in desertion. The Supreme Court by a majority of four to one (Subba Rao, J; *contra*) reversed the High Court decision on the following principle :

that the conduct of the deserted spouse (husband) which is proved not to have caused the deserting spouse to continue the desertion does not put an end to the desertion appears to be self-evident and deducible from the legal concepts underlying the law as to desertion.¹²

There was evidence to support the conclusion that she attached not much significance to that letter, stayed abroad for nearly one year and did not write any more after sending a reply denying the allegations. Despite the silence of the husband and lack of any effort to bring about an end to the desertion, it was held that the wife continued in desertion not because of the attitude of the husband but despite his anger.

It is to be remembered that in this particular case the parties belonged to high middle class and the important evidence could be found in the letters exchanged between the parties. The entire manner in which the wife, as a rich man's daughter, stayed away from her husband's home was inconsistent with the social ethos and customs of Hindu society. Her reticence on return to India made her intention to be in desertion eloquent. It is submitted that in ascertaining whether there was a reasonable cause justifying desertion the socio-economic condition of the parties must be taken into account: In middle class Hindu society or even under a lower middle class society, a Hindu wife dare not behave in the manner the wife acted in this case,

12. *Supra* note 9 at 53.

No doubt, interpretation of a given case in the light of socio-economic conditions of the parties makes the task of the judiciary a serious and complicated one but this cannot be avoided. Recent times have witnessed great upheavals taking place in our social set-up. Proliferation of nuclear families, spread of literacy, emancipation of women, inter-caste and inter-faith marriages are some of the marked modern features of our society. Undoubtedly they have affected the traditional set-up but it cannot be said that the old order has completely yielded place to the new. It may take a couple of centuries or even more when the undivided families, oceans of illiterate and unemployed women, and indogamous marriages will be found as a trace of the past. In the circumstances, the family law has to be devised in such a fashion so that it can deal with the family problems of both the blocks in the society in a right perspective. In the absence of evidence as to the correct ratio of difference in the sizes of the two blocks, the author ventures to say it is one to hundred.

The consent or wish of the deserted spouse may be inferred by words or conduct. Refusal to accept a genuine offer to resume cohabitation, adultery, or remarriage on the part of the deserted spouse may be suggestive of such consent or wish depending upon the circumstances of each case. Hence, it is submitted that the court should exercise its discretion in determining whether the sum total of the effect of the conduct of the petitioner had the impact of altering the intention of other to live apart. Continuation or the question of desertion being alive is a question of fact for each case and, therefore, the law cannot be asked to list up infinitely complex situations.

The legal desertion must pass throughout the prescribed statutory period and its permanency must not be disrupted at all. It is now well established that the burden is on the petitioner to show that desertion without cause subsisted throughout the statutory period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the two or three years period as required under the particular law concerned.¹³

The desertion terminates as soon as the parties resume cohabitation in a bid to bring about reconciliation. This is so because desertion is a continuing offence and it terminates as soon as the intention to permanently forsake the spouse is abandoned by resumption of cohabitation. In the circumstances, if the attempt to bring about reconciliation proves to be unsuccessful, the deserted party is supposedly required to wait for the prescribed statutory period for desertion to mature afresh. The position is indeed repugnant to

13. See XII *Halsbury's Laws of England*, (3rd ed.) 244, para 457, followed in the cases mentioned in *supra* notes 3 and 9.

the very climate of reconciliation and hence calls for an immediate amendment in the law.

Section 23 of the Hindu Marriage Act, and section 34 of the Special Marriage Act encourage reconciliation but this lacuna in the law of desertion destroys the very spirit of these two respective sections. By way of comparison, it may be pointed out that in English law under the Divorce Reform Act, 1969 section 2(1)(c) periods of cohabitation of up to six months are to be disregarded in determining whether the period for which the respondent has deserted the petitioner is continuous, though the actual periods during which the parties live together are not to be counted as part of the statutory period of desertion.

V

As already noted, barring the Hindu Marriage Act and the Indian Divorce Act, desertion for three years is a ground for divorce. It is submitted that the desertion has a potentiality to be a ground for divorce also under the Hindu law. This will become clear if we take a random account of the beginnings of desertion. Invariably an act of desertion comes to surface only after the occurrence of matrimonial friction between the couple. Our social set-up reacts very favourably to reunion and reconciliation as the family ties are still strong and elders function as self-appointed guardians of the welfare of younger ones. Despite these circumstances if estrangement continues, it can be safely presumed that the deserted spouse has already suffered a wrong which served as executioner of the marriage and what remains now is just the empty shell to be destroyed by the ammunition of desertion.

It may be asked why does the deserted spouse prefer a matrimonial relief on the ground of desertion and why not on the preceding wrong which is often cruelty in all its infinite dimensions or adultery or the like grave, weighty and convincing conduct? According to the outcome of an unofficial survey the ground of desertion, especially in uncontested or *ex parte* cases, saves the grace and dignity of the spouses. It is indeed a peculiar characteristic of the institution of marriage that even when the end of relations becomes inevitable the parties want the maximum fairness, minimum bitterness, distress and humiliation.

Further, it is submitted that desertion for two years with mutual consent of the parties to the proceedings for divorce be made a ground for divorce in all the family laws. Such a provision will provide a number of safeguards for the respondent and eliminate false and collusive petitions encouraged by

the existing strict laws. The respondent should be given the liberty to withdraw his consent at any time and then the proceedings should be stayed. Withdrawal of the consent at the hearing would thus appear effective. The obvious disadvantage in the event of such withdrawal are considerable waste of the petitioner's time, energy, money and also it may produce uncertainty. The threat to revoke consent might also be used as a form of blackmail to obtain generous financial arrangements. However, in terms of expedition, fairness and justice to both the parties, the provisions will come to be regarded as having social or therapeutic value replacing the purely legal or punitive approach.

Desertion for two years without the consent of the respondent to divorce proceedings should, however, be a ground for judicial separation only.

Finally, I submit that there is a need to assimilate certain grounds for matrimonial relief under the concept of desertion. For instance, absence for seven years, imprisonment for seven years, *sanyas* or civil death could easily be viewed as modifications of desertion. In these cases, *animus deserendi* and *factum* of desertion are established by the very nature of the circumstances. Similar approaches will result into simplification of our much complicated mess of family laws. It may be recalled that in English law there is only one ground for divorce while the Hindu Marriage Act speaks of not less than a dozen. It is hoped that the task of the liberalisation of strict law will not exclude considerations of simplification which are equally important to subserve the interest of the people.