

**IN THE HIGH COURT OF TRIPURA
A G A R T A L A**

MAT APPEAL 03 OF 2012

Sri Kartik Mahajan,
son of late Gour Hari Mahajan,
resident of village – Garjania,
P.O. Barapathari,
P.S. Belonia,
South Tripura District

..... **Appellant**

- V e r s u s -

Smti. Rama Mahajan,
wife of Kartik Mahajan,
daughter of Sri Harendra Mahajan,
presently residing at village Laxmipur,
P.S. Belonia, P.O. Barapathari,
South Tripura District

.....**Respondent**

**B E F O R E
THE HON'BLE MR. JUSTICE U.B. SAHA
THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the appellant	:	Mr. P. Majumder Advocate
For the respondent	:	Mr. B. Majumder, Advocate
Date of hearing	:	30.03.2016
Date of delivery of Judgment & Order	:	31.05.2016
Whether fit for reporting	:	YES

JUDGMENT & ORDER

(S. Talapatra J.)

This is an appeal under Section 28 of the Hindu Marriage Act, 1955 from the judgment and decree dated 12.08.2011, delivered in T.S.(Divorce) No. 32 of 2010 by the Additional District Judge, South Tripura, Belonia.

2. The appellant filed an application under Section 13(1) (ib) of the Hindu Marriage Act for dissolution of the marriage which was solemnized as per Hindu rites and customs between the appellant and the respondent. After thirteen years of their marriage, the said application for dissolution of marriage by a decree of divorce was filed in the court of the Additional District Judge, South Tripura, Belonia, as it appears, solely on the ground of desertion. The appellant has stated that in the wedlock, two male and one female children were born but one male child died prematurely. The two other children are living with the respondent. For the irreconcilable misunderstanding, which engulfed the marital relation, it gradually estranged the respondent.

3. According to the appellant, the respondent was extremely obstinate and not mending her taste, preference and cultural attributes. In the year 2007, the respondent left her matrimonial home with those two children and since then she has been living separately from the appellant. The appellant explored all possible means for restitution of the conjugal right, but in vain. The marital tie has been irretrievably broken down, for wilful desertion of the respondent which has been continuing for a period of more than two years, even the respondent filed an application under Section 125 of the Cr.P.C. on 7.12.2009, seeking maintenance. The Sub Divisional Judicial Magistrate, Belonia, South Tripura allowed monthly maintenance allowance at the rate of Rs.1000/-. The petitioner, the appellant herein, has asserted in his application that his relatives and well wishers made sincere and several attempts for reconstruction of the relation. Even a notice

was sent to the respondent in reply to which the respondent denied to restore the matrimonial relation.

4. By filing the written statement, the respondent has categorically stated that she was forced to leave the matrimonial home for physical and mental torture afflicted by the petitioner and since there was no change in the circumstances, the respondent did not garner her confidence to go back to the matrimonial home. That apart, in the para 5 of the said written statement it has been asserted that due to brutal torture of the petitioner, the respondent was compelled to leave her matrimonial home. But after few months, the respondent came to know that the petitioner maintained an illicit relation with another woman. According to the respondent, the story of wilful desertion is totally false and concocted one. She has further submitted that petitioner has two houses, one is at Barpathari (Garjania) and another is at Barpathari (Laxmipur). The respondent has been living in the house of the petitioner at Barpathari-Laxmipur which is her matrimonial home. The respondent has categorically denied that the claim of attempt to reconcile or to restore the matrimonial relation as entirely false . The respondent has further stated that in reply to the notice sent by the petitioner for agreeing to a mutual divorce she stated that she would not agree for dissolution of marriage. It appears from the records that for purpose of determining the dispute the following issues were framed by the trial court:

i) Is the petitioner entitled to get the decree of divorce as prayed for.

ii) Is the petitioner entitled to get any other relief.

5. It further appears from the records that the appellant apart from examining himself as PW-1, examined three other witnesses namely Chitta Ranjan Dhar, PW-2, Shyamal Biswas, PW-3 and Krishna Kumar Baidya, PW-4. The respondent has also examined herself as OPW-1 and examined two other witnesses namely Balaram Sukla Das, OPW-2 and Parimal Majumder, OPW-3. No document has been proved by the appellant or the respondent in the trial. As a result, the trial court had no occasion to look into the content of the notice or the order of maintenance allowance for purpose of appreciation. It appears from the records that the petitioner simply reiterated the story as laid in the application and according to him, as the respondent has been living separately for a period of more than two years it has been conclusively proved that the respondent deserted the petitioner and for her conduct, the marriage has been broken down irretrievably. In the cross-examination, the appellant has admitted that the respondent has been living in one of his houses at Laxmipur.

6. PW-2, Chittaranjan Dhar, has stated that the respondent has been working as a cook in the Laxmipur Primary School under the mid-day meal scheme. He has asserted that he along with other local persons including the Panchayat Pradhan tried to bring settlement but could not succeed. PW-3, Shymal Biswas, replicated what PW-2 had stated in the trial and the similar suit was followed by Krishna Kumar Baidya, PW-4.

7. The respondent as OPW-1 has stated in the trial that for mental and physical torture, she had left the house where the petitioner was living. Later on, she came to know that the appellant was having an illicit relation with another woman. She asked the appellant to rectify. Than he had forsaken her and started living in their old house. She denied desertion from her end. OPW-2, Balaram Sukla Das has corroborated the version of the respondent and stated that the respondent was subjected to physical and mental torture by the appellant. The appellant had been maintaining an illicit relation with another woman. He has further submitted that the appellant has two houses within the Laxmipur Gau Panchayat. In one of those houses, the respondent has been living with her children. In the cross-examination, the respondent admitted that there was a meeting in the Panchayat for uniting them but the basic root of the matrimonial discord could not be extracted and as a result, the effort failed. Even OPW-2 has stated in the trial that he had also tried to settle the dispute but did not succeed. OPW-3, Parimal Mahajan, replicated what the OPW-2 has stated and thus corroborated the respondent. The trial court dismissed the suit on returning the findings inter alia as under by the judgment dated 12.08.2011 :

“10. It is apparent from the above that after a certain period of marriage the O.P. started staying in the new house of the petitioner. Her case is that as the petitioner maintains illicit relation with another lady, she was compelled to do so. It is her further case that she did not

desert him. Rather , for his misbehaviour she was compelled to live in his other house where he visits occasionally. From the side of the petitioner, the allegation of illicit relationship is denied. From the evidence discussed above, it cannot be said that during the period of last 8/10 years they did not meet at all. So considering the evidence adduced by the parties it cannot be said that the O.P. actually deserted the petitioner.

11. As regard the other ground that marriage ties between the parties had irretrievably broken down, it is to be said that the prevailing law does not permit dissolution of the marriage on the ground just mentioned. In other words, section 13 of the Act, does not contain any such provision which can be made a ground for dissolution of the marriage. For the reasons stated above, issue No.1 is decided in the negative.”

The said judgment dated 12.08.2011 is under challenge in this appeal.

8. Mr. P. Majumder, learned counsel appearing for the appellant has submitted that on the face of the record the grounds of desertion and cruelty have been proved. Even it has been contended that withdrawal from cohabitation is by itself cruelty to

the other spouse. That apart, for all purposes, the marriage has irretrievably broken down.

9. Having referred to **Savitri Pandey Vs Prem Chandra Pandey** reported in **(2002) 2 SCC 73**. Mr. Majumder, learned counsel has submitted that desertion may constructively be inferred from the attendant circumstances for which living in the separate residence is not necessary. Mr. Majumder, learned counsel has further submitted that no evidence was led by the respondent to show that she was forced to leave the company of the appellant or that she was thrown away from the matrimonial home or she was forced to live separately. It has been asserted that the appellant has squarely proved *animus deserendi*. The respondent had brought the marriage to an end by refusing to have cohabitation or to have live with the appellant. It is manifest on the face of the record that the respondent had withdrawn from state of things, the matrimonial relation. What the respondent has stated in the trial to support her conduct has only reflected that she was banned to take advantage of her own wrong or disability. In this regard, Mr. Majumder has referred the following passage from **Savitri Pandey Vs Prem Chandra Pandey**:

“13. In any proceedings under the Act whether defended or not, the court would decline to grant relief to the petitioner, if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No

party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.”

10. On placing reliance on the statements of PW-2, PW-3 and PW-4, Mr. Majumder, learned counsel for the appellant has emphatically submitted that the trial court has wrongly inferred that *animus deserendi* has not been proved. Those testimonies, if read with the conduct of the respondent in terms of Section 23(1) of the Act, it would probablise that for desertion of the respondent the marital tie has been irretrievably broken down. As an additional ground, Mr. Majumder, learned counsel for the appellant has stated that allegation seriously offending the character of the appellant has been left without proof and as such, it has to be observed that the appellant has been treated further with cruelty constituting adequate ground for divorce.

11. In reply, Mr. B. Majumder, learned counsel appearing for the respondent while defending the impugned judgment has submitted that it has been established by the judicial records that for perpetration of violence on the respondent she had to live alone. Moreover, taken that advantage, the appellant started living with another woman despite disapproval strongly expressed by the respondent and such allegation has been proved by OPW- 2 and 3.

As such, the contention that such allegation was left at lurch without proving it, is entirely without foundation and contrary to the records. He has relied on a few judgment of the apex court to support his contention. In **Bipinchandra Jaisingh Shah versus Prabhabati** reported in **AIR 1957 SC 176**, as relied, the apex court has observed as under:

"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 principal 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".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandoned 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. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. 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 that 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. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements must subsist. Hence, 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 the 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. In this connection the following observations of Lord Goddard, C. J. in the case of *Lawson v. Lawson* [1955] 1 All E. R. 341 may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... ".

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back."

It has been further observed in the said report that :

"15. The defendant's further case that she had been turned out of the house by the husband under duress cannot be accepted because it is not corroborated either by circumstances or by direct testimony. Neither her father nor her cousin say a word about her speaking to them on her arrival at Jalgaon that she had been turned out of her husband's home. If her case that she had been forcibly turned out of her marital home by the husband had been made out, certainly the husband would have been guilty of "constructive desertion", because the test is not who left the matrimonial home first. (See Lang v. Lang [1955] A. C. 402, 417. If one spouse by his words and conduct compel the other spouse to leave the marital home, the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the marital home. It should be noted that the wife did not cross-petition for divorce or for any other relief. Hence it is no more necessary for us to go into that question. It is enough to point

out that we are not prepared to rely upon the uncorroborated testimony of the defendant that she had been compelled to leave her marital home by the threats of the plaintiff.”

12. The ratio as laid down in **Bipinchandra Jaisingh Shah versus Prabhabati**, if culled out would be that 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 spouse who intends to take desertion as the ground for divorce he or she must prove the said offence beyond all reasonable doubt. The spouse who compels for separate living is guilty of desertion as he has made the other spouse to be physically separated from him. He cannot take such physical separation as the ground of divorce by branding the same as desertion.

13. Mr. B. Majumder, learned counsel appearing for the respondent has also relied on a decision of the apex court in **Lachman Utamchand Kirpalani versus Meena alias Mota** reported in **AIR 1964 SC 40** where it has been held that it is settled law that the burden of proving desertion- the “factum” as well as the “*animus deserendi*” is on the petitioner and he or she has to establish beyond reasonable doubt, to the satisfaction of the court, the desertion through out the entire period of two years before the petition, is filed as well as that such desertion was without just cause. In other words, if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner husband has still to satisfy the court that desertion

was without just cause. Mr. Majumder, learned counsel has also referred and relied on **Smt. Rohini Kumari versus Narendra Singh** reported in **AIR 1972 SC 459** where the apex court has 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 the marital relation or cohabitation permanently. Without *animus deserendi* there can be no desertion. Thus, it is no more *res integra* what is meant by desertion within the ambit of section 13(1)(ib) of the Hindu Marriage Act and how to discharge the burden of proof of desertion.

14. Having regard to the rival contentions exposited by the counsel for the parties and on scrutiny of the records, it is found that the respondent was compelled to live separately in another residence of the appellant with their children as she could not tolerate the violent behaviour of the petitioner and later on, his living with another woman. The respondent has categorically stated she did never intend to bring an end to the marital life. Furthermore, she denied to accept the proposal for divorce by mutual consent. That apart, the respondent has stated that during that period of their living separately she visited her husband, the appellant. The respondent has been getting maintenance allowance by the order of the judicial Magistrate under Section 125 of the Cr.P.C., which fact has not been denied by the appellant. The respondent has also stated that she had exposited the violent behaviour of the appellant and the Judicial Magistrate having observed that the respondent's living

separately is founded on the reasonable cause. That apart, the respondent has assigned the similar cause for living separately from the appellant. This court is of the view that the appellant has failed to prove *animus deserendi* beyond reasonable doubt. It is further observed that the appellant is responsible for the separation and he is the person who has compelled the respondent to live separately. Moreover, the allegation of living with another woman has been supported by OPW 2 and 3 and as such, it cannot be stated that such allegation was left in the lurch. This court is constrained to observe that the appellant cannot be allowed to take advantage of his own conduct in view of Section 23(1) of the Hindu Marriage Act.

15. In the result, this appeal stands dismissed.

Prepare the decree accordingly and send down the LCRs thereafter.

Send down the LCRs forthwith.

JUDGE

JUDGE

Sabyasachi B.