

AFR

HIGH COURT OF CHHATTISGARH, BILASPURFAM No.206 of 2017{Arising out of judgment & decree dated 1-9-2017 passed by the Judge, Family Court, Manendragarh, District Korea, in civil suit No.81-A/15}

1. Uttamram S/o Late Ledu Singh Aged About 46 Years R/o Sonamani, Post Office Dafai Sonamani Chirmiri, Tahsil Khadgawa District Koriya Chhattisgarh.

---- Appellant/plaintiff

Versus

1. Smt. Kayaso Bai W/o Uttamram Aged About 43 Years By Caste Panika R/o Madahabuda Para Arjunpur Tahsil Surajpur District Surajpur Chhattisgarh.

---- Respondent/Defendant

For Appellant
For Respondent

Mr. Parag Kotecha, Advocate
Mr. Sachin Singh Rajput, Advocate

Hon'ble Mr. Justice Goutam Bhaduri &
Hon'ble Mrs. Justice Rajani Dubey

Judgment on Board**Per Goutam Bhaduri, J.**07-02-2022

1. Challenge in this appeal is to the judgment & decree dated 1-9-2017 passed by the Judge, Family Court, Manendragarh, District Korea, in civil suit No.81-A/15 whereby the application filed by the appellant/husband for grant of decree of divorce on the ground of desertion, was rejected.
2. The appellant/husband pleaded that he was married to respondent/ wife-Kayaso Bai prior to 26 years from the date of filing of the suit. After the marriage, the wife was residing with him at village



Arjunpur and out of wedlock, three daughters were born, who were married. According to the appellant, for the last 25 years the respondent has deserted him without any lawful cause, therefore, he is entitled to get decree of divorce.

3. The respondent/wife denied the plaint averments and pleaded that she was subjected to physical and mental torture. The appellant kept one lady as his wife and asked the respondent to go away and stay at her parental village. Because of the fact that another lady was kept by the appellant in the house for which the torture was being meted out to respondent she was forced to stay at her parental village. The respondent further pleaded that in the marriages of three daughters the appellant came and participated, therefore, there was no question of desertion by either of the parties. She also pleaded that her name was recorded in the service book of the appellant as a legal representative. Since the appellant left her without any reasonable cause, an amount of Rs.500/- was ordered to be paid to the respondent in an application filed by her under Section 125 of the Cr.P.C., that too was not being paid to her regularly, therefore, the respondent would be entitled for further relief and consequently, the appellant is not entitled for any relief.
4. After hearing the parties and on the basis of evidence adduced by both the parties, the learned Court below dismissed the suit filed by the appellant/husband. Hence, this appeal.





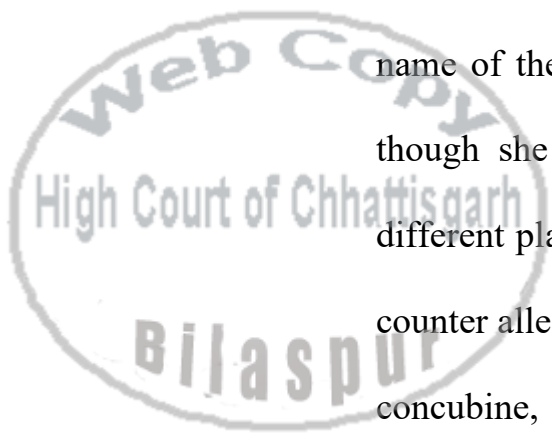
5. Learned counsel for the appellant/husband would submit that without any lawful cause the respondent herself left the company of the appellant for a continuous period of about 25 years prior to presentation of the suit. The respondent was not the legally wedded wife of the appellant which would be evident from the statement and hence the marriage itself from the inception was a nullity. Learned counsel would further submit that the statement of PW-1 Uttamram would show that the respondent has deserted and living separately, which is further supported by the statement of PW-2 Rajesh Kumar as such the Court below has committed gross error in not considering the said issue. The Court below ought to have granted the decree of divorce in favour of the appellant/ husband.

6. Learned counsel appearing for the respondent/wife, *per contra*, would submit that the conduct of the appellant itself would show that the respondent was thrown out of the house forcibly as another lady was kept by him in the house. Thus, the respondent started staying at her parental village with her three children. Learned counsel would further submit that the statement of the parties would show that the maintenance amount was awarded to the respondent under Section 125 Cr.P.C., because without any sufficient cause the husband failed to maintain his wife. Learned counsel would also submit that the appellant is at the verge of retirement and in order to deprive her lawful claim, the suit was filed by the appellant as in the service record of the appellant, the



name of the respondent was recorded as his wife. He would next submit that the validity of the marriage was not in question nor was in the pleading of the appellant, therefore, at this juncture, this issue cannot be deliberated by the appellant. The impugned judgment and decree passed by the Court below is well merit, which do not call any interference.

7. We have heard learned counsel for the parties at length and perused the record.
8. Perusal of the record would show that the cause of action pleaded by the appellant was that on 10-1-2014 he came to know that name of the respondent i.e. wife is recorded in the service book though she has left him 25 years back and was residing at a different place. It is completely denied by the respondent instead counter allegations have been made that the appellant has kept one concubine, which led to the family dispute and forced the respondent to stay at her parental village along with her three children. She maintains the stand that she has not deserted the husband and because of the fact that she was physically and mentally tortured she was forced to stay separately. Additional pleading has also been made that in a proceedings under Section 125 Cr.P.C., an amount of Rs.500/- was granted towards her maintenance. The said additional pleading has not been answered in the pleading of the appellant.





9. In the light of aforesaid pleadings, when we examine the evidence of PW-1 Uttamram (appellant herein) he has stated that the marriage took place between him and the respondent 26-27 years back as per Hindu rituals. According to him, for the last about 25 years, she has deserted him and living separately. In the cross-examination, PW-1 Uttamram admitted that three daughters were born to him and Kayaso Bai (respondent herein) is the mother. Under these circumstances, the question of desertion by wife for the last 25 years appears to be completely falsified. When the marriage solemnised between the parties 26-27 years back and three children were born thereafter, how it can be presumed that the wife has deserted the husband for the last about 25 years i.e. immediately after marriage. The appellant also admitted the fact that he kept one Urmila as a second wife and out of that relation he is blessed with two children.

10. In view of the above, it is apparent that during subsistence of marriage with the respondent, the appellant has kept another lady as his wife. As per the provisions of the Hindu Marriage Act, 1955 keeping another lady during subsistence of first marriage is illegal, however, we do not want to deliberate on this issue about the status of second lady. The thing which emerges out from the fact that during subsistence of first marriage with the respondent, the appellant kept another lady.



11. Now reverting back to the statement of DW-1 Kayaso Bai (respondent herein) wherein she stated that while she was pregnant with the younger child, another lady namely; Urmila was kept by the appellant. Thereafter, the appellant started quarreling with the respondent and asked her to live at village with assurance that he would pay the expenses. Subsequently, the family members of the appellant also started quarreling with her and hence she went to her village. According to her, as per the orders of the Court the husband used to give Rs.1,000/- per month as maintenance, but subsequently that too was stopped. She stated that she wanted maintenance.

12. In cross-examination of DW-1 Kayaso Bai, with regard to non-performance of certain rituals at the time of marriage were suggested, but the same cannot be given primary importance in view of admission of the appellant that he made a statement that he married the respondent according to the Hindu rituals. The respondent further maintained the stand that because of the fact that another lady was kept by the appellant she was subjected to cruelty and torture as such she was forced to stay at her parental village.

13. The evidence of the parties would show that one lady was kept by the appellant during subsistence of marriage with the respondent and she was forced to leave her matrimonial home to stay at her parental house because of the torture meted out to her.



14. In the matter of **Bipinchandra Jaisinghbai Shah v Prabhavati**¹ the Supreme Court observed and discussed about “What is desertion?”. Para 10 of the said dictum is quoted below for ready reference :

(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.

¹ AIR 1957 SC 176





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 abandon 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 bonafide offer of resuming the matrimonial life 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*(1) 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.....

15. Translating the aforesaid dictum into the facts and circumstances of the present case would show that in respect of a deserting spouse, in order to establish the offence of desertion, there must be two essential conditions namely; (i) the factum of separation; and (ii) the intention to bring cohabitation permanently to an end.

Whereas in respect of a deserted spouse, the absence of consent and absence of conduct giving reasonable cause to the spouse leaving the matrimonial home would be a necessary intention of desertion. The evidence would show that the appellant kept one lady as concubine; the respondent was subjected to physical and mental cruelty; and thereafter, she was forced to leave her matrimonial home as such there was reasonable cause for the respondent/wife to stay at the village of her parents though she was not intending to do so and hence it cannot be stated that the desertion was made by the wife.

16. The decision rendered by the Supreme Court in the case of **Bipinchandra Jaisinghbai Shah** (supra) was followed by this Court in the matter of **Sushil Chandra Sen v Smt. Champa Sen**².

² AIR 2018 Chhattisgarh 43



17. If the husband keeps another lady; gives shelter to her; and proceeds to have child with the said lady and for that reason if the first wife has to leave the matrimonial home because of physical and mental torture meted out to her it cannot be presumed as a desertion on the part of wife.

18. For the reasons stated hereinabove and applying the well settled principles of law to the facts of the case at hand, we are of the considered opinion that no ground for desertion was made out by the appellant/husband. The impugned judgment and decree passed by the Court below is just and proper warranting no interference of this Court.

19. In the result, the appeal is dismissed, leaving the parties to bear their own cost(s).

20. A decree be drawn accordingly.

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(Rajani Dubey)
Judge

Gowri

HEAD NOTE

During subsistence of marriage, if husband brings home concubine and for that wife leaves house it would not be desertion.

विवाह के अस्तित्व के दौरान, यदि पति किसी दूसरी स्त्री को घर में लाता है और इस कारण पत्नी घर छोड़ देती है, यह अभित्यजन नहीं होगा।