

An Analytical Study on Desertion is Ground of Divorce

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Abstract:

On divorce, remarriage, and desertion were reviewed. Particular emphasis was focused on variables (demographic and interpersonal) related to divorce, divorce adjustment, probability of remarriage, and the dynamics of remarriage. Data presented confirm some previous findings but challenge others. Implications of the no institutionalized status of divorce, remarriage, and desertion, and suggestions for research in the 1980s are included.

I. INTRODUCTION

What is Desertion?

In legal terms, desertion can be defined as being abandoned against your wishes by your spouse. If you ever find yourself in this situation, you can choose to divorce your deserting partner.

Under section 95 of the Women’s Charter, to file for a divorce, you will need to prove that your marriage has irretrievably broken down due to the desertion. Filing for a divorce can be done by showing that you have been deserted by your spouse for at least two (2) years (prior to the commencement of divorce proceedings) and that you have not resumed living with your spouse for a period or periods of not more than six (6) months in total. If either of these criteria is not proven, desertion cannot be justified and the desertion period must be renewed again.

However, before you can file for any divorce, there are some requirements that you must first meet parties

Criteria for Desertion;

To prove Desertion as a ground for divorce, it is necessary for you to trace and state the exact date for which your spouse deserted you as the Courts will have to consider all the circumstances involving you and your spouse. This includes the conduct of both parties during the period of

desertion or reasons behind the desertion. The Courts will utilise all these information before it can come to a definitive conclusion as to the exact date that you and your spouse commenced living separately.

Desertion can be proven if you can show the Court that you and your spouse have been physically living separately and that there is an intention of your spouse to desert you. It is worth noting that this intention cannot be an agreement between you and your spouse to live separately.

Furthermore, a couple who are merely living apart due to one of the spouse’s studies or work obligations in a foreign country cannot be considered to have committed desertion. The period of physical separation cannot be considered as having lived separately to justify a divorce as there were no intentions of desertion at the commencement of physical separation.

Difference between Separation and Desertion;

There is a difference between a legal separation and desertion when filing for a divorce. In a separation, there is a mutual agreement between both you and your spouse to live apart. Desertion, on the other hand, is an active choice by one party to leave the marriage with no intention of returning. The one factor that can turn separation into desertion is the deserting spouse’s state of mind. It must be shown that the deserting party had an intention to walk out

of the marriage. As such, an agreed separation cannot give rise to desertion on the part of the spouse that left.

Constructive Desertion;

If you are the party that left but wishes to bring up a case of desertion with the intention to divorce, you may prove constructive desertion instead of actual desertion. The difference between actual desertion and constructive desertion can be seen in the differences of circumstances.

To prove constructive desertion, you must show that your spouse must be guilty of conduct that 'drove you away' due to unbearable conditions at home. That said, your desertion cannot be from a minor incident (e.g., spouse continuously leaving the toilet's seat up or snoring loudly that you cannot sleep) but it must be of such severity that it necessitates your leaving of the household. Some examples of this include continuous physical or mental abuse towards you, adultery, or an unjustified refusal to have sexual intercourse for an extended period. If you think you are in any of these situations, you can file for a divorce based on constructive desertion.

DESERTION AS A GROUND OF DIVORCE;

Desertion as a ground of divorce is given under Section 13(1)(b) of Hindu Marriage Act, 1955. According to this section the decree of divorce can be granted if one party has deserted the other party for a continuous period of not less than two years immediately preceding the presentation of the petition. According to Explanation 'desertion' means the desertion of petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of the party. Desertion means withdrawing from matrimonial obligations. It is a negation of living together which is essence of any matrimonial relationship. It is total repudiation of marital obligations. Following are the essential requirements of desertion –

1. Factum of separation of one spouse from other.
2. *Animus deserendi*, i.e., intention to desert permanently.

3. The deserted spouse must not have agreed to the desertion.

4. The desertion must be without reasonable cause.

To obtain divorce on this ground, it must be shown that the other party has deserted the petitioner for continuous period of not less than two years immediately preceding the presentation of petition without reasonable excuse or against the wish of petitioner. However, before granting the decree of divorce on this ground, the court must be fully satisfied that the respondent had *animus deserendi* i.e. intention to desert and for that purpose the circumstances and the purpose for which desertion has taken place shall be examined. In case of genuine cause, the *animus desired* would be missing.

In *Bipin Chandra v. Prabhawati*, AIR 1957 SC 173, the wife peacefully resided with her husband. He went to England for few months and in his absence, the wife developed intimacy with the old friend of husband. They exchanged letters which fell in the hands of father-in-law of wife. When her husband asked her about this, she didn't answer and left for her parent's house next day. Later the husband wrote her a letter to send the child. He refused to let his wife return back and later filed for divorce on ground of desertion. The Supreme Court held that even though the wife left matrimonial home without any cause, she will not be guilty of desertion if she subsequently shows an intention to return and is prevented from doing so by the petitioner. So, there was no '*animus deserendi*' throughout the statutory period. The offence of desertion commences when factum of separation and *animus deserendi* co-exist. But it is not necessary that they should commence at the same time.

Desertion may be actual or constructive. Desertion is not withdrawal from a particular place, but it is withdrawal from a particular state of things i.e., cohabitation. It has been held by Supreme Court in *Lachman Utamchand Kiriaplani v. Meena alias Mota*, AIR 1964 SC 40, that desertion may not always be a physical separation rather it may be in

the form of virtual separation i.e. the spouses may be staying together but may not be fulfilling the conjugal obligation. If one spouse intentionally neglects another spouse then it will be case of constructive desertion even though they are living in same house.

Where the husband creates a condition in which the wife is compelled to leave his company and live separately, the wife will not be held guilty of desertion but the husband himself would be guilty of desertion. In *Jyotish Chandra v. Meera*, AIR 1970 Cal. 266, the wife and husband lived together but it was alleged by the wife that the husband was cold, indifferent, and sexual abnormal or perverse. He used to return very late from the club and hardly spent time with her. He sent his wife for higher studies to England for three years and his behavior did not change when she returned. She therefore started living separately. When her father tried to meddle between them, he misbehaved with him and beat her family members. The court held it to be a case of constructive desertion and husband was held guilty as deserter.

Supreme Court: In a case where it was argued that merely because husband and wife are staying separately since a long time, an inference regarding desertion cannot be drawn, the bench of Ajay Rastogi and **Abhay S. Oka***, JJ has held that whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence.

The Court explained that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be animus desired on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home.

“The reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence.”

In the case at hand, the marriage between the parties was solemnized on 17th June 2009 and that they stayed together only till 30th June 2009. The petition for divorce was filed on 9th September 2011. As per clause of sub-section (1) of Section 13 of HM Act, the desertion must be for a continuous period of not less than two years immediately preceding the institution of the petition. According to the wife, who is working as a Lecturer in University Law College at Guhaati, after she became aware of the serious illness of the appellant's mother, she came to Tezpur on 19th December 2009. She stayed with her sister-in-law and left the next day. After she was informed about the death of the appellant's mother, she came back to Tezpur and visited the appellant's house on 21st December 2009, and left on the next day.

The Court, however, took note of the wife's evidence which did not disclose any effort made by her to resume the matrimonial relationship. She has also not filed a petition for restitution of conjugal rights. Merely because on account of the death of the appellant's mother, the wife visited her matrimonial home in December 2009 and stayed there only for one day, it cannot be said that there was a resumption of cohabitation. She has not stated that she came to her matrimonial home on 21st December 2009 with the intention to resume cohabitation.

The Court, hence, held that the intention on the part of the respondent to resume cohabitation is not established. Thus, in the facts of the case, the factum of separation has been proved.

How long does a desertion divorce take?

Desertion – If one of the spouses voluntarily abandons his/her partner for **at least a period of**

two years, the abandoned spouse can file a divorce case on the ground of desertion

Imagine coming home after a long day at work one day to an empty house. You call out for your loved one, but there is no response. You head into your room, and you realize that your spouse's belongings are no longer there. The racks that held their clothes are now empty, leaving behind the scent that you first fell in love with.

You wait for them to return. A day turns into a week and before you know it, months have passed. You can no longer take the loneliness anymore. You knew that your marriage had been rocky, but you never thought that it would come to this. The realization sets in finally, your spouse has deserted you.

Cause of desertion in India

What is the issue?

- India is known as a society with **low rates of divorce or separation**.
- This also reflects that the marriages are still highly constrained by **patriarchal socio-cultural norms** and tends to be determined by families rather than the individuals who enter into the marriage.

Indian Marriage System?

- **Caste endogamy** still dominates in choice of partner.
- Women only very rarely have any autonomy in spouse selection.
- There is still very little social and cultural acceptance of divorce, particularly when initiated by women.
- There are even numerous instances of women being encouraged to stay with an abusive and violent partner, even by their own natal families, rather than exiting the marriage.

CONCLUSIONS

Divorce is unpleasant and has negative effects on children. Children thrive on consistency and routine, once this is disrupted it can be hard for children to regain that consistency back resulting in behavior, cognitive and emotional problems. During a divorce,

it is wise to seek counseling for the children involved so they can learn to cope with the changes that come with divorce, to many times parents get wrapped up in what is taking place with their lives in dealing with divorce and forget about the needs of the children involved. It is important for parents to acknowledge the changes children go through during divorce to prevent long lasting problems in their future such as depression, addiction, and other emotional disorders. Being able to provide structure, and consistency to children is necessary for them to develop cognitively and emotionally.

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