

**(1961) 11 MP CK 0023**  
**In the Madhya Pradesh High Court**  
**Case No : Miscellaneous A. No. 74 of 1959**

Manglabai

APPELLANT

Vs

Devrao

RESPONDENT

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**Date of Decision :** 01-11-1961

**Acts Referred:**

Hindu Marriage Act, 1955 — Section 10, 13, 28

**Citation :** (1961) JLJ 1504

**Hon'ble Judges :** Shivdayal, J;A.H. Khan, J

**Bench :** Division Bench

**Advocate :** N.K. Jain, for the Appellant; B.G. Apte, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Shivdayal, J.—This is an appeal u/s 28 of the Hindu Marriage Act from a decree passed by the Additional District Judge, Gwalior, for judicial separation on petition by the husband.

2. Mangalbai was married to Deorao in 1951. In 1952 they were blessed with a son. They lived together upto July 24, 1953 when Mangalbai went away to her mother's house. After that she did not go to her husband at any time. The boy is living with his mother.

3. On February 7, 1957, Deorao made a petition under Sections 10 and 13 of the Hindu Marriage Act praying for a decree for judicial separation as also for a decree for divorce on the grounds that Mangalbai had deserted him without any cause, that inspite of his repeated requests she did not return to his house and that she was living in adultery. This petition was resisted by Mangalbai on the grounds that she was beaten by Deorao and his father on July 24, 1953, because of which she apprehended danger to her life; that even before this her husband and father-in-law ill-treated her; and that the charge of adultery against her was false. The learned Additional District Judge found that ill-treatment on the part of the husband and the father-in-law was not proved, that she declined to return to

her husband's house and that there was a firm intention on her part to desert her husband. As admittedly they had been living apart for more than two years, he passed a decree for judicial separation on those grounds. However, a decree for divorce was refused because there was not evidence of adultery.

4. It is strenuously urged by Shri Jain that Mangalabai was beaten by Deorao and his father which, coupled with previous ill-treatment, compelled her to leave her husband's roof. It was, therefore, constructive desertion by the husband and his petition should have been dismissed for that reason.

5. There is no dispute that the parties to the marriage have been living separately since July 24, 1953. This petition was made after two years. It is to be determined whether it was the wife who deserted the husband or that the husband was guilty of constructive desertion.

6. In the context of matrimonial law, desertion represents a legal conception which is not easy to be defined. A comprehensive definition has not been attempted, advisedly. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. A certain set of facts in the peculiar circumstances of the particular case may not lead to the same inference in the circumstances of another case. All cases must be determined on their own particular facts and in no class of cases is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case. It is dangerous "to formulate principles of law out of particular circumstances in particular cases, and then treating those principles of law as being, so to speak, explanations or viders to the actual statutory language". (See *Simson Vs. Simson* (1951) 1. All. E. R. 955, 958).

7. A large body of case law has developed from the legal significance of desertion. It is an established proposition that desertion is withdrawal not from a "place" but from a "state of things" (See, for instance, *Baker Vs. Baker*, (1952) 2 All. E. R. 248). In order that desertion may furnish ground for judicial separation, the petitioner must prove the following ingredients:-

(1) Factum of separation;

(2) Animus deserandi i. e. the intention to bring cohabitation permanently to an end; and

(3) Period of not less than two years immediately preceding the presentation of the petition, during which separation has been continuing.

If in fact there has been a separation, the essential question is whether the act could be attributable to an animus deserandi.

8. In this case the first and third elements are undisputed. If it is found that Mangalabal was the deserting spouse, she did not take advantage of the locus poenitentiae. She never decided to go back to the deserted spouse by offering to resume the matrimonial home with all the implications of marital life. Before I

proceed to consider the evidence produced by the parties, I must point out that the expression "wilful neglect" in the explanation to Section 10 of the Hindu Marriage Act is important. It seems clear to me that the word ""wilful" has been employed in contradistinction to "accidental" or "inadvertent", In the present context it means that the person is consciously acting or is consciously failing in an reprehensible manner in the discharge of his or her marital obligation. It implies abstention from an obvious duty.

9. Deorao stated in the witness box that it was a love marriage between him and Mangalabai. They had been students of the same school. It was wrong that she was beaten on the 24th July and that she had been ill-treated previously by him and his father. He went to her several times and requested her to come back to him but every time she refused. Raghunath Singh, P. W. 2, Bhagwandas, P. W. 3 and Smt. Tibai, P. W 4 were produced by the petitioner in support of his case. These witnesses not only stated that she had left her husband's house but also that she was approached by Deorao repeatedly but she never agreed to come back

10. Mangalabai stated that relations between the couple were happy only for one year, whereafter her husband and her father-in-law started beating her. They used to drink and used to say that he arrival in their family was inauspicious and also that she should persuade her mother to give away her (mother's) house to Deorao. On the 24th July also they were drunk when they beat her and at that time they not only threatened to kill her but they also went inside the house to bring something from there (implying that they had gone inside to fetch something for killing her). Neither in her written statement nor in her deposition to the Court did she give the manner in which she was beaten nor the extent of the beating. One does not know whether she was hit with a lathi or with a knife or with any other thing or that she was only slapped nor how many blows were dealt on her. On both these occasions she vaguely stated that she was beaten ""Maar Peet Kee". Apart from the omission to state the manner, or extent of beating, it is remarkable that she came forward with afterthoughts in her statement to the Court. She did not say in her petition that her husband or his father used to drink and beat her previous to the alleged incident of the 24th July; all that she had stated was "Vyavahar achchha nahin tha". This statement was obviously too vague to carry any meaning. There she did not state that she was asked to persuade her mother to give her house to her son-in-law (by gift or by will). Nor was it stated that she was blamed of being illominous. As regards the alleged incident of the 24th July as well, it was not stated that Deorao and his father were drunk nor did she accuse them of their threatening to kill her. It is obvious enough that the improvements in her statement to the Court were afterthoughts She did not produce any other witness in support of her defence.

11. It was argued by her learned counsel that in a matter of domestic quarrel between husband and wife it was hardly possible to adduce ocular evidence. This is generally true. But, at the same time, a mere allegation and more so when it is

so vague, cannot necessarily be an answer to the petition. If Shri Jain's argument is stretched to that length, it will amount to this that it should be sufficient for the wife just to make an allegation of ill-treatment and get out of the matrimonial home. This will be abhorrent to the conception of a Hindu marriage. Where direct evidence is not available, it is an absolute requirement that the written statement must contain the allegations with precision and with all necessary details. Apart from Deo Rao's statement denying the allegation of ill-treatment and beating, the reply which she gave to her husband's notice clinches the issue against her.

12. On August 10, 1953; Deorao gave a notice to her demanding her return to his house. This notice was given within a month of her going away, to be precise, it was within 18 days. This notice was not given through a counsel. Mangalabai replied to it through Shri Mohd. Rastbaz Khan Vakil. In this she said:

Aap ke notice ke vaqyat qatai ghalat hain. Aapne mujhe ek dhoti ke sath alhada kar diya va mera tamam zewar va mal aap ke pass hai va mujhe apne jan ka sakht khatra hai isliye ab apni man ke pass rah rahi hoon aur aap se farkhati chahati hoon: Bachcha abhi sheer khwar hai va qanunan qanuni umar tak mere pass rahega agar aap bachche ki parvarish ke liye kam az kam 30 rupaye mahwar denge to baad men bachche ki wapasi ka sawal paida hoga isliye aap mujhe tyag patra likh den va mera zewar va mal mujh ko wapis kar den.

Remarkably, there is not a word about the alleged beating on the 24th July or on any other date or about any other ill-treatment. All the allegations which she made in her statement to the Court for the first time did not find any place in this notice. She just expressed a passing apprehension of danger to her life, without stating any basis for it. These omissions become more significant when I find that this reply was given through a legal practitioner. She admitted in her statement to the Court that she did receive her husband's notice dated 10-8-53 and that she gave its reply through Mohd. Rastbaz Khan Vakil-

Maine us ka uttar Mohd. Rastbaz Saheb ke marfat dilwaya tha.

She also admitted that the notice which was received by her as also a copy of the reply were in her possession. She, therefore, could not possibly say that her counsel omitted to write something which she had instructed to be written in the notice nor that he wrote something which she did not want him to write. In her reply she clearly wanted her husband to give her a farkhati" (release) and this was reiterated in the last sentence of the reply saying that a deed of release might be executed in her favour. It must be remembered that this reply was given in August 1953 long before the provisions for judicial separation and divorce were introduced in the Hindu Law. The Hindu Marriage Act was enacted in 1956.

13. Not only in the above reply but also in her statement to the Court she categorically refused to go to her husband. She was asked in cross-examination and she admitted that her husband came to her at least twice to take her back

home but she refused.

It is stated in 12 Halsbury (Salmond) 241. Paragraph 453:-

In its essence desertion means the intentional permanent forsaking and abandonment of one's 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.

This has been approved by their Lordships in Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, .

14. It is imperative to assert the nature and extent of ill-treatment or beating when the wife complains of constructive desertion by her husband. The question of desertion cannot be decided by merely enquiring which party left the matrimonial home first. The husband may live in the place but make it impossible for his wife to live there and if in that state of things the wife leaves the matrimonial home it can be said to be desertion by the husband of the wife. In deciding the question of desertion the Court has to look at the conduct of both the parties Lila Devi Vs. Manoharlal, 1959 J.L.J. 708 Indeed there is no substantial difference between a husband leaving his wife with animus deserendi and a husband who by his conduct, with like intention, brings cohabitation to an end by virtually compelling his wife to depart from the matrimonial home. But it is not every conduct of the husband, although irritating to the wife, which may justify her in leaving the husband. It must be of a grave and convincing character. Edward Vs. Edward (1949) 2 All. E.R. 145: and Lang Vs. Lang (1954) 3 All E. R. 571. A line of demarcation must be drawn between blameworthy conduct causing unhappiness to the other spouse and conduct equivalent to dismissal from consortium [Buchler Vs. Buchler (1947)] All E.R. 319]. In a recent case the Privy Council has laid down the following instructive principles on the question of indirect desertion.

It has been recognised that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (Their Lordships will assume this to be the husband) may be, by reason of conduct on his part, making it unbearable for a wife with reasonable self-respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her by driving her out. In such a case the factum is the course of conduct pursued by the husband something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them, but she would not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying,

and taking the partner of the marriage "for better, for worse". The course of conduct-the "factum"-must be grave and convincing.

In the absence of any pleading or proof to establish grave and convincing conduct of Deorao equivalent to expelling Manglabai, it cannot be said that he was guilty of constructive desertion. Her bald statement of apprehension of danger to her life is neither here nor there. She stated to the Court that she did not want to stay in her husband's house because she was very badly treated by him and he used to say that he would kill her: that he would pour petrol on her and set fire to it; that he would cut her hands and feet and throw her in a river and that he himself would join a gang of dacoits. All this is altogether a new story, of which there is no mention either in the reply to the notice given by her to her husband or in her written statement. No comment is necessary to disbelieve such fabricated afterthoughts when there is no iota of corroboration. The plea of constructive desertion must be rejected.

15. For all these reasons I find that the learned trial Judge was right in his conclusion that Mangalabai deserted her husband without any cause. They have been living apart for well high ten years and, having regard to the totality of all the circumstances stated above, there is not a shred of doubt that this is a fit lease for judicially separating the couple.

16. Since the plaintiff accused her of living in adultery, a serious allegation, which he could not prove, although he tried to create a suspicion against her chastity, I think he is disentitled to costs.

17. The appeal is dismissed. The parties shall bear their own costs throughout.

A. H. Khan J-I agree.