

therefore, hold that there is no force in this appeal, that the order of acquittal made on 2nd June, 1958, stands and section 403 of the Criminal Procedure Code is a bar to a second prosecution of the respondents. This appeal must, therefore, fail and I would dismiss it.

The State  
v.  
Kuldip Singh and  
others  
G. D. Khosla,  
J.

TEK CHAND, J.—I agree.

Tek Chand, J.

B. R. T.

APPELLATE CIVIL

Before Shamsher Bahadur, J.

SHRIMATI KAKO,—Appellant.

versus

AJIT SINGH,—Respondent.

First Appeal from Order No. 44 of 1957.

Hindu Marriage Act (XXV of 1955)—Section 10—Requirements of—Desertion—Meaning of—Payment of maintenance by husband to wife—Whether puts an end to desertion.

1959  
July, 16th

Held, that to obtain a decree for judicial separation on ground of desertion it has to be shown that either party to a marriage has deserted the petitioner for a continuous period of not less than two years without reasonable cause and without or against his consent immediately preceding the presentation of the petition. Though no attempt has been made to define desertion, it is in essence 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 the married state." The gist of the matrimonial offence of desertion consists in the intention of the deserting spouse (*animus deserendi*) never to return to the marital home while there

must be absence of consent on the part of the person deserted. The claim of the husband could only be defeated if he had been guilty of constructive desertion which could have been proved by his own conduct in compelling his wife to have taken the course which she adopted.

*Held*, that the payment of maintenance allowance cannot in law put an end to desertion which remains 'continuing' because the agreement to make this payment does not bind the parties to live separately. Such a financial arrangement does not stop the desertion from running.

*Appeal from the order of the Court of Shri Gurnam Singh, Sub-Judge, 1st Class, Specially empowered under the Hindu Marriage Act, Bhatinda, dated the 31st day of December, 1956, granting a decree for judicial separation in favour of the petitioner Ajit Singh against his wife Shrimati Kako and further ordering that the petitioner husband should continue paying Rs. 30 per month as maintenance to the respondent so long as she does not re-marry. It was further ordered that the parties were to bear their own costs.*

S. L. GUPTA, for Appellant.

PURAN CHAND, for Respondents.

#### JUDGMENT

Shamsher Bahadur, J. SHAMSHER BAHADUR, J.—Shrimati Kako has brought this appeal from the judgment and decree of the learned Subordinate Judge, Bhatinda, granting a decree for judicial separation under section 10 of the Hindu Marriage Act, 1955, to her husband Ajit Singh.

The parties were married many years ago and at the time of their marriage, there was a great disparity between their ages; Ajit Singh being 8 or 9 and Kako 20. The *muklawa* ceremony took place about 9 years after the marriage. She lived with her husband in village Dhan Singh Khana

for a short while. A son was born of this marriage but he died subsequently after Kako left her husband's house to reside with her parents. They have never lived as married persons since then.

Shrimati Kako  
v.  
Ajit Singh  
—  
Shamsher  
Bahadur, J.

The only point for determination in this appeal is whether the decree for judicial separation granted to Ajit Singh can be sustained on ground of his wife's desertion. Both parties adduced evidence before the learned Judge who on its appraisal has found that it was the wife who had deserted her husband. For at least six years before the application was made in 1956 by Ajit Singh, Kako admittedly had been living separately from her husband. She admitted that during this period she never lived or co-habited with her husband. She resided with her parents in village Jakhal all the time. According to her, it was her husband who had turned her out of his house in 1947 after giving her a beating which disabled her permanently. According to Ajit Singh, his wife left him two years after their marriage which was performed about 40 years ago and although his parents did their best to persuade her to come back she never returned to the matrimonial home. She even did not care to come to his house for condolence when Ajit Singh lost his brother and father. It is common ground that she is in receipt of a maintenance allowance of Rs. 30 per month from her husband since 1953 as a result of intervention of Mr. P. S. Rau, then Advisor to Pepsu Government.

As pointed out by the learned trial Judge, Kako has not been able to establish that she left her husband's house because of the beating given by him. Indeed when she was examined by the doctor she stated that her injuries were caused by a fall. It is also pertinent to observe that she

Shrimati Kako joined the hospital two years after the infliction of  
v. the injuries.  
Ajit Singh

Shamsher  
Bahadur, J.

It is common ground that Kako never went to live with her husband who had been going from place to place in the course of his official duties as an official in the Excise Department. S. Chet Singh, P.W. 3, who was at one time Deputy Speaker of the Legislative Assembly of Pepsu. has supported the case as set out by the petitioner. He had been known to Ajit Singh for a long time and was in a position to depose about the estranged relationship of the parties.

To obtain a decree for judicial separation on ground of desertion it has to be shown that either party to a marriage had deserted the petitioner for a continuous period of not less than two years without reasonable cause and without or against his consent immediately preceding the presentation of the petition. Though no attempt has been made to define desertion, it is in essence 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 the married state..." (Halsbury's Laws of England Third Edition Volume 12 pages 241-242). The gist of the matrimonial offence of desertion consists in the intention of the deserting spouse (*animus deserendi*) never to return to the marital home while there must be absence of consent on the part of the person deserted.

The evidence in the case has to be examined keeping in view these requirements of law. The

learned Judge has found that Kako without just cause left the matrimonial home and in spite of the efforts made by Ajit Singh and his parents she never returned to it. It is true that there is no positive evidence in this case that Ajit Singh ever made any efforts to get her back but that does not negative the case of desertion as set up by the petitioner. It is she who left the house of her husband and the evidence of beating having been disbelieved, it must be held that there was no reasonable cause for her so doing. The husband has not remarried to this day and this circumstance reinforces the evidence led on his behalf that Kako would have been received in the house had she chosen to return. It is reasonable to deduce in these circumstances that the intention of Kako was permanently to leave the husband.

Shrimati Kako  
v.  
Ajit Singh  
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Shamsher  
Bahadur, J.

The defence set up by Kako has not been borne out from the evidence which has been produced on her behalf. I agree with the learned Judge below that it was Kako who deserted her husband and on this score the decree for judicial separation must be upheld.

It has been contended by the learned counsel for the appellant that the husband should not be allowed to take advantage of his own wrong and has relied on clause (a) of sub-section (1) of section 23 of the Hindu Marriage Act, 1955. I cannot accede to the suggestion made by the learned counsel that Ajit Singh in any way acted wrongly nor is there any force in his ensuing contention that he should not be permitted to take any advantage of his wrongful act. The claim of the plaintiff could only have been defeated if he had been guilty of constructive desertion which could have been proved by his own conduct in compelling his wife to have taken the course which she adopted. Neither the *factum* nor the *animus*

Shrimati Kako  
v.  
Ajit Singh  
—  
Shamsher  
Bahadur, J.

in support of such an assertion has been established. The wife has been living apart from her husband of her own choice and her conduct is attracted by the principle laid down by Lord Penzance in *Fitzgerald v. Fitzgerald* cited in *Pulford v. Pluford* (1), that Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists."

It has further been argued that the learned Judge should have examined more closely the question of maintenance. The maintenance allowance had been fixed at Rs. 30 per month some years ago. It was stated by the learned counsel for the husband and not disputed by the counsel for the wife that the monthly salary of Ajit Singh is in the neighbourhood of Rs. 150. I do not think that the allowance could be regarded as insufficient. In any event, I do not see any justification for remitting this case for further investigation on this point as the wife herself or her counsel did not take any plea with regard to the fixation of the maintenance allowance.

There is one other point which needs a mention in this connection. The payment of maintenance allowance cannot in law put an end to desertion which remains 'continuing' because the agreement to make this payment does not bind the parties to live separately. The husband had agreed to pay the allowance of Rs. 30 on the intervention of Mr. P. S. Rau and this payment has been made regularly. Such a financial arrangement does not stop "the desertion from running" in the words of Lord Justice Denning (as Lord Denning then was) in *Crabtree v. Crabtree* (2).

The result is that this appeal fails and is dismissed. I make no order as to costs.

B. R. T.

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(1) (1923) L.R. Probate 18  
(2) (1953) 2 All. I.L.R. 56