IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

J U D G M E N T

D.B. Civil Misc. Appeal No. 769/2001
Smt. Kailash Bhansali Vs. Surendra Kumar

Against judgment and decree dated 30.07.2001 passed by Family Court, Udaipur in Case No. 183/98 - Surendra Kumar Vs. Smt. Kailash.

DATE OF PRONOUNCEMENT OF JUDGMENT :: 13TH June,2005.

PRESENT

HON'BLE MR.JUSTICE B.PRASAD
HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. R.K. Thanvi & Mr. Sudhir Saruparia for appellant.
Mr. S.S. Purohit & Mr. P.C. Sharma for respondent.

BY THE COURT (PER HON'BLE PATHAK,J.):

This Civil Misc. Appeal under Sec. 28 of the Hindu Marriage Act 1955 (for short, hereinafter referred to as 'the Act') read with Sec.19 of the Family Courts Act, 1984 arising from matrimonial proceedings, is directed against the judgment and decree dated 30.07.2001 passed by learned Family Court, Udaipur granting decree of divorce in favour of respondent husband and against the appellant wife.

Briefly stated, the facts leading to the present appeal are that the appellant filed an application under Sec.9 of the Act of 1955 before the Family Court, Udaipur for restitution of conjugal rights and the Family Court by its order dated 26.10.1996 passed the decree to that effect. Earlier to that, the respondent husband, with whom the appellant was married in the year 1981 and out of whose wedlock two issues were born in the year 1982 & 1984, filed application for divorce against the appellant in the year 1992 before the Family Court on the ground of cruelty and desertion but the same was dismissed. Against that order, the respondent husband preferred appeal before this Court and the conciliation

proceedings took place on 25.08.1995, 30.10.1995 and 27.11.1995 and the parties were afforded opportunities to reconcile. Later on the said decree passed by Family Court became final by the order of Division Bench of this Court dated 04.03.1997.

In the meantime, on 27.09.1995 the respondent husband filed another application under Sec.13(1)(A)(ii) of the Act of 1955 stating that the appellant wife just orally agrees to live together but never stayed with him and that the decree of conjugal rights having been passed about 23 months back and the compliance thereof being not made, the respondent husband is entitled to the decree of divorce against the appellant. The said application was registered as Case No.183/1998 in the Family Court, Udaipur.

Reply to this application was filed by the appellant wife on 23.03.1999 in which, she, while denying the allegations of cruelty submitted that earlier also on this ground divorce was denied and the appeal filed against that was also dismissed by the High Court. It was also stated

that the respondent husband had not paid her the expenses for travelling and lodging boarding etc. and an amount of Rs.12,060/- remained due against the husband which was concealed from the Court. In addition to that the husband had given an undertaking before this Court on 26.08.1996 that he would maintain his wife and children and the appellant and respondent would remain as husband and wife and he would discharge the duties of marital life but did not stick to the undertaking. It was also stated that appellant and respondent while living in the same house in two separate floors discharged their social obligations and also had cohabitation stealthily after the children went to sleep. Regarding cruelty, the wife took the plea that the matter covered under res-judicata and the husband made such false allegation in order to misguide the Court. She also stated that the execution application for the conjugal rights was not pressed as physical relationship between the parties had established number of times and in those circumstances there was no need to continue the execution application. The appellant prayed for dismissal of the application with costs.

On the pleadings of the parties, the learned Family Court framed issues on 23.04.1999 to the effect that whether after passing of one year or more from the decree of restitution of conjugal rights dated 26.10.1996 there had been no restitution of the conjugal rights between the parties and if so then what relief can be granted.

The respondent husband, thereafter, filed rejoinder on 07.06.1999 and while rebutting the submissions of appellant wife, inter-alia stated that he had given accommodation to the wife in first floor of the house and making regular payment of maintenance. He ultimately prayed for the decree of divorce.

Before learned Family Court, the evidence of husband commenced on 08.03.2001. He has examined himself as AW1 and produced AW2 Dalpat Singh and AW3 Shankerlal. In the documentary evidence he has produced Ex.1 the judgment delivered by the Family Court on an application under Sec.9 for restitution of conjugal rights dated 26.10.1996, Ex.2 – the decree passed in

consequence of judgment dated 26.10.1996, Ex.3 – an application filed by wife non-applicant for the execution of the decree dated 26.10.1996, Ex.4 – reply filed by the husband to application (Ex.3), Ex.5 – rejoinder of reply (Ex.4), Ex.6 – affidavit in support of rejoinder (Ex.5), Ex.7 – application for withdrawal from execution of the decree, Ex.8 Reply of husband to the application filed by wife, Ex.9 – an application of the husband, Ex.10, an application of wife for sending the respondent husband to civil jail for non-compliance of the decree of restitution of conjugal rights, Ex.11 reply to the application by respondent husband, Ex.12 - an application for attachment of property by wife, Ex.13 – reply by the husband to the application Ex.12, Ex.14 – rejoinder to Ex.13, and Ex.15 ordersheets of the Court file regarding passing of order of withdrawal.

The appellant produced herself in evidence as AW1 and got exhibited documents A-1 to A-14. Exs. A/1 to A/4 are the applications for obtaining certified copies of various orders. Ex.A/5 is amended application under Sec.13 (1)(A)

(ii) of the Hindu Marriage Act by the respondent. Ex.A-6 is the reply filed by the wife, Ex.A/7 is the order passed by the Family Court dated 30.03.1995 dismissing the Divorce Petition. Ex.A/8 is the judgment of the Division Bench of the High Court dated 04.03.1997 in D.B. Civil Misc. Appeal No. 204/1995 upholding the order passed by the Family Court dated 30.03.1995. Ex.A/9 is the application filed by appellant wife before the Family Court seeking orders for compliance of High Court's order. Ex.A/10 is the reply to the application by respondent-husband. Ex.A/11 is the copy of the ordersheets dated 25.09.1997 to 09.02.1998. Ex.A/12 is the original application for seeking divorce by the husband. Ex.A/13 is the judgment dated 30.03.1995 passed by the Family Court whereby the application under Sec. 13A seeking divorce was rejected. Ex.A/14 is the judgment delivered by the Division Bench of High Court on 04.03.1997. Appellant's evidence which started on 09.04.2001 concluded on 20.04.2001. The appellant wanted to produce her daughter in the witness box, but due to her illness and accident of her son she sought time and after a short adjournment ultimately the

evidence of the appellant was closed on 10.05.2001.

The learned Family Court, after hearing arguments, vide its judgment and decree dated 30.7.2001 allowed the application of the respondent husband and granted the decree of divorce as stated hereinabove.

In the present appeal, the wife appellant has prayed for the following reliefs:

> "a) appeal may kindly be accepted and allowed with cost throughout; and
>
> b) impugned judgment and decree dated 30.07.2001 passed by the learned Judge, Family Court, Udaipur in case No.183/1998 (Surendra Kumar Vs. Smt. Kailash), may kindly be quashed and set aside and divorce petition filed by respondent may kindly be rejected;
>
> c) During the pendency of this appeal effect and operation of the impugned judgment and decree dated 30.07.2001 passed by the learned Judge, Family Court, Udaipur in case No.183/1998 (Surendra Kumar Vs. Smt. Kailash) may kindly be stayed; and respondent may be restrained from remarriage and if contacts second marriage then same may kindly be declared null and void;
>
> d) During the pendency of this petition expenses of this litigation and interim monthly maintenance may kindly be ordered and awarded to the appellant;

> e) Any other relief, direction, which Hon'ble Court may feel just and proper looking to the facts of the case may kindly be passed in favour of appellant."

It was contended by learned counsel for the appellant wife that admittedly a decree of restitution of conjugal rights was granted in her favour therefore the Family Court committed error in allowing the decree of divorce under Sec.13(1)(a)(ii) of the Act of 1955 as there is finding of the learned court below to the effect that the husband never tried to implement the decree of restitution of conjugal rights. It was further contended that the husband did not comply with the decree of restitution of conjugal rights and in such circumstances the only course open to the Family Court was to refuse the relief of divorce. Learned counsel emphasized that divorce under Sec.13(1-A)(ii) is available to the party who has obtained the decree of restitution of conjugal rights but not to the opposite party who is not complying with it. He further submitted that the execution of decree for restitution of conjugal rights was disposed off on 15.02.1999 on the application of appellant wife as the decree

had been satisfied and conjugal rights consumed. That order was passed in presence of respondent husband and thus the divorce petition was not maintainable on the grounds enumerated in Sec.13 (1-A)(ii) as there was no cause surviving after the cohabitation took place between the parties. It was contended that in the reply before Family Court it has come that the respondent was not responding to her invitations to live with her and he was trying to take advantage of his own wrong for the purpose of relief under Sec.13(1A) (ii). He also submitted that the decree passed is against the principle of res-judicata as the earlier petition filed by the husband for seeing divorce was dismissed upto the level of the High Court wherein the respondent husband took the same stand and factual matrix. In the end, it was submitted that the appellant is still ready and willing to live with her husband as his wife and wants to live happy matrimonial life and hence the impugned judgment and decree deserves to be quashed and set aside.

On the other hand, learned counsel appearing for respondent husband submitted that

the appellant used to give cruel treatment to the respondent and had deserted him without any just and reasonable cause and that the decree for restitution of conjugal rights passed in favour of appellant was never complied with and restitution of conjugal rights did not take place despite his best efforts. He stated that the marriage became irretrievable and therefore it was impossible to restitute the conjugal rights. He also denied cohabitation taking place between the parties on particular dates or thereafter. He submitted that non-compliance of decree for restitution of conjugal rights by any party against whom such decree has been passed is not a wrong and would not disentitle him to file a petition for seeking divorce. According to him the learned Family Court was justified in passing the decree of divorce after assessing the overall facts and circumstances of the case and the same calls for no interference by this Court. In relation to his submission for upholding the judgment and decree of the Family Court, he also submitted that as after the decree of divorce the respondent has remarried, it would be in the interest of justice and the parties that the marriage between them is

dissolved by a decree of divorce by upholding the impugned judgment and decree.

We have heard the learned counsel for the parties and perused the record of the case so also examined the law propounded in the authorities cited by counsel appearing for both side.

It is relevant to mention here that the present appeal was admitted on 14.08.2001 in presence of both the parties and it has come in the ordersheet of this Court dated 06.12.2001 that after the decree for dissolution of marriage the husband has contacted second marriage and in view of that no interim relief regarding restraining respondent from contracting second marriage was granted even then efforts were made for reconciling the parties a number of times but the same yielded no fruits.

The question now before this Court is as to whether the respondent husband is entitled to maintain the decree of dissolution of marriage granted by the Family Court and what is the effect of respondent's contracting second marriage

and the relief to which the appellant wife is entitled in the aforesaid facts and circumstances?

The contention of the learned counsel for the appellant is that in view of the provisions contained in Sec. 13(1A)(ii) read with Sec.23(1)(a) of the Act of 1955, the husband is not entitled to seek divorce on account of his own fault as he did not comply with the decree passed on an application under Sec.9 of the Act regarding restitution of conjugal rights. According to the learned counsel, decree for divorce can be obtained by a party who files an application under Sec.9 of the Act for getting a decree in relation to restitution of conjugal rights.

On the other hand, it was submitted that it is not necessary in view of the provisions of Sec. 13(1)(1A)(ii) and Sec. 23 of the Act that the relief which is available under Sec.23 (1)(a) can only be obtained by a person who files the application under Sec.9 of the Act.

We have considered the above submissions. To appreciate the contention of the learned

counsel, it shall be useful to see Sec.13 (1A)(i) & (ii) and Sec. 23(1)(a) of the Act. The relevant provisions read as under:

> **Sec.13**
> (1-A) Either party to a marriage, whenever solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the grounds
>
> (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
>
> (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

> **Sec. 23. Decree in proceedings.-** (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -
>
> (a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief.

A perusal of Sec. 13(1A)(i) & (ii) of the Act allows either party to a marriage to present a petition for dissolution of marriage by decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for the period specified under the provisions after the passing of the decree for restitution of conjugal rights. Sec.23 of the Act prescribes that any proceeding under the Act whether defended or not, if the court is satisfied that any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in relevant sub-clauses of clause (ii) of Section 5 and the spouse is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief would entitle either of the spouses to claim relief as provided in the aforesaid provision of the Act.

A Full Bench of Punjab & Haryana High Court in Vimla Devi Vs. Singh Raja (AIR 1977 P&H 167) held that merely because the spouse who suffered the decree refused to resume co-

habitation would not be a ground to invoke the provisions of Sec. 23(1)(a) so as to plead that the spouse was taking advantage of his own wrong and observed that the provisions of Sec. 23 (1)(a) cannot be invoked to refuse the relief under Sec.13(1A)(i)&(ii) on the ground of non-compliance of decree for restitution of conjugal rights where there has not been restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree for restitution of conjugal rights in proceedings to which they were parties.

The Hon'ble Apex Court in Smt. Saroj Rani Vs. Sudarshan Kumar Chanda (AIR 1984 SC 1562) relying on Dharmendra Kumar Vs. Usha Kumar (AIR 1977 SC 2218) observed that it would not be reasonable to hold that the relief which was available to the spouse against whom a decree for restitution of conjugal rights has been passed, should be denied to the one who does not comply with the decree passed against him. The expression in order to be a 'wrong' within the meaning of Sec.23(1)(a) the conduct alleged has to

be something more than mere disinclination to agree to an offer of reunion and the misconduct must be serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled to.

Thus, it is clear that to deny the relief under Sec. and 23 (1)(a) of the Act requires something more than mere disinclination to agree to offer of reunion and thus because the petition is filed by a person against whom decree for restitution of conjugal rights has been passed, which had not been complied with, it cannot be said that he was taking advantage of his wrong. In the present case, only on this count that since the respondent husband did not file the application under Sec.9 for restitution of conjugal rights, he was not entitled to file petition under Sec. 13(1A)(ii) of the Act would not be the correct position of law in view of the decision rendered by the Hon'ble Apex Court referred to hereinabove.

Now, the another aspect which requires to

be considered in the present matter is as to whether the learned Family Court was justified in awarding the decree of divorce in favour of respondent husband as he filed an application under Sec. 13(1A)(ii)for seeking divorce?

The respondent-husband has produced himself as AW1 and in the statement he has stated that there had not been any compliance of the decree of conjugal rights and further the application for seeking divorce was filed after a year. He has also stated that in view of time prescribed for compliance of the decree of conjugal rights, after lapse of that time he was entitled to seek a decree of divorce. He has further stated that though the appellant wife was living in the upper story of the same house but no cohabitation took place between them and after passing of the decree under Sec.9 of the Hindu Marriage Act they had no marital relations and that he and his wife never discharged the social obligations rather prior to the passing of the decree under Sec.9 or subsequently. In the cross-examination, he has stated that he was having knowledge of the order Ex.P/15 passed by the

learned Family Court. He has further stated that he does not know as to whether the wife withdrew the execution application in relation to restitution of conjugal rights. He has admitted that he knew about the withdrawal of the proceeding on 15.02.1999 but he was not aware as to what was written in Ex.P/7 the application filed for withdrawal of execution proceedings. He has also admitted that the appellant wife was living in the upper story of the house and the staircase in the house is common. He has further stated that his wife is living in the house since 1992 but no cohabitation took place between them since then. The other witnesses namely Dalpat Singh (AW2) and Shankarlal (AW3) have stated that the relations between the spouses were not cordial for last so many years and they have not seen them together or even talking with each other.

The above witnesses in fact are not of much significance for the reason that they were the witnesses in the earlier proceedings on behalf of respondent husband and their testimony is of vague nature. They have simply stated that the relations were not cordial between husband and

wife and in fact that could not be a reason to believe that there had not been cohabitation between husband and the wife. The appellant wife in her statement has stated that she filed application Ex.A/11 for compliance of the decree of conjugal rights but as there had been cohabitation between him and her husband during the period from 21.07.1998 to 22.08.1998 and further on 14.02.1999, as such on the suggestion of her husband she withdrew the execution proceedings for the restitution of conjugal rights as the same had become infructuous. She stated that she did not disclose the fact of cohabitation with her husband to anybody else and stated that before 21.07.1998 also her husband had cohabited with her. She has stated that her husband used to come to the upper storey of the house and used to knock the door and thereafter cohabitation between them used to take place but the respondent husband was hiding this fact and was doing the above acts in a concealed way. In the cross examination, she has stated that she lived with her husband from 21.07.1998 to 22.08.1998. She has admitted the previous litigation between her and her husband but she stated that on account of death of her

mother-in-law (the mother of her husband) she discharged the social obligations with her husband and they had lived together. It has further been stated that she withdrew the execution proceedings in consultation with her counsel. A lengthy cross-examination has been addressed to her.

In view of above evidence, now it is to be seen as to whether the decree of divorce granted by the learned Family Court is just and proper and the same has been granted after proper appreciation of evidence? Previously, the husband filed a petition seeking divorce before the learned Family Court and the learned Family Court rejected that application vide order dated 30.03.1995. In that application same type of averments were taken as have been made in the subsequent application filed seeking divorce on the ground that after passing of the degree of restitution of conjugal rights no cohabitation took place between the spouses. A decree for dissolution of marriage was sought in the previous litigation making allegations of cruelty on the part of appellant wife and there being no cohabitation between the spouses for years

together. The learned Family Court, after examining the material came to the conclusion that the respondent-husband was not entitled to a decree of divorce. The matter, in appeal, came before a Division Bench of this Court and this Court vide its order dated 04.03.1997 upheld the order of the Family Court dated 30.03.1995 and it appears that order of the Division Bench has become final as the respondent husband took no recourse against that order.

After having lost in the first round, the respondent husband has filed the present petition seeking divorce on the ground that there had been no cohabitation for more than a year and therefore he was entitled to get the decree of divorce in his favour. The learned Family Court after assessing the evidence, came to the conclusion that since there had not been any cohabitation between the parties for more than a year after passing of the decree of restitution of conjugal rights and held the respondent husband entitled to seek the decree of divorce in view of Sec.13(1A)(ii) read with Sec.23 of the Act. But, we do not concur with the finding recorded by the learned

Family Court for the reason that with regard to cruelty etc. matters were agitated previously and the respondent husband was not able to prove this aspect that appellant wife was cruel so as to entitle the respondent husband to get a decree of divorce in his favour. Ex.7, the application filed by the appellant before the Family Court regarding withdrawal of the execution proceedings makes a mention that in view of the fact that there had been cohabitation between appellant wife and her husband she was not willing to pursue the application any more and the application for execution of decree was withdrawn. The respondent husband though was having knowledge of the withdrawal of the execution proceedings on 15.02.1999 by his wife on his suggestion even then as she has stated in her statement the respondent did not withdrew the present divorce petition. There appears to be no reason why when she was bent upon to pursue the execution proceedings will withdraw the same without there being a reason and the reason as disclosed by her to withdraw the execution proceedings pending before the learned Family Court appears to be reasonable and proper.

The contention of the learned counsel appearing for respondent husband was that it was the sweet-will and desire of the wife that she had withdrawn the execution proceedings filed for the restitution of conjugal rights however that cannot be a reason to believe that there had been cohabitation between the parties.

It is correct that it cannot be a reason to believe that there had been cohabitation between the parties but at the same time since an important fact was mentioned in the application that she was not inclined to pursue the execution application for the reason of cohabitation between them having taken place assumes importance and consideration. The copy of that application was obtained by the respondent husband but this fact was not controverted by him for quite some time. It appears that after the appellant had obtained a decree from the Court on an application under Sec.9 for restitution of conjugal rights, the husband thought it proper to seek divorce on the ground of cohabitation between the parties having not been taken place for a period more than a year

as required under the provisions of the Act.

In view of the evidence led by both the sides and in view of the fact that husband and wife both are living in the same house and the plea of cruelty having been disbelieved in the earlier proceedings by the learned Family Court, the same having been upheld by the learned Division Bench of this Court then on a simple statement made by the respondent husband that there had been no cohabitation after the passing of the decree for the restitution of the conjugal rights for more than a year therefore as a matter of right the petition for divorce must succeed cannot be said to be a correct proposition of law.

In matrimonial matters, the Courts are required to examine the matter carefully and particularly in the instant case when false allegations regarding cruelty etc. have not been found proved in the previous litigation then only on an assertion made in the subsequent present petition that no cohabitation has taken place

for more than a year after passing of the decree for the restitution of conjugal rights, the respondent husband would not be entitled to seek the decree of divorce. In our humble opinion, the judgment and decree passed by the learned Family Court is not based on proper appreciation of evidence.

It is also significant to notice here that the respondent husband was bent upon to anyhow get rid of the marriage as would be apparent from the fact that after passing of the divorce decree, the respondent immediately got married with another lady. He even did not wait for the expiry of the statutory period during which the other party has a right to challenge the order passed by the Family Court.

Now, it is to be seen as to what is the effect of the marriage which has been contracted after passing of the decree by the Family Court under Sec. 13 (1A)(ii) of the Act? In this connection, Sec. 15 of the Hindu Marriage Act is relevant, which reads as under:

> **Sec.15 Divorced person when may marry again.-** When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."

A perusal of Sec.15 of the Act of 1955 indicates that after the decree of divorce second marriage is permissible firstly when there is no right to appeal against the decree, secondly if right to appeal is provided then the time for filing the appeal has expired without filing the appeal, and thirdly when the appeal has been dismissed.

In the instant case, the appeal has been filed on 09.08.2001 that is to say within 10 days of the passing of the decree dissolving the marriage. As per the office report dt.10.8.2001 power on behalf of respondent husband was filed before 10.08.2001 alongwith caveat dated 17.05.2001 meaning thereby that caveat was filed even prior to passing of the impugned decree dated

30.07.2001 and thereafter on 14.08.2001 when the appeal was admitted, counsel for the respondent husband was present in the Court. The record of the case reveals that an application was moved on behalf of the appellant in the Court on 12.10.2001 stating therein that the respondent husband has contracted second marriage within three days of the passing of the decree by the Family Court. Thus, it is clearly established that the statutory period provided under Sec.15 of the Act has been given a complete go bye in an arbitrary manner and the husband remarried without waiting even for the statutory period to come to an end which is provided for preferring appeal by an aggrieved party.

It is, thus, apparent from the conduct of the respondent husband that after having lost in the first round upto the level of filing misc. appeal before Division Bench of this Court and after his petition for divorce having been dismissed by the learned Family Court in the year 1995 and same was affirmed by this Court in 1997, when the wife filed an application under Sec.9 for restitution of conjugal rights and obtained a

decree for restitution of conjugal rights, just after 11 months of the passing of the decree for restitution of conjugal rights, during the pendency of civil misc. appeal before this Court, he moved an application for seeking divorce on the ground that no cohabitation took place for a period of one year after passing of the decree under Sec.9 of the Act for restitution of conjugal rights. This conduct of the respondent husband shows that one way or the other he was impatiently trying to seek a decree of divorce. The averments made regarding cruelty in the present application as well as in the proceedings launched by him for seeking divorce did not find favour to him as in the earlier proceeding for divorce on the ground of cruelty and desertion had been dismissed.

Now, this takes us to consider this aspect of the matter as to whether the respondent husband's conduct was one of taking advantage of his own wrongs and whether it can be termed as misconduct so as to deprive him from seeking a decree of divorce in the present matter under Sec.13 read with Sec.23 (1A)(ii) of the Act?

As discussed above, we have come to the conclusion that the respondent husband after having failed in the first attempt to get the marriage dissolved and the decree for restitution of conjugal rights in favour of appellant wife having been passed, after lapse of one year immediately moved the Court for the grant of a decree of divorce in his favour on the ground that no cohabitation took place between him and his wife. The further conduct of respondent husband is that after passing of the decree of divorce he did not wait even for the statutory period to come to an end for filing appeal against the decree of divorce. The conduct of the respondent husband, as discussed above disentitles him to get a decree of divorce in the circumstances as discussed herein above and also taking into consideration that even without passing of the impugned judgment and decree he filed caveat in this Court i.e. to say before 74 days of the passing of the impugned judgment and decree.

It is apposite to mention here that

Hon'ble Apex Court in the case reported in AIR 1989 SC 1477 (Smt. Lata Kamat Vs. Vilas) has held that the appeal filed against decree for nullity of marriage on contracting second marriage by husband would not become infructuous. Further, in Tejinder Kaur Vs. Gurmit Singh (AIR 1998 SC 839) the Hon'ble Apex Court has held that after getting decree for divorce before marrying again the successful spouse should apprise whether appeal to Supreme Court is filed and pending, and that the appeal will not become infructuous on the ground that another spouse has remarried.

In the instant case, simply making a statement in Court by the respondent husband that there had not been cohabitation between him and his wife was not sufficient for the learned Family Court to grant decree in the present case particularly in the circumstances when the wife was throughout insisting upon to see that decree for restitution of conjugal rights is acted upon and for that she moved an application for execution of the decree which was withdrawn on 15.02.1999 for the reason stated in the application that there had been cohabitation

between them many a times and the husband was well in know of the application for withdrawal of execution application but no objection was raised by him regarding the application and as the appellant wife has stated in her statement that she withdrew the application on the suggestion of the husband though that has been disputed but appears to be trustworthy for the reason that she was desperate and was fighting the present matter for last many years then without there being any reason first to move the application to see that decree regarding restitution of conjugal rights is satisfied and then to withdraw the same without there being any reason.

In view of foregoing discussions, we are of the opinion that the respondent husband was not able to satisfactorily prove by his evidence that there had been no cohabitation between him and his wife particularly in the circumstances discussed above as husband and wife were living in the same house in two floors having common staircase and further for the reason that it has come on record in the statement of appellant wife that the husband used to cohabit with her stealthily and

the night before filing the withdrawal application respondent husband had asked her to withdraw the execution proceeding.

All the above facts and circumstances indicate that the learned Family Court has not properly appreciated the evidence led before it and arrived at a wrong conclusion that there was no dispute about the fact that there was no cohabitation after passing the decree of restitution of conjugal rights whereas the fact remains that the cohabitation was the main issue in dispute, and thus the impugned judgment and decree, in view of the above discussed facts and circumstances of the case, deserves to be quashed and set aside and further as discussed above, the conduct of the respondent husband also disentitles him to seek a decree under Sec.13 (1)(A) (i) & (ii) read with Sec.23 of the Act.

In the result, the appeal is allowed and the judgment and decree passed by learned Family Court dated 30.07.2001 is set aside. The appellant shall be entitled to cost which is quantified at Rs.20,000/-, to be paid within a

period of one month from today.

(SATYA PRAKASH PATHAK)J. **(B.PRASAD)J.**

/jpa