

DHARMENDRA KUMAR

v.

USHA KUMAR

August 19, 1977

[A. C. GUPTA AND S. MURTAZA FAZAL ALI, JJ.]

Hindu Marriage Act 1955—Section 13(1A)(ii).—23(1)(a)—If divorce can be obtained for absence of restitution of conjugal rights after decree for restitution is granted by a person who refuses to have restitution—Whether such a conduct amounts to a wrong within the meaning of sec. 23(1)(a) of the Act.

The respondent-wife was granted a decree for restitution of conjugal rights on her application under s. 9 of Hindu Marriage Act, 1955 by Additional Senior Sub-Judge, Delhi, on 27th August 1973. On 28th October 1975, the respondent presented a petition under s. 13(1A) (ii) of the Act in the Court of Additional District Judge, Delhi for dissolution of the marriage by a decree of divorce—stating therein that there had been no restitution of conjugal rights between the parties after the passing of the decree for restitution of conjugal rights. The appellant-husband, in his written statement admitted that there had been no restitution of conjugal rights, between the parties after the passing of the decree in earlier proceedings, but stated that he made attempts to comply with the decree dated 27th August 77 by writing several registered letters inviting the respondent to live with him to which, according to him, she never replied. The husband contended that she herself prevented the restitution of conjugal rights and was making a capital out of her own wrong which she was not entitled to do.

HELD : No circumstance has been alleged in the instant case from which it could be said that the respondent was trying to take advantage of her own wrong. Section 13(1A)(ii) of Hindu Marriage Act 1955 allows either party to a marriage to present a petition for dissolution of the marriage by a 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, in the provision after the passing of the decree for restitution of conjugal rights. Sub-section (1A) was introduced in section 13 by section 2 of Hindu Marriage (Amendment) Act 1964. Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce. The party against whom the decree was passed was not given that right. The relief which is available to the spouse against whom a decree for restitution of conjugal rights has been passed cannot reasonably be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a "wrong" within the meaning of s. 23(1)(a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. Mere non-compliance with a decree for restitution does not constitute wrong within the meaning of section 23(1)(a). [317D-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 949 of 1977.

Appeal by Special Leave from the Judgment and Order dated 19-10-1976 of the Delhi High Court in F.A.O., No. 170 of 1976.

Naunit Lal, R. K. Baweja and Miss Lalita Kohli, for the Appellant.

S. L. Watel, C. R. Somasekharan, R. Watel and M. S. Ganesh, for the Respondent.

The following Judgment of the Court was delivered by

GUPTA, J.—On her application made under section 9 of the Hindu Marriage Act, 1955, the respondent was granted a decree for restitution of conjugal rights by the Additional Senior Sub-Judge, Delhi on

Subsequently the following additional issue was also framed :

“Whether the objection covered by issue No. 1 is open to the respondent under the law ?”

This additional issue was heard as a preliminary issue. The Additional District Judge, Delhi, who heard the matter, relying on a Full Bench decision of the Delhi High Court reported in I.L.R. (1971) 1 Delhi 6, (*Ram Kali v. Gopal Dass*), and a later decision of a learned single Judge of that court reported in I.L.R. (1976) 1 Delhi 725, (*Gajna Devi v. Purshotam Giri*) held that no such circumstance has been alleged in the instant case from which it could be said that the petitioner was trying to take advantage of her own wrong and, therefore, the objection covered by issue No. 1 was not available to the respondent. The Additional District Judge accordingly allowed the petition and granted the petitioner a decree of divorce as prayed for. An appeal from this decision taken by the husband was summarily dismissed by the Delhi High Court. In the present appeal the husband questions the validity of the decree of divorce granted in favour of the petitioner.

Section 13(1A)(ii) of the Hindu Marriage Act, 1955 allows either party to a marriage to present a petition for the dissolution of the marriage by a 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 in the provision after the passing of the decree for restitution of conjugal rights. Sub-section (1A) was introduced in section 13 by section 2 of the Hindu Marriage (Amendment) Act, 1964 (44 of 1964). Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce; the party against whom the decree was passed was not given that right. The grounds for granting relief under section 13 including sub-section (1A) however continue to be subject to the provisions of section 23 of the Act. We have quoted above the part of section 23 relevant for the present purpose. It is contended by the appellant that the allegation made in his written statement that the conduct of the petitioner in not responding to his invitations to live with him meant that she was trying to take advantage of her own wrong for the purpose of relief under section 13(1A)(ii). On the admitted facts, the petitioner was undoubtedly entitled to ask for a decree of divorce. Would the allegation, if true, that she did not respond to her husband's invitation to come and live with him disentitle her to the relief? We do not find it possible to hold that it would. In *Ram Kali's* case (*supra*) a Full Bench of the Delhi High Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of section 23(1)(a). Relying on and explaining this decision in the later case of *Gajna Devi v. Purshotam Giri* (*supra*) a learned Judge of the same High Court observed :

“Section 23 existed in the statute book prior to the insertion of section 13(1A). . . . Had Parliament intended that a party which is guilty of a matrimonial offence and against

A which a decree for judicial separation or restitution of con-
jugal rights had been passed, was in view of section 23 of the
Act, not entitled to obtain divorce, then it would have inserted
an exception to section 13(1A) and with such exception, the
provision of section 13(1A) would practically become re-
dundant as the guilty party could never reap benefit of obtain-
ing divorce, while the innocent party was entitled to obtain it
B even under the statute as it was before the amendment. Sec-
tion 23 of the Act, therefore, cannot be construed so as to
make the effect of amendment of the law by insertion of sec-
tion 13(1A) nugatory.

Cthe expression "Petitioner is not in any way
taking advantage of his or her own wrong" occurring in
clause(a) of section 23(1) of the Act does not apply to
taking advantage of the statutory right to obtain dissolution
of marriage which has been conferred on him by section
13(1A) . . In such a case, a party is not taking advantage of
his own wrong, but of the legal right following upon of the
passing of the decree and the failure of the parties to comply
with the decree

D In our opinion the law has been stated correctly in *Ram Kali v. Gopal
Das* (supra) and *Gajna Devi v. Purshotam Giri* (supra). Therefore,
it would not be very reasonable to think that the relief which is avail-
able to the spouse against whom a decree for restitution has been
passed, should be denied to the one who does not insist on compliance
with the decree passed in his or her favour. In order to be a 'wrong'
E within the meaning of section 23(1)(a) the conduct alleged has to be
something more than a mere disinclination to agree to an offer of
reunion, it must be misconduct serious enough to justify denial of the
relief to which the husband or the wife is otherwise entitled.

F In the case before us the only allegation made in the written state-
ment is that the petitioner refused to receive or reply to the letters
written by the appellant and did not respond to his other attempts to
make her agree to live with him. This allegation, even if true, does
not amount to misconduct grave enough to disentitle the petitioner to
the relief she has asked for. The appeal is therefore dismissed but
without any order as to costs.

P.H.P.

Appeal dismissed.