

property to the author of the Trust, nor does the Trust make any provision whatsoever which entitles him at any time named or in the future to reassume power over the income of the assets directly or indirectly. That being so, the case does not fall within the mischief of the first proviso, nor is the case covered by section 16(1)(c); the income from the shares must be deemed to be the income of the Trust and not of the assessee which is—

Ragbir Singh
Raja Sansi,
The Commissioner of
Income-tax,
Simla,

Khosla, C. J.,

In this view of the matter, the first question

“Whether the dividend income of the 300 shares of the Simbhaoli Sugar Mills, Private Ltd., transferred by the assessee to S. Ragbir Singh Trust was the income of the assessee liable to tax?”

must be answered in the negative. The second question does not arise and I need not even set it out here.

The reference is answered accordingly. The assessee will recover his costs which we assess at Rs. 250.

MAHAJAN, J.—I agree.

B.R.T.

APPELLATE CIVIL

Before A. N. Grover, J.

KAMLESH KUMARI,—Appellant

versus

KARTAR CHAND,—Respondent

F.A.O. No. 3/M of 1960.

Hindu Marriage Act (XXV of 1955)—S. 13 (1) (ix)—Decree for restitution of conjugal rights passed in favour of the husband against the wife—Wife—Whether can ask for dissolution of marriage on the ground that husband did not

execute the decree—Husband—When can ask for dissolution of marriage.

1960

Sept. 22nd.

Held, that a person in whose favour the decree for restitution of conjugal rights is passed will alone be entitled to move a petition under section 13(1)(ix) of the Hindu Marriage Act, 1955 if the defendant in the suit fails to comply with the decree for two years and not the party against whom the decree was passed. According to the provisions contained in section 23(I)(a) of the said Act the Court is only to grant a decree after it is satisfied that apart from the existence of the grounds for granting the relief the petitioner is not in any way taking advantage of his or her own wrong. If a defaulting wife is allowed to obtain a decree for dissolution under section 13(1)(ix) it will be tantamount to her being allowed to take advantage of her own wrong. This provision lends support to the view that the legislature could never have intended that the wife could apply for dissolution under section 13(1)(ix) on the ground that it was the husband who was bound to execute the decree and although she herself did not take any steps to return to cohabit with him, she was entitled to dissolution because he failed to take any such steps.

Held, that if the wife fails to come and live with the husband after a decree for restitution of conjugal rights has been passed against her it can happen in two sets of circumstances. She may do so wilfully or she may genuinely attempt to return to her husband's home but the husband may prevent her from resuming cohabitation. In the first eventuality the husband would be entitled to ask for dissolution of marriage on the ground that she has failed to comply with the decree for restitution passed against her. In the second eventuality the husband cannot obtain dissolution on the aforesaid ground but it is difficult to hold that the wife would be entitled to seek dissolution because the husband has not allowed her to comply with the decree. Moreover, where the husband is the decree-holder it is for the wife who is the judgment-debtor to comply with it and the husband cannot be compelled nor indeed has he any obligation to seek execution against the wife. It cannot possibly be said that when a decree for restitution is passed against the wife in favour of the husband any obligation is created by which he must take steps to execute the decree or enforce it and that on his failure to do so the Courts can hold that he has failed to comply with the decree.

Appeal from the decree of the Court of Shri Brijindra Singh Sodhi, Sub-Judge, 1st Class, exercising special powers under the Hindu Marriage Act, Bhatinda, dated the 23rd November, 1959, whereby the application of the appellant (wife) was dismissed with costs.

Application under section 13 of the Hindu Marriage Act.

S. K. JAIN AND J. N. KAUSHAL, ADVOCATES, for the Appellant.

K. L. KAPUR, ADVOCATE (*Amicus Curiae*).

JUDGMENT

GROVER, J.—This is an appeal of the wife against the dismissal of her petition for dissolution of marriage made under section 13 of the Hindu Marriage Act, 1955.

Grover, J.

The parties were married in August, 1955. On 6th December, 1956, the husband filed a petition for obtaining a decree for restitution of conjugal rights which was granted in favour of the husband on 23rd May, 1957. In July, 1959, the wife filed the petition out of which the appeal has arisen seeking dissolution on the ground that the husband had failed to comply with the decree for restitution of conjugal rights for a period of more than two years after the passing of the decree, and that he did not want to maintain the appellant as his wife and in order to avoid payment of maintenance allowance he had obtained the decree for restitution of conjugal rights which he never got executed through Court or through the Panchayat. The husband raised the plea that it was not open to the wife to seek dissolution of marriage under clause (ix) of sub-section (1) of section 13 of the Act as it was she who had failed to comply with the decree. The point that at once arose for consideration was whether, when the husband had

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obtained the decree for restitution, it was open to the wife to seek dissolution under clause (ix) of section 13(1) of the Act on the ground that it was the husband who had never executed that decree and had taken no steps to obtain restitution and was, even otherwise, unwilling to allow the wife to come and live with him. The learned trial Judge has answered that question against the wife and that is how the present appeal has been brought to this Court.

Section 13 of the Act which gives the grounds for divorce contains provisions for passing a decree for dissolution in cases where a decree for judicial separation has been passed as also where a decree for restitution of conjugal rights has been passed.

Sub-section (1) is to the following effect:—

“Any marriage solemnized, whether before or after the commencement of this Act may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

“ * * * * *
* * * *

(viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.”

According to the appellant the absence of the words “against that party” in clause (viii) indicates that

it is open to either the husband or the wife to seek dissolution of marriage when a decree for restitution of conjugal rights has been passed irrespective of the fact against whom it has been passed if there is non-compliance with it for the requisite period. In other words even if the husband has obtained a decree for restitution against the wife but he does not execute it and fails to take steps to enforce it or prevents the wife from complying with it, it would amount to a failure on his part to comply with the decree and the wife in such circumstances being "the other party" within the meaning of sub-section (1) can seek dissolution under the aforesaid provisions. It is pointed out that clause (viii) expressly mentions the words "against that party" which shows that in a case where a decree for judicial separation has been obtained by the husband against the wife the husband alone can obtain dissolution of marriage if he shows that he has not resumed cohabitation for the requisite period. Even according to the counsel for the appellant under clause (viii) it is not possible for the wife in those circumstances to ask for a decree for dissolution of marriage. The provisions contained in clauses (viii) and (ix) are also to be found in section 27 of the Special Marriage Act, 1954, with this exception that in clause (j) there the words "after the passing of the decree against the respondent" expressly appear. In clause (i) also which relates to dissolution after a decree for judicial separation the words "passing of a decree for judicial separation against the respondent" appear. The Indian Divorce Act does not contain any provision analogous to clause (ix). Section 5 of the English Matrimonial Clauses Act, 1884, contained a provision to the effect that if the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights such

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respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause. and a suit for judicial separation may be forthwith instituted and when any husband, who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights, has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage. Section 14 of the English Matrimonial Causes Act, 1950, makes a provision for judicial separation by which a decree can be granted at the instance of either the husband or the wife on the ground of failure to comply with a decree for restitution of conjugal rights. Thus the scheme and the principle that have been incorporated in all these various enactments are that in the event of the non-compliance with the decree for restitution of conjugal rights by the spouse against whom it has been passed the other spouse has a right to ask for judicial separation or divorce. It is difficult to see how any departure has been made from that principle in section 13(1)(ix) of the Hindu Marriage Act. It is important in this connection to consider how compliance with a decree for restitution of conjugal rights has to take place and by whom. In the words of Blackstone the suit for restitution of conjugal rights is brought whenever either the husband or the wife is guilty of the injury of subtraction or lives separate from the other without any sufficient reason, in which case they will be compelled to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. In this country according to the provisions of Order XXI, Rule 32, where a decree for restitution of conjugal rights has been passed and the party against whom that decree has been passed has wilfully failed to obey it, the decree can be enforced

by attachment of the property of the defaulting party. Rule 33 of Order XXI gives power to the Court to make a different provision when it passes a decree for restitution against the husband. That provision, however, is not relevant in the present case. Now, if the wife fails to come and live with the husband after a decree for restitution of conjugal rights has been passed against her it can happen in two sets of circumstances. She may do so wilfully or she may genuinely attempt to return to her husband's home but the husband may prevent her from resuming cohabitation. In the first eventuality the husband would be entitled to ask for dissolution of marriage on the ground that she has failed to comply with the decree for restitution passed against her. In the second eventuality the husband cannot obtain dissolution on the aforesaid ground but it is difficult to hold that the wife would be entitled to seek dissolution because the husband has not allowed her to comply with the decree. Moreover, where the husband is the decree-holder it is for the wife who is the judgment debtor to comply with it and the husband cannot be compelled nor indeed has he any obligation to seek execution against the wife. It cannot possibly be said that when a decree for restitution is passed against the wife in favour of the husband any obligation is created by which he must take steps to execute the decree or enforce it and that on his failure to do so the Courts can hold that he has failed to comply with the decree. In *Alexander v. Alexander* (1), the form of the decree for restitution of conjugal rights is mentioned. In case of husband it has to be that the husband should take the petitioner home and receive her as his wife and ren-

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der her conjugal rights. Applying the same principle the decree against the wife will have to be "the wife should return and live with the husband and render him conjugal rights". In Latey on Divorce, Fourteenth Edition, at page 851 is to be found the form of 'Decree of Restitution of Conjugal Rights' on a wife's petition according to which the husband is to be ordered to return home to the petitioner and render her conjugal rights. If the decree has to be against the wife it will be similarly ordered that she should return home to the petitioner and render conjugal rights to him. Thus the entire obligation in such a decree is placed on the person against whom the decree is passed and I do not find any warrant for the proposition that any corresponding obligation is laid on the person who obtains a decree for restitution of conjugal rights to take steps to execute it or make efforts to persuade the judgment-debtor to comply with the decree. The Court below relied on the view of Shri Kashi Prasad Saksena, the learned author of the Hindu Marriage Act, 1955, at pages 251 and 252 of his book, which appears to me to be correct and which is clearly to the effect that a person in whose favour the decree for restitution of conjugal rights is passed will alone be entitled to move a petition under the aforesaid clause, if the defendant in the suit fails to comply with the decree for two years and not the party against whom the decree was passed.

The emphasis which has been laid by the learned counsel for the appellant on the absence of the words "against that party" in clause (viii) does not appear to be justified although it would have been better to have added those words as are to be found in the analogous provision in the Special Marriage Act, but it may have been considered that it would be altogether redundant to

use that language because the very words "has failed to comply with the decree" clearly indicate the intention of the legislature that it is for the party whose decree remains unsatisfied who can ask for a decree for dissolution and not for the defaulting spouse to take advantage of his or her own default or wrong. According to the provisions contained in section 23(1)(a) the Court is only to grant a decree after it is satisfied that apart from the existence of the grounds for granting the relief the petitioner is not in any way taking advantage of his or her wrong. If a defaulting wife is allowed to obtain a decree for dissolution under section 13(1)(ix) it will be tantamount to her being allowed to take advantage of her own wrong. This provision lends support to the view that the legislature could never have intended that the wife could apply for dissolution under section 13(1)(ix) on the ground that it was the husband who was bound to execute the decree and although she herself did not take any steps to return to cohabit with him she was entitled to dissolution because he failed to take any such steps.

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After giving the matter due consideration I am of the opinion that the conclusion at which the Court below arrived is right and must be affirmed. In the result this appeal is dismissed but in the circumstances I make no order as to costs. I am indebted to Mr. K. L. Kapur, who argued on behalf of the respondent as *amicus curiae* for the valuable assistance given by him.

B.R.T.