the same. For the reasons given above in that appeal, all these petitions fail and are dismissed with costs, counsel's fee in each being Rs. 100.

March 25, 1970.

R. S. NARULA, J.—I agree.

N. K. S.

APPELLATE CIVIL

Before H. R. Sodhi, J.

LACHHMAN SINGH,—*Appellant.*

versus

SHRIMATI MOHINDER KAUR,—*Respondent.*

First Appeal from Order No. 73—M of 1966

April 3, 1970.

Hindu Marriage Act (XXV of 1955)—Sections 9 and 13(1A)(ii)—Husband obtaining decree for restitution of conjugal rights—Such decree modified by compromise in appeal whereby husband undertakes to go to wife to win her confidence—Such compromise—Whether affects the operation of the decree—No restitution of conjugal rights for two years after passing of the decree—Whether entitles the husband to the grant of decree for divorce.

Held, that where a decree for restitution of conjugal rights is passed in favour of a husband and the decree is modified by compromise in appeal whereby the husband undertakes to go to wife to win her confidence such a compromise is more or less an undertaking on the part of the husband to appease his wife. A vague condition like this cannot legally affect the operation of the decree. Once a decree for restitution is passed, a duty is cast on the wife that she should return home and live with her husband and such a decree cannot be rendered ineffective or futile by a compromise. No conditions can be attached to the decree which are in their very nature contrary to the spirit of the decree and the fulfilment of which is incapable of being supervised or controlled by a Court of law. The spouse against whom a decree for restitution is passed is in a position of a judgment-debtor and no duty can be cast on the decree-holder that in order to get compliance with the decree he should be making further efforts to win the confidence of the judgment-debtor who is already proved to be a deserter from marital obligations. The only pre-requisite for passing a decree for divorce as required by section 13(1A)(ii) of the Hindu Marriage Act, 1955, is that factually for a period of two years or upward, after the passing of a decree

for restitution of conjugal rights, to which parties to the proceedings for divorce are parties, no restitution of conjugal rights has taken place. A decree can be refused only when the decree-holder creates a situation which makes it impossible for the parties to live together and taking advantage of his own wrong wants relief by way of a decree for divorce. Where such a circumstance does not exist, decree for divorce must be granted.

(Para 12)

Petition Under Section 28 of the Hindu Marriage Act, for revision of the order of the Court of Shri Gurnam Singh, Additional District Judge, Hoshiarpur, dated 8th March, 1966, dismissing the petition and leaving the parties to bear their own costs.

G. S. VIRK, ADVOCATE, for the appellant.

D. N. AGGARWAL, ADVOCATE, for the respondent.

JUDGMENT

H. R. Sodhi, J.—This is an appeal by Lachhman Singh appellant praying for dissolution of his marriage with the respondent by a decree of divorce under section 13 of the Hindu Marriage Act, 1955 (hereinafter called the Act).

(2) The appellant is a lecturer in a Government Higher Secondary School and the respondent is also a school mistress teaching in a Government Primary School. The appellant applied under section 9 of the Act for restitution of conjugal rights it being alleged by him that the respondent had withdrawn from his society without any reasonable excuse. The Senior Subordinate Judge, Hoshiarpur, exercising powers of the District Court under the Act granted a decree for restitution on 18th May, 1961.

(3) An appeal (F.A.O. No. 109-M of 1961) prefererd in this Court by Smt. Mohinder Kaur came up for hearing before P. D. Sharma, J. on 18th March, 1963. The parties entered into a compromise by virtue of which it was settled between them that the respondent would continue working in the department she was then serving and that the appellant would go to her and win her confidence so that they could live peacefully. It was also agreed that after the confidence of the respondent had been gained by the appellant, both of them would apply to the department for being posted at one station, and that in the meanwhile the appellant would continue sending the respondent Rs. 40 per month. An order of maintenance had been passed by a criminal Court as well but that was to

be kept in abeyance. The learned Judge hearing the appeal modified the decree for restitution to the extent as indicated in the terms of settlement as referred above. The decree was, thus, maintained but subject to the conditions of the compromise.

(4) In terms of the compromise decree, the appellant was to win the confidence of the respondent. It appears that the parties could not come close to each other in spite of the agreement and ultimately the appellant made an application on 26th April, 1965, out of which the present appeal has arisen, praying that a decree for divorce be passed.

(5) The ground on which divorce is sought is that the appellant made attempts to bring the respondent to his place and even wrote a number of letters requesting her to return to her home but she did not chose to do so nor she ever applied for her transfer to a place near that where the appellant was posted. According to the appellant the decree for restitution remained unsatisfied inasmuch as there was no restitution of conjugal rights between parties to the marriage within a period of two years after the passing of the decree. The relevant provision of law is contained in section 13(1A)(ii) of the Act, which reads as under :—

> "13(1A) Either party to a marriage, whether solemnised 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 ground—
>
> (i) * * * *
>
> (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

The respondent resisted the application for divorce and reiterated the pleas that she had raised in reply to the application for restitution. It was stated by her that the appellant treated her with such cruelty as to cause a reasonable apprehension in her mind that it was harmful and injurious for her to live with him and that there was danger to her life and safety. The Senior Subordinate Judge had, however, held in restitution proceedings that there was no foundation on which the charges of cruelty or maltreatment could

be based against the present appellant. She made a reference to the criminal complaint which resulted in the granting of maintenance allowance of Rs. 60 per month to her. As regards the obligation undertaken by the appellant under the modified decree for restitution, as passed on appeal to this Court, it was pleaded by the respondent that the appellant made no attempt to win her confidence in spite of her having written to him to come to her in Kaulgarh where she was then posted as a teacher and her promise to make suitable arrangements for his residence there. She denied the allegations of the appellant that he had gone to the house of the respondent either himself alone or with other respectables of the village to appease her and gain confidence. Letters purported to have been written by the appellant were admitted by the respondent but it was stated that the facts mentioned therein were not correct and the plea was that those letters had been written only to make out a plausible ground for divorce.

(6) On the pleadings of the parties, the following issues were framed :—

(1) Whether the petitioner has complied with his statement made in the High Court ? If so, what is its effect ?

(2) In case issue No. 1 is proved, whether the petitioner is not entitled to a decree of divorce ?

(3) Relief ?

(7) The Additional District Judge decided all the three issues against the appellant. It has been held under issue No. 1 that the conduct of the appellant has been such that he in fact did not like to rehabilitate the respondent and he wrote some letters only to create evidence in his favour in order to facilitate his getting divorce though the respondent had all the time been willing and ready to live with him. Issue No. 2 was held not to be proved and rather redundant. In the result, it was held that the appellant had failed to prove that he complied with the terms of the compromise effected in the High Court and was not, therefore, entitled to any relief. Hence the present appeal.

(8) I have been taken by the learned counsel for the parties through the evidence on record and the relevant letters that were exchanged between the parties have also been read to me. The

position taken up by the appellant is that he went to village Bachhauri where the parents of the respondent resided and also to her at Kaulgarh where she was posted and requested her to come to him in the vacation but she did not agree to do so. The letters written by the appellant assert that he had met the respondent and asked her to get herself transferred but letters of the respondent on the contrary show that she was never contacted either at Kaulgarh or at her house. She made a grievance in her letters that the appellant was strangely enough giving false facts. Similarly, the appellant in his letters made allegations to the same effect against the respondent. It is true, as found by the trial Court that some of the averments of the appellant are not correct and suggest that his statement in Court, on many particulars, is incredible. It is equally not possible to take the statement of the respondent at its face value as nothing has been shown which could prevent her from going to her husband if she was so inclined. She, in her letters, only requested the appellant to come to her.

(9) The oral evidence produced by the appellant consists of the statements of Gulzar Singh, A.W. 1, Gurmit Singh, A.W. 2 and Baldev Singh, A.W. 3. The appellant himself also went into the witness box as A.W. 4. Gulzar Singh is a fellow teacher with the appellant in the school at Garhshankar and deposes that he accompanied him (appellant) to Kaulgarh to persuade the respondent to come back to her husband but she declined. Baldev Singh, Lambardar of village Ajram to which the appellant belongs, is also said to have accompanied them. The other witness Gurmit Singh is a Member Panchayat of the same village and states that he was also a member of the party which went to the respondent to entreat her to come back to her husband.

(10) Evidence in rebuttal produced by the respondent consists of the statements of Inderjit Singh, R.W. 1, who is a Sarpanch of village Kaulgarh, Sadhu Ram R.W. 2, Joginder Singh, R.W. 3, Harbans Singh R.W. 4 brother of the respondent, and Lachhman Singh R.W. 5. Statements of Inderjit Singh and Lachman Singh are of negative nature inasmuch as one of them deposes that the appellant never went to village Kaulgarh in the year 1964 or in the beginning of the year 1965. It is stated by them that the appellant had actually been seeking their help to get a divorce. A reading of the statements of these witnesses does not inspire confidence and it is difficult to put faith in their testimony. Joginder Singh and Sadhu Ram

teachers also give no assistance when Joginder Singh says that the appellant never went to Kaulgarh though it is deposed by both that the appellant wanted divorce. Harbans Singh states that he was present in the High Court when the compromise was arrived at and that the appellant did not fulfil the conditions thereof. According to Lachhman Singh who is a resident of village Mandiani, the appellant had approached him to get divorce from the respondent on payment of a lump sum amount as compensation.

(11) I do not find it necessary to refer in detail to the contents of the letters, as I am satisfied from a perusal thereof and on a consideration of oral evidence produced by the parties that there was no honest endeavour on the part of either of the parties to get near to each other. They seem to have stood on some notions of prestige but the inevitable consequence was that the parties did not resume married life and the decree for restitution remained unexecuted.

(12) The only question that survives for determination is as to what were the legal obligations of the parties after the modified decree for restitution as based on compromise was passed on 18th March, 1963. In term of the decree, the appellant was to go to the respondent and win her confidence so that in future they could live peacefully. It cannot be appreciated what was intended by the parties by agreeing that the appellant would go to his wife and win the confidence of the latter. Both the spouses were in service and posted at different places. Was it intended that the appellant was to leave his job or obtain leave to go to his wife and stay with her for a period not specified between them in order to gain confidence of the latter or was the intention only this much that he should first move in the matter and go to the wife with a request that she should come back to him ? She had been found by the trial Court, in restitution proceedings, to have withdrawn from the society of her husband without any reasonable excuse and the compromise makes no reference to that finding. The so-called compromise was more or less an undertaking on the part of the husband to appease his wife. A vague condition like this, as imposed under the compromise, could not legally affect, nor was it intended to affect, the operation of the decree. The only reasonable way to read such a compromise is that the appellant made an offer that he would go to his wife and bring her home or when she comes he will receive her as his wife and render her conjugal rights. Once a decree for restitution is passed,

a duty is cast on the wife that she should return home and live with her husband and such a decree cannot be rendered ineffective or futile by a compromise. In other words, either there is or there is not in existence a decree for restitution capable of execution, and no conditions can be attached thereto which are in their very nature contrary to the spirit of the decree and the fulfilment of which is incapable of being supervised or controlled by a Court of law. It has been observed by Falshaw, C.J. in *Ishwar Chander Ahluwalia v. Pomilla Ahluwalia* (1), that "once a decree for restitution of conjugal rights is passed the person who fails to comply with it does so at his or her own risk, and it would not even be necessary for the aggrieved party to prove that he or she had made positive efforts to make the other party comply". I am in respectful agreement with these observations which lay down the correct rule of guidance when the question of passing a decree for divorce, after a decree for restitution remains unexecuted, arises. The spouse against whom the decree is passed is in the position of a judgment-debtor and no duty can be cast on the decree-holder that in order to get compliance with the decree he should be making further efforts to win the confidence of the judgment-debtor who is already proved to be a deserter from marital obligations. The fact of the matter is that there was no resumption of marital obligations by the parties after the compromise and the decree for restitution remained unsatisfied. It cannot be held on the evidence as produced in the present case that the appellant had in any way made it impossible for the respondent to return to him in compliance with the decree though may be that the efforts made by him fell short of the expectations of the latter. The only pre-requisite for passing a decree for divorce as required by section 13(1A)(ii) is that factually for a period of two years or upwards after the passing of a decree for restitution of conjugal rights, to which parties to the proceedings for divorce were parties, no restitution of conjugal rights has taken place. This provision of law was introduced by the Hindu Marriage (Amendment) Act, 1964, and the object of the amendment appears to be that where cohabitation has not been resumed for a period of two years or more after the passing of the decree for restitution, the right to obtain divorce should be available to both the husband and wife. Previous to this amendment of the Act, it was only the spouse holding the decree in his or her favour who could claim divorce. No doubt the policy of law is that severance of marriage should not

(1) 1962 P.L.R. 491.

be normally allowed except in specified cases and that divorce, as far as possible should not be permitted but at the same time it is no use keeping the parties tied together when we find as a fact that the decree remained unexecuted during the period specified by law. The only circumstances in which a decree for divorce can be refused is when either the decree-holder creates a situation which makes it impossible for the parties to live together and taking advantage of his own wrong wants relief by way of a decree for divorce. Section 23 controls granting of relief in matrimonial proceedings and lays down a set of rules which will disentitle a petitioner to any relief even if grounds for granting such relief exist and one of the rules is that no party to a proceeding can take advantage of his or her own wrong. It is for this reason that a decree-holder who conducts himself in a manner as to make it impossible for the judgment-debtor to comply with the decree is refused a decree for divorce. No such circumstances have been shown to exist in the instant case and all that we find is that according to the respondent, the appellant did not win her confidence as envisaged in the compromise.

(13) For the foregoing reasons, I must hold that in view of the established fact that there has been no restitution of conjugal rights for a period of more than two years after the passing of the decree the marriage between the appellant and the respondent must be dissolved.

The appeal is accordingly allowed and a decree for divorce passed in favour of the appellant against the respondent, with no order as to costs.

N. K. S.

INCOME TAX REFERENCE

Before Harbans Singh, C.J.

(on difference between Mahajan and Sandhawalia, JJ.)

THE COMMISSIONER OF INCOME-TAX,—*Applicant.*

versus

RAGHBIR SINGH TRUST, DISTRICT AMRITSAR,—*Respondent.*

Income Tax Reference No. 3 of 1966

August 20, 1970.

Income Tax Act (XI of 1922)—Sections 34(1)(b), 34(3), *second proviso and 66—Assessee creating Trust and filing two income tax returns one individually and the other on behalf of the Trust—In the individual assessment*