be illegal in view of the interpretation placed by me on rule 3 and 19 of the Rules. It is not disputed that if that be so, the result of the election must be held to have been materially affected in consequence. Accepting the two petitions, therefore, I set aside the election. There will be no order as to costs.

B.S.G.

APPELLATE CIVIL

Before Man Mohan Singh Gujral, J.

RANJIT KAUR—*Appellant.*

versus

SUKHDEV SINGH—*Respondent.*

First Appeal from Order No. 49-M of 1971.

November 9, 1971.

Hindu Marriage Act (XXV of 1955)—Sections 13(1A) and 23(1)(a)—Decree for judicial separation obtained by the wife—Refusal of the husband to co-habit within two years of the decree—Whether amounts to the husband's taking advantage of his own wrong—Petition for divorce by the husband after lapse of two years of the decree—Whether maintainable.

Held, that a bare perusal of sub-section (1A) of section 13 of the Hindu Marriage Act, 1955 shows that a right to claim divorce has been conferred on both the parties to the marriage and not only to the party which has obtained a decree for judicial separation or restitution of conjugal rights. Section 23 of the Act no doubt provides that before a Court grants relief it must be satisfied that any of the grounds for granting relief exists and none of the bars mentioned in this section is present for refusing the relief. One of the grounds of refusal of relief is the petitioner's taking advantage of his own wrong or disability for the purpose of obtaining relief. In order that this bar imposed by section 23(1) comes into operation it is necessary that the advantage taken must relate to the ground on which the relief is claimed. A party can only be refused relief where advantage has been taken by the party after the ground on the basis of which relief is claimed has arisen. Where a wife obtains a decree for judicial separation, the refusal of the husband to co-habit with the wife within two years of the decree cannot give rise to an inference that the husband is taking advantage

of his own wrong or disability while seeking relief at the hands of the Court. Hence a petition for divorce by such a husband after the lapse of two years of the decree of judicial separation obtained by the wife is maintainable. (Paras 7 and 11)

First Appeal from the order of the Court of Shri Joginder Singh Mander, District Judge, Chandigarh, dated 1st May, 1971 accepting the petition and decreeing for dissolution of marriage by a decree of divorce, between the parties.

Roop Chand, Advocate, *for the Appellants.*

M. L. Sarin, Advocate, H. L. Sarin, Advocate, and S. K. Pipat, Advocate, *for the Respondent.*

JUDGMENT

Gujral, J.—(1) This is an appeal against the order of the District Judge, Chandigarh, dated 1st March, 1970, whereby the petition of Sukhdev Singh, respondent, under section 13 of the Hindu Marriage Act was accepted and a decree for dissolution of marriage by divorce was granted in favour of the respondent.

(2) The parties were happily married in September, 1966, but their happiness was short-lived and shortly after the marriage their relations became strained. As a result of this, the parties started living separately and Ranjit Kaur was forced to file a petition for judicial separation under section 10 of the Hindu Marriage Act. This application was granted and she obtained a decree for judicial separation on 30th December, 1967. It was an *ex parte* decree as Sukhdev Singh, the husband, did not contest it. After the lapse of two years Sukhdev Singh filed an application under section 13 of the Hindu Marriage Act claiming divorce on the ground that more than two years had elapsed after the decree for judicial separation was passed and that the parties had not resumed cohabitation during this period.

(3) The petition was contested by the appellant and two main objections were taken. The fight of the husband to maintain the petition was challenged on the ground that he could not take advantage of his own wrong, the decree for judicial separation having been obtained by the wife on account of the conduct of the husband. The second plea was that a compromise having been brought

about in January, 1969 and the parties having resumed cohabitation for about fifteen days the petition was not maintainable. On the pleadings of the parties the following issues were framed by the trial Court:—

(1) Whether the petitioner has lived together and cohabited with the respondent, as alleged?

(2) Whether the petition is not maintainable as alleged?

Both the issues were decided against the wife with the result that the petition of the husband was allowed and a decree as prayed for was granted.

(4) On behalf of the appellant no serious effort was made to challenged the finding of the trial Court on issue No. 1. In this respect the main contention was that the parties having compromised in the criminal proceedings which were pending in January, 1969 it was reasonable to conclude that the parties had resumed cohabitation. There seems to be no merit in this contention. From the documents on the record it emerges that a case under section 323 of the Indian Penal Code had been instituted against Harbhajan Singh, the brother of Sukhdev Singh, but this was withdrawn on 23rd January, 1969. It was brought out that Harbhajan Singh had instituted a case under section 392 and 342 of the Indian Penal Code which was also withdrawn. An application was then filed for the restoration of pistol license of Harbhajan Singh and on one of the application the relatives of the husband had also signed. From these documents it would emerge that the parties did not want to proceed with the criminal cases which had been instituted against their relations. From this desire to end criminal litigation it does not necessarily follow that the parties had decided to live together.

(5) The appellant had led oral evidence to establish that a compromise had been arrived at between her and her husband and that they had lived together for fifteen days at Chandigarh. The learned trial Court had considered in detail the evidence of the witnesses and has given very cogent reasons for disbelieving their testimony. The learned counsel for the appellant has not been able to assail the reasons or the conclusions arrived at by the learned trial Court. In my opinion, the learned trial Court has given very plausible reasons and no case has been made out for arriving at a different conclusion.

In coming to the conclusion that in fact there had been no compromise and that the parties had not lived together the trial Court was also influenced by the fact that the alleged compromise was merely oral and no document had been written in this respect. Considering that there was civil and criminal litigation in which not only the parties but their relations were also involved, if the parties had decided to live together some document was bound to have been prepared especially when the appellant had obtained a decree for judicial separation which in the course was bound to supply a ground for a petition for divorce by either party. The view taken by the learned trial Court is, therefore, plausible and there is no scope for the conclusion that the parties had cohabited in January, 1969.

(6) The principal argument raised on behalf of the appellant is that the petition under section 13 was not maintainable at the instance of the husband as he having forced the wife to get a decree for judicial separation cannot take advantage of the decree. Support for this argument was sought from the decision in *Chaman Lal* v. *Mohinder Devi* (1).

(7) Before the amendment of the Hindu Marriage Act by amending Act 44 of 1964 the party against whom a decree for judicial separation had been obtained could not ask for divorce on the ground that the parties had not resumed cohabitation for a space of two years or upwards after the passing of the decree for judicial separation. Similarly, before the amendment the party against whom a decree for restitution of conjugal rights had been obtained could not file a petition for divorce on the ground that there had been no restitution of conjugal rights 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. By the amending Act clauses (viii) and (ix) of sub-section (1) of section 13 were omitted and sub-section (1A) was inserted which in in the following terms:—

> "(1A) Either party to a marriage; whether solemnized before or after the commencement of this Act, may also present

(1) 1971 P.L.R. 104=I.L.R. (1972) 2 Pb. & Hr. 481.

a petition for the dissolution of the marriage by a decree of divorce on the ground;

(1) that the has been no resmption of cohabitation as between the parties to the marriage for a period of two years or upwards afer 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 two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

A bare perusal of the above provision would show that a right has now been conferred on both the parties to the marriages and not only on the party which had obtained a decree for judicial separation or for restitution of conjugal rights.

(8) In *Chaman Lal's* case it was contended before a Division Bench of this Court that the mere existence of an unsatisfied decree for restitution of conjugal rights for the required period was sufficient for the Court to grant a decree for divorce and that the provisions of section 23(1) (a) were not attracted in that case. This contention was negatived and it was held that sub-section (1A) of section 13 was subject to the provisions of sub-section (1) of section 23 as the latter provision was in the nature of an overriding provision. Considering the scope of section 28(1) (a) it was held in *Chaman Lal's* (1), case that existence of an unsatisfied decree for restitution of conjugral rights for the required period was not sufficient to grant a decree for divorce and that sub-section (1A) of section 13 was subject to the provisions of section 23(1).

(9) On behalf of the respondent it is pointed out that if the view adopted in *Chaman Lal's* (1) case is accepted it would nullify the effect of the amendment introduced by Act No. 44 of 1964 especially in cases covered by clause (ii) of section 13(1A) inasmuch as the person against whom a decree for restitution of conjugal rights was obtained would not be able to apply for divorce on the basis of this decree. It is contended that in case he made an effort to comply with the decree and restitution of conjugal rights

took place he would not be entitled to divorce as he can only claim divorce if no restitution of conjugal rights takes place within the prescribed period. On the other hand, if he did not comply with the decree he would not be able to claim the relief in view of the bar imposed by section 23 of the Hindu Marriage Act. The learned counsel for the respondent, therefore, urged that section 23 could not be interpreted in a manner which would defeat the very purpose for which the legislature had introduced he amendment in section 13 by the introduction of sub-section (1A).

(10) Though the above arguments do appear somewhat attrative, but on a careful scrutiny there appears to be no merit in them. As pointed out by the Division Bench in *Chaman Lal's* (1), case "section 23 governs any proceeding under the Act and makes it clear that unless the conditions mentioned in sub-section (1) are fulfilled and not otherwise the Court shall not grant the relief prayed for". Moreover, the decisoin in *Chaman Lal's* (1) case, is binding on me being a decision of the Division Bench of this Court.

(11) Faced with this situation, Mr. Sarin contended that whatever may have been the position under clause (ii) of sub-section (1A) of section 13 so far as clause (i) is concerned once a decree for judicial separation has been obtained by any party either party can claim divorce if there has been no resumption of cohabitation within two years. The argument advanced further is that the refusal of the husband to cohabit after the wife has obtained a decree for judicial separation cannot give rise to an inference that the husband was taking advantage of his own wrong or disability while seeking relief at the hands of the Court. On a careful consideration the argument appears to be highly plausible. Section 23 provides that before a Court grants relief it must be satisfied that any of the grounds for granting relief exists and none of the bars mentioned in this section exists for refusing the relief. One of the grounds on which relief can be refused is if the petitioner was taking advantage of his own wrong or disability for the purpose of obtaining relief. In order that the bar imposed by section 23(1) may come into operation it is necessary that the advantage taken must relate to the ground on which the relief is claimed. In other

words, a party can only be refused relief where advantage has been taken by the party after the grounds on the basis of which relief is claimed has arisen. This principle also emerges from the ratio of the decision in *Chaman Lal's* (1) case. In that case, the party was wanting to take advantage of the decree for restitution of conjugal rights had wronged the other party by refusing to comly with the decree. The wrong having been done after the decree for restitution of conjugral rights had been obtained it was rightly held in *Chaman Lal's* case (1), that the bar imposed by section 23(1) would come into play. In the present case, the appellant had obtained an ex parte decree for judicial separation. After that decree had been obtained on the basis of which a decree for dissolution of marriage by divorce was being sought now. the respondent had not acted in a manner which may give rise to an inference that he was taking advantage of his own wrong. At this stage it would not be relevant to consider as to on what ground the wife had been able to obtain a decree for judicial separation as the only relevant considerations are the existence of a decree for judicial separation and the absence of a decree for judicial separation and the absence of cohabitation between the parties for a period of two years or more. The respondent can only be refused the relief if after the passing of the decree for judicial separation he had committed some wrong and had taken such advantage of the wrong without which he could not have obtained a decree for dissolution of marriage by divorce under section 13(1A) (i) of the Hindu Marriage Act. Viewed in this light. there is no room for concluding that the respondent's claim to the decree for dissolution of marriage by divorce is based on some wrong done by him. In my opinion, therefore, section 23(1) (a) does not stand in the way of respondent getting relief.

(12) No other point has been urged before me with the result that the appeal fails and is dismissed. The parties are, however, left to bear their own costs.

K.S.K.