

have acted illegally in coming to the conclusion that the need of the landlord is a *bona fide* one.

6. Of course, whether the need is a *bona fide* one or not may be a question of fact, but if the authorities below have mis-directed themselves in their approach, the finding arrived at is vitiated and is liable to be set aside in the exercise of the revisional jurisdiction under Section 15 of the East Punjab Urban Rent Restriction Act.

7. For the reasons recorded above, this petition succeeds and the order of the Appellate Authority is set aside and the application for ejection is dismissed with no order as to costs throughout.

N. K. S.

Before R. N. Mittal, J.

SANTOSH KUMARI,—Petitioner

versus

MOHAN LAL,—Respondent.

Civil Revision No. 2788 of 1979.

March 21, 1980.

*Hindu Marriage Act (XXV of 1955)—Sections 13(1-A) and 23—Code of Civil Procedure (V of 1908)—Order 21 and Rule 32—Decree for restitution of conjugal rights obtained by the husband—Wife taking out execution of the decree and husband refusing to re-unite—Decree—Whether satisfied—Spouse refusing re-union—Whether entitled to apply for divorce under section 13(1-A)—Such refusal—Whether amounts to taking advantage of one's own wrong.*

*Held*, that under section 13(1-A) of the Hindu Marriage Act, 1955 either of the party including a defaulting party can seek divorce on the ground that there has been no restitution of conjugal rights for a period of one year or more after the passing of a decree for restitution of conjugal rights and the question as to who is at fault for not coming together is not to be gone into by the courts. The words 'wrong or disability' referred to in section 23(1) (a) when read with section 13(1-A) mean a wrong or disability other

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than a mere disinclination to agree to an offer to reunion in pursuance of a decree for restitution of conjugal rights. A decree for restitution of conjugal rights can be executed symbolically under Order 21 Rule 32 of the Code of Civil Procedure, 1908 and simply because a spouse refuses to resume cohabitation in spite of an execution application filed by the other spouse, it cannot be said that the decree for restitution of conjugal rights stands satisfied and the spouse refusing to resume cohabitation is not entitled to file an application for divorce.

(Para 6).

*Petition under section 115 C.P.C. for revision of the order of the court of Shri N. S. Mundra, Sub-Judge 1st Class, Zira, dated, 27th September 1979 dismissing the execution application of Shrimati Santosh Kumari observing that its purpose had been fulfilled.*

A. N. Mittal, with Viney Mittal, Advocates, for the Petitioner.

H. L. Sarin, Senior Advocate with S. C. Sibal & R. L. Sarin and M. L. Sarin, Advocates, for the Respondents.

JUDGMENT

*Rajendra Nath Mittal, J.—*

(1) Briefly, the facts are that Mohan Lal filed an application for restitution of conjugal rights on September 12, 1973 against his wife Smt. Santosh Kumari, under section 9 of the Hindu Marriage Act (hereinafter referred to as the Act). The latter contested it on the ground of cruelty. It was dismissed by the trial Court. On appeal, the order of the trial Court was reversed on September 11, 1978 and a decree for restitution of conjugal rights was granted in favour of the husband. The wife filed an execution application on August 16, 1979, stating that she was prepared to go to the husband but he was not accepting her. The husband in pursuance of a notice filed objections wherein he stated that he had already filed an application for divorce under section 13 of the Act on September 14, 1979 and, therefore, he was not prepared to take her with him. The learned Executing Court dismissed the execution application observing that its purpose had been fulfilled. Shmt. Santosh Kumari has come up in revision against that order to this Court.

(2) It is contended by the learned counsel for the petitioner that after the passing of the decree for restitution of conjugal rights in favour of the husband, it is not only the husband who can execute it but it can be executed by the wife as well. He argues that in such

cases, either of the parties to the *lis* becomes decree-holder after passing of the decree and can request the Court for recording satisfaction thereof. To buttress his argument, he made reference to *M. P. Shreevastava v. Mrs. Veena* (1) and *M. P. Shreevastava v. Mrs. Veena* (2). According to him the Court could not dismiss the application for execution of the petitioners.

On the other hand, the learned counsel for the respondent has argued that in view of the amendments having been made in the Act, after passing of a decree for restitution of conjugal rights in favour of a spouse, either of the spouse can make an application for divorce, if there has been no restitution of conjugal rights between the parties for a period of one year or upwards after the decree. He argues that a decree for restitution of conjugal rights cannot be executed as a decree for recovery of money or a decree for possession. According to the counsel, there is no provision in the Code of Civil Procedure by which the custody of the spouse can be given to the other spouse. He further argues that in the aforesaid circumstances, the Executing Court rightly dismissed the application of the petitioner and refused to record satisfaction of the decree.

(3) I have heard the learned counsel for the parties at a considerable length. In order to determine the question it will be proper to notice Order 21 Rule 32 of the Code of Civil Procedure which provides for execution of decree for restitution of conjugal rights and Section 13 of the Act before and after amendments which are as follows:—

- (1) Where the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

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(1) A.I.R. 1965, Pb. 54.

(2) A.I.R. 1966, Pb. 506.

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(2) \* \* \* \*

- (3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.
- (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) .....

*Before amendment Section 13(1) (ix) of the Hindu Marriage Act.*

“13. (1) 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—

- (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.”

*After amendment by the Hindu Marriage (Amendment) Act, 1964 (Act No. 44 of 1964) sub-clauses (viii) and (ix) of sub-section (1) of section 13 of the Act were omitted and sub-section (1A) was introduced. Sub-section (1A) is relevant for determination of the present case and it reads as follows:—*

“(1A) Either party to a marriage, whether 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 ground—

- (i) that there has been no resumption as between the parties to the marriage for a period of two years 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 two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.”

Sub-section (1A) was further amended by the Marriage Laws (Amendment) Act, 1976 (Act No. 68 of 1976) and the period of two years in clauses (i) and (ii) of sub-section (1A) was reduced to one year. The said sub-section after amendment reads as follows:—

“(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for dissolution of the marriage by a decree of divorce on the ground—

- (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.”

The object of deletion of clause (ix) of Section 13 and introduction of sub-section (1A) was as follows:—

“The right to apply for divorce on the ground that cohabitation has not been resumed for a space of two years or more after the passing of a decree for Judicial separation, or on the ground that conjugal life has not been restored after the expiry of two years or more from the date of decree for restitution of conjugal rights should be available to

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both the husband and the wife, as in such cases, it is clear that the marriage has proved a complete failure. There is therefore, no justification for making the rights available only to the party who has obtained the decree in each case."

The only amendment made in sub-section (1A) by Act No. 68 of 1976 was that the minimum period of two years provided in that sub-section for making an application for divorce was reduced to one year. The purpose for doing so as given in the statement of objects and reasons was to liberalize the provisions relating to divorce. Section 23 of the Act *inter alia* provides that in any proceedings under the Act whether binding or not if the Court is satisfied that any of the grounds for granting relief exists and the petitioner is *not in any way taking advantage of his or her own wrong or disability for the purpose of such relief*, it shall pass a decree for such relief. (The emphasis has been supplied by underlining the relevant lines). It will be seen from Section 23 and sub-section (1A) of Section 13 of the Act that they are somewhat contradictory to each other. Sub-section (1A) of Section 13 of the Act was introduced later. These sections came up for interpretation in *Smt. Gajna Devi v. Purshotam Giri* (3), *Smt. Bimla Devi d/o Bakhtawar Singh v. Singh Raj, s/o Dasondhi Ram*, (4), and *Dharmendra Kumar v. Usha Kumar* (5), where in it was observed that effect has to be given to sub-section (1A) of Section 13 and simultaneously both the sections, namely, Section 23 and Section 13 (1A) are to be harmonized. The relevant observations in *Gajna Devi's case* (supra) are as follows:—

"Divorce under Section 13 (1A) (introduced by amendment in 1964) is available to either husband or wife irrespective of the petitioner being guilty of matrimonial offence leading to the decree of judicial separation or restitution of conjugal rights. Section 23 (entitling petitioner to relief only if not taking advantage of own wrong) existed at the time of that amendment and therefore it should be so construed as not to render Section 13 (1A) nugatory.

(3) A.I.R. 1977, Delhi 178.

(4) A.I.R. 1977, Pb. 167 (F.B.).

(5) A.I.R. 1977, S.C. 2218.

Section 23 and Section 13 (1A) may be harmonised. The matrimonial offence leading to an earlier decree of judicial separation or restitution of conjugal rights cannot be used to deprive the petitioner of his rights under Section 13 (1A) irrespective of guilt. The expression "petitioner is not in any way taking advantage of his/her own wrong" in Section 23(1) (a) does not apply to taking advantage of the statutory right under Section 13(1A) after the passing of the decree for judicial separation or restitution of conjugal rights. The petitioner then is not taking advantage of his own wrong but the legal right following the passing of the decree and the failure of the parties to comply therewith or resume cohabitation thereafter. However, if after the earlier decree any circumstances happen which in view of Section 23(1) disentitle the spouse to divorce under Section 13(1A) they can always be taken into account."

The above case was approved by the Supreme Court in *Dharmendra Kumar's case* (supra). In that case the respondent (wife) filed an application for restitution of conjugal rights under Section 9 of the Act which was allowed by the trial Court. A little over two years after that decree, she presented an application under Section 13(1A) (ii) of the Act for dissolution of marriage by a decree of divorce. In that petition a decree for divorce was passed in favour of the wife by the trial Court and affirmed by the High Court. The husband went up in appeal before the Supreme Court. A contention was raised there that the grounds for granting relief under section 13 including sub-section (1A) continued to be subject to the provisions of section 23 of the Act. It was further contended that the allegations made in the written statement that the conduct of the wife for not responding to his invitation 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). Thus the question arose whether the allegations of the husband that she did not respond to her husband's invitation to live with him, disentitled her to the relief. A. C. Gupta, J. speaking for the Bench stated that he did not find it possible to hold that the aforesaid circumstance would disentitle her to claim divorce. He places reliance on the above quoted *Gujna Devi's case* (supra) and observed as follows:—

".....it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for

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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' 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."

Same view was taken by the Full Bench in *Shmt. Bimla Devi's case* (supra). Before making a reference to the observations of the learned Judges in detail, it will be proper to discuss the provisions of Order 21, Rule 32 of the Code of Civil Procedure.

- (4) Order XXI Rule 32 of the Code of Civil Procedure provides method for executing the decrees for restitution of conjugal rights. According to sub-rule (1) if the judgment, debtor fails to obey the decree it can be enforced against him by attachment of his property. Sub-rule (3) says that if in spite of attachment of the property for a period of six months, the judgment-debtor fails to obey the decree, the attached property shall be sold in case the decree-holder makes an application in this regard. The Court in that event may award to the decree-holder such compensation as it thinks fit. The rule does not provide that the Court shall give physical custody of the person who suffered the decree to the decree-holder. Thus the decree for restitution of conjugal rights can be executed in a symbolic manner. The aforesaid rule has also been interpreted by the Full Bench in *Shrimati Bimla Devi's case* (supra) along with section 13(1) (a) and section 23(1) of the Act. The relevant observations of Dhillon, J., speaking for the Bench are as follows :—

"The provisions of section 23(1) (a) cannot be invoked to refuse the relief under section 13(1A) (ii) on the ground of non-compliance of a decree of 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 decree for restitution of conjugal rights in proceedings in which they were parties. There is no provision in the Code of Civil Procedure by which the physical custody of the



spouse, who has suffered the decree, can be made over to the spouse who obtained the decree for restitution of conjugal rights. Thus, merely because the spouse who suffered the decree, refused to resume cohabitation, would not be a ground to invoke the provisions of section 23(1) (a) so as to plead that the said spouse is taking advantage of his or her own wrong.

In a case covered under section 13(1A) (ii), either of the parties can apply for dissolution of marriage by a decree of divorce if it is able to show 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 proceedings in which they were parties. The plea that the party against whom such decree was passed failed to comply with the decree or that the party in whose favour the decree was passed took definite steps to comply with the decree and the defaulting party did not comply with the decree and, therefore, such an act be taken to be taking advantage of his or her own wrong, would not be available to the party, who is opposing the grant of divorce under clause (ii) of sub-section (1A) of section 13."

O. Chinnappa Reddy, J. (as my Lord then was) concurring with Dhillon, J., made the following observations :—

"The concept of wrong-disability which was hitherto the sole basis of relief under the Act has now, in part, given way to the concept of a broken-down marriage irrespective of wrong or disability. So, it is not permissible to apply the provisions of section 23(1) (a) based as they are on the concept of wrong-disability to proceedings in which relief is claimed under section 13(1A) based as they are on the concept of a broken-down marriage."

(5) This view was followed by this Court in *Smt. Ranjit Kaur v. Gurbax Singh* (6). Same view was taken by this Court in *Smt. Urmal Goel v. Vijay Kumar Goel* (7). In the latter case

(6) 1978(1) Marriage Law Journal 1.

(7) F.A.O. 155 M/79, decided on 30-1-80.

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a petition for restitution of conjugal rights was filed by the wife against her husband which was decreed. Later, the husband filed a petition for divorce on the ground that conjugal rights had not been restituted between the parties for more than one year after passing of the decree. The petition was resisted by the wife merely on the ground that the husband did not care to comply with the decree of restitution of conjugal rights. The trial Court granted the decree for divorce. The order was affirmed by this Court observing that the husband was entitled to that decree under section 13(1-A) of the Act. It was observed that it could not be held that the husband was taking advantage of his wrong and consequently, he was not entitled to a decree for divorce. In *Smt. Ranjit Kaur's case* (supra) the learned Judge observed that the provisions of section 23(1) (a) of the Act cannot be invoked to refuse the relief under section 13(1A) (ii) of the Act where cohabitation has not been resumed between the parties to the marriage for a statutory period after the passing of decree for restitution of conjugal rights in proceedings under the Act.

(6) From the above cases it follows firstly, that under section 13(1-A) of the Act either of the party including a defaulting party can seek divorce on the ground that there has been no restitution of conjugal rights for a period of one year or more after the passing of a decree for restitution of conjugal rights, secondly, that the question as to who is at fault for not coming together is not to be gone into by the Courts, thirdly, that words "wrong or disability" referred to in section 23(1) (a) when read with section 13(1-A) mean a wrong or disability other than a mere disinclination to agree to an offer to reunion in pursuance of a decree for restitution of conjugal rights, fourthly, that a decree for restitution of conjugal rights can be executed symbolically under Order 21 Rule 32 of the Code of Civil Procedure and fifthly, that simply because a spouse refuses to resume cohabitation in spite of an execution application filed by the other spouse it cannot be said that the decree for restitution of conjugal rights stands satisfied, and the spouse refusing to resume cohabitation is not entitled to file an application for divorce.

(7) The two cases referred to by the learned counsel for the petitioner are distinguishable. Those cases were decided before section 13 was amended by deletion of clause (ix) from sub-section (1) and introduction of sub-section (1-A). The observations made

in those cases are, therefore, not applicable to this case. It may be relevant to mention that the latter case was a Letters Patent Appeal from the former case.

(8) For the aforesaid reasons, I do not find any merit in the revision petition & dismiss the same with no order as to costs.

N. K. S.

Before R. N. Mittal, J.

INTERNATIONAL RADIO AND ELECTRIC ENGINEERS CO.

AND ANOTHER, —Petitioners

versus

SHEELA WANTI,—Respondent

Civil Revision No. 765 of 1978

March 21, 1980.

*East Punjab Urban Rent Restriction Act (III of 1949)—Section 2(d) & (g)—Garage forming part of a residential building let out to a business house for the parking of a car—Tenant sought to be ejected on the ground of personal necessity—Such letting out—Whether for business purposes.*

*Held, that the premises used for conducting business or storing goods in which a business house is dealing can be said to be used for business purposes but not a garage which is used for the parking of a car. The case may, however, be different if the company is dealing in cars or is having an automobile workshop or running taxies. Thus, a garage let out to a business house for the parking of a car cannot be said to be used for business purposes particularly when the garage forms part of a residential building. (Para 8).*

*Petition under section 15(5), Rent Restriction Act, for the revision of the order of the court of Shri G. S. Teji, Appellate Authority Amritsar, dated 29th March, 1978, confirming the order of the Court of Shri I. C. Aggarwal Rent Controller, Amritsar accepting the appeal and an ejectment order in respect of the garage in question is hereby passed in favour of the applicant and against the respondents and giving three month's time to vacate the same and hand over its possession to the applicant.*

M. K. Mahajan, Advocate, for the Petitioners.

Amar Dutt, Advocate, for the Respondents.