(2014) 07 AP CK 0114

Andhra Pradesh High Court

Case No: F.C.A. Nos. 176 of 2008 and 60 of 2010

K. Kavitha	APPELLANT
Vs	
Shiva Shankar	RESPONDENT

Date of Decision: July 14, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Evidence Act, 1872 - Section 145
- Family Courts Act, 1984 - Section 19, 19(1)
- Hindu Marriage Act, 1955 - Section 13, 13(1 A), 13(1 -A), 13(1)(1-A)(ii), 13(1)(i-a)

Citation: (2014) 6 ALD 552 : (2014) 6 ALD(Cri) 552 : (2014) 6 ALT 162

Hon'ble Judges: R. Subhash Reddy, J; A. Shankar Narayana, J

Bench: Division Bench

Advocate: P.B. Vijay Kumar and K. Chaitanya, Advocate for the Appellant; A. Chandraih Naidu, K. Chaitanya and Dr. P.B. Vijaya Kumar, Advocate for the Respondent

Final Decision: Allowed

Judgement

A. Shankar Narayana, J.

F.C.A. No. 176 of 2008 is preferred, u/s 19(1) of the Family Courts Act, 1984, by the respondent-wife in O.P. No. 540 of 2005, aggrieved of the order therein, dated 14-09-2006, passed by the Judge, Family Court, Hyderabad, granting decree for restitution of conjugal rights u/s 9 of the Hindu Marriage Act, 1955.

2. F.C.A. No. 60 of 2010 is preferred, u/s 19 of the Family Courts Act, 1984, by the unsuccessful petitioner - husband in O.P. No. 737 of 2008, aggrieved of the order therein, dated 19-P2-2010, passed by the Judge, Additional Family Court, Hyderabad, whereby and whereunder his request for dissolution of marriage by grant of decree of divorce, u/s 13(1)(i-a) and 13(1-A)(ii) of the Hindu Marriage Act, 1955, was refused.

3. Since the parties and the subject matter are common in both the appeals, they are being disposed of by this common judgment.

4. For the sake of convenience, the parties are hereinafter referred to as ''wife'' and ''husband'' respectively.

5. The facts that are relevant for the purpose of disposal of these appeals, briefly stated, are as hereunder:

"(a) The husband was working as Assistant Section Officer in G.A. Department, Secretariat, Hyderabad, on the date of filing O.P. No. 540 of 2005 for restitution of conjugal rights. Initially, he was appointed as an Attender on compassionate grounds, as his father took voluntary retirement on medical invalidation. He rose to the position of Assistant Section Officer, over a period. He married the wife on 21-11-2002 at R.T.C. Kalyana Mandapam, R.T.C. crossroads, as per Hindu rites and customs. His mother and two brothers are dependents on him. The wife is the only daughter to her parents. It is stated, since she was unable to adjust in her in-law''s house, very often she used to visit her parents'' house and stay there for longer duration. In view of certain trivial issues, she started insisting him to stay in her parents'' house as an illatom son-in-law, which was refused by him. In the month of March 2003, since she was with 4th month of pregnancy, she left for her parents'' house on the ground that good doctors are available at Chikkadpally for regular check-ups, for which he agreed and sent her to her parents'' house. He used to visit her regularly and on occasions he used to stay overnights at her parents'' house. She delivered a male child on 05-09-2003 who is named as ''Bhargav''. He states that when he, along with his family members, went to see the child, his wife and her parents did not receive them in proper manner, but, however, he did''; not mind the same. Three months after the delivery, when he requested the parents of the wife to send her to his house along with the child for performing cradle ceremony, the wife postponed the same on the ground that the child was only days old and it will be difficult for her to perform her regular duties with the child; which was conceded by him. He claims that she did not come and join his company despite his repeated requests, but started insisting him to live with her parents or set up a separate family near her parents'' house. He expressed his inability to concede to her demand as he has no financial capacity to maintain two separate houses. Even the efforts made by his family proved abortive as his wife did not get convinced and the matter was reported to their caste elders. When the caste elders summoned his wife, she refused to join his company. He also states that she got issued a legal notice with all false allegations. He got a suitable reply issued getting the true facts mentioned. Thereafter, instead of joining his conjugal society, she filed M.C. No. 53 of 2005 on the file of Additional Metropolitan Sessions Judge for trial of Jubilee Hills Car Bomb Blast Case - cum - Additional Judge, Family Court, Nampally, Hyderabad and, therefore, he was constrained to file the petition for restitution of conjugal rights (O.P. No. 540 of 2005).

(b) Having referred to the above facts stated in O.P. No. 540 of 2005, in O.P. No. 737 of 2008 filed by him u/s 13(1)(i-a) & 13(1-A)(ii) of the Hindu Marriage Act, 1955 (for short, "the Act"), the husband states in the pleadings while referring to the evidence let in by them in the maintenance case, that, though, she did not aver that he maintained extra marital relations with a neighbour viz., Saritha, nor mentioned the same in her notice, dated 08-01-2005, she made that allegation in her chief-examination. According to him, the Court below, by the order, dated 23-01-2006, granted monthly maintenance at Rs. 1,000/- to his wife and Rs. 1,000/- to their child and he had been depositing the same, by the date of petition. He mentions that his petition for restitution of conjugal rights was allowed directing his wife to join him within a period of three (03) months, but she did not oblige the same. The wife deserted him for a period of more than two years and despite the intervention of the elders, she did not join his conjugal society and, thus, she deserted him for a period of more than two years by levelling false allegations causing severe mental agony to him. Hence, he sought for dissolution of the marriage by grant of decree of divorce.

(c) The wife in her counter in O.P. No. 540 of 2005 resisted the request of the husband for restitution of conjugal rights. She states that at the time of marriage, her parents gave Rs. 2,00,000/- and 25 tolas gold jewellery to her husband as per the demand made by him, besides incurring an expenditure of Rs. 3,00,000/- for marriage. She admits that their marriage was consummated and they are blessed with a male child on 05-09-2003. She states that while she was living in the house of her in-law''s, her husband and his family members harassed her demanding to get more dowry. She has also mentioned that the husband was maintaining extra marital relations with a woman residing in his neighbour''s house at Bandlaguda and he used to spend his entire salary to fulfill her (Saritha) needs. She claims that when the cradle ceremony of their child was performed at her parents'' house, her husband did not attend the function in spite of making repeated requests.

(d) According to the wife, as she filed maintenance case, her husband, as a counter blast to avoid payment of maintenance, filed the petition for restitution of conjugal rights. She admitted grant of maintenance at Rs. 1,000/- each to her and their son in M.C. No. 53 of 2005 filed u/s 125 of the Code of Criminal Procedure, 1973. She also admits that the Court below granted the decree for restitution of conjugal rights, but she preferred appeal (F.C.A. No. 176 of 2008), wherein interim suspension of the order of restitution of conjugal rights was granted.

(e) Concerning the relief prayed by the husband for dissolution of-marriage by grant of decree of divorce in O.P. No. 737 of 2008, having adverted to the above factual events, the wife specifically denied that she deserted her husband on her own volition, but mentions that as she was subjected to harassment by her husband, mother-in-law and sister-in-law and as there was no other alternative, she has been living with her parents. She states that her husband never made any efforts to

create an atmosphere for her healthy and happy living and he, due to his adamant attitude, subjected her to mental cruelty. According to her, she did everything to see that the matrimonial relation between them should not be broken, but on account of ill-advice and motivated attitude of her husband, as he was disinterested to change his nature, leading to her position, as such. Lastly, she states that her husband being a responsible father ought to have looked after their son, but till the date of filing of the petition, he did not even visit to see their son. She, therefore, sought to dismiss the petition for dissolution of marriage."

6. The Court below formulated the following three (03) points for determination in O.P. No. 540 of 2005:

"(1) Whether the respondent is living away from the company of petitioner on account of petitioner and his family members demanding additional dowry and on account of petitioner having illicit intimacy with a neighbouring women?

(2) Whether the petitioner is entitled to the relief of restitution of his conjugal rights?

(3) To what relief?"

7. During enquiry in O.P. No. 540 of 2005, the husband (petitioner) himself examined as P.W. 1 and his junior paternal uncle as P.W. 2 and marked Exs. P-1 to P-9 to prove his case. The wife (respondent), on the other hand, examined herself as R.W. 1 and her father as R.W. 2 and marked Exs. R-1 to R-4 to substantiate her stand.

8. The Court below, on appraisal of evidence let in by both the parties, both, oral and documentary, answered point Nos. 1 and 2, in favour of the husband and granted the relief of restitution of conjugal rights with a direction to the wife to join the society of her husband within three (03) months from the date of the order leaving option to the husband to initiate execution proceedings if the wife fails to comply with that direction.

9. The Court below, basing on certain probabilities from the proved facts, acceded to the request of the husband. The probabilities that weighed with the Court below are firstly, getting it suggested to the husband, who was examined as P.W. 1, that he was suspecting the character of the wife (R.W. 1), despite absence of plea therefor in the counter or in the maintenance case; second, getting it suggested that on one occasion he beat the wife without there being any plea in the counter and also in the maintenance case to that effect; third, refusal of the wife to join the society of her husband despite intervention of the caste elders; fourth, failure of the wife in explaining the nature of indecent manner in which the husband behaved with her; fifth, her answer to the effect that because of the husband''s extra marital relations with another lady, she was not in a position to continue her relation with P.W. 1, which fact was not mentioned either in the maintenance case or in her counter; sixth, her admission that sometime prior to institution of the petition, herself and her parents informed P.W. 1 that they would not show her son to the husband on

the ground that the child was sick; and last, admission of the wife that when she filed maintenance case, she has not mentioned about the demand for additional dowry and about the illicit intimacy of the husband with another woman; and granted the relief of restitution of conjugal rights.

10. In O.P. No. 737 of 2008, the Court below formulated the following point for determination:

"Whether there are any tenable grounds to allow this petition or not?"

11. During enquiry, the husband (petitioner) besides examining himself as P.W. 1 examined his junior paternal uncle as P.W. 2 and marked Exs. P-1 to P-3 as to entitlement for the relief of divorce. Whereas the wife (respondent) examined herself as R.W. 1 and her father as R.W. 2 and exhibited Exs. R-1 to R-3 to substantiate her own stand.

12. So far as the relief claimed in O.P. No. 737 of 2008 is concerned, the Court below on the ground that the husband did not depose as to how he was subjected to cruelty either physically or mentally by the wife and even his close relative, P.W. 2, did not depose anything about cruelty said to have caused by the wife to the husband, opined that the ground of cruelty was not made out to grant decree of divorce. So far as non-cohabitation as a ground u/s 13(1-A)(ii) is concerned, there is no discussion by the Court below and no finding was tendered.

13. Aggrieved of the order granting restitution of conjugal rights, wife preferred F.C.A. No. 176 of 2008 contending in the grounds, that the Court below ought to have noticed that the O.P. for restitution of conjugal rights was filed by the husband as a counterblast to the case filed by her u/s 125 Cr.P.C. to evade payment of maintenance and ought to have dismissed the same. It is also stated that the Court below ought to have taken note of the fact that after she left the house of her husband during her pregnancy in fourth month, he never bothered to enquire about her health condition and to take her back to his house, basing on which fact only, maintenance was granted in M.C. No. 53 of 2005 and, as such, the Court below ought to have dismissed the O.P. for restitution of conjugal rights. It is stated that the reasons assigned by the Court below with regard to the factum of her staying away from the husband and the evidence let in on that aspect of the case, was not sound, and, therefore, sought to allow the appeal setting aside the impugned order.

14. In the grounds of appeal in F.C.A. No. 60 of 2006, preferred by the husband, he agitates that the Court below failed to weigh on the admissions made by the wife that the husband was paying maintenance regularly and that she was not willing to join him. It is stated that the Court below somehow made an incorrect observation that the wife filed O.P. No. 540 of 2006 for restitution of conjugal rights though, in fact, it was filed by the husband and further observed that the husband obtained stay without joining her. It is also stated that the admission of the wife as R.W. 1 that she was not willing to join him was overlooked by the Court below. It is further

stated that the Court below somehow introduced extraneous evidence not let in by either party to the effect that sister of the husband used to harass and insist the wife to work, though, she has undergone caesarean, despite the fact that the wife never stated so in her evidence. It is also stated that the Court below somehow held that the husband used to beat her frequently even though, the wife was ready to join him and that she has also filed O.P. No. 540 of 2006 for restitution of conjugal rights, which was not the plea at all by the wife and in fact husband has filed O.P. No. 540 of 2006. It is further stated that the Court below wrongly held that O.P. No. 737 of 2008 is filed as a counterblast to O.P. No. 540 of 2006 for restitution of conjugal rights and M.C. No. 53 of 2005 for maintenance. It is still further stated that despite mentioning the material facts in paragraph No. 9 of his petition as to how the wife stayed away from him without joining his company and filed maintenance case with all false allegations of illegal intimacy and did not join him despite suffering a decree for restitution of conjugal rights and thereby degraded him causing mental disturbance and treated him with cruelty and that she had hardly stayed with him for three (3) months after the marriage and since then living separately for more than three (3) years, which facts were neither stated in the counter nor proved in the cross-examination. The Court below totally ignored all these vital circumstances. Lastly, it is agitated that the Court below side-lined the definite admission made by the wife in her cross-examination that the husband married her as per Hindu rites and customs and that she has removed "tali and mangalasutram " and she is wearing a "cross" (Christianity symbol) having converted herself into Christianity without his permission, which admission itself is sufficient for the Court below to grant divorce.

15. Heard Sri A. Chandraiah Naidu and Sri K. Chaitanya, learned counsel for the husband, and Dr. P.B. Vijay Kumar, learned counsel for the wife, and perused the material on record.

16. Learned counsel for the wife submits that in O.P. No. 737 of 2008 husband sought dissolution of marriage by grant of decree of divorce on the ground of cruelty u/s 13(1)(i-a) & 13(1-A)(ii) of the Act, and the desertion u/s 13(1)(1-A)(ii) of the Act on the ground that, though, a decree for restitution of conjugal rights was granted by the Court below directing the wife to join the society of her husband within three (03) months, still, she did not comply with the decree and preferred F.C.A. No. 176 of 2008.

17. At the outset we would like to mention that the Court below, in O.P. No. 737 of 2008, in its judgment, somehow, misdirected itself under wrong impression that O.P. No. 540 of 2006 was filed for restitution of conjugal rights by the wife and viewed that O.P. No. 737 of 2008 is filed by the husband as a counter blast to O.P. No. 540 of 2006 and M.C. No. 53 of 2005, and dismissed O.P. No. 737 of 2008.

18. Learned counsel for the wife in F.C.A. No. 176 of 2008 contends that when maintenance was granted in M.C. No. 53 of 2005, which was also filed on the file of

the Judge, Additional Family Court, Nampally, Hyderabad, granting the relief of restitution of conjugal rights to the husband was uncalled for. It is also his submission that there is strong evidence to show the neglect on the part of the husband in taking care of his wife and their child and the harassment meted out to the wife by him and ought to have refused the request for restitution of conjugal rights.

19. Learned counsel for the husband contends that the evidence let in by the husband clinchingly establishes that the wife demanded him to join her at her parents'' house and reside thereat which was not conceded to by him and that, though, he convened caste elders'' mediation also, she refused to attend the panchayat and join him and further she levelled a scandalous allegation against him stating that he maintained illicit intimacy with a woman which was not pleaded either in maintenance case or in the notice issued by her and, therefore, the Court below taking notice of these circumstances and disbelieving the evidence of the wife and her father, granted the relief of restitution of conjugal rights.

20. Perused the orders under challenge and the evidence, both, oral and documentary, let in by the respective parties in both their appeals.

21. Since the grounds on which the husband in F.C.A. No. 60 of 2010 sought dissolution of marriage, being cruelty u/s 13(1)(i-a) and the second ground being non-cohabitation for a period of one year and upwards u/s 13(1-A)(ii) of the Act and since the second ground is based on the relief granted in his favour in O.P. No. 540 of 2006 against which F.C.A. No. 176 of 2008 is preferred by the wife, we intend to take up the appeal preferred by the wife in F.C.A. No. 176 of 2008 in the first instance.

22. The evidence of the husband, as P.W. 1, definitely indicates that the wife demanded him to set up a separate family and for the same he expressed his inability to maintain a separate family besides their family consisting of his mother and brothers. It is an admitted fact that he got the job under compassionate appointment scheme as his father took retirement under voluntary retirement scheme on the ground of medical invalidation, and he joined as an attender initially, in the Secretariat and rose to the position of Assistant Section Officer on the date of filing the instant petition. His evidence shows that without just and reasonable cause, his wife left his house and started staying with her parents despite his efforts to see that she joins his company by sending his junior paternal uncle Sri B. Narayana, who is examined as P.W. 2, and also convening an elders'' mediation therefor but his wife refused to join his society. In fact, when it was suggested to him in his cross-examination, he answered that he was offered for a separate residence to live with the wife without any interference. No doubt, it may run contra to one of the pleas he has put forth to the effect that he has expressed his inability to maintain a separate family, still, he answered to that suggestion in affirmative. However, it would not aid the wife''s stand, but on the other hand, it gives rise to an

inference that without any just and reasonable cause, she withdrew from the society of her husband. A suggestion was also made to P.W. 1 in his cross-examination that he was maintaining illicit intimacy with one Saritha which was bluntly denied by him. Irrespective of these answers given by P.W. 1 to the suggestions, when the evidence of R.W. 1 on this aspect of the case is carefully analysed, she admits in specific terms that she has not mentioned about illicit intimacy of her husband in the maintenance case and that the woman with whom, she was alleging illicit intimacy, is a married woman having two children and residing with her husband, two sisters-in-law in her house and her (Saritha) husband is having a shop of his own dealing with steel utensils. Concerning her (wife) husband, she answers that he is residing with his two brothers and mother and leaves the office in the morning at 9-00 a.m. and comes back in the evening at 7-00 p.m. At a later stage of her cross-examination, she admits that she has not alleged the illicit intimacy in the maintenance case but stated in the present case and that she was stating illicit intimacy as a reason for not leading the matrimonial life. Even her father, who is examined as R.W. 2, also admits that they have not mentioned about illicit intimacy of the husband in the maintenance case in Ex. P-4. He also admits that he has not mentioned or stated about the illicit intimacy in the affidavit. He has also admitted that he has not mentioned anywhere in his affidavit complaining about the said issue and about holding panchayat and admits that they have not put any panchayat for the above said issue. That has been the evidence of the wife and her father, as R.Ws. 1 and 2, respectively, in the direction of proving the stand of illicit intimacy which they have taken for the first time in the counter in the instant petition without mentioning the same in the earlier proceedings (maintenance case) and in the notice got issued by the wife. Therefore, it has to be construed that a reckless allegation is levelled against the husband which amounts to levelling a scandalous allegation.

23. The case of the husband is that his wife left his house in the month of March, 2003, while she was in fourth month pregnancy, stating that several good doctors were available at Chikkadpally for regular check-ups and it would be difficult for her to go from Bandlaguda and he agreed for the same keeping in view, the welfare of the wife and their child, but thereafter, she did not return to his society and he used to visit her at her parents'' house regularly and on occasions, he used to sleep overnights upon the insistence of his wife and her parents and after the birth of the child, when he intended to take his wife back to his house, on the premise that the child was days old it would be difficult for her to serve at his house, she evaded to join him and thereafter, the attempts made by him to get her back, all proved futile and even the elders'' mediation became abortive as she refused to join his society. Concerning elders'' mediation, there are categorical admissions made by the wife and her father as R.Ws. 1 and 2 respectively. She admits that in Ex. P-6, which was her cross-examination in the maintenance case, she has admitted that at the instance of the husband, caste panchayat was convened, but they did not attend. She also admits that even after reply notice, her husband has asked her to come

and join his society, but she refused. She also answers to a question that they have informed her husband recently (perhaps prior to her deposition in the cross-examination) that they will not show their child as he was sick and stating that he had not come at 4-00 p.m. exactly, but sometimes he used to come at 4-30 p.m. or 4-45 p.m. also. It appears that she was speaking in regard to visitation rights as can be culled out from the further answer given by her. To the next question, she admits that her husband is working in the Secretariat as Assistant Section Officer, but expressed that she was not aware of the timings of Secretariat as 10-00 a.m. to 5-00 p.m. She also admits that she returned to her parents'' house in the month of March, 2003, for delivery and after the marriage she stayed one week at Vizag. In the concluding portion, she answers to a question that she was not willing to stay with her husband. When the evidence of R.W. 2, father of R.W. 1, is scanned, he admits that her daughter came to his house in the month of March, 2003, as she was not well and as she was carrying and, therefore, she did not join her husband at Bandlaguda. He admits that the husband sent reply notice requesting the wife to join and lead happy marital life with him and even in the maintenance case also, he asked her to come and join his family and one Shyam, who is a relative to their both families, had approached him at his house to send her for leading matrimonial life with her husband even before the maintenance case was filed, but they have not sent her. He denies the suggestion that they have not attended the caste panchayat. However, he admits that husband has called for panchayat at Malakpet. He says that he was not willing to send her daughter for joining her husband to lead matrimonial life. What all can be culled out from these answers is, that the husband did make concrete attempts to see that his wife joins his society, but it is only on account of the attitude of the wife, she did not incline either to attend the panchayat or to join the society of her husband despite expressing his strong desire asking her to join him to lead happy marital life. There are other aspects in regard to which allegations and counter allegations were made and the parties and their witnesses were cross-examined touching the dowry and other articles said to have given at the time of marriage and the amounts incurred for the marriage and reception by the respective parties, which, in our view, need not be analysed critically, but it is clear that the marriage expenses were borne by R.W. 2, whereas the reception expenses were borne by the husband.

24. So, from the aforementioned discussion, we are of the considered view that the evidence on record definitely indicates that the husband made genuine attempts to see that his wife joins his society, but it is only on account of her adamant attitude, his every attempt proved abortive.

25. Therefore, we are of the view, that the conclusion arrived at by the Court below is on correct lines of appreciation of evidence on record and, therefore, does not warrant interference, consequently we confirm the order of the Court below and dismiss the instant appeal (F.C.A. No. 176 of 2008).

26. Now turning to the appeal in F.C.A. No. 60 of 2010, we have already adverted to the factual scenario, grounds of appeal and the contentions advanced by the learned counsel for both the parties.

27. Concerning cruelty, the first ground seeking dissolution of marriage, the husband''s main case is that his wife levelled scandalous allegation against him that he was having illicit intimacy with a neighbour Saritha, in her chief-examination in the maintenance case, for the first time in order to avoid joining his company and making such false allegation caused severe mental agony to him since it occasioned emotional disturbance and degraded him at every possible opportunity and it has become impossible for him to lead matrimonial life with her.

28. The next ground is, that there were no restitution of conjugal rights between them for more than one year after passing of the decree for restitution of conjugal rights and, therefore, he is entitled to claim decree of divorce u/s 13(1)(1-A)(ii) of the Act.

29. It is pertinent here to mention that in paragraph No. 7 of her counter, the wife got specifically mentioned that the brother of her father-in-law Sri B. Narayana also gave evidence in the maintenance case and he admitted about illicit intimacy of her husband with one Saritha.

30. Before the Court below, the very same sets of witnesses were examined by the parties on their behalf. When perused the affidavit in chief-examination of the husband as P.W. 1, he asserted that his wife filed her counter making wild allegations against him and that in her cross-examination, she admitted that she has not mentioned about her husband''s illicit intimacy in her legal notice or her pleadings in the maintenance case. When the cross-examination of the husband as P.W. 1 is scanned, nothing was confronted to him touching that aspect of the case leaving apart making any suggestion therefor to him. When the evidence of P.W. 2, Sri B. Narayana, junior paternal uncle of the husband, is perused, strangely, he was not cross-examined on that aspect of the case at all. When a definite allegation is made in the counter by the wife that this witness (P.W. 2) in the maintenance case has admitted illicit intimacy of her husband with one Saritha, certainly, searching cross-examination of this witness on that aspect of the case, is expected or at least a certified copy of his evidence in the maintenance case ought to have been filed and got marked as a document in this case, and then resorted to confronting it, if any such admission did really occur as required u/s 145 of the Indian Evidence Act. Therefore, certainly, it cannot be ruled out that the husband getting mentally disturbed that too when that allegation was repeatedly taken as a plea in the earlier proceedings even. Therefore, on the ground of cruelty, in view of the reckless and scandalous allegation levelled against the husband that he maintained illicit intimacy, we are of the view, that he is entitled to dissolution of marriage by grant of decree of divorce u/s 13(1)(i-a) of the Act. Somehow, the Court below went wrong omitting to this aspect of the case in the light of not only the plea but also the

evidence on record and, therefore, the finding of the Court below that the husband did not depose as to how he was subjected to cruelty through physically or mentally by his wife is perverse and has to be reversed.

31. So far as the second ground is concerned, falling within the ambit of the provisions of Section 13(1)(1-A)(ii) of the Act, for better appreciation, we would like to refer to the sequence of events in F.C.A. No. 176 of 2008 since the wife and her father as RWS. 1 and 2, respectively, have answered that they obtained stay of execution of the order in O.P. No. 540 of 2005. The Court below granted decree of restitution of conjugal rights to the husband on 14-09-2006. The wife challenged that order by filing F.C.A. No. 176 of 2008, but it was presented on 14-11-2006, which was at S.R. stage since she has also filed a petition for condonation of delay in preferring that appeal. The delay was condoned and in F.C.A.M.P. No. 352 of 2008, this Court granted interim suspension of the order of the Court below on 30-09-2008. When the husband filed vacate stay petition vide F.C.A. M.P. No. 258 of 2010 in F.C.A. No. 176 of 2008, this Court vacated the order of interim suspension, dated 30-09-2008, on 26-04-2010. It is, therefore, crystal clear that exactly two months after the Court below granting decree for restitution of conjugal rights in favour of the husband, the wife preferred appeal and obtained stay more than one year ten months later, that was on 30-09-2008. So, at the outset we would like to observe that the direction given by the Court below while granting decree for restitution of conjugal rights on 14-09-2006 directed that the wife should join the husband within three months from that day. This apart even till 30-09-2008, that order of the Court below was in force as it was stayed only on 30-09-2008. Thus, it is also clear that only one year ten months after passing of the decree for restitution of conjugal rights by the Court below, the interim suspension order was granted by this Court.

32. It is clear from the evidence on record that a caste elders'' panchayat was also convened, but, we intend to make it clear that the said mediation was prior to filing of O.P. No. 540 of 2005 and, therefore, we are of the view, that it is unnecessary to refer to the assertions made and the answers given by P.Ws. 1 and 2 in their chief-examination and cross-examination respectively on the said panchayat. However, it is clear from the evidence on record that the husband was emphatic in asserting that the wife did not oblige the order of the Court below in joining his conjugal society despite there being a direction to join his society within three months from the date of that order.

33. Now the short point that arises for consideration, at this stage, is whether want of any attempts being made by the husband in the direction of requiring the wife to join his society would come in the way of entitling him to the relief of dissolution of marriage by grant of decree of divorce, he has sought for?

34. When the evidence of the wife as R.W. 1 and her father as R.W. 2 is perused, concerning the relief claimed by her husband in O.P. No. 540 of 2005, she also

admits that in the decree of that O.P., there is a direction to her to join her husband within a period of three months and her husband got issued a notice calling upon her to join his company and against that orders, she preferred appeal (F.C.A. No. 176 of 2008) in this Court and obtained interim suspension of that order. She answers to a question in emphatic terms that she was not ready to join her husband even as on that day. She admits that she did not get issue any legal notice or lodge any complaint with regard to the quarrels and threats by her husband, for which reason she was not joining him. Her father, who was examined as R.W. 2, admits that they did not give any notice for restitution of conjugal rights and also for willingness to send his daughter. It is, thus, clear from the evidence of the wife and her father that they did not abide by the direction given by the Court below and made no attempts to see that the wife joins the conjugal society of her husband and the only reason they have reiterated was that they obtained interim suspension of the order passed by the Court below in an attempt to show that they did not disobey the orders of the Court below.

35. We are, therefore, of the considered view that the wife has not brought out any circumstances from which it could be gathered that the husband was trying to take advantage of his own wrong. It is needless to mention that either party is entitled to dissolution of marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between them for a period of one year or upwards after passing of the decree for restitution of conjugal rights in a proceeding to which they were parties or there has been no restitution of conjugal rights between the parties for a period of one year or upwards after passing the decree for restitution of conjugal rights in a proceeding to which they were parties. Admittedly, there has been no cohabitation subsequent to passing of the decree for restitution of conjugal rights in favour of the husband. We have, adverted to, in the above, that the interim suspension was obtained by the wife in F.C.A. No. 176 of 2008 exactly after one year ten months of passing the decree for restitution of conjugal rights and in that view of the matter, there is no legally acceptable ground on which the claim of the husband would be legally defeated. We would like to observe that the right conferred by Section 13(1-A) is subject to the provisions of Section 23(1) of the Act. Therefore, we are of the view, that it would be appropriate to refer to a decision of the Hon''ble Apex Court in Dharmendra Kumar v. Usha Kumar 1977 AIR 2218, in answering the question ''if divorce can be obtained for absence of restitution of conjugal rights after decree for restitution is granted for a person, who refuses to have restitution, and whether such a conduct amounts to a ''wrong'' within the meaning of Section 23(1)(a) of the Act; in paragraph No. ''3'' held thus:

"3. Section 13(1-A)(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 (1-A) 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 u/s 13 including sub-section (1-A) 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 u/s 13(1-A)(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 Vs. Gopal Dass, 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 Vs. Purshotam Giri, a learned Judge of the same High Court observed: (at p. 182 para 12)

"Section 23 existed in the statute book prior to the insertion of Section 13(1-A)..... Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of Sec. 23 of the Act, not entitled to obtain divorce then it would have inserted an exception to Section 13(1 A) and with such exception, the provision of Section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore cannot be construed so as to make the effect of amendment of the law by insertion of Section 13(1 -A) nugatory.

.....the expression ''petitioner is not in any way taking advantage of his or her own wrong'' occurring in Cl. (a) of S. 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 Sec. 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..."

In our opinion the law has been stated correctly in Gajna Devi Vs. Purshotam Giri, . Therefore, it would not be very reasonable to think that the relief which is available 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" 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."

36. In the case on hand, the mere fact that the husband did not resort to execution proceedings cannot be construed as misconduct of such serious nature to justify denial of the relief to which he is entitled as what is required to satisfy the "wrong" within the meaning of Section 23(1)(a) of the Act is the conduct alleged has to be something more than the mere disinclination to agree to an offer of reunion. We also find from the evidence on record that the wife did not comply with the direction of the Court below in joining the conjugal society of the husband within the period ordered and even did not make any effort to join the conjugal society of the husband by issuance of any notice.

37. Incidentally, we now turn to the question ''whether there was any need for the husband, who obtained the decree for restitution of conjugal rights, to compel his wife to join matrimonial life by filing an execution petition?'' In this context, it would be profitable to refer to the decision of a Full Bench of the Punjab and Haryana High Court in Smt. Bimla Devi Vs. Singh Raj, . On an examination of Section 23(1)(a) as well as 13(1-A) of the Act, held that under Rule 32 of Order - XXI of the Code of Civil Procedure, 1908, only a symbolic execution of decree has been provided for and there is no provision to force the two spouses physically to resume cohabitation. In paragraph Nos. 9 and 10 held, thus:

"9. On the other hand, if the provisions of S. 23(1)(a) of the Act are held to be applicable to a petition under S. 13(1-A)(ii) on the ground that the party against whom decree for restitution of conjugal rights has been passed having failed to comply with, is taking advantage of his or her own wrong, the provisions of S. 13(1-A) would be rendered nugatory, which interpretation cannot be given. It would further be noticed that the legislature thought it fit not to provide the mode of execution of a decree of restitution of conjugal rights so as to unite the two spouses physically who could not live together for one reason or the other. Only symbolical execution of the decree has been provided for. Reference in this connection may be made to the provisions of S. 28 of the Act which provide that the decrees and orders made by the Court in any proceedings under the Act shall be enforced in a like manner as decrees and orders of the Court made in exercise of its original civil jurisdiction are enforced. Reference may be made to the provisions of O. 21, Cl. (1) of R. 32 of the CPC wherein the mode for execution of a decree for restitution of conjugal rights has been provided. The said decree can be executed by attachment of the property of the judgment-debtor which is a symbolical mode of execution. There is no provision in the CPC 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. That being the position, merely because the spouse, who suffered the decree, refused to resume cohabitation, would not be a ground to invoke the provisions of S. 23(1)(a) so as to plead that the said spouse is taking advantage of his or her own wrong.

10. We are, therefore, inclined to hold that in a case covered u/s 13(1-A)(ii) of the Act, 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 Cl. (ii) of sub-s. (1-A) of S. 13 of the Act. We are, therefore, inclined to hold that the law laid down in Chaman Lal''s case (1971-73 Pun LR 104) (supra) is not the correct position of law and the said authority is, therefore, overruled.

This decision was made by the Bench in L.P.A. filed by Chaman Lal against the decision of a learned single Judge (P.C. Pandit, J.) reported as Chaman Lal Chuni Lal Vs. Smt. Mohinder Devi, . It was found by the learned single Judge that the husband having not made any effort to comply with the decree of restitution of conjugal rights passed against him at the instance of the wife could not be allowed to take advantage of his own wrong and thus was not entitled to claim divorce under S. 13(1-A) of the Act. The learned Judge held that it was the duty of the husband who suffered a decree for restitution of conjugal rights to take steps to comply with the said decree and that he could not choose to avoid restitution of conjugal rights for two years after the passing of the decree to create a ground for petition of divorce. In our opinion, the reasoning given by the learned Judge is not tenable.

No such obligation is imposed by law on the party who suffered such a decree as no provision has been made for physically bringing together the spouses who separated because of the fault of either of them. To hold that the person who suffered the decree is obliged to comply with the same and if he fails to do so, the provisions of S. 23(1)(a) can be invoked on this ground, will make the provisions of S. 13(1-A)(ii) redundant. If that interpretation is given, then in every case where a decree for restitution of conjugal rights has been passed, there being a duty cast on the spouse who suffered the decree to comply with the same, there can hardly be a case in which decree for divorce can be obtained under the provisions of S. 13(1-A)(ii) at the instance of the party who suffered the decree. As has been pointed out, the policy of the legislature by making amendments to the provisions of S. 13 appears to be to liberalise divorce so that the broken marriages are dissolved and the parties to the marriage are freed from the bonds as they are unable to live together in spite of opportunities having been given to resolve the differences and to live together. It may well be that the spouse who obtained the decree for restitution of conjugal rights may change his or her mind and may not be willing to live with the other spouse after the passing of the decree. It would further be seen that a spouse who has suffered a decree of restitution of conjugal rights, has

already been adjudged to have left the company of the other spouse without reasonable excuse. The said wrong was committed much before the passing of the decree for restitution of conjugal rights and it can-not be said that the said wrong has been committed after the passing of the decree for restitution of conjugal rights. Moreover, living separately from the spouse cannot be regarded as a wrong as the term ''wrong'' as contemplated in S. 23(1)(a) of the Act contemplates causing of some injury to the other side. In this view of the matter, the decision of the learned single Judge, which was affirmed in L.P.A. in Chaman Lal''s case (supra), in our opinion, is not correctly made. Similarly, a Single Bench decision of the Bombay High Court in Laxmibai Laxmichand Shah Vs. Laxmichand Ravaji Shah, in our view, is not the correct position of law."

38. It is, therefore, clear that even in the absence of any attempt being made by way of resorting to execution proceedings under the Code of Civil Procedure, 1908, the husband is entitled to dissolution of marriage by grant of decree of divorce when once the period mentioned in clause (ii) of Section 13(1-A) of the Act lapses, unless there are such circumstances to stamp him as ''wrong doer'' in terms of Section 23(1) of the Act.

39. Incidentally, we would also like to observe a strange situation occurring in the instant case which must have been subsequent to institution of the proceedings in O.P. No. 737 of 2008. The wife as R.W. 1 in the opening portion of her cross-examination, while answering that their marriage was performed as per Hindu rites and customs and while admitting that as per Hindu custom, a married woman wears ''tali and mangalasutram'', answers to further questions that she was not wearing ''tali and mangalasutram'' and since recent days she stopped wearing ''mangalasutram'' and admits that she was not even putting ''bindi (vermilion)'' on her forehead and that she was wearing a "cross" as Christianity symbol as she converted herself into Christianity religion and that she did not obtain permission of her husband for the same to convert her religion from Hinduism to Christianity. Though, the husband has not amended his plea subsequent to the cross-examination of his wife, having got elicited the answers as to her conversion from Hinduism to Christianity, still, when viewed that conduct of the wife, certainly, she has no legitimate ground to resist the request of her husband for grant of the relief of decree of divorce as we found in the above that the husband has not committed any ''wrong'' as explained within the provisions of Section 13(1)(1-A)(ii) of the Act.

40. For the aforesaid reasons, F.C.A. No. 60 of 2010 is to be allowed, as the husband is entitled to the relief of decree of divorce by dissolution of marriage between the parties, consequently, F.C.A. No. 176 of 2008, preferred by the wife, becomes infructuous.

41. In the result, F.C.A. No. 60 of 2010 is allowed and the marriage between the parties is dissolved and decree of divorce is granted setting aside the impugned

order, dated 19-02-2010, passed by the Court below in O.P. No. 737 of 2008. Consequently, F.C.A. No. 176 of 2008 stands dismissed as infructuous.

42. As a sequel thereto, Miscellaneous Applications, if any, pending stand disposed of.