

(1983) 05 DEL CK 0042

Delhi High Court

Case No: First Appeal No. 216 of 1979

O.P. Mehta

APPELLANT

Vs

Saroj Mehta

RESPONDENT

Date of Decision: May 27, 1983

Citation: AIR 1984 Delhi 159 : (1984) 6 DRJ 58

Hon'ble Judges: N.N. Goswamy, J

Bench: Single Bench

Advocate: L.D. Adlakha, S.N. Marwah and A.K. Marwaha, for the Appellant;

Judgement

N.N. Goswami, J.

(1) This appeal by the husband is directed against the judgment and decree dated 27/8/1979 passed by the learned Additional District Judge, Delhi whereby his petition u/s 13(1-A) of the Hindu Marriage Act for a decree of divorce on the ground that there has not been a resumption of cohabitation between the parties for a period of one year after the passing of the decree for restitution of conjugal rights.

(2) The parties were married at Delhi on 18/2/1964 in accordance with Hindu rites. Two children were born out of the wedlock and both those children are with the respondent. The appellant filed a petition u/s 9 of the Hindu Marriage Act on 3/6/1974 against the respondent for restitution of conjugal rights. The petition filed by the appellant was decreed on 30-5-75. The appellant thereafter on 26/7/1976 filed the present petition for a decree of divorce on the ground that there has been no resumption of cohabitation between the parties for a period of more than one year from the passing of the decree for restitution of conjugal rights. The appellant also mentioned in his petition that on 15/10/1975 i.e. just about 41 months after the passing of the decree for restitution of conjugal rights he had filed another petition for a decree of divorce alleging adultery against the respondent.

(3) The respondent contested the petition and admitted the factum of marriage, the birth of the children as also the filing of a petition for restitution of conjugal rights and the decree passed thereon. She also admitted that there had not been any resumption of cohabitation between the parties for a period of one year after the passing of the decree. She further pleaded that soon after the decree for restitution of conjugal rights was passed, the appellant had filed petition for divorce alleging adultery against her and in these circumstances the respondent was justified in not resuming cohabitation with the petitioner for the period of one year after the passing of the decree for restitution of conjugal rights. She also pleaded that the appellant cannot be permitted to take advantage of his own wrong and she was fully justified in not resuming cohabitation.

(4) The facts of the case were not in dispute. The learned trial Judge relying on a judgment of this Court in the case of [Sushil Kumari Dang Vs. Prem Kumar Dang](#), held that the petitioner was taking advantage of his own wrong and in these circumstances he was not entitled to the decree prayed for. Accordingly he dismissed the petition filed by the appellant.

(5) The learned counsel for the appellant before me relied on a full bench decision of this Court in Ram Kali v. Ram Gopal 1971 (1) Delhi 6, for the proposition that the provisions of Section 23(1)(a) of the Act are not applicable to the petitions filed u/s 13(1-A) of the Act. Various other decisions of the High Courts were also cited for the same proposition. In view of the full bench decision of the High Courts and the decision of their Lordships of the Supreme Court which I shall refer to later it is not necessary to deal with the other decisions of the High Courts for this proposition. It is true that in Ram Kali's case this Court came to the conclusion that Section 23(1)(a) of the Act was not applicable to the petitions filed u/s 13(1)(A) of the Act. In Ram Kali's case the full bench of this Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of Section 23(1)(A). Ram Kali's case was later considered by a learned single Judge of this Court in Smt. Gajna Deviv. Purshotam Giri 1976 (1) Delhi 725. The learned single Judge in that case opined that Section 23 existed in the statute book prior to the insertion of Section 13(1A)... ..ad the 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 Section 23 of the Act, not entitled to obtain divorce, then it would have inserted an exception to Section 13(1A) 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 stood before the amendment. Section 23 of the Act, Therefore, cannot be construed so as to make the effect of amendment , the law by insertion of Section 13(1A) nugatory. Nevertheless, if after the passing of the previous decree, any other facts or circumstances occur, which in view of Sub-section (1) of Section 23 of the Act disentitle the spouse from obtaining the relief of dissolution of marriage by a decree of divorce u/s 13(1A) of the Act, the same can be legitimately taken into consideration and must be given due effect.

(6) The full bench of the Punjab and Haryana High Court in [Smt. Bimla Devi Vs. Singh Raj](#), had also an occasion to consider the effect of Section 23(1)(a) on the petitions u/s 13(1A) of the Act. In the full bench case a decree for restitution of conjugal rights was passed against the wife on a petition by her husband. There was no restitution of conjugal rights between the parties after passing of the said decree for a period of more than two years. The wife filed a petition u/s 13(1A) for a decree of divorce on the ground that there had been no resumption of cohabitation for a period of two years after the passing of the decree. The full bench came to the conclusion that merely because the wife failed to comply with restitution of conjugal rights it could not be said that she was taking advantage of her own wrong as it was a statutory right and no wrong had been committed after the passing of the decree for restitution of conjugal rights. Paragraph 15 of the report which is relevant for the decision of this case is to the following effect :

" IT may ,however, be observed that it may not be understood to have been held that the provisions of Section 13(1-A) are not subject to the provisions of Section 23(1)(a). But, infact, what we have held is that a defaulting spouse, who has suffered a decree for restitution of conjugal rights, cannot be held to be taking advantage of his of her own wrong merely because he or she has failed to comply with the decree of restitution of conjugal rights. Human ingenuity being what it is, it cannot be disputed that many cases may arise, where notwithstanding that a ground for divorce exists, there may be something in the conduct of the petitioner which would be so reprehensible that the Court would deny to such a petitioner "relief by way of divorce on the consideration that the petitioner was taking advantage of his or her own wrong".

(7) The two cases decided by this Court i.e. Ram Kali"s case and Smt Gajna Devi"s case referred to above were considered by their Lordships of the Supreme Court in the case of Dharamendra Kumar v. Mrs. Usha Kumari 1977 Mlr 160. It was observed by the Supreme Court :

"IN our opinion the law has been stated correctly in Ram Kuli v Gopal Dass(supra) and Gajna Devi v. Purshotam girl (supra). 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, should be denied to the one who does not insist on compliance with the decree passed, in his or her favor. 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 justify denial of the relief to which the husband or the wife is otherwise entitled."

(8) The law as laid down by the Supreme Court, Punjab and Haryana High Court and in a later decision of this Court referred to above, it cannot be disputed that the provisions of Section 23(1)(a) of the Hindu Marriage Act are applicable to the petitions u/s 13(1A) of the Act. However, it has to be seen that the conduct of the defaulting spouse-has to be something more than a mere disinclination to agree to justify denial of the relief to which the spouse is otherwise entitled. It has further been laid down that such a conduct must

be subsequent to the passing of the decree.

(9) In [Soundarammal Vs. Sundara Mahalinga, Nadar](#), the husband was living with another woman. He filed a petition for restitution of conjugal rights against his wife and obtained a decree. Subsequently he filed a petition u/s 13(1A) of the Act on the ground that there has been no resumption of cohabitation for the statutory period after the passing of the decree. It was pleaded by the wife that the husband was continuing to live in adultery with the other woman. The learned single Judge of Madras High Court came to the conclusion that continuing to live in adultery were a wrong as contemplated by Section 23(1)(a) and as such the husband was refused relief u/s 13(1)(a).

(10) Applying the aforesaid principles to the facts of this case it is clear that the appellant is taking advantage of his own wrong. The decree for restitution of conjugal rights was passed on 13/5/1975. Just after 4" months of the said decree he filed a petition for a decree of divorce on the ground that the respondent was living in adultery. Having made such allegations, he could not possibly expect the respondent to comply with the decree for restitution of conjugal rights. It is well-settled that a person coming for the relief of restitution of conjugal rights must be sincere and must come to the Court with clean hands. In case the court finds that the petition was presented with an ulterior motive the court has to refuse the decree for restitution of conjugal rights. Same principle would apply in a case where having obtained a decree for restitution of conjugal rights the spouse levels such charges against the other spouse which necessarily compel the other spouse not to comply with the decree. In the present case, by filing a petition for divorce on the ground of adultery the appellant had created such situation which necessarily resulted in the respondent"s not coming back to him. In these circumstances. Section 23 of the Act would certainly disentitle him from getting a decree of divorce u/s 13(1A) of the Act. Though the Supreme Court in the case referred to above has not illustrated the cases where the wrong can be said to be one which would disentitle the defaulting spouse from getting a decree but all the same it is clear when it is observed that the conduct alleged has to be something more than a mere disinclination to agree. In the present case, the conduct is much more than such an inclination in as much as no wife would like to join her husband if the husband has made allegations of adultery against her. It is also clear that having made the allegations of adultery the appellant was not sincere in even expecting the wife to join him and comply with a decree for restitution of conjugal rights.

(11) For the reasons recorded above I do not find any merit in this appeal which is dismissed. Since the respondent was allowed litigation expenses I leave the parties to bear their own costs.