

DELHI HIGH COURT

Gajna Devi

Vs.

Purshotam Giri, (Delhi)

F. A. O. No. 120 of 1975.

(B. C. Misra, J.)

2.2.1976

JUDGEMENT

B. C. Misra, J.

1. This first appeal from order has been filed by the wife against the order of the Additional District Judge, Delhi, dated 15th March, 1975, by which he has granted a decree for divorce by dissolving the marriage under Section 13 (1A) (i) of the Hindu Marriage Act (25 of 1955), hereinafter referred to as the Act.

2. The material facts of the case are that the appellant wife and the respondent husband, who were Hindus, were married on 16th April, 1963 according to Hindu rites. It is alleged that after a few months the husband turned out the wife after treating her cruelly. Consequently the wife filed a petition on 5th November, 1965 under Section 10 of the Act for judicial separation. This was decreed *ex parte* by Mr. Mahesh Chandra, Sub-Judge, I Class, by order dated 30th March, 1966 (copy Ex. P1).

After sometime, the husband instituted a petition against the wife for dissolution of marriage on the allegation of adultery with one Nanak Chand. This was disbelieved and Nanak Chand was found to be a friend of the husband. The petition was dismissed by Mr. K. S. Sidhu by order dated 23rd August, 1968 (Copy Ex. RW 5/1). Eventually the husband instituted on 19th July, 1972 the petition which has given rise to the present appeal. It was alleged that the decree for judicial separation had been passed and for a period of two years of upwards there had not been any resumption of cohabitation and so the respondent was entitled to a decree for divorce under Sub-section (1A) of Section 13 of the Act, which has been inserted by Section 2 of the Amendment Act 44 of 1964. The defense of the wife in the petition was that the parties had

been reconciled and she had lived with the husband for about 1 3/4 months in December 1966 and January, 1967 at house No. 287, *Jafarabad*, Delhi and consequently the allegations of the husband made in the petition were wrong and he was not entitled to a decree for divorce. On the pleadings of the parties, the following issues were framed :

"1. Whether there has been no resumption of cohabitation for a period of more than two years after the passing of the decree for judicial separation on 30-3-1966?

2. Relief."

By order dated 24th September, 1974 the following additional issue was framed:

"If issue No. 1 is decided in the affirmative whether the petitioner is still not entitled to the decree for divorce against the respondent as he is taking advantage of his own wrong or disability for the purpose of the said relief within the meaning of Clause (a) of Sub-section (1) of Section 23 of the Hindu Marriage Act?"

3. The court below after considering the entire material on record came to the conclusion that the respondent had proved issue No. 1. The court has answered the additional issue against the appellant and has granted a decree for divorce dissolving the marriage. Feeling aggrieved, the appellant wife has filed this appeal and her learned counsel has raised the following contentions:

1. The finding of the court below on issue No. 1 is erroneous on the evidence on record; and

2. The court below has erred in deciding the additional issue and it ought to have held that the conditions of Clause (a) of Section 23 (1) of the Act must still be satisfied before the party is entitled to apply under Section 13 (1A).

4. I shall now examine the first contention. Ex. P1 is the certified copy of the judgment of Mr. Mahesh Chandra, Sub-Judge, dated 30th March, 1966, by which he has granted a decree for judicial separation. Of course, the decree had been passed ex parte, but this fact will not affect or diminish the legal effect of the same. It has become final. It is, however, significant that the husband never took any step to have the said decree set aside. In 1967 the husband instituted

the petition against the wife for dissolution of marriage on the ground of adultery, which was dismissed on 23rd August, 1968, but during the pendency of the same, the wife claimed maintenance, which was granted at the rate of Rs. 50 per month. The appellant wife was clearly not residing with the husband on the date of the presentation of the petition, nor did she allege to be residing with him at that time. The defense set up by the wife in the present case is that she lived and cohabited with the husband for about 1 3/4 months, in particular from 8/9th December, 1966 to 21st January, 1967, at House No. 287, *Jafarabad, Delhi*. This house is alleged to be owned by the father of the wife. It is not an independent house alleged to have been taken by the husband, nor is it the house where the husband had been ordinarily residing on the date of the marriage or subsequently.

5. The wife, examined as R.W.6, stated that she had been married to the husband on 16th April, 1963 and they lived together for about a month and then he maltreated her and his parents also did not treat her well and that the decree for judicial separation was at her instance granted by the court on 30th March, 1966. She has stated that later on the husband told her father that he could not manage a separate house and then offered the aforesaid house and those parents of the husband used to visit them there and her parents also visited them. She also named some persons whom the husband had approached for reconciliation. In cross-examination she stated that she did not remember the day on which she had gone to *Jafarabad* with the husband and she had been sent from her parents' house and that at that time the only persons present there were her parents, Sri Ram, her maternal uncle and his wife.

She, however, admitted that she had made an application for the grant of maintenance in the court of the Magistrate and that in that application she had not stated that the husband had taken her to *Jafarabad* and they had lived together at that place for one month and three quarters, nor had she stated this fact in her complaint made against the husband under Section 494. Indian Penal Code. She was also unable to state as to what was the place of posting of the husband, who was an employee of the Delhi Electricity Supply Undertaking, nor could she state when the husband handed to her the pay. She denied the suggestion that she was making false allegations to get the maintenance.

The statement of the wife does not inspire any conviction. It does not give any details of her setting up a matrimonial home in a new house. It has not been

brought on the record if any ration card had been prepared for the couple in that house or any mail had been received in the house or she had purchased any provision in order to set up the house. Her bald statement that she lived with him for a month and three quarters has rightly not been relied upon by the court below. It is significant that she had, as admitted by her, not mentioned this fact in her application to the criminal court, nor had she stated it in her defense in the petition filed by her husband against her. Their living together after the decree for judicial separation for about two months is if true not an unimportant event which could fail to create an impression and be forgotten by the wife. She has again not given any reason as to why she left the alleged matrimonial home in January, 1967. It is clear that this story has been set up by her to concoct a defense to the present petition for divorce.

6. The other evidence produced by her in support of her story consists of her neighbor, R.W. 1, Bashir Hussain, R.W. 3. Sri Ram, her uncle, and R.W. 5, her father. Surely, the statements of these witnesses do not improve her case. R.W. 5, Phool Giri, father of the wife, after baldly supporting the story of the wife, has stated that he visited the said matrimonial home four or six times, but he could never find the husband on any of the occasions. This fact alone will belie the story set up by the wife. He has stated that at the end of January, 1967 the husband stopped going to the house in *Jafarabad* and his daughter was left alone and therefore, he brought her to his own house. No reasonable ground has been advanced to show why the husband should, if they had really been living together happily for about two months, suddenly stop going to the house. The witness has also admitted that no writing was executed between the parties at the time of reconciliation, and no writing was obtained from the husband that he would treat the wife properly when she was sent with him in December, 1966, nor was any letter sent by the father of the wife or the wife nor was any received from the husband by them or the family either before or after the said reconciliation. The father has also admitted that this cohabitation has not been mentioned in the criminal proceedings under Section 488, Cr. P. C., or under Section 494, Indian Penal Code and that she was getting Rs. 50 as maintenance. The father was also a witness in the adultery case initiated by the husband. No reliance can be placed on the testimony of this witness.

7. R.W. 3. Sri Ram, is the maternal uncle of the wife. He admitted that he had initiated the settlement between the parties and the husband had approached

him about ten times and he had effected the compromise without first consulting the father of the wife or the wife herself. He stated that the husband came to him with a request for compromise after the passing of the decree. This witness is a relation of the wife and is obviously supporting the false case set up by the wife as a defense to the petition. The other two witnesses, R.W. 1 and R.W. 4 are neighbors. R.W.1, Bashir Hussain stated that he lived in *Jafarabad* for about six and a half years prior to seven months, and he had seen the parties living in hut No. 287, Jafarabad, and had been seeing them from the end of 1966 for two-three months. In cross-examination, he admitted that he had not brought any rent receipt of the house where he was living in *Jafarabad* and that he had never paid a visit to the house of the wife's father, where the parties were alleged to be living.

In answer to a question, whether the witness had seen the parties cohabiting or sleeping together, he said it was not possible to see. The witness was further unable to give the day or date or the month when he saw the respondent there. He denied the suggestion that he was making a false statement to oblige the wife or that he never lived in Jafarabad. R.W. 4, Ram Chander stated that after a few months of the grant of the decree for judicial separation the husband came to him and asked him to help in sending back the wife and that the past be forgotten. Thereafter, Sri Ram. R.W. 3, and father of the wife, and some other relations collected. The husband was also present and then the father of the wife declared that if all wanted the wife to be sent, he would send her to the husband and in the second week of December, 1966 the husband and the wife went away to live together.

The witness further stated that, he made enquiries about the welfare of the couple and was told that they were living all right. In cross-examination the witness admitted that he himself never visited *Jafarabad* and he had no knowledge about any other case pending between the parties. He admitted that no writing was executed at the time of sending the wife along with the husband. He denied the suggestion of giving false evidence to favor the wife.

8. If these witnesses produced by the wife were telling the truth, trial the husband had approached them for reconciliation and living together it is obvious that the first step that the husband would have taken to restore the marriage age would be to have the *ex parte* decree set aside and the parties would have had the reconciliation recorded in the aforesaid judicial

proceedings. At all events, no writing was executed between the parties to get rid of the decree for judicial separation. The Story set up by the wife and supported by the witnesses is untrue and has been rightly rejected by the court below.

9. The husband, on the other hand, examined himself as a witness and stated that after the decree for judicial separation they never lived together and they never had resumption of cohabitation. Nothing has been brought out in his cross-examination to show that he was not telling the truth. He even denied the knowledge of the allegation that the house where the parties were supposed to have lived belonged to the wife's father. The cross-examination of the witness was, in fact, directed more towards his alleged marriage with another girl, Prem Lata in November, 1968 than to the story of living and cohabiting together in December/January. I find that the finding of the court below on the first issue does not suffer from any legal infirmity and the same is amply justified on the material on record. The same is, therefore, affirmed and the contention of the counsel for the appellant fails.

10. This takes me to the consideration of the second contention. Section 13 of the Act has been amended by the Amendment Act 44 of 1964. Formerly the law was that after the passing of the decree for judicial separation or restitution of conjugal rights if for a period of two years or more resumption of cohabitation does not take place, a decree for divorce could be granted only at the instance of a party who had obtained the decree, while the guilty other party could not avail of the same. By the amendment Act, the provision has been recast and it reads as follows :

"13(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 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."

Under the provision after the amendment, the right has been given to either of the parties to the marriage whether or not he/she is an innocent party or has been guilty of the matrimonial offence. The result is that where the wife obtained a decree for judicial separation and if for two years the cohabitation has not been resumed, the husband, who had suffered the previous decree, is now entitled to obtain dissolution of marriage merely on the ground of passage of time without resumption of cohabitation. There is no dispute about the validity or the construction of this provision.

11. The question that has been agitated by the learned counsel for the appellant is that Section 23 (1) of the Act still prohibits the court from granting the relief to the husband if he is taking advantage of his own wrong or is guilty of improper or unnecessary delay or if any other ground specified in clauses (a) to (e) of this section exists. Section 23 (1) reads as follows:

"23. (1) In any proceedings under this Act whether defended or not, if the court is satisfied that

(a) 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, and

(b) where the ground of the petition is the ground specified in Clause (f) of subs. (1) of Section 10, or in Clause (i) of Sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why the relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly."

12. Section 23 existed in the statute book prior to the insertion of Section 13 (1A)

The Parliament when it enacted Section 2 of the Amendment Act and inserted

Section 13 (1A), was well aware of the existence of Section 23. Had 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 of the law by insertion of Section 13 (1A) nugatory.

13. The provision of law came up for consideration before a Full Bench of this court in *Ram Kali v. Ram Gopal*, , where the Bench speaking through H. R. Khanna, C. J. (as his Lordship then was), after considering a number of authorities and the provisions of law, observed that to non-suit such a petitioner by invoking Clause (a) of subs. (1) of Section 23 would have the effect of defeating the manifest purpose of the amending Act and reducing it to futility, and a construction which would lead to such a result must be avoided and the provisions should be so construed that they operated in harmony and the duty of the courts was to place such construction on a statute as shall suppress the mischief and advance the remedy.

The court relied upon the observations of Maxwell on the Interpretation of Statutes, 12th Edition to the effect that, "if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result".

I am bound by the observations of the Full Bench and nothing has been urged in arguments to persuade me to have any view not in consonance with the same and I respectfully agree with the views expressed in the authority.

14. The learned counsel for the appellant has cited *Laxmibai Laxmichand Shah v. Laxmichand Ravaji Shah*, ² where Chandrachud J. (as his Lordship then was) observed that the right conferred by Section 13 (1A) was subject to the

provisions of Section 23 (1). He also cited *Smt. Hirakali v. Dr. Ram Asrey Awasthi*,³ *Anupama Misra v. Bhagaban Misra*,⁴ *Jethabhai Ratanshi Lodaya v. Manabai Jethabhai Lodaya*, *Smt. Kailash Kumari v. Manmohan Kapoor*⁶ *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*,⁷ , and *Dr. N. G. Dastane v. Mrs. S. Dastane*,⁸. But, these authorities do not assist the appellant in resolving the controversy raised before me.

15. In my opinion, the two provisions may be completely thus harmonized. The matrimonial offence which was the foundation of the previous decree for judicial separation or restitution of conjugal rights cannot be used as a valid defense against the petitioner in a subsequent petition for divorce instituted under Section 13 (1A) of the Act. The petitioner for divorce, whether innocent or guilty, cannot be deprived of his/her rights on the grounds which existed prior to the passing of the previous decree.

In my view, the expression "petitioner is not in any way taking advantage of his or her own wrong" occurring in Clause (a) of Section 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 Section 13 (1A) of the Act subsequent to the passing of the decree for judicial separation or restitution of conjugal rights. In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon the passing of the decree and the failure of the parties to comply with the decree or resumption of cohabitation after its passing. 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 under Section 13 (1A) of the Act, the same can be legitimately taken into consideration and must be given due effect.

16. In the instant case no such circumstance has been alleged or brought out on the record. A feeble attempt was made by the appellant to urge that after the decree for judicial separation, the husband had married another girl by name Prem Lata and had by her a daughter born on 25th February, 1972 (vide Ex. R1). This fact had not been alleged in the petition and no evidence has been produced to show that Ex. R1 relates to the respondent husband. The court below has found as a fact that it has not been established that the respondent had married another girl, which marriage would during the lifetime of the appellant wife, be illegal or void or by that girl he has had a child. I endorse the

finding of the court below and hold that no foundation has been laid for the point. The contention is, therefore, rejected.

17. As a result, the appeal fails and is dismissed, but in the circumstances of the case, the parties are left to bear their respective costs.

Appeal dismissed.

Cases Referred.

1. ILR (1971) 1 Delhi 6
2. AIR 1968 Bombay 332,
3. AIR 1971 Allahabad 201,
4. AIR 1972 Orissa 163,
5. AIR 1975 Bombay 88,
6. AIR 1975 Jammu and Kashmir 95,
7. AIR 1965 Supreme Court 364
8. AIR 1975 Supreme Court 1534