

# RAJASTHAN HIGH COURT

Bal Kishan

Vs.

Urmila

D.B. Civil Misc. Appeal No. 620 of 1994

(V.S. Kokje and K.S. Rathore, JJ.)

30.08.2001

## JUDGMENT

### **V.S. Kokje, J.**

1. The appellant Bal Kishan was married to respondent Urmila Sharma on 23.2.85. They lived together as husband and wife for about four months and after 19.6.85, they have not lived together. The appellant had filed a petition under Section 12 of the Hindu Marriage Act, 1955 (in short 'the Act') for declaration of the marriage to be a nullity which was decided against him on 12.12.1986. The appellant filed an appeal against this decision in the High Court and the appeal was also rejected on 13.12.88. In the meanwhile, the respondent wife had filed an application under Section 9 of the Act for restitution of conjugal rights and a decree for restitution of conjugal rights was passed in her favour on 12.12.1986. The appellant, thereafter, filed a petition under Section 13 of the Act for a decree of divorce on 22.3.90 on the ground of cruelty, desertion and non-resumption of co-habitation for a period of more than one year after the passing of the decree for restitution of conjugal rights on 12.12.86.

2. Respondent denied the allegations made relating to the grounds of cruelty, desertion and in answer to the ground relating to non-resumption of cohabitation after the passing of the decree of restitution of conjugal rights, contended that the appellant was taking advantage of his own wrong as he did not comply with the decree for restitution of conjugal rights and has filed a petition taking advantage of the same decree.

3. The Family Court framed issues on the grounds of cruelty, desertion and non-restitution of conjugal rights between the parties for the period of one year or upward

after the passing of decree for restitution of conjugal rights. Upon taking evidence and hearing parties, the Family Court held that the grounds of cruelty and desperation (desertion) were not proved and on the ground of non-restitution of conjugal rights for more than one year after the passing of the decree of restitution of conjugal rights, the Family Court held that the appellant was not entitled to the relief as he was taking advantage of his own Wrong. The petition was, therefore, rejected. This is an appeal against that judgment and decree.

4. Learned counsel for the appellant submitted that the judgment and decree passed by the Family Court were against law and facts on record. The main ground, on which the arguments were advanced, was decision on issue No. 3 relating to non-restitution of conjugal rights for a period of more than one year after passing of the decree of restitution of conjugal rights. Learned counsel for the appellant submitted that mere non-compliance with the decree for restitution of conjugal rights would not amount to taking advantage of one's own wrong because according to the learned counsel, in the first place, non-compliance with the decree for restitution of conjugal rights cannot be said to be a wrong at all.

5. Learned counsel for the respondent supported the impugned judgment and decree and submitted that firstly, a party against whom decree for restitution of conjugal rights was passed cannot file a petition for divorce on the ground that the decree has not been complied with by him. According to the learned counsel, a person against whom the decree for restitution of conjugal rights is passed, would be clearly taking advantage of his own wrong if he bases his objection on the non-compliance by him of decree of restitution of conjugal rights passed against himself. Secondly, learned counsel submitted that even if such a petition was maintainable and the ground was available to such a petitioner, in this case, even on the facts and circumstances available, it could be said that the petitioner-appellant was taking undue advantage of a situation created by himself. If he had complied with the decree of restitution of conjugal rights, there would have been no occasion for filing a petition for divorce on the ground that decree had not been complied with.

6. Let me first deal with the grounds of cruelty and desertion which also have been negated by the Family Court. On the ground of cruelty, the only pleading is that the respondent had willingly taken a job in government school in a village near Rewari in order to torture the appellant husband in different ways. It has also been alleged that

the respondent had never discharged the duties of a wife and had never talked normally with the appellant. She used to threaten the petitioner-appellant and used to ask him to come to Rewari if he wanted to live with her. It was pointed out in the petition that because of such a behaviour the petitioner suffered mental and physical tension and fortune. In reply, the respondent wife denied all such allegations. The evidence on the point is also slipshod and perfunctory. The appellant Bal Kishan in his statement has given only vague description of the facts on which his case of practicing cruelty by his wife was based. He has vaguely stated that she had tortured him in different ways. She was not paying heed to his instructions and was not preparing food and used to go away to her aunt's place, time and again. The respondent had denied in her statement truth of such allegations. On such evidence, it cannot be said that the ground of practicing cruelty by the wife against her husband is proved. The Family Court has correctly decided the issue.

7. On the ground of desertion also, there is hardly any pleading or evidence. In this state of evidence, the decision of the Family Court on the ground that desertion was not proved is also found to be correct.

8. So far as issue No. 3 relating to non-compliance with the decree for restitution of conjugal rights for a period of more than one year is concerned, the pleadings are specific. It has been pleaded by the petitioner that after the passing of the decree on 12.12.86, it has not been complied with by the parties and there has been no restitution of conjugal rights pursuant to that decree for a period of more than three years and on that ground, divorce deserves to be granted. In reply, the respondent has submitted that the petitioner deliberately did not comply with the decree for restitution of conjugal rights and is taking advantage of his own wrong by filing this petition.

9. It was contended that the petitioner wanted to divorce the respondent in order to marry again taking advantage of his own wrong in flouting the decree for restitution of conjugal rights. In the evidence, petitioner stated that after the passing of the decree for restitution of conjugal rights, the respondent did not come to him and did not enforce the decree. The respondent in her statement had admitted that after obtaining the decree for restitution of conjugal rights, she did not try to get it enforced through court and did not file any application for execution of the same. The Family Court held that the petitioner did not make any attempt to comply with the decree of restitution of conjugal rights and the restitution of conjugal rights could not take place

because of the petitioner's fault. Ultimately, the Family Court held that since the petitioner had thwarted the efforts of the respondent to live with him, passing a decree in his favour on the ground of non-restitution of conjugal rights, despite a decree of restitution of conjugal rights, would amount to permitting him to take advantage of his own wrong.

10. To appreciate the controversy on the question as to whether the petitioner, against whom a decree for restitution of conjugal rights has been passed, could file a petition for divorce on the ground of non-compliance with the decree for restitution of conjugal rights for a period of one year or more, it would be necessary to reproduce the relevant provisions of the Act.

11. Section 13(1A)(ii) of the Act, which provides the ground for divorce to either party to a marriage on the basis of non-restitution of conjugal rights for a period of one year even after passing of the decree for restitution of conjugal rights, reads as under :

"Section 13(1A)(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."

12. It is very clear that the ground is available to both the parties and there is no distinction made between the party in whose favour the decree of restitution of conjugal rights was passed or the party against whom such a decree was passed. It is clear that the ground is available to both the parties irrespective of as to whom has obtained decree for restitution of conjugal rights.

13. Difficulty is created by the provisions of Section 23(1)(a) which reads as under:

"Section 23. *Decree in proceedings.* - (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 except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5, any way taking advantage of his or her own wrong or disability for purpose of such relief, and ....."

14. A reading of this provision would show that even if it is proved that the decree for restitution of conjugal rights was passed between the parties and conjugal rights have not been restituted for more than one year, the Court can still refuse to grant the relief if it finds that the petitioner was taking advantage of his or her own wrong. The question is whether mere non-compliance with the decree for restitution of conjugal rights passed against a person would disentitle him from getting relief of divorce on the grounds mentioned in Section 13(1).

15. A Full Bench of the Punjab and Haryana High Court in *Vimla Devi v. Singh Raja*,<sup>1</sup> took the view that 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 decree for 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 the decree for restitution of conjugal rights in proceedings in which they were parties. It was held that merely because the spouse who suffered the decree refused to resume co-habitation that would not be a ground to invoke the provisions of Section 23(1)(a) so as to plead that the said spouse was taking advantage of his or her own wrong.

16. In *Bai Mani v. Jayantilal Dahyabhai*,<sup>2</sup> a Division Bench of Gujarat High Court has observed that there must be some facts or circumstances occurring after the decree for judicial separation or restitution of conjugal rights showing that the petitioner was the defaulting party and a wrong-doer who was taking advantage of his own wrong. In that case, the husband against whom a decree for judicial separation was passed on the ground that he was leading an adulterous life, continued to live in adultery and after expiry of the statutory period after the decree for judicial separation was passed, filed a petition for divorce on the grounds available under Section 13(1A) of the Act. The Court observed that the matrimonial offence of adultery has exhausted itself when the decree for judicial separation was granted to the wife. It was no doubt true that the husband was continuing to reside with his mistress. It was no doubt true that it was a continuous wrong but, therefore, it cannot be said that it is a new fact or circumstance amounting to a wrong which will stand as an obstacle in the way of the husband to successfully obtain the relief which he claims in the divorce proceedings. It cannot be said that he is taking advantage of his own wrong when he makes an application for divorce though continuously residing with his mistress after the judicial separation has been granted. As a matter of fact, he was trying to exercise his right granted under the

amending provision contained in Section 13(1A).

17. In *Smt. Saroj Rani v. Sudarshan Kumar Chanda*,<sup>3</sup> relying on the view taken in *Dharmendra Kumar v. Usha Kumar*,<sup>4</sup> it was observed that it would not be reasonable to hold that the relief which was available to the spouse against whom a decree for restitution of conjugal rights has been passed, should be denied to the one who does not comply with the decree passed against him. The expression, in order to be a 'wrong' within the meaning of Section 23(1)(a) the conduct alleged has to be something more than 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 to. In *Dharmendra Kumar v. Usha Kumar* (supra), quoting with approval, a Full Bench decision of Delhi High Court in *Ramkali v. Gopal Das*,<sup>5</sup> it was observed that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of Section 23(1)(a) of the Act. The decision of the High Court of Delhi in the case of *Gajna Devi v. Purshottam Giri*,<sup>6</sup> was quoted with approval. The following excerpt from Gajna Devi's case (supra) was quoted :

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

.....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) .... 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."

18. In *Mrs. Meera Bai v. Rajinder Kumar Sobti*,<sup>7</sup> a Single Bench of Delhi High Court

decided on facts of that case, that the petitioner against whom a decree for restitution of conjugal rights was passed ex parte, was taking advantage of his own wrong by filing a petition for divorce under Section 13(1A)(ii) while having contracted second marriage.

19. In *Smt. Santosh Kumari v. Kewal Krishna Sabharwal* <sup>8</sup> another Single Bench of Delhi High Court held, in the facts and circumstances of the case, that the husband who had admittedly taken the wife back only to defeat the maintenance proceedings pending against him and who subsequently filed a petition for divorce under Section 13(1A)(ii), was taking advantage of his own wrong.

20. The up-shot of the aforesaid case law is that merely because the petition is filed by a person against whom decree for restitution of conjugal rights had been passed, which he had not complied with, it cannot be said that he was taking advantage of his own wrong. Something more is required to be proved. In the case before us, the learned Judge of the Family Court did not approach the case from this angle and was swayed away by the argument that the appellant did not try to get the decree for restitution of conjugal rights complied with or was not agreed to comply with it. Learned Judge of the Family Court has cursorily referred to the allegation that the appellant wanted to marry a girl named Vimlesh. The respondent had deposed in her statement that the appellant was keeping Vimlesh with him. Learned Judge has observed that the allegation against the appellant relating to keeping Vimlesh with him did not appear to be groundless. Actually, the learned Judge should have discussed evidence on the point and then to have come to the conclusion as to whether in the facts and circumstances of the case, the appellant was taking advantage of his own wrong. It appears that the parties also were not able to forego on the real basis on which it could be said that the appellant was taking advantage of his own wrong. In such state of affairs, it would be just and proper to remit the case back to the Family Court for addressing itself to the question as to whether in the facts and circumstances, the appellant-petitioner was taking advantage of his own wrong in seeking divorce on the ground under Section 13(1A)(ii) of the Act. Hearing before the Family Court will be confined to this point alone and if the Family Court considers it necessary, it may give fresh opportunity to the parties to lead evidence on this point alone.

21. In the aforesaid circumstances, this appeal is allowed and the matter is remitted

back to the Family Court for decision in accordance with law in the light of the directions and observations made in this judgment.

Appeal allowed.

Cases Referred.

1. AIR 1977 Pun and Har 167
2. AIR 1979 Guj 209
3. AIR 1984 SC 1562
4. AIR 1977 SC 2218
6. AIR 1977 Del 178
7. AIR 1986 Del 136
8. AIR 1985 Del 393