Himachal Pradesh High Court
Smt. Banti Devi vs Moti Ram on 7 June, 1989
Equivalent citations: AIR 1990 HP 35, I (1990) DMC 219
Author: N Kasliwal
Bench: N Kasliwal
JUDGMENT N.M. Kasliwal, C.J.

1. The parties were married according to Hindu rites on 30-11-1975. After a short span of about three years, the relations between the parties became strained and the wife, Smt. Banti Devi had to leave the house of her husband, Moti Ram. The wife then filed a petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act for restitution of conjugal rights. The husband did not contest the said petition and a decree for restitution of conjugal rights was given ex parte on 10-5-1983. Even after the said decree, there was no restitution of conjugal rights, as such the wife filed a petition under Section 10 of the Act for judicial separation on 6-8-1984. The wife in this petition also levelled an allegation that the husband had married another woman. This petition was also not contested by the husband and was allowed ex parte by judgment dated 12-10-1984. After the said decree for judicial separation, the husband filed the present petition for divorce on 19-10-1987 on the ground that there was no resumption of cohabitation between the parties after the passing of the decree for judicial separation and as such the petitioner was entitled to a decree of divorce.

2. The above facts are almost admitted between the parties.

3. The wife contested the present petition for divorce on a legal ground to the effect that the petitioner husband cannot take benefit of his own wrong and get a decree for divorce. It has been alleged by the wife that the husband had deserted her and now married another woman and as such he was not entitled to a decree for divorce as contemplated under Section 23(1)(a) of the Act.

4. Learned Addl. District Judge, Mandi, Kulu and Lahaul Spiti districts at Mandi, considered a number of authorities cited at the Bar and held that the petitioner husband was entitled to a decree for divorce. Learned Addl. District Judge thus passed a decree for divorce and dissolved the marriage between the parties by his order dated 6-4-1988. The wife aggrieved against the above decree has filed the present appeal under Section 28 of the Act.

5. In order to appreciate the controversy raised in the present appeal, it would be necessary to reproduce Section 13(1A)(i) and Section 23(1)(a) of the Act:

"13. Divorce.-- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissoved by a decree of divorce on the ground that the other party -

.....

.....

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

(1) that there has been no resumption as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or ....."

"23. Decree in proceedings.-- (1) In any proceeding 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) is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and ....."

6. Mr. Chhabil Dass, learned Counsel appearing for the appellant-wife contended that the husband was living in adultery by keeping another woman during the subsistence of the marriage between the parties and such act of adultery being a continuous wrong, the husband was not entitled to any decree of divorce as contemplated under Section 23(1)(a) of the Act. It was contended that a decree for judicial separation had been granted in favour of the appellant on the ground of desertion and marrying another woman during the subsistence of the marriag between the parties. It was submitted that the husband cannot take advantage of his own wrong and the provisions of Section 23(1)(a) of the Act clearly debar the husband for getting a relief of the decree for divorce. Mr. Chhabil Dass, in support of his contention placed reliance on Sounderammal v. Sundara Maha-linga Nadar, AIR 1980 Mad 294.

7. On the other hand, Mr. K. D. Sood, appearing on behalf of the respondent-husband, submitted that the view taken by the learned Addl. District Judge was quite correct and for argument's sake, even if the husband was living in adultery, the same came to be exhausted when the wife herself had obtained a decree for judicial separation on the ground of adultery. Mr. Sood in support of his contention placed reliance on Bai Mani v. Jayantilal Dahyabhai, AIR 1979 Guj 209; Jethabhai Ratanshi Lodaya v. Nanabai Lodaya, AIR 1975 Bom 88; Gajna Devi v. Purshotam Giri, AIR 1977 Delhi 178; Dharmendra Kumar v. Usha Kumar, AIR 1977 SC 2218; Saroj Rani v. Sudarshan Kumar Chadha, AIR 1984 SC 1562 and Dr. K.M.K. Nair v. Radha Kumari, (1988) 2 Hindu LR 486 : (AIR 1988 Ker 235).

8. I have considered the arguments raised by the learned Counsel for both the parties and have perused the authorities cited at the Bar.

9. Section 23(1)(a) of the Act provides that if the Court is satisfied that any of the grounds for granting relief exists, and the petitioner is taking advantage of his or her own wrong, or disability for purpose of such relief, such relief should not be granted.

Now, so far as Section 13(1-A) is concerned, it was inserted by Hindu Marriage (Amendment) Act, 1964 and the words 'one year' were substituted for the words 'two years' by Marriage Laws (Amendment) Act, 1976 in Clause (i) of Sub-section (1-A) of Section 13 of the Act. The above provision clearly provides that either party to a marriage may also present a petition for the dissolution of a marriage by a decree of divorce on the ground that there has been no resumption as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties. It is an admitted fact that the decree for judicial separation had been passed on 12-10-1984 and there has been no resumption of cohabitation as between the parties for a period of one year or upwards till the present petition for divorce had been filed on 19-10-1987. It may be mentioned at this stage that contrary views have been taken in this regard by the Madras and Gujarat High Courts. A Division Bench of the Gujarat High Court in Bai Mani v. Jayantilal (AIR 1979 Guj 209) (supra) held as under (at p. 214 of AIR) :--

".... The learned Advocate for the appellant-wife, therefore, emphasised that in spite of the decree for judicial separation, the fact that the husband continued to live in adulterous course is a circumstance which must be considered by the Court and, therefore, it should be treated as a wrong disentitling him to the relief which he has prayed for. We are unable to agree with this submission of the learned Advocate more so in view of the decision of the Supreme Court in Dharmendra Kumar's case (AIR 1977 SC 2218) (supra). The matrimonial offence of adultery has exhausted itself when the decree for judicial separation was granted to wife. It is precisely for that reason that the wife sought the decree for judicial separation. It is no doubt true that the husband, in the present case, is continuing to reside with his mistress. But can it be said from that fact that it is a new fact or circumstance subsequent to the decree or judicial separation which amounts to a wrong of such a nature as to disentitle her husband to the relief which he is claiming in the present case? It is no doubt true that it is a 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 present proceedings. If the view, which has been canvassed by the learned Advocate for the appellant-wife is accepted, it would in effect render the right which has been given under the amending provision contained inS. 13(1A) even to a defaulting party or a party in wrong for obtaining the relief specified in Section 13 nugatory. We have therefore, got to reconcile these two provisions and the only way in which one can reconcile is, as has been done by the learned single Judge of the Delhi High Court in Ganjna Devi's case (AIR 1977 Delhi 178) (supra), that there must be some facts or circumstances occuring after the decree for judicial separation, which, if amounting to substantial wrong that in granting a decree for divorce to a defaulting party or a wrong-doer, would amount in the circumstances in giving advantage of his own wrong. The learned Advocate for the respondent-husband has invited our attention to the decision of a Division Bench of the Bombay High Court in Jethabhai Ratanshi Lodaya v. Nanabai Jethabhai Lodaya, AIR 1975 Bom 88, where the Division Bench has taken a view that after a decree for judicial separation is passed, the ground on which that decree is granted, namely, desertion or cruelty the matrimonial wrong exhausts itself, and it would not be open to the parties to fall back upon it after the Court has pronounced the judgment and determined about the guilt of one of the parties. The learned Advocate for the appellant-wife, however, tried to distinguish this judgment by urging that in case of a decree for ajudicial separation on the ground of cruelty or desertion, there is no scope for the party in wrong to persist in that wrong doing, namely, persisting or committing acts of cruelty while in that case of a decree of judicial separation on the ground of

adultery there is a possibility of the wrong-doer to continue to commit that wrong even after the decree has been granted. We are afraid, we cannot agree with this submission of the learned Advocate for the wife obviously for the reason that he may be right so far as the cruelty is concerned, but so far as the desertion is concerned, the wrongdoer has a scope of indulging himself in continuous desertion after the decree for judicial separation is passed because there is no prohibition against him in resuming cohabitation. We are, therefore, in respectful agreement with the view which has been taken by the Division Bench of the Bombay High Court. The real question as posed by the Supreme Court in Dharmendra Kumar's case (supra) is, whether the continuance of stay of the husband after the decree of judicial separation with his mistress can be said to be misconduct serious enough to justify denial of the relief to which he is entitled to under the amending provision of the Act. As stated by the learned single Judge of the Delhi High Court in Gajna Devi's case (supra) 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 is trying to exercise his right granted under the amending provision of the Act. In that view of the matter, therefore, we regret that we are compelled to reject the submissions of the learned Advocate for the appellant-wife and we do not find any justifying reasons to interfere with the order made by the learned City Civil Judge."

In the above case, the Gujarat High Court placed reliance on a decision of the Delhi High Court in Gajna Devi v. Purshotam Giri (supra) and also on a decision of a Division Bench of the Bombay High Court in Jethabhai Ratanshi Lodaya v. Nanabhai Jethabhai Lodaya (supra). The crux of the above view taken by the Gujarat High Court is that two provisions of Section 13(1A) and Section 23 have to be reconciled and the only way in which one can reconcile is that there must be some facts or circumstances occuring after the decree for judicial separation, which, if amounting to substantial wrong that in granting a decree for divorce to a defaulting party or a wrong-doer would amount in the circumstances in giving advantage of his own wrong. After a decree for judicial separation is passed, ground on which that decree is granted, namely, desertion or cruelty, the matrimonial wrong exhausts itself and it will not be open to the parties to fall back upon it after the Court has pronounced the judgment and determined about the guilt of one of the parties.

10. Now so far as the Madras High Court is concerned, a learned single Judge of that Court in Soundarammal v. Sundara Mahalinga Nadar (AIR 1980 Mad 294) (supra) has dissented with the view taken in Gajna Devi v. Purshotam Giri (AIR 1977 Delhi 178)(supra) and Bimla Devi v. Singh Raj, AIR 1977 Punj & Har 167 (FB). In this Madras case, the learned single Judge gave the following reasonings (at pp. 301-302 of AIR) :--

"24. Leading an adulterous life is a continuing wrong. Therefore, mere fact that in the earlier proceedings, it was a ground for relief, does not mean that unless some other ground is established or the foundation for the wrong is to be made out subsequent to the decree, and achieve his nefarious ends and ambitions, if upheld by Courts, it would be a negation of law. If for sustaining amendments a harmonious construction is to be resorted, and it is to result in a wrong-doer to be helped, of all things in the world by legal provisions, then it will lead to disastrous situations and would be the easiest handle for the wrongdoer to wriggle himself out of his marital obligations on his whims and fancies by committing deliberate acts to disrupt marital life. No law can be conceived

of to give relief to a wrong-doer, the foundation of which is based on his own wrongs. In attempting to make a harmonious construction of the sections in the amended Act, merely because the subsequent amendments are claimed to usher in liberalisation on the aspect of divorce, the Court cannot bring about an interpretation which would give a helping hand to a wrongdoer to get relief based on his wrongs, commissions and omissions, which are against law. Illegality and immorality cannot be countenanced as aids for a person to secure relief in matrimonial matters. To construe that, any wrong made out, must be the one which is subsequent to the earlier decree, will go against the purport and scope of Section 23(1)(a), which is still retained in spite of amendments. Therefore, even though the defaulting spouse is now enabled to file a petition for divorce, if the wrong is of a continuing nature, it cannot be held that, merely because it originated even earlier to the first petition and pleaded in that petition, it cannot be taken note of for finding out whether such a conduct of the defaulting person is reprehensible enough to constitute a 'wrong' on the date of the presentation of the petition by him. The Supreme Court held that in spite of Section 3(1-A) having been enacted, the provisions of Section 23 of the Act will continue to apply. I am of the view that the decisions relied upon by Mr. Subramanian, learned Counsel for the respondent for the proposition that Section 23(1)(a) of the Act cannot be invoked in petitions filed by any sort or category of defaulting spouses under Section 13(1-A) of the Act, can be of no assistance to him. The limited extent to which relief granted is to hold that the failure to comply with decree for restitution of conjugal rights and judicial separation would not constitute a 'wrong', and therefore, such a defaulting spouse can also ask for divorce, and nothing more."

"25. If the defaulting spouse, as in this case, persists in doing the same wrong which had formed the ground for the earlier petition filed against him, Section 23(1)(a) will definitely prevent him from seeking relief for divorce. The view taken by the Full Bench in AIR 1977 Punj and Har 167 and the decision in AIR 1977 Delhi 178 that the foundation for the wrong must be one which had originated subsequent to the earlier decree, does not find favour with this Court. Hence, I hold that if it be shown that the petitioner seeking relief under Section 13(1-A) has committed any further wrong apart from what has been pleaded in the earlier petition, or the wrong already committed is of a continuing nature, and such conduct is serious enough to justify the other party from complying with the decree that has been passed, the amendments which have been effected to the Act do not enable such defaulting spouses to secure a decree for divorce."

11. Apart from the abovementioned two diagonally opposite views taken by the Madras High Court on one side and the Gujarat, Bombay and Punjab and Haryana High Courts on the other side, it would be useful to refer to certain observations made by Their Lordships of the Supreme Court in Saroj Rani v. Sudarshan Kumar Chadha (AIR 1984 SC 1562) (supra). Though this case does not directly deal with the qustion of living in adultery even after the passing of decree for judicial separation, yet their Lordships in the facts of the case observed as under (at p. 1566 of AIR) :--

"The definite case of the wife was that after the decree for restitution of conjugal rights, the husband and wife cohabitated for two days. The ground now sought to be urged is that the husband wanted the wife to have a decree for judicial separation by some kind of a trap and then not to cohabit with her and thereafter obtain this decree for divorce. This would be opposed to the facts alleged in the defence by the wife. Therefore quite apart from the fact that there was no pleading which is a serious

and fatal mistake, there is no scope of giving any opportunity of amending the pleadings at this stage permitting the wife to make an inconsistent case. Counsel for the appellant sought to urge that the expression 'taking advantage of his or her own wrong' in Clause (a) of Sub-section (1) of Section 23 must be construed in such a manner as would not make the Indian wives suffer at the hands of cunning and dishonest husbands. Firstly even if there is any scope for accepting this broad argument, it has no factual application to this case and secondly if that is so then it requires a legislation to that effect. We are therefore unable to accept the contention of counsel for the appellant that the conduct of the husband sought to be urged against him could possibly come within the expression 'his own wrong' in Section 23(1)(a) of the Act so as to disentitle him to a decree for divorce to which he is otherwise entitled to as held by the Courts below. Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever to be the reasons this marriage has broken down and the parties can no longer live together as husband and wife, if such is the situation it is better to close the chapter.

12. A Division Bench of the Kerala High Court in Dr. K.M.K, Nair v. Radha Kumari (AIR 1988 Ker 235) (supra) also held as under (at p. 240 of AIR) :--

"The Supreme Court affirmed the view taken by the Delhi High Court in Ram Kali v. Gopal Dass, ILR (1971) 1 Delhi 6 (FB) and Gajna Devi v. Purshotam Giri, AIR 1977 Delhi 178, that the expression 'petitioner is not in any way taking advantage of his or her own wrong' in Section 23(1)(a) 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), after the passing of a decree of restitution of conjugal rights and in such a case the party is not taking advantage of his or her wrong, but the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree or resume cohabitation thereafter. The Supreme Court in Saroj Rani's case (AIR 1984 SC 1562) pointed out that if such a conduct of the husband is intended to be treated as wrong, then it required a legislation to that effect. We cannot rule out the possibility of a party obtaining a decree for restitution of conjugal rights and in not enforcing the same with the sole purpose of getting a divorce after the lapse of statutory period. But such an abuse can be prevented only by bringing necessary legislation plugging this device and it is certainly a matter which requires serious consideration of the Parliament. But as law stands now, we are helpless in the matter and can only grant relief as one naturally flowing from the fact that there was no restitution of conjugal rights for a period of more than one year after passing of the decree, if there is no acceptable evidence to show that there was restitution within the statutory period."

13. In my view, the view taken by the Gujarat High Court which follows the view taken by the Bombay, Punjab and Haryana and Kerala High Courts stands on a better reasoning and I am inclined to follow the view taken by the Gujarat High Court in Bai Mani v. Jayantilal Dahyabhai (AIR 1979 Guj 209) (supra). Thus I hold that if a decree for judicial separation in the present case was obtained by the wife on the ground of desertion or marrying another woman, and thus having an adulterous union, the same got exhausted when such decree for judicial separation was given in favour of the wife. There was no fresh wrong committed by the husband after the passing of such decree for judicial separation and the husband cannot be refused the relief of divorce which the Legislature has allowed under Section 13(1A)(i) of the Act. That apart, it is an admitted position in

the present case that the matrimonial relations in between the parties came to be irretrievably broken down as back as 1978 and learned Counsel for both the parties submitted that there was no question of living together of the parties again. The wife is living with her parents at village in tehsil Sundernagar in Himachal Pradesh and the husband is living in Bombay running a taxi and is keeping another woman as his wife. In view of the above circumstances of the case, I find no ground or justification to interfere with the decree of divorce granted by the learned Addl. District Judge.

14. In the result I find no force in this appeal and it is dismissed with no order as to costs.