Bombay High Court
Jethabhai Ratanshi Lodaya vs Manabai Jethabhai Lodaya on 6 April, 1973
Equivalent citations: AIR 1975 Bom 88, (1974) 76 BOMLR 304
Author: Nathwani
Bench: Nathwani, Mukhi
JUDGMENT Nathwani, J.

1. This is a letters patent appeal by the original petitioner-husband against the decree of Mr. Justice Gatne in appeal confirming the decree of the City Civil Court. Bombay, dismissing his petition for divorce and raises a point of importance and interest arising out of judicial separation, namely, whether desertion by a spouse on which ground a decree for judicial separation was passed in favour of the original petitioner spouse under Section 10(1)(a) of the Hindu Marriage Act. 1955 (hereinafter referred to as the Act) continues unless the original respondent spouse makes efforts to resume cohabitation and constitutes a wrong which would disentitle the spouse so failing to get the relief of divorce on ground of non-resumption of cohabitation, and involves construction of Sections 10(2), 13(1A), 23(1)(a) of the Act.

2. The facts are not in dispute. The appellant is the husband and was married to the respondent wife according to Hindu FDIC rites on Dec. 16, 1956 at Bombay. They lived together for about 5 months at Thana till May 1957 when the wife left the husband and continued to live separately from him. On April 26, 1961 the wife filed Miscellaneous Petition No.1526 of 1961 in the City Civil Court at Bombay for judicial separation on the grounds of desertion, cruelty and adultery. The husband filed his written-statement denying the said allegations. In November 1963 when the suit came up for hearing the wife did not press her allegations of cruelty and adultery and the husband did not contest the suit on the remnant ground of desertion and the Court passed a decree for judicial separation on the ground of desertion. No attempt was made for reconciliation between the parties and on March 10, 1968 the husband filed M. Petition No.1735 of 1968 against the wife in the Bombay City Civil Court for divorce on the ground of non-resumption of cohabitation under Section 13(1A)(i) of the Act. At the hearing of the suit on the 12th October 1968 the husband gave evidence and categorically stated that he made no attempt to see or meet the wife because the parties were separated by the decree of judicial separation. The wife did not examine herself or led any evidence. On this evidence the learned trial Judge dismissed the petition observing that Judge dismissed the petition observing that husband's explanation for not making any attempt to take back his wife did not help him and he had committed a wrong within the meaning of section 23(1)(a) of the Act. On appeal to this Court by the husband Mr. Justice Gatne confirmed the decree on the same ground on October 12, 1971. The husband has now preferred this appeal against the said decision.

3. Mr. Rele for the appellant-husband has assailed the decree on two grounds, first the amended Section 13(1A), which confers an absolute and unqualified right on either party to obtain divorce on ground of non-resumption of cohabitation for a period of two or more years after the passing of a decree for judicial separation is not subject to or controlled by Section 23 of the Act and, therefore, the question of the husband having committed a wrong or taking advantage thereof for his present petition within Section 23(1) does not arise; and secondly, that even if Section 23(1) applies, the husband was under no duty after judicial separation to take steps for resuming co-habitation and,

therefore, his omission to do so did not amount to a desertion and, therefore, not a wrong within the meaning of the said Section 23(1)(a). Mr. Thacker for the wife has contested the above propositions and supports the judgment of the Court below. It is obvious that if the appellant succeeds on either of his above contentions the appeal will have to be allowed.

4. Before dealing with the first point, it will be convenient to notice the amendments made in Section 13 of the Act. section 13(1) as it originally stood contained nine clauses specifying various grounds of divorce. Clauses (viii) and (ix) provided for a divorce on the ground that the other party:

(viii) has not resumed co-habitation for a space of two years or upwards after the passing of the decree."

By the Amending Act No.44 of 1964, which came into force on December 20, 1964. clauses (viii) and (ix) were deleted from sub-section (1) and in their place a new sub-section (1A) was introduced in section 13. The new sub-section (1A) reads.

"Either party to a mortgage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage of divorce on the ground-

(i) That there was has been no resumption of co-habitation 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 parities: 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 proceeding to which they were parities". By the amendment a very conspicuous change is made and the right to get divorce is conferred on either of the spouses, whereas under the old clauses (viii) and (ix) only the petitioner. On whose application the decree for judicial separation was passed could get divorcee and to this extent . no doubt the law is liberalised. Mr. Rele, however. Contends that there is a further change made and it is this; while both the grounds under the said old clauses involved an element of default on other party. namely in not resuming cohabitation in one case and in failure to comply with the decree for restitution of conjugal rights in the other under the new grounds in the sub-section (1A) no such consideration arises as only objective conditions on non-resumption of jugal rights are laid down. He urges that this change in the conditions of grounds necessarily implies at least. after the said amendments that section 23(1) of the Act does not govern the proceedings for divorce under Section 13(1A). Now, there is no doubt that the grounds in clauses (i) and (ii) of the new sub-section (1A) lay down purely objective tests and involves no dereliction of duty or wrong. further , it does not appear that there was any element of default in the ground under old clause (viii) though the words "failed to suggested it. Further. as discussed later a decree of judicial separation makes it cohabit with the other and therefore spelling out any element of default from the old clause (viii) would have run counter to the said consequence of judicial separation. Further. Mr. Rele cited an authority of Jammu and Kashmir High court in Tej Kour v. Hakim Singh (AIR 1965 J and K 111) in connection with his other point and which is refereed more fully later wherein it was held that under the old ground (viii) there was no condition or limitation to grant divorce once two or more years had

passed after the passing more years had passed after the passing of the decree for judicial separation. But even apart from this alleged change in the old and new grounds for divorce, appellant's arguments ignores the express provisions of Section 23. Even if any one or more of the grounds for divorce exist a decree for divorce will not automatically follow as the Court has to satisfy itself under Section 23 about certain conditions before granting the relief asked for, Section 23 reads as follows:-

"(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) any of the ground of the petition is the ground specified in clause (f) of sub-section (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 relief should not be granted.

then, in such a case, but not otherwise, the Court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties".

5. It is obvious from the above provisions that it is the duty of the Court to satisfy that certain requirements are complied with before granting the relief in a proceeding under the Act. In sub-section (1) the opening words "in any proceedings" and later the words "in such a case but not otherwise" are very material. In a recent decision of this Court in Laxmibai v. Laxmichand Chandrachud J. had to consider the question, whether Section 23 applies to petition for divorce on the ground of non-restitution of conjugal rights under clause (ii) of Section 13(1A). In that case the wife had obtained a decree of restitution of conjugal rights.

After a lapse of two years the husband filed a petition for divorce on the ground that there was no restitution of conjugal rights under clause (ii) of Section 13(1A). The wife contended that the petitioner husband had failed to comply with the decree for restitution of conjugal rights which amounted to a wrong within clause (a) of Section 23(1). The husband sought to meet that argument by contending. as has been done, by the husband in the present case, that the provisions of Section 13(1A) were not subject to Section 23(1) of the Act. After considering the effect of the amendments made in 1964, the learned Judge observed -

"I see no warrant in the language of Sub-s. (1A) for holding that it confers an absolute or unrestricted right on a party to apply for and obtain a decree of divorce. In a petition filed under Sub-section (1A) not only is it open to the Court the consider whether the provisions mentioned in sub-s(1) of Section 23 are satisfied but the Court is under an obligation to consider that question. Section 23 are satisfied but the Court is under an obligation to consider that question. Section 23 is in the nature of an overriding provision not only for the reason that it governs "any proceedings" under the Act, but for the more important reason that it provides that it is only if the conditions mentioned in sub-s. (1) are satisfied "but not otherwise" that the Court shall decree the relief sought".

In a more recent decision of this Court in Madhukar Bhaskar v. Saral Madhukar . Mr. Justice Nain referred to the above ruling and held that "in granting relief under Section 13(1A) the Court will and must take into consideration Section 23(1)." I am, with respect in agreement with the learned Judges in their view of Section 23. Appellant's first contention therefore, fails.

6. This brings me to the other point whether the husband was guilty of desertion of the wife and after judicial separation. Now, the desertion on which ground the wife obtained the decree for judicial separation was exhausted once the said relief was granted and the wrong which the Court has to consider under Section 23(1) must be subsequent to the date of the decree of judicial separation. It is therefore, urged for the wife that the husband admittedly did not make any attempt after judicial separation. It is therefore, urged for the wife that the husband admittedly did not make any attempt after judicial separation to get her back to his home, that such failure was in breach of his material obligation to cohabit with her and thus her desertion had continued after the passing of the decree of judicial separation and therefore, there was no resumption of cohabitation. It is, contended that such subsequent desertion amounted to a wrong within Section 23(1) and, therefore, though the ground of divorce mentioned in clause (ii) of Section 13(1A) existed, the Court should not grant divorce. On the other hand, it is urged for the husband that he was not after judicial separation under any duty to resume cohabitation and to make any efforts to take her back and reestablish a marital home and he was not guilty of having continued desertion and, therefore, no wrong was committed by him.

7. It will be seen from the above rival contentions that the real question which arises is, whether after a decree for judicial separation is passed the other party, respondents to the petition for judicial separation continues to remain under an obligation to cohabit with the other spouse. In this connection the provisions of Section 19(2) are material and read as under:-

"Where a decree for judicial separation has been passed, it shall not longer be obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so."

8. Thus the provisions of sub-section (2) in terms release the petitioner from obligation with the other spouse and this immunity continues till the decree for judicial separation is rescinded. Mr. Thacker for the wife strongly relies on the said provision exempting the wife to cohabit with the

husband and argues to the effect that on the normal rule of literal construction of statutory provisions and bearing in mind that the marriage lays the spouses under a mutual obligation to cohabit with the other, the spouse applying for judicial separation is released from the said obligation under the decree for judicial separation but the other spouse whose misconduct or disability was the cause of judicial separation is not released from the said obligation. In other words he contends that a decree for judicial separation does not shape co-habitation on both sides and hence in the present case the husband remained liable to co-habit with the wife and was, therefore, bound to make efforts to get her back and resume co-habitation which he admittedly did not do and had thus continued her desertion which amounted to wrong he was taking advantage for the purpose of his present petition. He also sought to derive support for his contention from the language of the old clause (viii) of Section 13(1) and submitted that on its proper construction it implied a failure on the part of the other party to resume co-habitation which indicated that the said party continued to remain under an obligation to do so. Lastly, he also tried to impress upon us that the Hindu marriage is a sacrament and the scheme of the Act was not to encourage or favour an easy divorce and we should not view judicial separation under the Act as having the same consequences so far the parties" obligations to co-habit were concerned as follow under the corresponding English law or even the Special Marriage Act (Indian Act No.43 of 1954).

9. Husband's contention bed on literal construction of Section 10(2) of the Act may seem at first sight plausible but entirely ignores the origin and nature of the action of judicial separation. It is true that a marriage performed according to Hindu rites and ceremonies is a holy union and was dissoluble and neither party could divorce the other unless permitted by custom till recently when some State Laws and ultimately the Hindu State Laws and ultimately the Hindu Marriage Act. 1955 introduced important changes in the law having regard to the social needs of the time and empowered either spouse to get judicial separation or divorce in certain circumstances. Prior to that the concept of judicial separation or divorce in certain circumstances. Prior to that the concept of judicial separation was unknown to Hindu marriage. Historically even in England the Court's had no jurisdiction to grant judicial separation or divorce till the passing of the Matrimonial Causes Act. 1857. Prior to that divorce was granted by Ecclesiastical Courts or by Private Acts of parliament . Divorce was of two kinds a limited one called a divorce a mensa et thoro (separation from bed and board) granted by Ecclesiastical Courts in cases where the husband or wife had been guilty of adultery or cruelty to make conjugal intercourse impossible, and the other, divorce a Vinculo Matrimoni (from the bond of marriage) granted by Private Acts of Parliament in cases where the marriage was violable or void ipso jure. The English Matrimonial Causes Act, 1857, by Section 7 conferred jurisdiction for the first time on the Courts to give judicial separation but not the divorce a mensa et thoro: but a decree of judicial separation had the same effect and same consequences as a decree by way of divorce mensa et thoro. Thus the term 'judicial separation' came to be used for denoting a limited kind of divorce i.e. separation from bed and board thereby putting and end to notice that in India also the remedy of judicial separation was made available to the Christians by the Indian Divorce Act No. IV of 1369. Section 22 of the said Indian Act is identical in terms with Section 7 of the Matrimonial Causes Act. 1357.

10. Further as to the provision of non-cohabitation in favour of the petitioner spouse in Section 10(2) it may be pointed out that in England such a provision was contained in the Summary

Jurisdiction (Married Women) Act. 1895, whereby the Magistrates were given jurisdiction on a complaint of desertion by a married woman against her husband to pass an order of separate residence and maintenance and also to provide that wife would be no longer bound to cohabit with her husband which provision was to have the effect of a decree of judicial separation on the ground of cruelty. (see Section 5 of the said Act of 1895 now reenacted in Section 2(1) (a) of the Matrimonial Proceedings (Magistrates Courts) Act 1960. In Hariman v. Harriman, 1909 P 123. the Appeal Court held by Majority that the effect of such an order was to terminate the continuance of the desertion by the husband. Cozens Hardy M. R. observed -

"By obtaining the order she not only expressed her desire that cohabitation should

Finally, the House of Lords in the case of Cohen v. Cohen, (1940) 2 All ER 331 while di

"There (in Harriman's case) had been a decree or what was equivalent to a it was out

11. In England alter the Matrimonial Causes Act. 1857 a series of amending repealing an

"Where the Court grants a decree of judicial separation it shall no longer be obliga

The non-cohabitation provision came to be introduced for the first time in the Act of 1937 which has been re-enacted in sub-sequent Acts (see Section 14 (2) of the Matrimonial Cases Act. 1950, which in its turn was re-enacted in Section 12(2) of the Matrimonial Causes Act. 1965). In making an express provision however the statute merely gave its sanction to what had been always treated as a legal consequence of judicial separation the breach of consortium. (see Latey on Divorce, 1952. 14th Edn. page 180, para 320).

12. The provisions of Section 10(2) of the Hindu Marriage Act are in parimateria with those in the corresponding Section of the English Matrimonial Causes Acts, and there is nothing in any other provision of the Act to derogate from the concept of judicial separation discussed above, namely a decree of judicial separation snaps the marital tie to the extent of doing away with either party's duty to cohabit with the other. But judicial separation does not itself dissolve the marriage though it affords a ground for divorce. In this sense a decree of judicial separation aims at divorce but the separation is not final and irrevocable as can be seen from the latter provisions of Section 10(2) and there is always a locus penitential. But since on a decree of judicial separation the duty to cohabit ceases there can, be no desertion after such decree.

13. As regards the appellant's contention that old ground (viii) supported his construction of Section 10(2). I have already expressed my view on this point. It is a well-established rule to be borne in mind that every part of a statute is to be construed with reference to its other parts so as to make a consistent enactment of the whole. But having regard to the very nature of the remedy of judicial

separation and the effect of non-cohabitation provision itself there is no ambiguity or obscurity in construing the provisions of Section 10(2) and they are susceptible of only one meaning namely that after the passing of the decree for judicial separation both the parties are released from their material obligations to cohabit with the other. Therefore as already noticed earlier, the above rule of harmonious construction of several parts of a statute also militates against appellant's contention that the old clause (viii) of Section 13 did not imply an element of default or wrong on the part of the other party.

14. Having regard to the above legal position it is evident in the present case that after the passing of the decree for judicial separation the husband was no longer bound to cohabit with the wife; in fact by reason of the said decree the wife prevented him from doing so. Therefore, there was no desertion by him after judicial separation. It is his evidence that he made no attempts to see or meet his wife as the parties were separated by the decree of judicial separation and he was right in taking up this position. No doubt after a decree of judicial separation the parties or either of them may make attempts for reconciliation and even the Court is at the hearing of the petition for divorce enjoined in every case where it is possible so to do to make every endeavour consistently with the nature and circumstances of the case to bring about a reconciliation between the parties (see Section 23(2) of the Act).

But there is no obligation on either party to make any such attempt. The husband was not guilty of continuing to desert her. Both the Courts below had continued on the wrong of desertion had continued on the part of the husband as he had made no attempts to bring about a reunion with the wife. Mr. Justice Gatne held that after the passing of the decree of judicial separation the wife but not the husband was released from the obligation to cohabit . From his judgment however it does not appear that his attention was drawn to the non-cohabitation provision in Section 10(2) of the Act and the effect thereof on husband's obligation to cohabit with the wife. For the reasons already expressed, the Courts below are in error in taking the view that the husband remained under this obligation to cohabit with the wife and was guilty of continuing to desert her, and therefore, of a wrong with in Section 23(1) of the Act.

15. It remains now to refer to the cases which were cited at the bar on the point of what constitutes a wrong after a decree fro judicial separation is passed. On behalf of the wife reliance was placed on the cased of Laxmibai v. Laxmichand (Supra). This authority is of no assistance to her as in that case the decree that was passed was for restitution of conjugal rights and not for judicial separation and in considering whether subsequent conduct of a party amounts to a wrong different considerations may apply in a case where a decree for restitution of conjugal rights is passed.

16. Husband relied on the case of this Court in 74 Bom LR 496 = (Supra). In that case the wife had obtained a decree for judicial separation on the ground of cruelty. After an expiration of more than two years the husband sued for divorce under section 13(1a) . Wife resisted it saying that the husband was under obligation to assure her that his previous cruelty would cease and that he would treat her well or to ask her to come back and stay with him Mr. Justice Nain rejected wife's is a contention. It may however be noticed that in support of her said contention the wife had relied upon the new Section 13(1A) to spell out therefrom such obligation on the part of her husband (see

page 501 of Bom LR = 59 of AIR) buy the did not rely also upon the provisions of Section 10(2) as has been done in this case by the respondent wife.

17. The appellant-husband also sought to derive support from AIR 1965 J & K 111 (Supra). In that case that wife had asked for divorce on ground of non-resumption of cohabitation under the old clause (viii) of Section 13(1). The husband opposed the petition on the ground that since before the passing of the decree of judicial separation against him he was serving his sentence of life imprisonment in jail it was impossible for him to perform his marital obligations. The High Court granted divorcee holding that there was no condition or limitation imposed under the said clause (viii(to grant divorce once two or more years had passed after the passing of a decree for judicial separation . This case turned on the interpretation of old clause (viii) of Section 13(1) of the Act. however, in the judgment there is no reference to section 23 of the Act and no discussion whatsoever whether the provision of Section 23(1) governed the proceedings for divorce under the said clause (viii) and further there are some observation in para (6) of the judgment as to the effect of passing of a decree for judicial separation: there is no discussion as to the effect of the provision of Section 10(2) on the obligation so the spouses to cohabit with the other. Therefore this authority is of no assistance to the appellant husband in his contention that his subsequent conduct did not constitute a wrong within Section 23, but as already noticed it is definitely against this contention that the old ground in clause (viii) contained an element of default which is omitted from the new ground under clause (i) of Section 13(1A).

18. The husband also relied upon the case of Syal v. Syal . However, it was a case for getting divorce on the ground of non-restitution of conjugal rights under the new clause (ii) of Section 13(1A), though there are observations in the judgment about the nature and effect of judicial separation to the effect discussed above.

19. It may appear somewhat harsh that a party originally guilty of desecration shoudl ultimately be in a position to obtain divorce in the circumstances like the present one. But such a result follows because the aggrieved party itself asks for end obtains a decree of judicial separation thereby putting an end to the desertion. As already noticed a decree of judicial separation does not by itself dissolve the marriage but aims at it while leaving time to both the parties for reelection, adjustment and reconciliation. In this connection it may not be out of place to point out that a wife can obtain maintenance and separate residence on the ground of desertion or crusty under Section 18(1)(a)(b) of the Hindu Adoptions and Maintenance Act, 1956 or she may obtain an order of maintenance even while residing separately from her husband under Section 488 (3) of the Code of Criminal Procedure. In such cases, however, there is no provision exonerating the wife from her obligation to cohabit with the husband. But in the present case no questions arises as to the effect of such a decree or order on parties mutual obligations to co-habit and 1 express no opinion on it.

20. To sum up, then the appellant husband was under no obligation to cohabit with the wife after judicial separation and therefore, the desertion on his part did not continue and no wrong was committed by him after passing of the decree of judicial separation and the question of his taking advance of wrong under Section 23(1) does not arise.

21. In the result the appeal succeeds and the petition for divorce must be granted..

Mukhi, J.

22. I agree with my brother Nathwani J. who has just delivered his judgment that Letters patent Appeal be allowed and the order and judgment of the learned Single Judge as well as the order and judgment of the Judge of the City Civil Court Bombay be set aside. High Court. however desire to make my own observation on the question raised and the state of the law.

23. This is a Letter Patent Appeal filed by Jethabhai Ratanshi Lodava against the order and judgment of a single Judge of this Court (Catne J.) dated the 12th of October 1971, which appeal was directed against the decision of a Judge of the City Civil Court Bombay, dismissing the appellants petition for divorce (M. J. Petition 1737 of 1968) under Section 13(1A) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act").

24. The Letters Patent Appeal in this cases raises a question of divorce law of considerable importance. The matter concerns the interpretation of Section 13(1A) as well as of Section 23 of the Act and the question raised are such that they are likely to affect a fairly substantial segment of modern Hindu Society.

25. The facts necessary to state in order that the points raised may be appreciated are as follows: First of all it is to be noticed that the appellant before us that is to say, the petitioner in M. J. Petition No. 1737 of 1968 is the husband and the respondent who was the petitioner in the earlier Petition for judicial separation being M. J. petition No. 1528 of 1961, is the wife.

26. On the 16th February 1956 the appellant , original petitioner, and the respondent were married at Wadala and thereafter they stayed together at Thana for a relatively short period of five months till on 12th of May 1957 the respondent left the appellant's house. The parties have stayed separately, thereafter.

27. There seems to be no indication as to what transpired between 1957 and 1961 but it would appear that on the 26th of April 1961 the wife, that is to say the respondetn, Manabai, before us filed a petition for judicial separation in the City Civil Court at Bombay on the ground of cruelty and desertion. It is also to be noticed than the ground of adultery was also vaguely suggested but it was not pursued.

28. When the said petition for judicial separation came up for hearing before the City Civil Court Bombay the Advocate appearing on behalf of the respondent (petitioner therein) stated (as recorded in the said judgment) that his client would seek judicial separation only on the ground of desertion which had admittedly taken place and had continued for more than five years prior to the filing of that petition. It would appear that accordingly the respondent did not press the other grounds of cruelty and adultery and the petition for judicial separation was allowed only on the ground of desertion. A decree for judicial separation was, therefore, passed in favour the respondetn on the 6th November 1963 in M. J. petition 1528 of 1961. There was no appeal from the said decree for

judicial separation and therefore, it became final in so far as a decree for judicial separation can be said to be final. It is not disputed that no application was made by either of the parties for rescinding the said decree under the latter part of sub-section (2) of Section 10 of the Act.

29. It is also not disputed that after the decree for judicial separation was passed in the aforesaid circumstances the appellant and the respondents did not resume cohabitation for a period of two years and upwards so that a ground for divorce accrued to either party under Section 13(1A)(i) of the Act.

30. It is in these circumstances that after about a further lapse of five years, and there being no reconciliation between the parties during that period, the appellant sought to bring the marriage to an end and filed the petition for divorce under Section 13(1A)(i) of the Act. This petition filed in the City Civil Court was numbered as M. J. Petition No. 1737 of 1968 from which the present Letters Patent Appeal arises.

31. The appellant's petition for divorce was however dismissed by the learned Judge of the City Civil Court on the ground that the appellant (as the petitioner therein) was taking advantage of his own wrong in seeking the relief of divorce because the reason for the parties not resuming cohabitation was the failure of the appellant after the decree for judicial separation in 1963, to take steps; make attempts and overtures to take back his wife to live with him and further that the appellant far from doing that had in effect categorically stated that he was not prepared to take back his wife to live with him.

32. It is to be noticed that the petition for divorce was strenuously opposed by the respondent and although she did not either examine herself or lead any evidence whatsoever in her written statement in answer in the petition for divorce she contended that she was really the aggrieved party the petitioner had no cause of action and that the petitioner had made no attempts after the decree for judicial separation in 1963 to take her back to his house Curiously, while denying to the appellant (petitioner therein) the relief of divorce she sought to claim back various ornaments costly garments and utensils which she alleged the appellant had wrongfully kept back with him in has possession. However show admitted that there had been no cohabitation between her and the petitioner for a period of two years and upwards till the date of the petitioner for divorce. It would k therefore appear that the ground for divorce as provided by Section 13(1A)(i) of the Act was clearly available to the appellant (petitioner therein).

33. The learned Single Judge of this Court (Gatne. J.) who heard the First Appeal agreed with the findings and the reasoning of the learned Judge of the City Civil Court and observed that it was difficult to find fault with the conclusion arrived at by the learned Judge of the City Civil Court and on this footing the appeal was dismissed.

34. Reliance was placed by both the courts on a judgment of this Court in , where Chandracud J. (now a Judge of the Supreme Court) held that under Section 23(1) of the Act it was open to the Court to refuse to pass a decree for divorce under Section 13(1A) of the Act on a petition filed by a party who had refused to resume cohabitation after the passing of the decree against such person for

restitution of conjugal rights. The learned Judge also held that the Court was under an obligation under Section 23(1) (a) to satisfy itself that the petitioner in seeking a divorce on the grounds mentioned was not in any way taking advantage of his own wrong.

35. Now, it is to be at once noticed that in that case there was a decree for restitution of conjugal rights, and even though it can be said that such a decree was not really capable of execution by the coercive process of law, willful refusal to comply with the decree in any event though it can be said that such a decree was not really capable of execution by the coercive process of law, willful refusal to comply with the decree in any event could be considered as defiance of the Court's mandate and therefore a wrong. Such defiance could thus be considered as the Petitioner "taking advantage of his own wrong" within the meaning of Section 23(1)(a) of the Act.

36. Now, it does not require much argument to appreciate that a decree for judicial separation is not a decree which could be 'defied" as such by non-compliance except perhaps in the unlikely event of the defeated husband forcing event of the defeated husband forcing himself upon his wife and molesting her as happened in the case of R. v. Clarke, (1949) 2 All ER 448. In that case there was a separation order in force against the husband but nevertheless he appears to have forced his attentions on his wife and he was charged on indictment w..... the rape of his wife and with assault on her. It was held that by reason of the separation order the husband was not entitled to have intercourse with her with out her consent. This is obviously an extreme case where a decree for judicial separation may be said to have been defied because by reason of the decree the wife was no longer bound to cohabit with her husband. But it is to be observed that in such an event the husband was hardly likely to petition for a divorce on the basis of the decree for judicial separation.

37. Mr. Rele, the learned Advocate for the appellant, placed the following main proposition before us: "whether the failure of a party against whom a decree for judicial separation has been passed to make attempts to bring about a re-union will amount to a wrong within the meaning of Section 23(1)(a) of the Act." Mr. Rele contends taht there is no obligation on a spouse against whom a decree for judicial separation has been passed to remedy the matrimonial wrong or offence on the basis of which the decree was made and basis of which the decree was made and that by reason of the decree for judicial separation having been passed neither party is obligated to cohabit with the other. In other words, the contention is that there was no obligation or duty cast on the appellant after the decree for judicial separation had been passed in 1963 against him on the ground of desertion to reverse or remedy the said matrimonial wrong of desertion by calling upon the respondent to come back and live with him. Mr. Rele has placed reliance on Section 10(2) of the act for his contention that on a correct interpretation thereof if both the parties are absolved from the matrimonial obligation to cohabit, then the appellant's desertion couldn't be said to be a continuing matrimonial wrong and that, therefore, it could never be contended that the appellant was taking advantage of his own wrong in seeking the relief of divorce on the ground contained in Section 13(1A)(i) of the Act.

38. Mr. Rele also contended that the right to apply for a divorce under Section 13(1A) was absolute and unqualified and that the only condition for relief was that the ground mentioned in Section 13(1A) (i) or (ii) was shown to factually exist.

39. Mr. Thacker, the learned Advocate for the respondent Manabai on the other hand contends that as held by the learned Judge of the City Civil Court and confirmed by the learned Single Judge of this Court, a decree for judicial separation does not affect the marriage itself which continues to exist and therefore, the party against whom the decree for judicial separation is made continues to remain bond by his or her matrimonial obligations and if that part, even after the decree for judicial separation has been passed does not make any attempts or overtures to take back the spouse and obtain a reunion then such a party commits a wrong and cannot take advantage of that wrong in allowing the time to run out so that the ground for divorce under Section 13(1A) comes into existence. Mr. Thacker further contends that when a spouse is guilty of desertion then even after the decree for judicial separation has been obtained by the aggrieved spouse the desertion continues and such a desertion must be held to be a matrimonial wrong which is continuing.

40. The suggestion appears to be that while the winning spouse, having obtained a decree for judicial separation is absolved from the duty to cohabit the defeated spouses is not so absolved and must go on making genuine bona fide and persistent efforts to obtain a reconciliation, pursuant to his or her matrimonial obligation. If the winning spouse relents, well and good, and if he or she does not and two years pass in spite of efforts on the part of the defeated spouse to resume cohabitation then and then only the right accrues to the defeated spouse to obtain a divorce on the ground contained in Section 13(1A)(i) Mr. Thacker also places reliance on Section 10(2) viz. "Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent ....." are so framed that on a literal construction, which according to him is the only construction possibel only the petitioner is relieved of the marital obligation to cohabit.

41. At the very outset we asked Mr. Thacker to address us on what appears to me to be the central question in the present case that is, what is the effect of decree for judicial separation. I shall deal with this aspect after a referenced to the relevant section and the legal possession as obtaining.

42. This brings me to a consideration of the scope and content of sections 10(2). 13(1A) and 23(1) of the Act in relation to a petition for divorce on the ground that the parties have not resumed cohabitation for two years or upwards after a decree for judicial separation has been passed. It will also have to be considered as to what are the rights and duties of a spouse against whom a decree for judicial separation has been passed.

43. It is, therefore, appropriate to first of all notice the state of the law in this behalf and then to find out in the instant case whether the appellant was in fact taking advantage of his own wrong so as to disentitle him to the relief of divorce as the trial Court and the learned Single Judge of this Court seem to have found.

44. Now, if Section 10 and 13 of the Act are perused, it would be noticed that the several grounds for judicial separation or divorce comprise either a matrimonial offence or wrong or disability which in turn may be either self-inflicted or fortuitous. Looking at Section 10. it will be noticed that ground (a), viz. desertion, ground (b) viz. cruelty and ground (f) viz, extra marital sexual inter course are obviously matrimonial offences or wrongs. Ground (c) viz. Leprosy ground (Government) viz. venereal disease and ground (e) viz. unsoundness of mind rate obviously disabilities. Even as

regards venereal disease is concerned, contrary to popular view it can be contracted innocently and. therefore it would be a disability and not a wrong.

45. Turning now to Section 13 of the Act we find that - ground (i) viz. adultery, ground (vi)viz, renouncing the world by entering any religious order may also be characterised as matrimonial offences in so far as the person after having taken upon himself the marital obligations could not be expected to renounced the word and thereby leave his spouse without the benefit of the marital obligations otherwise imposed on him or her. The other grounds under Section 13(1) are obviously disabilities.

46. The two grounds introduced by the Hindu Marriage (Amendment) Act, 1964, and which are now contained in sub-section (1A)must of necessity be placed in a separate category. I will revert to this aspect at a later stage.

47. It requires to be noticed that the petition for divorce with which this Letters Patent Appeal is concerned was filed by the appellant on the ground that after the decree for judicial separation had bee obtained by the respondent in 1963 "there has been no resumption of cohabitation" within the meaning of Section 13(1A) (i) of the Act, Section 13(1A) reads as follows:-

"Either party to a marriage 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

(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".

48. By the same amending Act of 1964 which introduced sub-section (1A) in Section 13 clauses (viii) and (ix) of Section 13(1) of the Act were deleted but it is appropriate to set out section 13(1) before the amendment and it reads as follows:-

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

(i) is living in adultery : or

(ii) has ceased to be a Hindu by conversion to another religion: or

(iii) has been incurably of unsound k mind for a continuous period of not less than three years immediately preceding the presentation of the petition: or

(iv) has, for a period of not less than three years immediately preceding the presentation of the petition been suffering from a virulent and incurable from of leprosy: or

(v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form: or

(vi) has renounced the word by entering any religious order: or

(vii) has not been heard of as being k alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; or

(viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree".

49. It is also appropriate at this stage to set out Section 23(1)(a) of the Act because it was on an interpretation and application of that section that the appellant's petition for divorce was dismissed by the learned Judge of the City Civil Court and the said dismissal confirmed by the learned Single Judged (Gante . J.)of this Court.

"23(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 is not in anyway taking advantage of his or her own wrong or disability for the purpose of such relief".

50. It is significant that there is a marked difference between the language of the old clauses (viii) and (ix) of Section 13(1) on the one hand and the newly introduced sub-section (1A) on the other hand. The true effect of this difference will have to be considered.

51. Whereas under Section 13(1)(viii) of the Act as it existed prior to 1964, a Hindu Marriage could be dissolved on the ground that the other party had not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party, the new sub-section (1A) now provides that either party may apply for a divorce on the ground 'that there has been no resumption of cohabitation as between the parties to the marriage".

52. Similarly in the case of a decree for restitution of conjugal rights it was provided before the amendment that the marriage could be dissolved on the ground that the other party had failed to comply with the decree etc. But after the amendment Act of 1964 either party can apply on proving to the Court that "there has been no restitution of conjugal rights as between the parties .....".

53. The change k introduced by the amendment Act of 1964 in my opinion clearly suggests that the concept of default of the offending party as furnishing the ground for divorce has been eliminated so

far as the two grounds in sub-section (1A) are concerned that is why they fall in a somewhat separate category. In other words the concept of matrimonial wrong or disability as furnishing a ground for divorce, although it continues to exist so far as Section 13(1) is concerned, stands excluded so far as the grounds in Section 13(1A) are concerned.

54. As Nain J. has tersely put it (to which I will again revert) at page 498 = (57 of AIR): - "..... the enactment of Section 13(1A) in 1964 is a legislative recognition of the principle that in the interest of society if there has been a interest of society if there has been a breakdown of the marriage there is no purposes in keeping the parties tied down to each other".

56. Before making the above observation Nain J. had earlier in the same case observed as follows:-

"The ground for the granting of the relief of judicial separation is the matrimonial offence or wrong of cruelty whereas the ground for the granting of the relief of divorce is that after the passing of the decree for judicial separation there has been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards. The reference in that case is to an existing state of affairs between the parties to the marriage that is that there has been no resumption of cohabitation between the parties for two years or upwards. The reference is not to a matrimonial offence or wrong committed by a party".

57. The scope and content of Section 13 of the Act has been very lucidity explained by Nain J. in the same case and I can do no better than reproduce the relevant passage, which appears at page 499 = (58 of AIR).:-

"Under Section 13(1) of the Hindu Marriage Act the Court may grant divorce either on account of a specified matrimonial offence a disease or a party to the marriage not being heard of for a period of seven years, which may be due to no fault of his as where he might be a prisoner of war. The matrimonial offence for which divorce may be granted are habitual living in adultery, conversion to another religion or renunciation of the word, such as entering into Sanyasa. The last three would be acts of volition of a party to the marriage and may conveniently be called matrimonial offences.

Prior to the amendment of the Hindu Marriage Act in 1964 there were two more grounds on which the Court could grant divorce but only at the instance of the wronged party. Those grounds were that the party against whom a decree for judicial separation had been passed had not resumed cohabitation for a space or period of two years or that the party against whom a decree for restitution of conjugal rights had been passed had failed to comply with the decree. These grounds were contained in Section 13(1) (viii) or (ix) respectively. These provisions have however been repealed and instead Section 13(1A) has been enacted which gives a right not only to the party in whose favour the decree for judicial separation or restitution of conjugal rights has been passed, but also to the other party against whom such decree has been passed to apply for divorce. If the decree is for judicial separation all that is required is that there should have been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards. If the decree is for restitution of conjugal rights all that is required is that there should have been no restitution of conjugal rights for a period of two years or upwards. Section 13(1A) refers to existing

state of affairs and has no reference to a wrong committed by a party to the marriage or by whom the wrong is committed. This provision is totally different from the provision of Section 13(1) (viii) and (ix) which gave the right to apply for divorce only to the wronged party and not to be wrong doer....."

58. There is no doubt that what Section 13(1A) postulates is that the judicial separation factually continues or in the case of a decree fro restitution of conjugal rights, restitution of conjugal rights has to taken place. To bring into these additional grounds for divorce the further consideration as to who was at fault in relation to the original matrimonial offence on the basis of which the decree for judicial separation or restitution of conjugal rights was passed is to read more into Section 13(1A) than it contains.

59. If the ground for judicial separation is desertion, then it would be unrealistic to suggest that even after the decree the matrimonial offence or wrong of desertion continues. If the ground for judicial separation was cruelty, then again it would be un reaslitice to suggest that the matrimonial wrong or offence of cruelty continues in so far as there is no assurance forthcoming from the spouse that he or she will no longer be cruel and will henceforth treat the aggrieved spouse with utmost consideration and in full compliance with marital obligations.

60. It may be noticed that one of the grounds on which the decree for judicial separation can be passed under Section 10 of the Act is also that the other party has after the solemnising of the marriage had sexual intercourse with any other person than his or her spouse. Now, this is obviously a matrimonial wrong or offence but can it be said with any show of reason or logic that that wrong continues; that even after the decree for judicial separation has been passed it would-be obligatory upon the defeated spouse to come for there with an assurance and declaration that he would sin no more.

61. In my opinion, on a correct view of the effect of a decree for judicial separation it should be clear that once a decree has been passed the matrimonial wrong or offence on which it was based exhausts itself. It would not be open to the parties to look back after the Court has pronounced its judgment and determined that one of the parties was guilty of a matrimonial offence on the basis of which either a decree for judicial separation or a decree for restitution of conjugal rights has been made.

62. It is necessary at this stage to consider the effect of a decree for judicial separation on the matrimonial rights and obligations of the parties to the marriage. As stated above we asked the learned Advocates for the parties to address us on this very question, because, in our view the decision in the instant case would depend on an ascertainment of the rights and obligations k of the parties to a Hindu marriage and in particular. the effect of the decree for judicial separation on such rights and obligations.

63. There is no doubt that the tie of marriage grants certain rights to the parties and also places certain obligations on them. This is particularly so in the case of a Hindu marriage.

64. It has been contended that the expression "it shall no longer be obligatory for the petitioner to cohabit with the respondent" would suggest that only the petitioner is absolved from the marital obligation by reason of the decree for judicial separation having been passed in favour of the petitioner and further that by implication the respondetn is nt so relived of his or her obligation to cohabit with the petition.

65 Now, the effect of a decree for judicial separation is only this; it puts the marriage so to say, in cold storage without dissolving it there and then. In other words there is a suspension and as Section 10(2) says the petitioner is absolved from the obligation to cohabit. It would, therefore, on principle and authority follow that after such a decree has been passed by the Court the obligation of the petitioner to cohabit with the respondetn is suspended and on a logical follow up it would come to this taht the right of the respondent would also be suspended.

66. It is appropriate at this stage to reproduce herein Section 10(2) of the Act, which is as follows :-

"(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondetn, but the Court may, on the application by petition of either party and on begin satisfied of the truth of the statements made in such petition rescinded the decree if it considers it just and reasonabel to do so".

67. There is no substance therefore in the contention that because after a decree for judicial separation has been passed the marriage continues the marital obligation to cohabit also continues but only the petitioner's obligation is suspended. In my opinion, the expression "it shall no longer be obligatory for the petitioner to cohabit with the respondent" can, on a fair and correct interpretation only mean that the petitioner having obtained an order of separation from the Court is protected from the overtures of the respondent and both parties are relieved of the obligation to cohabit. Now, it will be noticed that a defacto separation would obviously not protect the petitioner from the unwelcome attention or overtures of the respondent. An illustration has been furnished by the case of Ry v. Clerk 1949-2 All ER 448 where a husband forced his attention on an unwilling wife even though she had obtained an order for separation. Sub-section (2) of Section 10, it would, therefore, appear to me is designed to protect the petitioner after he or she has sought the intervention of the Court and in having established any of the ground available obtained a decree for judicial separation. There are innumerable cases where on a failure of their marriage the husband and wife have lived apart for several years without having had to go to the Court to obtain a decree for judicial separation.'

68. It is significant that the learned commendatory of Mulla's Hindu Law 13th edition at page 647 has made the following observation as to the effect of a decree for judicial separation under the Hindu Marriage Act, 1955:-

"A legal or judicial separation permits the parties to a marriage to live apart Sub-section (2) in terms states that where a decree for judicial separation has been passed it shall no longer be obligatory for either party to cohabit with the other. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed

by the decree are substituted therefor. The decree does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity for reconciliation and adjustment. It may fall by a reconciliation of the parties in which case the rights of respective parties which flowed from the marriage and were suspended are restored. Where there is no reconciliation and cohabitation's not resumed, it serves after two years of the passing of it as the basis for the dissolution of the marriage by a decree of divorce (Section 13(1A)".

69. It is true that a commentary in a text book is not binding on the Court but when it is to be found in a learned treatise on a relevant law it can and does have persuasive value in so much as it demonstrates that the view of the jurist and that of the Court coincides.

70. In my opinion the effect of a decree for judicial separation would be that once a decree has been passed the matrimonial wrong or offence on which it was based whether 'desertion' or 'cruelty' etc. exhausts itself and it would not be open to the parties to look back (after the Court has pronounced its judgment and determined that one of the parties was guilty of a matrimonial offence such as desertion) and to say that the matrimonial offence of desertion continues. The correct view would be that once a decree has been passed the matrimonial offence of desertion (with which we are concerned in the instant case) would come to an end .

71. I am supported in this view by a statement in halsbury's laws of England, 3rd edition. Volume 12. Para 500 at page 263, and para 511 at page 267 to the effect taht a decree for judicial separation terminates the desertion during the continuance of the decree.

72. There is authority for the proposition that after a decree for judicial separation has been obtained by a spouse then it shall be no longer obligatory for either party to cohabit with the other and it follows that neither party shall be under obligation to make an attempt to come back to his spouse and resume cohabitation. It would not be obligatory for a husband against whom the wife has obtained a decree for judicial separation on the ground of desertion to make efforts to obtain reconciliation or reunion and resumption of cohabitation. Looked at form the point of view of common report as to what is human nature it would on principle and authority follow that after such a decree it could not be legitimately expected that the respondent, whose matrimonial wrong has led to the decree for judicial separation and against whom an order has been so made would suddenly acquire angelic qualities and seek to atone for his former sins by making sincere and bona fide attempts to undo or reverse the wrong on the basis of which the decree for judicial separation was obtained against him. It would indeed be illogical to say that the law expects from a spouse who has deserted the other, sincere attempts to obtain reconciliation after a decree for judicial separation has been passed, while it does not expect the same conduct from him or her before the decree for judicial separation is passed.

73. The case of Harriman v. Harriman, 1909 P 123 is in point on the question whether it could be said that a respondent to a decree for judicial separation was under an obligation or duty to make attempts to reverse the wrong that he or she has done and obtain or at least make sincere efforts to obtain reconciliation and take his or her spouse back. In that case it was held by the Court of appeal that the effect of the non-cohabitation clause in the Magistrate's order (which provision had the

effect, in all respects of a decree for judicial separation) was to prevent the continuance of the desertion after the date of the order.

74 It is appropriate to refer to the relevant observations of some of the Judges, who decided that case. Cozens Hardy M. R. said:

"But in my opinion it is impossible that the petitioner who in March 1906 obtained an order that the should no longer be bound to cohabit with her husband can be allowed, in the absence of any further evidence on her part to say that her k husband's desertion continued after that date".

75. Fletcher Moulton L. J. made perhaps the most pertinent observation on the point in question and this is what he said.

"..... But that order also contained the following provision in its cooperative part: - 'And it is ordered that the said applicant to no longer bound to cohabit with her husband the said defendant'. It appears therefore, that at the request of the petitioner the Court made an order which if valid and effective took away from the respondent the right to cohabitation. If that order was valid, there is to my mind, no possible doubt that desertion by the husband in the legal sense of the term ceased at the date. It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has nt the right to cohabit....."

76. Farwell L. J. said:

"But I fail to see how a husband who is prevented by the order obtained by his wife from ..... returning to live with her can be said to have deserted her; the wife who has rejected her husband can not call herself deserted by him....."

77. Kennedy L. J. said:

"How can a husband be aid to be deserting his wife 'without case or "without reasonabel excuse' so long as his wife has obtained an order which is still on foot and which debars him from returning to her? How can he be bound to cohabit, if she is not".

78. In Robinson v. Robinson , 1919 P. 352, the case of Harriman v. Harriman 1909 P. 123 (Supra) came up for consideration and Horridge J. made the following observations:-

"I think the effect of the section which makes the order equal to a decree for judicial separation does away with the duty of either spouse to cohabit with the other".

79. It may be stated that one of the learned Judge in Harriman v. Harriman, Buckley L. J. had made an observation that-

"I do not at all intend to decide that the existence of a non-cohabitation order precludes the possibility of proving desertion continuing after its date". This observation was not approved in 1919

P. 352 (supra) .

80. Some time in 1940 the decision in 1909 P. 123 (supra) was approved by the House of Lords in (1940) 2 All ER 331, and Lord Romer, who spoke for the Court referred to it in the following manner (at p. 337).

"1909 P. 123 was decision of the full Court of Appeal given in these circumstances. A husband deserted his wife in July, 1909. In March 1906 the wife obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, Section 5, that her husband should pay a weekly sum for her support, but the order contained a provision under Section 5 (a) of that Act that the wife should no longer be bound to cohabit with her husband and this provision, by virtue of the sub-section had the effect of a decree of judicial separation. In Dec. 1907, the wife presented a petition for dissolution of the marriage on the grounds of the husband's adultery and desertion for 2 years without reasonabel excuse. It was held that the effect of the non-co- habitation clause was to prevent the continuance of the desertion after the date of order. There had been a decree, or what was equivalent to a decree of the Court in the face of which it was out of the question that the husband should make any attempt to return to the matrimonial domicile".

81. Later on in the same case Lord Romer, while discussing Lapington v. Lapingtion, (1888) 14 P. D. 21, said :-

"..... for the decree of judicial separation which he was ready to grant would necessarily bring the desertion to an end, in accordance with the decision in 1909 P. 123".

82. Mr. Thacker, the learned Counsel for the respondent has contended that the decision in 1909 P. 123 was no authority that the desertion ends as soon as a decree for judicial separation is passed. According to him, the decision was 3 to 3 and at least 2 of the learned Judges had countenanced the argument that evidence could be led to show that the husband against whom the separation order had been passed was staying away from the wife not because there was an order against him but because his intention was to desert and to continue to desert.

83. Now in view of the summary of the decision in 1909 P. 124 as made by the House of Lords in Cohen v. Cohen, it is difficult to agree with Mr. Thacker that the case of Harriman v. Harriman is not an authority on the point that desertion comes to an end on the passing of a decree for judicial separation. It is not necessary to deal with the question of any evidence being taken by the Court to ascertain the reason for the husband remaining away from the wife, as it is not relevant for the present purpose. In deed in the case before us there is no such evidence and the point therefore becomes academic.

84. Mr. Thacker also sought to show that there was a difference between the concept of judicial separation as obtaining in England and that under the Hindu Marriage Act of 1955. We are unable to agree that such is the case. As a matter of fact any idea of judicial separation of marriage was unknown in relation to Hindu marriage and it is only after legislation in that behalf in the form of the Hindu Marriage Act and other Acts which were passed substantially on the English concept of a

legal separation between husband and wife that the right to judicial separation has been given to a Hindu spouse.

85. Before going on to discuses the effect of the legal position as it obtains on the facts o the case before us, it may be appropriate to consider section 23(1)(a) of the Act.

86. It would appear that there are two views and some conflict of judicial opinion as to the effect of Section 23(1)(a) of the Act on the granting of a decree for divorce.

87. One view is that even though the grounds contained in Section 13(1A) do not refer to any matrimonial offence or wrong as such (unlike some of the grounds for divorce contained in S. 13(1) the two grounds in Section 13(1A) do not confer an absolute or unrestricted right on a party to obtain a decree for divorce. It is therefore contended that it would be perfectly open to the Court to consider whether the provisions of Section 23(1)(a) are satisfied before granting a decree for divorce.

88. In (supra) , this Court has held that in a petition filed under Section 13 (1A) of the Act not only is it open to the Court to consider whether the provisions mentioned in Section 23(1) of the Act are satisfied but the Court is under an obligation to consider that question. Section 23 is in the nature of an overriding provision not only for the reason that it governs "any proceeding" under the Act but for the more important reason that it provides that it is only if the conditions mentioned in sub section(1) are satisfied "but not otherwise" that the Court shall decree the relief sought.

89. The other view is that Section 23 would have no application since the legislature must have had the section in mind and nevertheless chose to introduce sub-section (1A) in Section 13 by the Hindu Marriage (Amendment) Act of 1964. The argument is that when the very ground for divorce is the continuance of the judicial separation granted by the same Court there is no reason why considerations contained in Section 23(1)(a) should be imported. Now the language of Section 23(1) including the words "in any proceeding under this Act" go to show that Section 23 must apply even to a petition for divorce on the grounds contained in Section 13(1A). which petition is undoubtedly a proceeding under this Very Act. Indeed if the legislature wanted to exclude the operation of Section 23 for the grounds contained in Section 13(1A). it could very well have said so.

90. As held by this Court in (supra). "there can be little doubt that in granting relief under Section 13(1A) the Court will and must take into consideration Section 23(1)."

91. In my opinion, if attention is focused on the nature of the wrong or disability which the Court is required to take into account for "the purpose of such relief. i.e. the petition on the grounds contained in Section 13(1A), then it will be noticed that there is no real conflict between the two view i.e. as to whether Section 23(1) of the Act will apply or not if regard is to be had to the fact that Section 13(1A) refers to an existing set of facts, that is to say in the case of judicial separation that there has been no resumption of conjugal rights that in fact there has been no restitution. If that is so, then a reference to what I might describe as the earlier matrimonial offence or wrong on which the decree for judicial separation or restitution of conjugal rights was passed would be unwarranted. It would only be the conduct (if any) of the petitioner after the passing of the decree for judicial

separation or restitution of conjugal rights forming the ground for the petition of divorce the would have to be taken into consideration for the Court to satisfy itself that the petitioner is not in any way taking advantage of his or her own wrong and/or disability for the purpose of such relief, that is to say, for the purpose of the petition for divorce. I am supported in this view by the observations of nain J. in (Supra). where he states at page 497 = (56 of AIR):

"It is the conduct of the petitioner after the passing of the decree for judicial separation that has to be taken into consideration for deciding whether the petitioner is or is not taking advantage of his own wrong and that such a wrong or disability must be for the purpose of such relief as the petitioner wants in the petition for divorce."

92. It is thus to be noticed that when a petition for divorce is based on either of the two grounds mentioned in Section 13(1A). Section 23(1) will apply and it would be the duty of the Court to satisfy itself that not only does the ground for granting the relief for divorce exists but that the petitioner is not in any way taking advantage of his or her own wrong or disability, if any, for the purpose of the relief of divorce. But the scope of Section 23(1)(a) in relation to the grounds for divorce, as contained in Section 13(1A). must in my opinion, of necessity any logic be somewhat limited. It is not possible to envisage what kind of wrong or disability would have to be taken into consideration. Human ingenuity being what it is there is no doubt that many cases will arise where notwithstanding that a ground for divorce exists, there may be something in the conduct of the petitioner which be so reprehensible that the Court would deny to such a petitioner the relief by way of divorce on the consideration that the petitioner was taking advantage of his or her own wrong.

93. Our attention has been drawn to judgments of the various High Court on the question whether Section 23(1)(a) of the Act is attracted to a petition for divorce on the grounds contained in for Section 13(1A) of the Act. They are, Ishwar Chander v. Pomilla anluwalia . Syal v. Ssyal , Shanti Devi v. Ramesh Chandra and Tej Kour v. Hakim Singh AIR 1965 J & K 111.

94. In (supra) also there was a decree for restitution of conjugal rights and it was held that it was the husband who wanted to end the marriage and that the proceedings adopted by the husband were from the very start with a view to end the marriage.

96. In the Jammu and Kashmir case, which was under Section 13(1) (viii) the wife was granted a decree for judicial separation even though the husband was anxious to resume cohabitation with his wife but was prevented from doing so by his incarceration in jail. It was held that the wife was entitled to a decree for divorce. It is to be noticed that Section 23(1)(a) of the Act has not even been referred to and, therefore, this particular case cannot be of any help to either of the parties.

97. As I have stated above, it is possible that different considerations may arise where the ground for divorce is that contained in Section 13(1A) (ii), but we are not directly concerned with that aspect in the present case.

98. In the light of the state of the law setup I shall now proceed to consider the facts of this case and the contentions raised by the parties. As stated by me. the central question is whether there was an

obligation on the appellant to make efforts to obtain a reunion with the respondent notwithstanding the decree for judicial separation having been passed against him in 1963 and further whether by not doing so he could be said to be taking advantage of his own wrong, when seeking the relief of divorce.

99. It has already been stated that the learned trial Judge of the City Civil Court held that the relief could not be granted to be appellant because he had failed to make attempts to obtain a reunion with the respondent after the decree for judicial separation was passed in 1963. The learned Judge of City Civil Court framed an issue which, according to him, was the only issue which arose in the case before him and the issue is in the following words:-

"Whether in seeking a dissolution of his marriage with the respondent by a decree for divorce on the grounds mentioned in his petition the petitioner seeks to take advantage of his own wrong"

100. The learned Judge of the City Civil Court then went on to analyse the evidence of the petitioner who it may be noticed was the only witness. as the respondent did not choose to step into the box or lead any evidence on her behalf. It would appear that the appellant made a statement in his evidence before the City Civil Court in which he stated that "I am not prepared to take my wife to live with me. I do not want to take her back because she has been separated from me by a decree of the Court." The learned Judge on the basis of this statement and nothing else came to the conclusion that the petitioner had by not making any efforts to obtain a reunion with the respondent and by stating that he did not want to take her back had committed a matrimonial wrong even after the passing of the decree for judicial separation in favour of the respondent on the 6th of November 1963. The learned Judge of the City Civil Court held that "the absence of co-habitation is attributable directly to the conduct of the petitioner. It was his obligation by virtue of the subsistence of the marriage and to go and live with the wife. He has admittedly made no attempts to do so and has stated in his evidence that he does not with to take his wife even today." On this finding the learned Judge of the City Civil Court came to the conclusion that the petitioner was taking advantage of his wrong and dismissed the petition.

101. In the appeal from the order which appeal, as stated above, was also dismissed by a Single Judge of this Court (Gatne J.) on the 12th of October 1971, the learned Single Judge on the basis of the statement made by the appellant which has been quoted above and on the contention raised by the respondent in her written statement, that she was always willing to live under the roof of her husband, made the following observations:-

"The position, therefore, is that a decree for judicial separation has been passed against the husband on the ground of his being guilty of desertion. That decree was therefore necessitated by a wrong done by the husband himself. Even after that decree has been passed, the same wrong has continued because the husband has admittedly made no attempts to bring about a reunion with his wife. If in these circumstances the learned Judge came to the conclusion that the husband was taking advantage of his own wrong, it is difficult to find fault with that conclusion.

102. Reliance was placed on the decision of this Court in (supra). But it is clear that that came is only authority for the proposition that defiance of a decree for restitution of conjugal right was a wrong for the purpose of Section 23(1)(a) of the Act. It is in my view, not an authority for the proposition that even after the decree for judicial separation the respondent husband is under a martial obligation not only to cohabit but also to make genuine and persistent efforts to obtain a reunion.

103. It is obvious that the decision of the learned Judge of the City Civil Court, as confirmed by the Single Judge of this Court, proceeds on the footing (in my view erroneous) that the decree for judicial separation having been passed against the appellant by reason of his own wrong (i.e) desertion, it was the duty of the appellant to remedy that wrong in order to entitle him to a petition for divorce, otherwise it would be said that he was taking advantage of his own wrong. I am afraid. that such a construction is neither warranted by the language of the relevant sections nor by principles.

104. As discussed above, the correct view is that after a decree for judicial separation is passed the desertion terminates and there can be, therefore no continuation of that matrimonial wrong of desertion after the passing of the decree. No obligation to remedy the wrong which led to the passing of the decree for judicial separation or restitution of conjugal rights can be spelled out against the defeated spouse either from Section 13(1A) or from Section 23(1)(a) of the Act. The grounds in Section 13(1A). as already stated by me, pertain to the state of affairs or a factual position without any element of default or failure by either party.

105. If a husband or a wife is not prepared to take back his or her spouse (as he or she was to begin with when he or she deserted his or her spouse before the decree for judicial separation) after the decree, then it can only mean that the prior matrimonial, offence or wrong was not reversed or remedied. It stands to reason that the decree for judicial separation both the husband and the wife back, would be his duty to do after the decree for judicial separation, both the husband and the wife are entitled to live separately (and in a majority of cases peacefully), as per the orders of the Court and they are, in my opinion, in no way obligated to resume cohabitation or to make overtures to each other, although it can be said that there is nothing in a decree for judicial separation which would prevent the parties, if they are so minded., to be reconciled to each other and to resume cohabitation, if they choose to do so. The only result of such resumption of cohabitation would be able to take recourse to the grounds contained in Section 13(1A) for obtaining a divorce if they should unfortunately, fall out again.

106. It requires to be stated that I am in respectful agreement with the observations of nain J. in (supra) that the amendment of Section 13 in 1964 by deleting clauses (viii) and (ix) of Section 13 of the Act and substituting sub-section (1A) recognized the modern trend that even in Hindu Society which has always been somewhat conservative, the time had come when it was unrealistic insist on continuing the marriage which had failed and it would be more in the interest of Society to dissolve such a marriage than to maintain the farce of a union which had broken down and, in spite of the lapse of a certain period of time, was beyond redemption. There is also recognition of the fact that the marriage, having irretrievably failed it was immaterial to considers to which of the two parties to the marriage was initially to be blamed.

107. Read in this light, it becomes at once clear that any other construction of Section 13(1A) would largely negative the beneficial aspects and the reform in the divorce law brought about by the Amendment Act of 1964. For instance, can it be said that a spouse against whom a decree for judicial separation or restitution of conjugal rights had been passed can never invoke Section 13(1A) and apply for dissolution of the marriage unless he or she had made efforts for a reconciliation which he or she in all sincerity and truthfulness did not wish to do.

108. At the best of times the state of the law of divorce and separation in any country can never be satisfactory. Constant change are required if the law is to be in tune with the times, so that the law as it exists from time to time is often full of inconsistencies, anomalies and inequalities. If, therefore, the construction, as sought for the respondent was to be placed on the relevant provisions of the law, then it would only have the undesirable effect of putting a premium on pretense and untruthfulness so that by resorting to falsehoods a petitioner would avoid the effect of Section 23(1)(a) on his or her case. If it was to be insisted upon that even after the marriage has practically broken down and an order for judicial separation has been made, or for, that matter a decree for restitution of conjugal rights then the petitioner would have to go throughout the reconciliation, otherwise the Court would not be able to bring to an end an unhappy and ill-starred union.

109. It is true that the decision of this Court in (supra) was based on the fact that the petitioner had defied a mandate of the court by wilful non-compliance of a decree for restitution of conjugal rights. It can never be unreasonable to say that defiance of a Court's order is, at all times, to be deprecated and frowned upon. But viewed in the light of modern society, it would perhaps not be very realistic to expect a wife or a husband for that matter to resume cohabitation under the threat of a decree.

110. In my view, the only effect of a decree for restitution of conjugal rights is to fix the blame on the party primarily responsible for the break down of the marriage and then provide a period for reflection with the hope that a marriage which had foundered may still be redeemed. But once the parties have reached a stage of the ground contained in Section 13(1A)(ii) it will require to be considered by the Court that a point of no return may have been reached, at which stage a consideration as to who was to blame becomes irrelevant.

111. It may be noted that whether non-compliance of a decree for restitution of conjugal rights is a wrong which can be taken into consideration for the purpose of Section 23(1) of the Act is also a matter on which there is some difference of judicial opinion.

112. This High Court in (supra) has held it to be so. But another High Court has held that failure to perform a decree for restitution of conjugal rights per se without more does not disentitle a spouse to relief under Section 13(1A)(ii) of the Act.

113. It is not as a rule wise to express any opinion on points which are not strictly necessary to the decision of a case. In the case before us there is a decree for judicial separation and the ground for divorce is under Section 13(1A)(1). It is, therefore, not necessary to consider the effect of Section 23(1) when a decree for restitution of conjugal rights has made the ground for divorce.

114. Now, as held by us, if there was no obligation on the appellant to make any efforts to resume cohabitation with the respondent then the finding by the learned Judge of the City Civil Court, as confirmed by the single Judge of this Court, that the appellant by reason of his failure to take steps to bring about a reconciliation with his wife was taking advantage of his own wrong is clearly erroneous and cannot be sustained.

115. It is to be noticed that there was no dispute whatsoever that after the decree for judicial separation dated the 6th November 1963 there had been in the words of section 13(1A) is, therefore, satisfied and the appellant was clearly entitled to a decree for divorce.'

116. It is also to be noticed that no other "wrong" was attributed to the appellant, other than his so-called obligation to obtain a reconciliation.

117. In the result this appeal must be allowed and the order and judgment of the learned Judge of the City Civil Court and that of the Single of this High Court must be set aside.

ORDER OF THE COURT

118. Appeal allowed, decree of the City Civil Court and the Single Judge of this Court set aside. Petition made absolute. In the circumstance of the case there will no order as to costs throughout.

119. Appeal allowed.