Rajasthan High Court
Santosh Acharya (Smt.) vs Narsingh Lal on 13 November, 1997
Equivalent citations: I (1999) DMC 121, 1998 (2) WLC 12, 1997 (2) WLN 646
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Bench: N Tibrewal, B Chouhan
JUDGMENT N.L. Tibrewal, J.

1. The wife-Smt. Santosh has filed this appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter to be referred to as the Act) being aggrieved by the judgment and decree of divorce, dated April 29, 1997 passed by the learned District Judge, Jalore, under Section 13(1-A) of the Act on the ground of non-compliance of the decree of restitution of conjugal rights for a period of more than one year.

2. The factual position does not appear to be in dispute. The marriage between the parties was solemnized according to Hindu custom and rites in the year 1970, and they lived at Jalore. From their wedlock there is no issue. In the year 1980, the wife went to her parent's house at Bikaner and when she did not return to her matrimonial home, the husband-respondent filed a petition in the Court of District Judge, Jalore for restitution of conjugal rights under Section 9 alleging that the wife had fully deserted him without any lawful excuse. This petition was filed on April 27, 1987 and a decree for restitution of conjugal rights was passed on 16.2.1988. Even after passing of the aforesaid decree, the wife did not join the husband and when there was non-compliance of the decree of restitution of conjugal rights for a period of more than one year, the husband filed the petition on 17.5.1989 for dissolution of marriage. The petition was contested by the appellant-wife before the District Judge. In her reply to the petition for dissolution of marriage, it was pleaded, inter-alia, that the respondent's behaviour with her had been inhumane as he used to beat her and treated her with cruelty which compelled her to leave matrimonial home in January, 1978 to live with her parents at Bikaner. She also stated that she was always willing to live with the husband, but still he performed a second marriage on 5.8.1981 with one Smt. Nirmala daughter of Dev Kishan Acharya of Barmer. It was, then pleaded that she had filed a criminal complaint against the respondent at Bikaner for committing offences under Sections 494,114 and 120b, Indian Penal Code wherein he was convicted and punished. For the decree of restitution of conjugal rights it was stated to have been obtained by the respondent ex-parte after getting service effected on her in a wrong manner, though it was admitted that there has been no resumption of marital relations after passing of the decree.

3. On pleadings of the parties, following six issues were framed by the Trial Court:

(1) Whether petitioner Narsingh Lal (husband) filed a suit for restitution of conjugal rights against the wife Smt. Santosh and a decree of restitution of conjugal rights was passed therein ?

(2) Whether after passing of decree, the wife did not resume marital relations with the husband for more than one year on account of which he is entitled to get a decree of divorce by dissolution of marriage ?

(3) Whether behaviour of the husband was inhumane with the wife as he used to beat her and commit other cruelties on her; gave her beating in the year 1977 which compelled her to leave her matrimonial home in January, 1978 ?

(4) Whether on 5.8.1981 the petition performed second marriage with one Nirmala daughter of Dev Kishan Acharya of Barmer ? If so, what shall be the effect ?

(5) Whether the wife was not bound by the decree of restitution of conjugal rights passed against her ?

(6) What should be the relief ?

4. After recording evidence of the parties, the Trial Judge decided issue Nos. 1, 2, 3, 5 and 6 in the favour of the husband and issue No. 4 was decided in favour of the wife vide judgment, dated April 29, 1997 and passed the decree of divorce in favour of the husband-respondent.

5. Mr. A.K. Rajwanshi, learned Counsel for the appellant, challenged the decree of divorce on several grounds. First and the foremost attack is that the appellant-wife was not bound by the decree for restitution of conjugal rights as it was an ex-parte decree and the same has been obtained by the husband without due service. Another important contention of Mr. Rajwanshi is that the husband cannot be allowed to take advantage of his own wrong as the appellant-wife was compelled to leave matrimonial home in the year 1978 on account of beating, inhuman and cruel treatment to her. Lastly, it was contended that the wife was/is ready and willing to join the husband but he never asked her to live with him and resume marital life and on the contrary, he is keeping a second wife after solemnizing second marriage in the year 1981 and children are borne from the second wife. For this, learned Counsel further contended that the husband has been convicted under Section 494, Indian Penal Code by the Trial Magistrate and the said conviction is still in force.

6. We have given our careful consideration to the above submission. We also minutely scrutinized the judgment under appeal and perused the record of the Trial Court.

7. Before dealing with the submissions made by Mr. Rajwanshi, we would like to consider the purpose and scheme of Section 13(1-A) of the Act under which the decree for divorce has been passed for non-compliance of the decree of restitution of conjugal rights in statutory period. Section 23(1) also requires consideration as much stress has been laid by Mr. Rajwanshi against the conduct of the husband, which according to him, disentitles him for grant of relief in his favour.

8. There is no dispute that the parties are Hindus by religion and the Hindu Marriage Act, 1955, as amended from time to time, is applicable to them, which codifies the law relating to marriage amongst Hindus. Section 9 provides passing of a decree of restitution of conjugal rights in favour of the husband or the wife in case the other spouse, without reasonable excuse, withdraws from his/her society. Similarly, Section 10deals with passing of a decree of judicial separation on any of the grounds specified in Sub-section (1) of Section 13. Section 13 then deals , with passing of a decree of divorce by dissolution of marriage on the grounds enumerated in the section. By the Hindu

Marriage (Amendment) Act, 1964, Clauses (viii) and (ix) of Sub-section (1) of Section 13 were substituted by Sub-section (1-A). The distinctions made by the aforesaid amendment lay primarily in the fact that while under the original provision only the decree-holder in the earlier proceedings for judicial separation or restitution of conjugal rights, as the case may be, could apply for divorce against the judgment-debtor in that earlier proceeding while such judgment-debtor had not resumed cohabitation for two years or more since the passing of the decree for judicial separation or had failed to comply with the decree for restitution of conjugal rights passed against him/her for two years or more.

9. On the other hand, under the provisions made in 1964, either party to an earlier proceeding for judicial separation or restitution of conjugal rights, as the case may be, could apply for divorce on the ground that there has been no resumption of cohabitation between the parties for a period of two years or more, after the decree of judicial separation or that there has been no restitution of conjugal rights as between the parties after the decree for restitution of conjugal rights. The period of two years has been reduced to one year by the 1976 amendment. It may be emphasised that under the new provision, even the judgment-debtor of the earlier proceeding may apply for divorce and get a decree on proof of the mere fact that the separation between the parties and continued for an year or more after the earlier decree and inspite of it, irrespective of the fact that he/she has done nothing to up do that wrong even after the decree therein.

10. For the sake of convenience Section 13(1-A) with which we are concerned as it stands today after 1976 amendment, may be reproduced as under:

"13(1-A). 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 (one year) 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 (one year) or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

11. A bare perusal of Section 13(1-A) would show that in addition to grounds provided for in Section 13(1) either party to a marriage may also present a petition for the dissolution of the marriage by a decree of divorce on the ground enumerated in Clauses (i) and (ii). Under Clause (ii), a decree of divorce can be passed if there has been no restitution of conjugal rights between the parties to the marriage for a period of one year or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties. This section further makes it clear that such petition for divorce can be made even by the party against whom a decree of restitution of conjugal rights has been passed and which has been found guilty in the earlier proceeding for having withdrawn from the society of the other aggrieved party without reasonable excuse.

12. Matrimonial disputes, in fact, are complexed social and psychological problems. In view of the recent trend in the society and in order to meet out the hardship in cases of irretrievable break down of marriage, the object of this provision brought in by the Amendment Acts of 1964 and 1976 was merely to enlarge the right to apply for divorce. The legislative policy and intention is clear and it is to make divorce liberal and easy for parties whose marriages have broken down irretrievably as evidenced by the fact that there has been no resumption of cohabitation or restitution of conjugal rights within the prescribed period.

13. Thus, Section 13(1-A) provides special remedy for obtaining divorce by either party on cases of non-compliance of a decree for a period of one year after decree of restitution of conjugal rights.

14. It will also be fruitful to refer to Section 23(1)(a) of the Act which disentitles the petitioner of a relief by taking advantage of his or her own wrong or disability. It reads as under :

"Decree in proceeding.--(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied--

(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..."

15. Section 13(1-A) has not been taken out of the purview of Section 23(1)(a) which has been in the Statute Book from the commencement of the Act of Section 13(1-A) which was introduced by way of amendment in 1964. Hence, undoubtedly, the provision of Section 13(1-A) is subject to the provisions of Section 23(1)(a) of the Act and in granting relief under this provision, the Court will and must take into consideration the conduct of the petitioner subsequent to the passing of the decree of conjugal rights and not granting relief to a party who is taking advantage of his own wrong. In view of the fact that even the judgment-debtor in the decree for restitution of conjugal rights and who has been found to be guilty in the earlier proceedings of restitution of conjugal rights, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground enumerated in Section 13(1-A) and the fact that Section 23(1)(a) has no reference to remedying the wrong which led to the decree for judicial separation or restitution of conjugal rights, the conduct of the petitioner subsequent to passing of the decree of conjugal or judicial separation, as the case may be, is only relevant to disentitle him for grant of relief on the ground of his taking advantage of his own wrong or disability. There is no obligation on the decree-holder to appeal to the spouse to return to the matrimonial home for restitution of conjugal rights once a decree for restitution of conjugal rights is passed under Section 9 of the Act. He is also not required to take any step for restitution of conjugal rights. The provisions further make it dear that there is no scope to embark on an enquiry whether there was some reason for the wife not to obey the decree for restitution of conjugal rights. Similarly, reluctance of the husband in taking back his wife for restitution of conjugal rights cannot be termed as 'wrong' which would disentitle him to obtain a decree of divorce under Section 13(1-A).

16. In Bimla Devi v. Singh Raj, AIR 1977 P&H (FB) 167, O. Chinappa Reddy, J. (as he then was), has considered the laws as under:

".. .Even if Section 23(1)(a) is to be held to apply to proceedings in which relief is claimed under Section 13(1-A), the wrong or disability referred to in Section 23(1)(a) must be construed to be a wrong or disability other than the mere non-resumption of co-habitation or the mere non-restitution of conjugal rights which forms the basis of relief under Section 13(1-A). To probe into the question as to who was responsible for the non-resumption of cohabitation or non-restitution of conjugal rights and to deny relief on the ground that the petitioner was the guilty party would be to nullify the very object of the 1964 amendment, (at page 178). It is true that if Section 23(1)(a) is applicable to proceedings based on Section 13(1-A), it is difficult to visualise what wrong other than non-resumption of cohabitation or non-restitution of conjugal rights can preclude relief. But failure, at present, to contemplate such a situation is neither here nor there, since one cannot pre-empt all future situations."

17. In the case of Dharmendra Kumar v. Usha Kumar, AIR 1977 SC 2218, the wife had obtained a decree for restitution of conjugal rights. After a little over two years after passing of the decree, she presented a petition for dissolution of marriage by way of decree of divorce under Section 13(1-A)(ii) of the Act on the ground that there was no restitution of conjugal rights. The husband took the plea that the wife did not respond to his attempts to comply with the decree for restitution of conjugal rights which were made by him by writing several registered letters to the wife and otherwise inviting her to live with him. On these facts it was argued that the wife having herself prevented the restitution of conjugal rights, she was not entitled to a decree of divorce as it would mean to allow her to take advantage of her own wrong. The Supreme Court approved the view taken by the Delhi High Court in Ram Kali v. Gopal Das, ILR (1971) 1 Delhi 6, and Gajna Devi v. Purshottam Giri, AIR 1974 Delhi 178, and observed as under:

"...Therefore, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should not be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a "wrong' within the meaning of Section 23(1)(a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of which, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled."

18. The decision of Supreme Court in Saroj Rani v. Sudershan Kumar, AIR 1984 SC 1562, does take the law a short step further towards acceptance of irretrievable break-down of marriage as the ultimate touch-stone for disagreeing divorce rather than the petitioner's 'wrong' or 'guilt' for refusing it in the context of Section 13(1-A) of the Act. In that case, the wife had obtained a decree for restitution of conjugal rights against the husband without contest as the husband consented to the passing of the decree although, he denied the allegations against him. On the expiry of one year, the husband-petitioner for divorce under Section 13(1-A) of the Act. One of the points raised on behalf of the wife, who was appellant before the Supreme Court, was that from the very beginning, the husband wanted divorce, he did not, therefore, deliberately opposed the passing of the decree for restitution with the intention of ultimately getting divorce on its basis by not complying with it and

as such, he could not be allowed to take advantage of his own wrong in view of Section 23(1)(a) of the Act. The Supreme Court rejected the contention of observing as under :

"Counsel for the appellant sought to urge that the expression taking advantage of his or her own 'wrongs' in Clause (a) of Sub-section (1) of Section 23 must be construed in such manner as would not make the Indian wives suffer at the hands of cunning and dishonest husband. 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 wrongs' 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 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."

19. In Madhukar Bhaskar v. Sarala Madhukar, AIR 1973 Bom. 55, even before amendments in 1976, it was observed as under:

"....In granting relief under Section 13(1-A), the Court will and must take into consideration Section 23(1) and consider the conduct of the petitioner subsequent to the passing of the decree of conjugal rights and not grant relief to a party who is taking advantage of his own wrong. It has however no reference to remedying the wrong which led to the decree for judicial separation or restitution of conjugal rights."

20. Tine observations of V. Mohta, J. of Bombay High Court in Vatsala v. N.R. Gulwade, 1982 Hindu LR 148, would be relevant and purposeful to refer here :

"It seems to me that the purpose behind both these provisions is entirely different. Section 13(1-A) gives statutory recognition to the principle that it is in the interest of society as well as the spouse that if there is irretrievable break down of the marriage and all chances of reunion disappear, there is hardly any utility in maintaining a marriage as a facade in absence of emotional and other bonds which are the very essence of marriage relationship. This was intended to be achieved irrespective of the question as to who is responsible for the unfortunate situation. If two or more years have passed without resumption of marital life inspite of decree by a competent Court, it was considered unrealistic to expect that some day spouses will unite and marriage will work. The old concept of default of the spouse as furnishing a ground for refusing divorce when claimed by that party was, therefore, given up. Permitting only a decree holder to more the Court for divorce led to a stalemate. If he chose not to do so a curious situation could arise. Opposite party was left with no remedy and the marriage was, as it were, a limbo. The 'fault' theory is, therefore, pushed back and 'breakdown' theory has been pushed as step further. This is thus codification of the principle that if marriage cannot be worked, there is no point in thrusting one spouse on the other much against his or her desire irrespective of the reasons behind."

It may be noticed that the Act came to be amended further by Act No. 68 of 1976. It not only reduced the waiting period of two years to one year but also incorporated a fresh provision, in the form of Sec tionl3-B for grant of decree of divorce by mutual consent....New legislative intention is that all efforts to restore sick marriage to health have to be made, but once they fail, there is no point in with holding the award of a decree for divorce. It is considered better to dissolve it than meaninglessly to try to let it limp along. Not that these last amendments are relevant in the present case, but they do point out that more realistic approach is being made towards this human problem by the society. While more practical view of the marriage relationship is taken, old tradition is not given up completely. Divorce is not available merely for asking and consideration of conduct of parties has still been retained, in the form of Section 23(1)(a). There is thus no unqualified right to divorce as soon as condition of Section 13(1-A) are fulfilled. Decree can be refused if any spouse is taking advantage of his or her own wrong for the purposes of relief claimed....it seems that wrong prior to passing of decree is not the wrong contemplated...Concept of 'wrong' as used in Section 23 even otherwise seems to be different than that has been held in Champalal's case (supra). It means, an act of causing some injury to the other side in the sense that action has some direct or indirect relation to the marital offence committed by the other spouse and on which the cause of action for the petition is based. The terminology 'taking advantage' also has to be kept in view.

21. In Bai Mani v. Jayantilal Dahyabhai, AIR 1979 Guj. 209, the admitted facts were that after remaining with his wife for 7 years and begotting three children through her, the husband developed intimacy with a friend of his wife and got three children through her. The wife obtained a decree of judicial separation, but since there was no resumption of cohabitation for a period of two years after passing of the decree for judicial separation, the husband presented petition for dissolution of marriage by a decree of divorce under Section 13(1 -A) of the Act which was resisted by the wife. The question for consideration in that case was, whether the 'wrong' as contemplated in Section 23(1)(a) of the Act, should be a 'wrong' separate from the one existing prior to the passing of the decree for judicial separation or it means a continuous 'wrong'. The Division Bench on consideration of the decision of the Delhi High Court in Gajana Devi's case (supra), and the decision of the Supreme Court in Dhartnendra Kumar's case (supra), came to hold as under:

"..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 in Section 13(A) even to a defaulting party or a party in wrong for obtaining the relief specified in Section 13 nugatory. We have, therefore, get to reconcile these two provisions and the only way in which one case reconciles as has been done by the learned Single Judge of Delhi High Court in Gajana Devi's case (supra), that there must be some facts or circumstances occurring 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". As stated by the learned Single Judge of the Delhi High Court in Gajana Devi's case (supra), it cannot be said that he is taking advantage of his wrong when he makes an application for divorce through 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."

22. In the case of Jasxvinder Kaur v. Kulwant Singh, AIR 1980 P&H 220, the husband obtained a decree of restitution of conjugal rights and the decree having remained uncomplied with for the statutory period, the husband filed a petition under Section 13(1 -A) of the Act seeking dissolution of the marriage by divorce. The wife took the stand that she and her father and few other persons had approached the husband to settle her in his house, but he declined her request. It was contended in the High Court mat since the husband was at fault, he was not entitled to a decree for divorce in the list of Section 23 of the Act. The High Court answered the question in the following manner:

"The subsequent conduct of the' parties can of course be taken into consideration while granting relief but the refusal to let compliance of the decree of restitution of conjugal rights is not a consideration which can weigh against a party claiming relief of dissolution of marriage under Section 13(1-A) of the Act..."

23. In Smt. Gurmeet Kaur v. Harbans Singh, AIR 1981 P&H 161, the husband obtained a decree for restitution of conjugal rights against the wife. Although the wife was ready and willing to comply with the decree, there was total reluctance to resume cohabitation. The husband filed application for divorce after the prescribed period under Section 13(1-A) was over. It was resisted by the wife on the ground that reluctance of the husband was a wrong within Section 23(1)(a) which would disentitle him from getting a decree of divorce. The Punjab and Haryana High Court rejected the contention with the following observations:

" A perusal of the provision of Section 13(1-A) of the Act would show that both parties can present a petition. This would include the party whose conduct has resulted in the failure of the restitution of conjugal rights after the passing of the decree. If the contention was that such party could not file a petition then and there was no question of giving the right to such divorce on the said grounds to both the parties. Therefore, the wrong mentioned under Section 23(1)(a) of the Act has to be a wrong of a kind different from a mere conduct on their side of refusing to resume conjugal relationship after passing of the decree in question."

24. A survey and consideration of the decisions referred to above, the following principles of law emerge:

(i) Section 13(1-A) of the Act is subject to Section 23(1)(a), hence, the provisions of Section 23(1)(a) would apply to a petition for divorce under Section 13(1-A) of the Act.

(ii) If the 'wrong' is committed by a spouse subsequent to the passing of decree for restitution of conjugal rights and that wrong is serious enough, the same would disentitle him/her to obtain a decree for divorce.

(iii) The wrong existing prior to the passing of the decree for restitution of conjugal rights would not be relevant to deny a decree of divorce on the ground of non-restitution of conjugal rights between the parties for a period of one year or upwards after the passing of the decree for restitution of conjugal rights. However, if the existing wrong continues, the same may, in suitable cases be considered as a ground for refusing relief of decree of divorce.

25. In the background of the relevant provisions of the Act and proposition of law as enunciated by the judicial pronouncements referred to above, none of the contentions raised by Mr. Rajwanshi in the present appeal has any merit and this appeal can be conveniently dismissed even without issuing notice to the respondents.

26. At the out-set, it may be stated that an ex-parte decree for restitution of conjugal rights is as good as a contested decree for attracting the provisions of Section 13(1-A) of the Act for presenting a petition for dissolution of the marriage by a decree of divorce, if there has been no restitution of conjugal rights for a period of two years or more after passing of the decree. The ex-parte decree was passed on February 16, 1982 and it appears that it was not challenged by the appellant in higher Court. She also did not apply for setting aside the ex-parte decree on the ground that service was not effected on her. Once the said decree having become final, the argument on behalf of the appellant is not 'tenable that the appellant is not bound by the said decree or that the decree cannot be made basis for a petition under Section 13(1-A). The contention of Mr. Rajwanshi that the respondent-husband is not entitled to get relief of divorce on the ground of the alleged 'wrong' is also not sustainable for more than one reason Firstly, the alleged beating in the year 1977 or other acts of cruelty by the husband have not been proved by the appellant and the Trial Court rightly decided issue No. 3 against the appellant. Secondly, the decree of divorce has been passed on February, 16, 1988 and no act of misconduct subsequent to the passing of decree has been alleged or proved against the respondent-husband. Similar is the position about the alleged second marriage by the husband with one Smt. Nirmala Devi in the year 1981 and the criminal case of bigamy on that ground which relates to the year 1981 much prior to the passing of the decree.

27. On the other hand, the facts of the case take us to the conclusion that the marriage has broken down completely and the parties can no longer live together as husband and wife. In such circumstances, as observed by the Supreme Court in the case of Saroj Rani v. Sudershan Kumar (supra), it is better to close the chapter. In the instant case, the marriage had taken place in the year 1970. As per the contention of the wife herself, she is not living with the husband since 1978. More than 19 years have passed since their separation. There had been allegations and counter allegations against each other. The husband is alleged to have performed second marriage in the year 1981 with one Nirmala Devi and they have given birth to the children. Admittedly, no issue was born from the wed-lock of the appellant with the respondent. Taking into consideration the totality of the circumstances, the decree of divorce is the only proper course calling for no interference by this Court in this appeal.

28. Consequently, the appeal fails and is dismissed summarily.