

Punjab-Haryana High Court

Smt. Bimla Devi D/O Bakhtawar ... vs Singh Raj S/O Dasondhi Ram on 17 December, 1976

Equivalent citations: AIR 1977 P H 167

Author: B Dhillon

Bench: O C Reddy, B S Dhillon, H Lal

JUDGMENT B.S. Dhillon, J.

1. This F.A.O. was admitted to a Full Bench by the Motion Bench as the correctness of the judgment of a Division Bench in Chaman Lal v. Mohinder Devi 1971-73 Pun LR 104 was being questioned. This is how this appeal has been laid before us.

2. The necessary facts giving rise to this appeal may thus be stated:

Singh Raj respondent was married to Smt. Bimla Devi at village Bhareri Khurd, Tehsil Naraingarh, District Ambala, on 8th November, 1968. After the marriage, the wife stayed with her husband only for one day in village Surakhpur, Tehsil Thanesar, District Karnal, and then returned to her parents' house. According to the wife-appellant, the marriage was solemnised between her and the respondent on account of the fraud practised by the respondent and his father on her parents. The appellant filed a petition under S. 12 of the Hindu Marriage Act, 1955, (hereinafter called the Act) on 3rd June, 1969, which was dismissed by the learned District Judge, Ambala, on 2nd May, 1970. Singh Raj respondent filed a petition for restitution of conjugal rights on the ground that the wife withdrew from his society without reasonable cause. In reply, the wife took the stand that the marriage was got solemnised by practising fraud and as such the husband was not entitled to a decree for restitution of conjugal rights. This application was allowed by the learned Additional District Judge, Karnal, vide order dated 12th of November, 1970. Aggrieved against both the orders, the appellant-wife then filed two appeals challenging the orders of the Courts below. Both the appeals were dismissed by this Court on 25th of October, 1972. On 21st December, 1972, the appellant-wife filed a petition under Section 13(1A) of the Act claiming a decree for divorce. The said petition was dismissed by the learned Additional District Judge, Ambala, vide order dated 30th August, 1973. This order has been assailed in this appeal. The learned Judge came to the conclusion that the wife wanted to take advantage of her own wrong in not living in the company of the husband and thus in view of the provisions of Section 23 of the Act, she was not entitled to the relief of decree of divorce claimed by her.

3. In order to decide this case, reference may be made to the relevant provisions of the Act. Section 5 of the Act provides that a marriage may be solemnized between any two Hindus, if the conditions mentioned therein are fulfilled. Section 9 is in the following terms:--

"9 (1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district Court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce."

Under Section 10 of the Act. either party to a marriage, whether solemnized before or after the commencement of the Act can present a petition to the District Court praying for a decree of judicial separation on the grounds mentioned therein, Section 11 provides for declaring a marriage null and void by a decree of nullity, if it contravenes any of the conditions specified in Clauses (i), (iv) and (v) of Section 5. Section 12 deals with voidable marriages Section 13, before it was amended by Amending Act No. 44 of 19.64, was as follows:--

"13 (1) Any marriage solemnized whether before or after the commencement of this Act

(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 mind for a continuous period of not less than three

(iv) has for a period of not less than three years immediately preceding the presentation

(v) has, for a period of not less than three years immediately preceding the presentation

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those

(viii) has not resumed cohabitation for a space of two years or upwards after the passing

(ix) has failed to comply with a decree for restitution of conjugal rights for a period

(2) A wife may also present a petition for the dissolution of her marriage by a decree of

(i) in the case of any marriage solemnized before the commencement of this Act, that the

Provided that in either case the other wife is alive at the time of the presentation of

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape,

4. In 1964 by Act No. 44 of 1964. this section was amended and Clauses (viii) and (ix) o

"13(1A) Either party to a marriage, whether solemnized before or after the commencement

(i) that there has been no resumption of cohabitation as between the parties to the marr

(ii) that there has been no restitution of conjugal rights as between the parties to the

This section was further amended by Act No. 68 of 1976. The amended Section 13 up-to-dat

"13 (1) Any marriage solemnized, whether before or after the commencement of this Act, m

(i) has, after the solemnization of the marriage had voluntary sexual intercourse with a

(ia) has ,after the solemnization of the marriage, treated the petitioner with cruelty;

(ib) has deserted the petitioner for a continuous period of not less than two years imme

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

(iii) has been incurably of unsound mind or has been suffering continuously or intermitt

Explanation:-- In this clause,--

(a) the expression 'mental disorder' means mental illness, arrested or incomplete develo

(b) the expression 'psychopathic disorder' means a persistent disorder or disability of

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by altering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those

Explanation:-- In this sub-section, the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(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.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground--

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy, or bestiality, or

(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), (or under the corresponding Section 486 of the Code of Criminal Procedure, (1898), (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation:-- This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.

(13A) In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in Clauses (ii), (vi), (vii) of Sub-section (1) of Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

(13B) (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have actually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in Sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

4-A. The only other relevant section is Section 23, which, as amended, is in the following terms:--

"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 (except in cases where the relief is sought by him on the ground specified in Sub-clause (a), Sub-clause (b) or Sub-clause (c) of Clause (ii) of Section 5) is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified 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 (bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence; and

(c) the petition (not being a petition presented under Section 11) 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, and 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:

Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in Clause (ii), Clause (iii), Clause (iv) Clause (v), Clause (vi) or Clause (vii) of Sub-section (1) of Section 13.

3. For the purpose of aiding the court in bringing about such reconciliation the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceeding have due regard to the report.

4. In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of costs to each of the parties.

(23-A) In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counterclaim for any relief under this Act on that ground and if the petitioner's adultery, cruelty or desertion is proved the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

5. From the various amendments made in the provisions of Section 13 by the Parliament, one thing is obvious that the Parliament thought it fit to liberalise the dissolution of marriage between the parties where there is no possibility of the spouses continuing matrimonial relations, As would be noticed, Section 13, to begin with, gave right to one party to move for the dissolution of the marriage against the other party against whom the grounds as mentioned in Section 13 existed. In view of the provisions of Clause (viii), the party who sought decree for judicial separation against the other party only could apply for divorce on the ground that the other party has not resumed cohabitation for a period of two years. Similarly, only the party who obtained a decree for restitution of conjugal rights could apply for divorce on the ground that the other party has failed to comply with the decree for a period of two years or upwards after the passing of the decree. The defaulting party against whom the decree for judicial separation or decree for restitution of conjugal rights was passed could not move the Court for decree of divorce.

It was by 1954 amendment that both Clauses (viii) and (ix) of Sub-section (1) were deleted from Section 13 and Section 13(1A) was inserted, by virtue of which either party to the marriage has been given a right to present a petition for dissolution of marriage by decree of divorce on the ground 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 on the ground 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 the decree for restitution of conjugal rights in a proceeding to which they were parties. By Amending Act No. 68 of

1976, the grounds for decree of divorce have been further liberalised. In Clause (i) previous to this amendment, divorce could be obtained if the other spouse was living in adultery. This clause has been substituted by Clauses (i), (ia) and (ib) and the grounds of divorce, as is apparent, have been further liberalised. Similarly, Clause (iii) has been deleted by substituting Clause (iii) with Explanations (a) and (b).

In Clauses (iv) and (v) the words, "for a period of not less than three years immediately preceding the presentation of the petition", have been omitted. In Sub-section (1A), for the words 'two years', the words, 'one year' have been substituted. It would further be seen that by adding Section 13B, a further provision has been made that a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to the marriage together on the ground that they have been living separately for a period of one year or more and that they have not been able to live together and they have actually agreed that the marriage should be dissolved. If this consent is not withdrawn within a period of six months and the Court finds that the marriage has been solemnized and that the averments in the petition are true, the Court shall have to pass a decree of divorce, declaring the marriage to be dissolved with effect from the date of decree. It would thus be seen that the policy of the legislature has been to dissolve those marriages liberally where the parties to the marriage are unable to live together.

6. Section 23(1)(a) of the Act provides that in case the Court is satisfied that 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, it shall decree such relief, The language of the section is clear that the advantage of his or her own wrong or disability should be in connection with the relief which is sought to be claimed in the proceedings. Any such advantage of his or her own wrong or disability which had been taken or incurred in some other proceedings before the claim for the grant of relief was made cannot be made the basis for refusing relief under Section 23 of the Act.

7. Presently, we are concerned with a case where a decree for restitution of conjugal rights has been obtained by the respondent-husband under Section 9 of the Act on the ground that the wife has without reasonable excuse withdrawn from his society. In view of the fact that the wife was found to have left the company of the husband without reasonable excuse, decree for restitution of conjugal rights was granted to the husband. It would thus be seen that if she failed to comply with the decree for restitution of conjugal rights, it cannot be said that she committed any wrong after the passing of the decree against her. In fact this wrong which she was found to have committed in the proceedings under Section 9 of the Act cannot be said to be a wrong committed by her after the passing of the decree so as to disentitle her from getting the relief under Section 13(1A) because of the provisions of Section 23(1)(a) of the Act. The advantage of her own wrong or disability mentioned in Section 23(1)(a) should be an advantage of her own wrong or disability, foundation of which was laid after the decree for restitution of conjugal rights was passed.

It is the accepted rule of interpretation that two provisions of an enactment should be, as far as possible, harmoniously construed to give meaning to both the provisions. As has been pointed out, the legislature liberalised the grounds for divorce by amending Section 13 at various stages. By enacting Section 13(1A), right has been given to both the parties to the marriage to claim dissolution

of marriage by a decree of divorce on the grounds given therein. Before the amendment, only a party who moved petition for judicial separation or for restitution of conjugal rights could move for dissolution of the marriage. The legislature has made this change and has given right to both the parties, even though decree for restitution of conjugal rights or for dissolution of marriage has been obtained by either of the parties. In my view, if the ingredients mentioned in Section 13 (1A) are satisfied in a case where decree for restitution of conjugal rights has been obtained by either party, the other party can legitimately apply for dissolution of marriage by decree of divorce, irrespective of the fact that the spouse against whom decree has been granted has failed to comply with the said decree.

The ground that the spouse against whom the decree for restitution of conjugal rights was obtained failed to comply with the decree cannot be taken for refusing the relief of dissolution of marriage on the ground that the spouse is taking advantage of his or her own wrong. In spite of the finding that the spouse against whom decree for restitution of conjugal rights has been passed, left the company of the petitioner under Section 9 of the Act without reasonable cause for the specified period, the legislature thought fit to entitle the spouse against whom such a finding has been given to apply for divorce under Section 13(1A)(ii) of the Act; the said relief cannot be made non-existent by applying the provisions of Section 23(1)(a) of the Act on the ground of non-compliance of a decree of restitution of conjugal rights. Such an interpretation will frustrate the very purpose of the amending Act of 1964.

8. From what has been stated above, it appears that the provisions of Section 23(1)(a) of the Act cannot be invoked to refuse the relief under Section 13(1A)(ii) of the Act on the ground of non-compliance of a decree of restitution of conjugal rights where there has not been restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of decree for restitution of conjugal rights in proceedings in which they were parties. The contention of the learned counsel for the respondent that if the provisions of Section 23(1)(a) are interpreted in the manner as suggested above, the provisions of Section 23(1)(a) will become null and void and will not be applicable to any proceedings, is without any merit. As would be seen, in proceedings under Section 9 for restitution of conjugal rights, under Section 10 for judicial separation, under Section 12 of the Act and so also under Section 13(1), the provisions of Section 23, wherever they are applicable on the facts proved on the record of the case, will be attracted. It is only to the limited extent in proceedings of divorce under Section 13(1A), where the divorce is claimed by either of the parties on the ground that there has been no resumption of cohabitation after the passing of a decree for judicial separation or that there has been no restitution of conjugal rights after a period of one year or upwards after the passing of the decree for restitution of conjugal rights, that the said provisions cannot be invoked on the ground of non-compliance with the decree passed so as to hold that the said act of non-compliance is in any way taking advantage of his or her own wrong.

9. On the other hand, if the provisions of Section 23(1)(a) of the Act are held to be applicable to a petition under Section 13(1A)(ii) on the ground that the party against whom decree for restitution of conjugal rights has been passed having failed to comply with, is taking advantage of his or her own wrong, the provisions of Section 13(1A) would be rendered nugatory, which interpretation cannot be



given. It would further be noticed that the legislature thought it fit not to provide the mode of execution of a decree of restitution of conjugal rights so as to unite the two spouses physically who could not live together for one reason or the other. Only symbolical execution of the decree has been provided for. Reference in this connection may be made to the provisions of Section 28 of the Act which provide that the decrees and orders made by the Court in any proceedings under the Act shall be enforced in a like manner as decrees and orders of the Court made in exercise of its original civil jurisdiction are enforced. Reference may be made to the provisions of Order 21, Clause (1) of Rule 32 of the Code of Civil Procedure wherein the mode for execution of a decree for restitution of conjugal rights has been provided. The said decree can be executed by attachment of the property of the judgment-debtor which is a symbolical mode of execution. There is no provision in the Code of Civil Procedure by which the physical custody of the spouse, who has suffered the decree, can be made over to the spouse who obtained the decree for restitution of conjugal rights. That being the position, merely because the spouse, who suffered the decree, refused to resume cohabitation, would not be a ground to invoke the provisions of Section 23(1)(a) so as to plead that the said spouse is taking advantage of his or her own wrong.

10. We are, therefore, inclined to hold that in a case covered under Section 13(1A)(ii) of the Act, either of the parties can apply for dissolution of marriage by a decree of divorce if it is able to show 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 proceedings in which they were parties. The plea that the party against whom such decree was passed failed to comply with the decree or that the party in whose favour the decree was passed took definite steps to comply with the decree and the defaulting party did not comply with the decree and, therefore, such an act be taken to be taking advantage of his or her own wrong would not be available to the party, who is opposing the grant of divorce under Clause (ii) of Sub-section (1-A) of Section 13 of the Act. We are, therefore, inclined to hold that the law laid down in Chaman Lal's case (1971-73 Pun LR 104) (supra) is not the correct position of law and the said authority is, therefore, overruled.

This decision was made by the Bench in L.P.A. filed by Chaman Lal against the decision of a learned single Judge (P. C. Pandit, J.) reported as Chamal Lal v. Mohinder Devi, AIR 1968 Punj & Har 287. It was found by the learned single Judge that the husband having not made any effort to comply with the decree of restitution of conjugal rights passed against him at the instance of the wife could not be allowed to take advantage of his own wrong and thus was not entitled to claim divorce under Section 13(1A) of the Act. The learned Judge held that it was the duty of the husband who suffered a decree for restitution of conjugal rights to take steps to comply with the said decree and that he could not choose to avoid restitution of conjugal rights for two years after the passing of the decree to create a ground for petition of divorce. In our opinion, the reasoning given by the learned Judge is not tenable.

No such obligation is imposed by law on the party who suffered such a decree as no provision has been made for physically bringing together the spouses who separated because of the fault of either of them. To hold that the person who suffered the decree is obliged to comply with the same and if he fails to do so, the provisions of Section 23(1)(a) can be invoked on this ground, will make the

provisions of Section 13(1A)(ii) redundant. If that interpretation is given, then in every case where a decree for restitution of conjugal rights has been passed, there being a duty cast on the spouse who suffered the decree to comply with the same, there can hardly be a case in which decree for divorce can be obtained under the provisions of Section 13(1A)(ii) at the instance of the party who suffered the decree. As has been pointed out, the policy of the legislature by making amendments to the provisions of Section 13 appears to be to liberalise divorce so that the broken marriages are dissolved and the parties to the marriage are freed from the bonds as they are unable to live together in spite of opportunities having been given to resolve the differences and to live together.

It may well be that the spouse who obtained the decree for restitution of conjugal rights may change his or her mind and may not be willing to live with the other spouse after the passing of the decree. It would further be seen that a spouse who has suffered a decree of restitution of conjugal rights, has already been adjudged to have left the company of the other spouse without reasonable excuse. The said wrong was committed much before the passing of the decree for restitution of conjugal rights and it can-not be said that the said wrong has been committed after the passing of the decree for restitution of conjugal rights. Moreover, living separately from the spouse cannot be regarded as a wrong as the term 'wrong' as contemplated in Section 23(1)(a) of the Act contemplates causing of some injury to the other side. In this view of the matter, the decision of the learned single Judge, which was affirmed in L.P.A. in Chaman Lal's case (*supra*), in our opinion, is not correctly made. Similarly, a Single Bench decision of the Bombay High Court in *Laxmibai Laxmichand Shah v. Laxmichand Ravaji Shah*, AIR 1968 Bom 332 in our view, is not the correct position of law.

11. The Single Bench decision of this Court in *Gulab Kaur v. Gurdev Singh*, AIR 1963 Punj 493, is a judgment interpreting the provisions of Section 13(1)(ix) of the Act and thus has no relevancy to the present controversy. As has been stated earlier, under the pre-amended Section 13(1), Clause (ix) the person who obtained a decree for restitution of conjugal rights could only claim for a decree of divorce and the other spouse had no right to move the Court. The whole complex has been changed after the amendment of Section 13 in 1964 and then in 1976.

12. The decision of a learned single Judge of this Court in *Kamla Rani v. Raj Kumar*, 1976 Hindu LR 70, is also of no assistance. In the said case the learned Judge was mainly concerned as to the onus of the issue. However, we may observe that the reliance placed by the learned Judge on cases *Gulab Kaur v. Gurdev Singh*, 1963-65 Pun LR 598 : (AIR 1963 Punj 493) and *Kishni Bai v. Dr. Bhola Nath* (1967-69 Pun LR 59) for the proposition that the compliance of the decree for restitution of conjugal rights has to be made by the judgment-debtor is not the correct legal position as has been held by us in the earlier part of the judgment. The other two decisions of a learned single Judge of this Court reported as *Kirpal Singh v. Tej Kaur*, 1976 Hindu LR 721 (Punj), and *Tek Chand v. Raksha Wati*, 1976 Hindu LR 725 (Punj) are based on wrong interpretation of the provisions of law and we are, therefore, of the opinion that the said cases have not been correctly decided.

13. Reference may now be made to a decision of the Andhra Pradesh High Court in *Manepally Suryakantham v. Manepalli Ranga Rao*, 1975 Hindu LR 312. In that case it was held that the failure of the spouse to execute a decree for restitution of conjugal rights by not filing an execution petition is not a bar to his maintaining a petition for annulment of marriage under Section 13(1A)(ii) of the

Act. The learned Judges after considering the scope of the provisions of Section 23(1)(a) of the Act and Clause (1) of Rule 32, Order 21, Civil Procedure Code, observed that the said provisions cannot have an overriding effect over the provisions of Section 13(1A)(ii) of the Act and any omission or failure on the part of the spouse who obtains a decree for restitution of conjugal rights to enforce the same by filing an execution petition would not disentitle him to seek or debar him from seeking the statutory relief of divorce, if the requisite conditions specified in Clause (ii) of Section 13(1A) of the Act are satisfied. This authority to an extent supports the view which we are taking in the present case.

14. In another decision of the Bombay High Court in *Jethabhai Ratanshi Lodaya v. Manabai Jethabhai Lodaya*, 1975 Hindu LR 449 : (AIR 1975 Bom 88), their Lordships considered the scope of Sections 10(2), 13(1A) and 23(1)(a). This was a case where a decree for judicial separation on the ground of desertion had been obtained. The said decision is of no relevance to the present controversy. Similarly, in a decision of Jammu and Kashmir High Court in *Smt. Kailash Kumari v. Manmohan Kapoor*, 1975 Hindu LR 532 : (AIR 1975 J & K 95), their Lordships were only concerned with the onus probandi of the issue involved in the case.

15. It may, however, be observed that it may not be understood to have been held that the provisions of Section 13(1A) are not subject to the provisions of Section 23(1)(a). But, in fact, what we have held is that a defaulting spouse, who has suffered a decree for restitution of conjugal rights, cannot be held to be taking advantage of his or her own wrong merely because he or she has failed to comply with the decree of restitution of conjugal rights. Human ingenuity being what it is, it cannot be disputed that many cases may arise, where notwithstanding that a ground for divorce exists, there may be something in the conduct of the petitioner which would be so reprehensible that the Court would deny to such a petitioner relief by way of divorce on the consideration that the petitioner was taking advantage of his or her own wrong.

16. On the view which we have taken, we are of the considered opinion that the appellant is entitled to dissolution of marriage by way of decree of divorce as it is not disputed that ingredients of Clause (ii) of Section 13(1A) are fully satisfied as there was no restitution of conjugal rights as between the parties to the marriage after the passing of the decree for restitution of conjugal rights for a period of more than two years.

17. It may be clarified that amendments made in 1976 to the Act have been mentioned in the judgment with a view to highlight the intention of the legislature as the present case is to be decided on the basis of the provisions of the Act as they stood before the amendment of 1976.

18. The appeal is accordingly allowed and the appellant is granted a decree of divorce. However, there will be no order as to costs.

O. Chinnappa Reddy, J.

19. I agree with the conclusion of Dhillon J. that the appeal should be allowed. While generally agreeing with the outline of his reasoning I would like to add a little note of my own having regard to

the importance of the issues involved. The broad question for consideration is, whether a wife who has failed to obey a decree for restitution of conjugal rights obtained by the husband against her can seek a divorce under Section 13(1A) of the Hindu Marriage Act notwithstanding the provisions of Section 23(1)(a) which disentitle a petitioner from taking advantage of his or her own wrong or disability for the purpose of obtaining relief in any proceeding under the Act.

20. Section 9 of the Hindu Marriage Act provides that an aggrieved husband or wife may apply for restitution of conjugal rights if the other party to the marriage has withdrawn from his or her society, without reasonable excuse. Such withdrawal is, clearly, considered to be a matrimonial wrong. Section 10 enables either party to a marriage to seek judicial separation on the ground that the other party has committed one or the other of the matrimonial wrongs specified therein or has come to suffer one or other of the disabilities specified in the section. Section 10(2) provides that if a decree for judicial separation is obtained it shall no longer be obligatory for the petitioner to cohabit with the respondent. Section 11 deals with void marriages and Section 12 deals with voidable marriages and both provide for a decree of nullity. Section 13 provides for dissolution of marriage by a decree of divorce.

21. Prior to 1964, it was necessary for the party seeking a divorce to prove that his or her spouse had committed one or other of the matrimonial wrongs specified in Section 13 or had come to suffer one or other of the disabilities specified in Section 13. Clauses (viii) and (ix) furnished two grounds for divorce which were based on matrimonial wrongs. They were the failure of the defaulting spouse to resume cohabitation for a period of two years or more after the passing of a decree for judicial separation against that party or the failure to comply with a decree for restitution of conjugal rights for a period of two years or more after the passing of the decree. As Clauses (viii) and (ix) stood prior to 1964, only the party who had obtained a decree for judicial separation or restitution of conjugal rights could seek divorce on the ground of the continued matrimonial fault of the other party after the expiry of the prescribed period.

22. In 1964, there was a radical departure. By an Amending Act, Clauses (viii) and (ix) were omitted and instead, Sub-section (1A) was introduced into Section 13. Instead of the non-defaulting party-decree-holder alone being entitled to sue for divorce, Section 13(1A) provides that either party may seek divorce on the ground that there has been no resumption of cohabitation or no restitution of conjugal rights for a period of two years or more after the passing of a decree for judicial separation or a decree for restitution for conjugal rights. The question is no longer who obtained the decree for restitution of conjugal rights or for judicial separation, or, who was at fault previously? or, who is at fault now? The question is not one of fault at all. The question is not one of apportioning blame. The question is, have the parties been able to come together after the decree was passed whether it was for judicial separation or restitution of conjugal rights. If they have not been able to come together, either party may seek divorce, irrespective of whose fault it was that they did not come together. The grounds for divorce in Section 13(1A) unlike the grounds for divorce in Section 13(1) are not based on any present matrimonial wrong or disability.

23. The legislative policy is clear. 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. 'It is to provide the basis for dissolving dead marriage with the minimum of rancour and hostility and the maximum of humanity.'

24. In tune with this policy, the Hindu Marriage Act was again amended in 1976, further liberalising the grounds for divorce. Among other amendments, the period prescribed by Section 13(1A) has been reduced from two years to one year and a new section, Section 13B has been introduced providing for divorce by mutual consent.

25. Now, the question for consideration, is, what is the effect of Section 23(1)(a) which has been in the statute book from the commencement of the Act on Section 13(1A) which was introduced by way of amendment in 1964? The question has to be considered in the light of the indisputable legislative policy and intention "The dominant purpose in construing a statute is to ascertain the intent of the legislature to be collected from the cause and necessity of the Act being made" and to make the intent effective. The questions to be asked are: What was the law before the amendment was introduced? What was the mischief or defect for which the law had not previously provided? What is the remedy appointed by Parliament' and What is the reason of the remedy?

26. Before 1964, the whole scheme of the Act in relation to decrees for restitution of conjugal rights, judicial separation and divorce was based on the concepts of wrong and disability. The Court was not to concern itself with the fact of break down of the marriage but with who had committed wrong or who was suffering from disability. It was in the context of the concept of wrong-disability that Section 23(1)(a) provided that the Court shall decree relief under the Act only if any of the grounds for granting relief existed and the petitioner was not in any way taking advantage of his or her own wrong or disability for the purpose of such relief. The concept of wrong disability which was hitherto the sole basis of relief under the Act has now, in part, given way to the concept of a broken-down marriage irrespective of wrong or disability. To my mind it is not permissible to apply the provisions of Section 23(1)(a) based as they are on the concept of wrong-disability to proceedings in which relief is claimed under Section 13(1A) or Section 13B based as they are on the concept of a broken down marriage.

In fact, it is impossible to apply the provisions of Section 23(1)(a) to a proceeding in which relief is claimed under Section 13B. That should be a pointer to show that Section 23(1)(a) is not meant to apply to all proceedings under the Act. Even if Section 23(1)(a) is to be held to apply to proceedings in which relief is claimed under Section 13(1A) 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 cohabitation or the mere non-restitution of conjugal rights which forms the basis of relief under Section 13(1A). 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.

It is true that if Section 23(1)(a) is applicable to proceedings based on Section 13(1A), it is difficult to visualize 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. The only reasonable way of construing the provisions and giving effect to legislative intent is to say that Section 23(1)(a) applies to cases based on the concept of wrong-disability and not to Section 13(1A) which is not based on that concept. At any rate the wrong or disability contemplated by Section 23(1)(a) is not the non-resumption of cohabitation or the non-restitution of conjugal rights which is the basis of Section 13(1A). In that view the appeal has to be allowed.

Harbans Lal, J.

I agree with Dhillon, J.