Punjab-Haryana High Court
Santosh Kumari vs Mohan Lal on 21 May, 1980
Equivalent citations: AIR 1980 P H 325
Bench: R N Mittal
ORDER

1. Briefly, the facts are that Mohan Lal filed an application for restitution of conjugal rights on Sept. 12, 1973 against his wife m t. Santosh Kumari, under S. 9 of the Hindu Marriage Act (hereinafter referred to as the Act). The latter contested it on the ground of cruelty. It was dismissed by the trial Court. On appeal, the order of the trial Court was reversed on Sept. 11, 1978 and a decree for restitution of conjugal rights was granted in favour of the husband. The wife filed an execution application on Aug. 16, 1979 stating that she was prepared to go to the husband but he was not accepting her The husband in pursuance of a notice filed objections wherein he stated that he had already filed an application for divorce under S. 13 of the Act on Sept. 14, 1979 and, therefore, he was not prepared to take her with him. The learned Executing Court dismissed the execution application observing that its purpose had been fulfilled. Smt. Santosh Kumari has come up in revision against that order to this Court.

2. It is contended by, the learned counsel for the petitioner that after the passing of the decree for restitution of conjugal rights in favour of the husband it is not only the husband who can execute it but it can be executed by the wife as well He argues that in such cases, either of the parties to the lis becomes decree-holder after passing of the decree and can request the Court for recording satisfaction thereof. To buttress his argument, he made reference to M. P. Shreevastava v. Mrs. Veena, AIR 1965 Punj 54, and M P. Shreevastava v. Mrs. Veena, AIR 1966 Punj 508. According to him the Court could not dismiss the application for execution of the petitioners.

3. On the other hand, the learned counsel for the respondent has argued that in view of the amendments having been made in the Act, after passing of a decree for restitution of conjugal rights in favour of a spouse either of the spouses can make an application for divorce, if there has been no restitution of conjugal rights between the parties for a period of one year or upwards after the decree. He argues that a decree for restitution of conjugal rights cannot be executed as a decree for recovery of money or a decree for possession. According to the counsel, there is no provision in the Civil P. C. by which the custody of the s use can be given to the other spouse. He further argues that in the aforesaid circumstances, the Executing Court rightly dismissed the application of the petitioner and refused to record satisfaction of the decree.

4. I have heard the learned counsel for the parties at a considerable length. In order to determine the question it will be proper to notice Order 21, Rule 32 of the Civil P. C. Which provides for execution of decree for restitution of conjugal rights and S. 13 of the Act before and after amendments which are as follows:--

"O. XXI, R. 32.

(1) Where the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has bad an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his party or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2).....

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold such property may be sold and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to ay or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5)....."

Before amendment S. 13(1)(ix) of the Hindu Marriage Act.

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

(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."

After amendment by the Hindu Marriage (Amendment) Act 1984 (Act No. 44 of 1984) sub-cls. (viii), and (ix) of sub-section (1) of S. 13 of the Act were omitted and sub-section (1A) was introduced. Sub-section (1A) is relevant for determination of the present case and it reads as follows:--

"(1A). 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 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

proceed in to which they were parties."

Sub-section (1A) was further amended by the Marriage Laws (Amendment) Act 1978 (Act No. 68 of 1976) and the period of two years in cls. (i) end (ii) of sub-sec (1A) was reduced to one year. The said subsection after amendment reads as follows:--

(1A) Either to a marriage whether solemnized before or after the commencement of this Act, may also present a petition for 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 p 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."

The object of deletion of clause (ix) of S. 13 and introduction of sub-section (1A) was as follows:--

The right to apply for divorce on the ground that cohabitation has not been resumed for a space of two years or more after the passing of a decree for Judicial separation, or on the ground that conjugal life has not been restored after the expiry of two years or. more from the date of decree far restitution of conjugal rights should be available to both the husband and the wife, as in such cases, it is clear that the marriage has proved a complete failure. There is therefore, no justification for making the rights available only to the party who has obtained the decree in each case.

The only amendment made in sub-section (1A) by Act No. 68 of 1976 was that the minimum period of two years provided in that sub-section for making an application for divorce was reduced to one year. The purpose for doing so as given in the Statement of Objects and Reasons was to liberalize the provisions relating to divorce. S. 23 of the Act inter alia provides that in any proceedings under the Act whether binding or not if 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 shal1 pass a decree for such relief. (The emphasis has been supplied by underlining the relevant lines). It will be seen from S. 23 and sub-section (1A) of Section 13 of the Act that they are somewhat contradictory to each other. Sub-section (1-A) of Section 13 of the Act was introduced later. These sections came up for interpretation in Smt. Gajna Devi v. Purshotam Giri, AIR 1977 Delhi 178 Smt. Bimla Devi v. Singh Raj, AIR 1977 Punj 167 (Full Bench) and Dharmendra Kumar v. Usha Kumar AIR 1977 SC 2218., wherein it was observed that effect has to be given to sub-sec(1A), of S. 18 and simultaneously both the sections namely S. 23 and S. 13(1A) are to be harmonized. The relevant observations in Gajna Devi's case (supra) are as follows:--

"Divorce under S. 13(1A) (introduced by amendment in 1964) is available to either husband or wife irrespective of the petitioner being guilty of matrimonial offence leading to the decree of judicial separation or restitution of conjugal rights. S. 23 (entitling petitioner to relief only if not taking

advantage of own wrong) existed at the time of that amendment and therefore it should be so construed as not to render S. 13(1A) nugatory.

Section 23 and S. 13(1A) may be harmonised. The matrimonial offence leading to an earlier decree of judicial separation or restitution of conjugal rights cannot be used to deprive the petitioner of his rights under S. 13(1A) irrespective of guilt. The expression "petitioner not in any way taking advantage of his/her own wrong in S. 23(1)(a) does not apply to taking advantage of the statutory right under S. 13(1A) after the passing of the decree for judicial separation or restitution of conjugal rights. The petitioner then is not taking advantage of his own wrong but the legal right following the passing of the decree and the failure of the parties to comply therewith or resume cohabitation thereafter. However, if after the earlier decree any circumstances happen which in view of S. 23(1) disentitle the spouse to divorce under S. 13(1A) they can always be taken into account.

The above case was approved by the t Supreme Court in Dharmendra Kumar's case (AIR 1977 SC 2218) (supra). In that case the respondent (wife) filed an application for restitution of conjugal rights under S. 9 of the Act which was allowed by the trial Court. A little over two years after that decree she presented an application under S. 13(1A)(ii) of the Act for dissolution of marriage by a decree of divorce. In that petition a decree for d9vorce was passed in favour of the, wife by the trial Court and affirmed by the High Court. The husband went up in appeal before the Supreme Court. A contention was raised there that the grounds for granting relief under Section 13 including sub-section (1A) continued to be subject to the provisions of S. 23 of the Act. It was further contended that the allegations made in the written statement that the conduct of the wife of not responding to his invitation to live with him meant that she was trying to take advantage of her own wrong for the purpose of relief under S. 13(1A)(ii). Thus the question arose whether the allegations of the husband that she did not respond to her husband's invitation to live with him, disentitled her to the relief. A. C. Gupta, J. speaking for the Bench stated that he did not find it possible to hold that the aforesaid circumstance would disentitle her to claim divorce. He placed reliance on the above quoted Gajna Devi's case (AIR 1977 Delhi 178) (supra) and observed as follows:--

".....it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has be passed, should 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 S. 23(1)(a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled."

Same view was taken by the Full Bench in Smt. Bimla Devi's case (AIR 1977 Punj 167) (supra). Before making a reference to the observations of the learned Judges in detail, it will be proper to discuss the provisions of O. 21, R. 32 of the Civil P. C.

5. Order XXI, R. 32 of the Civil P. C. provides method for executing the decrees for restitution of conjugal rights. According to sub-rule (1) if the judgment debtor fails to obey the decree it can be enforced against him by attachment of his property. Sub-rule (3) says that if in spite of attachment of the property for a period of six months the judgment debtor fails to obey the decree, the attached

property shall be sold in case the decree-holder makes an application in this regard. The Court in that event may award to the decree-holder such compensation as it thinks fit. The rule does not provide that the Court shall give Physical custody of the person who suffered the decree to the decree-holder. Thus the decree for restitution of conjugal rights can be executed in a symbolic manner. The aforesaid rule has also been interpreted by the Full Bench in Shrimati Bimla Devi's case (supra) along with Section 13(1)(a} and S. 23(1) of the Act. The relevant observations of Dhillon, J. speaking for the Bench are as follows:--

"The provisions of S. 23(1)(a) cannot be invoked to refuse the relief under S. 13(1A)(ii) 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. There is no provision in the Civil P. C. 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. Thus, merely because the spouse who suffered the decree, refused to resume cohabitation, would not be a ground to invoke the provisions of S. 23(1)(a) so as to plead pat the said spouse is taking advantage of his or her own wrong.

In a case covered under S. 13(1A)(ii), 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 lea 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 6e 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-s. (1A).of S. 13."

5A. O. Chinnappa Reddy, J (as my Lord then was) concurring with Dhillon, J. made the following observations:--

"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. So, it is not permissible to apply the provisions of S. 23(1)(a) based as they are on the concept of wrong-disability to proceedings in which relief is claimed under Section 13(1A) based as they are on the concept of a broken down marriage."

6. This view was followed by this Court in Smt. Ranjit Kaur v. Gurbax Singh, 1978 Marr LJ l. Same view was taken by this Court in F. A. O. No. 155-M of 1979 (Smt. Urmal Goel v. Vijay Kumar Goel) decided on Jan. 30, 1980. In the latter case, a petition for restitution of conjugal rights was filed by the wife against her husband which was decreed. Later, the husband filed a petition for divorce on the ground that conjugal rights had not been restituted between the parties for more than one year after passing of the decree. The petition was resisted by the wife merely on the ground that the husband did not care to comply with the decree of restitution of conjugal rights. The trial Court

granted the decree for divorce. The order was affirmed by this Court observing that the husband was entitled to that decree under S. 13(1A) of the Act. It was observed that it could not be held that the husband was taking advantage of his wrong and consequently, he was not entitled to a decree for divorce. In Smt. Ranjit Kaur's case (supra) the learned Judge observed that the provisions of S. 23(1)(a) of the Act cannot be invoked to refuse the relief under S. 13(1A)(ii) of the Act where cohabitation has not been resumed between the parties to the marriage for a statutory period after the passing of decree for restitution of conjugal rights in proceedings under the Act.

7. From the above cases it follows firstly, that under S. 13(1A) of the Act either of the parties including a defaulting party can seek divorce on the ground that there has been no restitution of conjugal rights for a period of one year or more after the passing of a decree for restitution of conjugal rights, secondly, that the question as to who is at fault for not coming together is not to be gone into by he Courts thirdly, that words "wrong or disability" referred to in Section 23(1)(a) when read with Section 13(1A) mean a wrong or disability other than a mere disinclination to agree to an offer to reunion n pursuance of a decree for restitution of conjugal rights, fourthly, that a decree or restitution of conjugal rights can be executed symbolically under Order 21, Rule 32 of the Code of Civil Procedure and fifthly, that simply because a spouse refuses to resume cohabitation in spite of n execution application filed by the other spouse it cannot be said that the decree for restitution of conjugal rights stands satisfied, and the spouse refusing to resume cohabitation is not entitled to file an application for divorce.

8. The two cases referred to by the learned counsel for the petitioner are distinguishable. Those cases were decided before Section 13 was amended by deletion of clause (ix) from sub-section (1) and introduction of sub-section (1-A). The observations made in those cases are, therefore, not applicable to this case. It may be relevant to mention that the latter case was a Letters Patent. Appeal from the former case.

9. For the aforesaid reasons, 1 do not find any merit in the revision petition and dismiss the same with no order as to costs.

10. Revision dismissed.