



**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO-2355-2017(O&M)

Reserved on : 02.07.2025

Date of decision: 08.07.2025

Maya Devi ..Appellant

Versus

Kailash Chand ..Respondent

**CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MR. JUSTICE ROHIT KAPOOR**

Present: Ms. Sharmila Sharma, Advocate for the appellant
Mr. Jitender Nara, Advocate for the respondent

ANIL KSHETARPAL, J.

1. Brief facts:-

1. Through this appeal, the appellant (the respondent's wife) assails the correctness of the judgment passed on 22.02.2017 whereby decree of divorce was granted in favour of respondent under Section 23 (1)(a) of the Hindu Marriage Act, 1955 (hereinafter referred to as '1955 Act').

2. In order to comprehend the issues involved in the present case, a brief recital of relevant facts is necessary.

3. The marriage between the parties was solemnized according to Hindu rites and ceremonies on 26.03.1992. From this wedlock two children were born. Though the respondent claims that the behavior of appellant was cruel towards him and his family members, however, the learned counsel representing the appellant did not press these grounds neither before the Family Court nor before



this Court. Hence, it is not necessary to refer to the detailed averments in this regard.

4. The parties have been living separately from 13.11.1997/07.12.1997. Initially, the respondent filed a petition for the grant of decree of divorce on 14.05.1999 on the grounds of cruelty and desertion by the appellant, which was dismissed on 04.09.2001 on the ground that the respondent could not be permitted to take benefit of his own wrongs. The aforesaid judgment attained finality. Subsequently, the appellant filed petition on 13.02.2002 under Section 9 of the 1955 Act for restitution of conjugal rights, which was allowed on 10.01.2003. Thereafter, she filed execution application under Section 47 and 151 and Order XXI Rule 32 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') whereas the respondent filed an application for recording of satisfaction of the decree. The application filed by the respondent was allowed on 08.12.2005 wherein it was recorded by the court that the appellant is directed to join the company of her husband Kailash. Challenging the correctness of the order the appellant filed Civil Revision i.e. CR-1571 of 2006, (Ex.R10) which was allowed on 17.12.2013, with the Court recording the following findings:-

“I hold that the petitioner has withdrawn from the society of her husband for a valid reason and the findings recorded by the executing Court are perverse in so far as it directed petitioner to join company of respondent and recorded decree as satisfied at the instance of faulting party who by his own conduct made the compliance of decree impossible for the decree-holder. Such findings of the executing Court have



the effect of giving undue benefit to the erring spouse of his own fault. Bigamy is prohibited under law and is in violation of the statutory provisions. In the circumstances of the case, wife could not have been compelled to live with the husband and it would have been unjust and unreasonable to do so and would amount to inequitable order for recording satisfaction of the decree. “One can take a horse to the water but one cannot make him to drink” is a famous proverb and the provision for restitution of conjugal rights under the Act as well as the Special Marriage Act seem to be akin to that. It is to be noted that Court cannot compel the defaulting spouse to physically return to the comfort-consortium of the decree-holder spouse. In view of the above discussion, the findings of the trial Court are result of misreading of the provision of law and are as such perverse.”

5. Thereafter, the respondent filed a petition under Section 13 (1)(a) and 13 (1) (b) of the 1955 on 29.08.2013 seeking dissolution of marriage by way of a decree of divorce which was contested by the appellant on the ground that the respondent had already contracted a second marriage during the subsistence of first marriage. The reference was also made to the order passed by the High Court on 17.12.2013 in CR 1571-2006. In order to prove his case, the respondent himself appeared in the witness box as PW1 and produced certain documents. Per contra, the appellant examined Smt. Anita Devi, Ranbir Singh, Food & Supply Inspector, RW4 Sushil Kumar Clerk from the office of the Tehsildar besides examining herself as RW2. At the time of arguments, learned counsel representing the respondent does not press the petition for divorce on the ground of cruelty and desertion.



6. However, he sought decree of divorce under Section 13(1)(A)(ii) of 1955 Act, which was granted by the Family Court while relying upon the various judgments passed including **Bimla Devi vs. Singh Raj 1977 AIR (Punjab) 167** and **Dharmendra Kumar vs. Usha Kumar 1977 (4) SCC 12.** The appellant assails the correctness of the aforesaid judgment passed by the Family Court.

7. Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook, alongwith the requisitioned record.

II. Arguments Adduced:-

8. Learned counsel representing the appellant submits that the respondent has wrongly been granted a decree of divorce despite being barred of such relief under Section 23(1)(a) of the 1955 Act. She submits that the respondent cannot be permitted to take advantage of his own wrong. In support of her submission, she relied upon the judgment of the Rajasthan High Court in **Smt. Gopi Bai vs. Govind Ram 2007(4) Latest Judicial Report 394.**

9. Per contra, the learned counsel representing the respondent contends that the appellant despite having a decree in her favour for restitution of conjugal rights, failed to resume cohabitation with the respondent. Hence, the court has correctly granted the decree of divorce.

III. Discussion & Analysis:-

10. This Court has considered the submissions made by the learned counsel representing the parties.



11. At the outset, it is apposite to refer to the relevant statutory provisions, namely, Section 13 and 23 of the 1955 Act, which are extracted as under:-

13. Divorce:- (1) *Any marriage solemnised, 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—*

(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

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

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

(a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it



requires or is susceptible to medical treatment; or]

(iv) [* *]*

(v) has, [* *] been suffering from venereal disease in a communicable form; or*

(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 persons who would naturally have heard of it, had that party been alive; [* *]*

[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].

(viii) [* *]*

(ix) [* *]*

[(1-A) Either party to a marriage, whether solemnised 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 solemnised 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 solemnisation 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 solemnisation 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 488 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 solemnised 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 solemnised before or after the commencement of the [Marriage Laws \(Amendment\) Act, 1976 \(68 of 1976\)](#).]



23. Decree in proceedings.—(1) *In any proceeding under this Act, whether defended or not, if the court is satisfied that—*

(a) *any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5] is not in anyway 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 under 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 cost to each of the parties.]”

12. It is evident that by Act no.44 of 1964 sub section 1-A was added to Section 13 enabling either party to a marriage to seek dissolution of marriage by way of decree of divorce on the ground that there is no cohabitation between the parties to the marriage for a period of one year or upward after the passing a decree for restitution of conjugal rights.

13. Section 23 (1)(a) provides that the spouse shall not be entitled to relief if he or she is taking advantage of his or her wrong, except in the cases where relief is sought on the grounds specified in sub-clauses (a), (b) or (c) of clause (ii) of Section 5. Section 5 clause (a), (b) or (c) of Section 5(ii) are with regard to incapability of a spouse to give valid consent due to unsoundness of mind, the spouse is suffering from a mental disorder or subject to recurrent attacks of



insanity. Hence, exceptions to Section 23(1)(a) are not applicable.

Therefore, Section 23(1)(a) shall be applicable in the present case.

14. Apart from other judgments, the Family Court has relied upon a judgment of the three Judge Bench of this Court in **Bimla Devi's case (supra)**. In this case, husband filed a petition under Section 9 of the 1955 Act, which was for restitution of conjugal rights, which was allowed. The wife filed a petition under Section 13 on the ground of non-resumption of cohabitation despite a decree of restitution, but was dismissed by the Family Court, which in appeal, was reversed by the High Court. The Full Bench held that the wife was not taking benefit of her own wrong. Hence, she was not debarred under Section 23(1)(a). Family Court also relied upon the judgment passed in **Dharmendra Kumar's case (supra)** to hold that bar under Section 23(1)(a) shall not be applicable. In the cited case, the wife obtained decree for restitution of conjugal rights. Subsequently, she did not accept her husband's advice to reside. In that context, the Supreme Court held that something more than a mere disinclination to agree an offer of reunion must be established to invoke prohibition under 23(1)(a). It was also held that refusal to join company for restitution of conjugal rights must be for the reasons serious enough to justify the denial.

15. However, the Family Court has overlooked the facts of the present case. It is evident that while deciding CR-1571 of 2006 on 17.12.2013, it was categorically recorded that the wife is justified in refusing to resume cohabitation, as the husband had remarried



during the subsistence of first marriage. The aforesaid judgment attained finality. In this regard, reference may also be made to the judgment of the Supreme Court in **Hirachand Srinivas Managaonkar vs Sunanda 2001(4) SCC 125**, wherein it was held that if the husband continues to live in adultery with another lady, the husband's petition for divorce cannot be decreed merely because the wife obtained decree for judicial separation. Para 19 of the judgment is extracted as under:-

“19. The question that remains to be considered is whether in the facts and circumstances of the case in hand the appellant husband can be said to have committed and to be committing a “wrong” within the meaning of Section 23(1)(a) by continuing to live with his mistress even after passing of the decree for judicial separation on the ground of adultery. The respondent presented the petition seeking a decree of judicial separation on the ground that the appellant has been living in adultery since he is living with another lady during the subsistence of the marriage with her. The Court accepted the allegation and passed the decree for judicial separation. Even after the decree the appellant made no attempt to make any change in the situation and continued to live with the mistress. To pursue still such an adulterous life with no remorse, even thereafter, is yet another “wrong” which he deliberately continued to commit, to thwart any attempt to reunite and, in such circumstances can it be said that the passing of a decree for judicial separation has put an end to the allegation of adultery; or that the chapter has been closed by the decree for judicial separation and therefore he cannot be said to have committed a “wrong” by continuing to live with the mistress. The learned counsel appearing for the appellant placed reliance on a Division Bench decision of the Gujarat High Court in the case of Bai Mani v. Jayantilal Dahyabhai [AIR 1979 Guj 209] in which the view was taken that matrimonial offence of adultery had exhausted itself when the



decree for judicial separation was granted, and therefore, it cannot be said that it is a new fact or circumstance amounting to wrong which will stand as an obstacle in the way of the husband to successfully obtain the relief which he claims in the divorce proceedings, and contended that the question should be answered in favour of the husband as has been done by the Gujarat High Court. We are unable to accept the contention. Living in adultery on the part of the husband in this case is a continuing matrimonial offence. The offence does not get frozen or wiped out merely on passing of a decree for judicial separation which as noted earlier merely suspends certain duties and obligations of the spouses in connection with their marriage and does not snap the matrimonial tie. In that view of the matter accepting the contention raised on behalf of the appellant would, in our view, defeat the very purpose of passing the decree for judicial separation. The decision of the Gujarat High Court does not lay down the correct position of law. On the other hand, the decision of the Madras High Court in the case of Soundarammal v. Sundara Mahalinga Nadar [AIR 1980 Mad 294 : (1980) 2 MLJ 121] in which a Single Judge took the view that the husband who continued to live in adultery even after decree at the instance of the wife could not succeed in a petition seeking decree for divorce and that Section 23(1)(a) barred the relief, has our approval. Therein the learned Judge held, and in our view rightly, that illegality and immorality cannot be countenanced as aids for a person to secure relief in matrimonial matters.”

16. It is evident that the judgment passed in **Hirachand Srinivas Managaonkar’s case (supra)** applies with all force to the facts of the present case. The language of Section 23(1)(a) is crystal clear. There is a specific prohibition against granting of a decree of divorce to a spouse who is taking advantage of his or her wrong. The respondent is residing with the second wife and out of their wedlock, the second wife has given birth to two children from the loins of the respondent which stands proved from the ration card produced by the



appellant. Furthermore, the appellant has also produced a certified copy of the affidavit filed by the respondent admitting that Rakhi is his daughter. A perusal of the ration card further reveals that Rakhi is the daughter from second marriage with Jagwanti. From the first marriage, appellant was blessed with two children, namely Renu and Jitender.

17. Hence, the appellant's refusal to honour the decree for restitution of conjugal rights granted in her favour is for a valid and justified reason. The conduct of the respondent, in entering into a second marriage, during subsistence of the first, is a serious matrimonial wrong that disentitles him to any equitable relief. Consequently, the judgments passed in **Bimla Devi's case and Dharmendra's case (supra)** are not applicable.

IV.Decision:-

18. Keeping in view the aforesaid discussion, the judgment passed by the Family Court is not sustainable. Consequently, the same is hereby set aside. Resultantly, the petition filed by the respondent under Section 13 of the 1955 Act shall stand dismissed.

19. The appeal stands allowed.

20. All the pending miscellaneous applications, if any, are also disposed of.

(ANIL KSHETARPAL)
JUDGE

08.07.2025

rekha

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No

(ROHIT KAPOOR)
JUDGE