CASE NO.:
Appeal (civil) 1473 of 1999

PETITIONER:
HIRACHAND SRINIVAS MANAGAONKAR

Vs.

RESPONDENT:
SUNANDA

DATE OF JUDGMENT: 20/03/2001

BENCH:
D.P. Mohapatra & Doraiswamy Raju

JUDGMENT:

D.P. MOHAPATRA,J.
L...I...T.....T.....T.....T.....T.....T.....T..J

The point that arises for determination in this case is short but by no means simple. The point is this: Whether the husband who has filed a petition seeking dissolution of the marriage by a decree of divorce under section 13(1-A)(i) of the Hindu Marriage Act, 1955 (for short the Act) can be declined relief on the ground that he has failed to pay maintenance to his wife and daughter despite order of the Court?

The relevant facts of the case necessary for determination of the question may be stated thus :

The appellant is husband of the respondent. On the petition filed by the respondent- under section 10 of the Act seeking judicial separation on the ground of adultery on the part of the appellant a decree for judicial separation was passed by the High Court of Karnataka on 6.1.1981. In the said order the Court considering the petition filed by the respondent, ordered that the appellant shall pay as maintenance Rs.100/- per month to the wife and Rs.75/- per month for the daughter. Since then the order has not been complied with by the appellant and the respondent has not received any amount towards maintenance. Thereafter, on 13.9.1983 the appellant presented a petition for dissolution of marriage by a 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 more than one year after passing of the decree for judicial separation.

The respondent contested the petition for divorce on the ground, inter alia, that the appellant having failed to pay the maintenance as ordered by the Court the petition for divorce filed by him is liable to be rejected as he is trying to take advantage of his own wrong for getting the relief. The High Court by the judgment dated 10.4.1995 in M.F.A.No.1436/1988 accepted the plea taken by the respondent and refused to grant the appellants prayer for divorce. The said order is assailed by the appellant in this appeal

by special leave.

The answer to the question formulated earlier depends on the interpretation of section 13(1-A) and its interaction with Sections 10 and 23(1)(a) of the Act.

Ms. Kiran Suri, learned counsel appearing for the appellant, contended that the only condition for getting a divorce under section 13(1-A) is that there has been no resumption of co-habitation 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 both the spouses were parties. If this pre-condition is satisfied, submitted Ms. Suri the Court is to pass a decree of divorce. According to Ms.Suri section 23 (1)(a) has no application to a case under section 13(1-A)(i). Altlernatively, she contended that the wrong allegedly committed by the appellant has no connection with the relief sought in the proceeding i.e. to pass a decree of divorce. According to Ms.Suri an order for payment of maintenance is an executable order and it is open to the respondent to realise the amount due by initiating a proceeding according to law.

Per contra Mr.K.R.Nagaraja, learned counsel for the respondent, contended that in the facts and circumstances of the case as available from the record the High Court rightly rejected the prayer of the appellant for a decree of divorce on the ground that the move was not a bona fide one, that he continues to live in adultery even after the decree for judicial separation was passed and that he has failed to maintain his wife and daughter. Mr. Nagaraja submitted that granting his prayer for a decree of divorce will be putting a premium on the wrong committed by the appellant towards the respondent and her child. Shri Nagaraja also raised the contention that the High Court while directing the appellant to pay maintenance to his wife and daughter (Rs.100/- + Rs.75/- per month) did not pass any order on the prayer made by the respondent for education expenses and marriage expenses of the daughter.

Since the decision of the case depends on the interpretation of the relevant provisions of section 13(1-A)(i) and its interaction with sections 10 and 23(1)(a) of the Act, the relevant portions of the two sections are quoted hereunder:

13.Divorce (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-

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

(i-a) has, after the solemnization 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

xxx xxx xxx

(1-A) Either party to a marriage, whenever 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.

Sectin 10 provides as follows :

10. Judicial separation (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

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

Section 23(1)(a) provides as follows :

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 any way taking advantage of his or her own wrong or disability for the purpose of such relief.

Originally nine different grounds were available to a husband or wife for obtaining a decree of divorce under sub-section (1) of Section 13. Under clause (viii) of the sub-section a marriage could be dissolved by a decree of divorce on a petition presented by the husband or the wife on the ground that the other party has not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation against that party. Under clause (ix) of the sub- section, a marriage could be dissolved by a decree of divorce on a petition presented by the husband or the wife on the ground that the other party had failed to comply with a decree for

restitution of conjugal rights for a period of two years or upwards after the passing of a decree of restitution against that party.

Amending Act No.44 of 1964, which came into force on the 20th of December, 1964, effected two significant changes. Clauses (viii) and (ix) which constituted two of the nine grounds on which a marriage could be dissolved by a decree of divorce were deleted from sub-section (1) and secondly, a new sub- section i.e. sub-section (1-A) was added to Section 13. It is clear from these amendments introduced by the Act No.44 of 1964 that whereas prior to the amendment a petition for divorce could be filed only by a party which had obtained a decree for judicial separation or for restitution of conjugal rights, this right is now available to either party to the marriage irrespective of whether the party presenting the petition for divorce is a decree holder or a judgment debtor under the decree for judicial separation or the decree for restitution of conjugal rights, as the case may be. This position is incontrovertible.

The question is: whether in a petition for divorce filed under sub-section (1-A) of Section 13, it is open to the Court to refuse to pass a decree on any of the grounds specified in section 23 of the Act, in so far as any one or more of them may be applicable.

The contention that the right conferred by sub- section (1-A) of Section 13 is absolute and unqualified and that this newly conferred right is not subject to provisions of Section 23 is fallacious. This argument appears to be based on the erroneous notion that to introduce consideration arising under Section 23(1) into the determination of a petition filed under sub-section (1-A) of Section 13 is to render the amendments made by the Amending Act No.44 of 1964 wholly meaningless. As noted earlier, prior to the amendment under clauses (viii) and (ix) of Section 13(1) the right to apply for divorce was restricted to the party which had obtained a decree for judicial separation or for restitution of conjugal rights. Such a right was not available to the party against whom the decree was passed. Sub-section (1-A) of Section 13 which was introduced by the amendment confers such a right on either party to the marriage so that a petition for divorce can after the amendment be filed not only by the party which had obtained a decree for judicial separation or for restitution of conjugal rights but also for the party against whom such a decree was passed. This is the limited object and effect of the amendment introduced by Act No.44 of 1964. The amendment was not introduced in order that the provisions contained in Section 23 should be abrogated and that is also not the effect of the amendment. The object of sub-section (1-A) was merely to enlarge the right to apply for divorce and not to make it compulsive that a petition for divorce presented under sub-section (1-A) must be allowed on a mere proof that there was no cohabitation or restitution for the requisite period. The very language of Section 23 shows that it governs every proceeding under the Act and a duty is cast on the Court to decree the relief sought only if the conditions mentioned in the sub-section are satisfied, and not otherwise. Therefore, the contention raised by the learned counsel for the appellant that the provisions of Section 23(1) are not relevant in deciding a petition filed under sub-section (1-A) of Section 13 of the Act, cannot be accepted.

The next contention that arises for consideration is whether the appellant by refusing to pay maintenance to the wife has committed a wrong within the meaning of Section 23 and whether in seeking the relief of divorce he is taking advantage of his own wrong. In Mullas Hindu Law (17th Edition at page 121) it is stated: Cohabitation means living together as husband and wife. It consists of the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband supporting his wife as a husband should. Cohabitation does not necessarily depend on whether there is sexual intercourse between husband and wife. If there is sexual intercourse, it is very strong evidence it may be conclusive evidence that they are cohabiting, but it does not follow that because they do not have sexual intercourse they are not cohabiting. Cohabitation implies something different from mere residence. It must mean that the husband and wife have begun acting as such and have resumed their status and position as husband and wife.

(Emphasis supplied)

After the decree for judicial separation was passed on the petition filed by the wife it was the duty of both the spouses to do their part for cohabitation. The husband was expected to act as a dutiful husband towards the wife and the wife was to act as a devoted wife towards the husband. If this concept of both the spouses making sincere contribution for the purpose of successful cohabitation after a judicial separation is ordered then it can reasonably be said that in the facts and circumstances of the case the husband in refusing to pay maintenance to the wife failed to act as a husband. Thereby he committed a wrong within the meaning of Section 23 of the Act. Therefore, the High Court was justified in declining to allow the prayer of the husband for dissolution of the marriage by divorce under Section 13(1-A) of the Act.

In this connection it is also necessary to clear an impression regarding the position that once a cause of action for getting a decree of divorce under section 13(1-A) of the Act arises the right to get a divorce crystallises and the Court has to grant the relief of divorce sought by the applicant. This impression is based on a mis-interpretation of the provision in section 13(1-A). All that is provided in the said section is that either party to a marriage may present a petition for dissolution of the marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or more after the passing of a decree for judicial separation in a proceeding to which they were parties or that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or more after the passing of a decree for restitution of conjugal rights in a proceeding to which both the spouses were parties. The section fairly read, only enables either party to a marriage to file an application for dissolution of the marriage by a decree of divorce on any of the grounds stated therein. The section does not provide that once the applicant makes an application alleging fulfilment of one of the conditions specified therein the Court has no alternative but to grant a decree of divorce. Such an interpretation of the Section

will run counter to the provisions in section 23(1)(a) or (b) of the Act. In section 23(1) it is laid down that if the Court is satisfied that any of the grounds for granting relief exists and further that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief and in clause (b) a mandate is given to the Court to satisfy itself that in the case of a petition based on 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 in (bb) when a divorce is sought on the ground of mutual consent such consent has not been obtained by force, fraud or undue influence. If the provisions in section 13(1A) and section 23(1)(a) are read together the position that emerges is that the petitioner does not have a vested right for getting the relief of a decree of divorce against the other party merely on showing that the ground in support of the relief sought as stated in the petition exists. It has to be kept in mind that relationship between the spouses is a matter concerning human life. Human life does not run on dotted lines or charted course laid down by statute. It has also to be kept in mind that before granting the prayer of the petitioner to permanently snap the relationship between the parties to the marriage every attempt should be made to maintain the sanctity of the relationship which is of importance not only for the individuals or their children but also for the society. Whether the relief of dissolution of the marriage by a decree of divorce is to be granted or not depends on the facts and circumstances of the case. In such a matter it will be too hazardous to lay down a general principle of universal application.

In this connection the decision of this Court in the case of Dharmendra Kumar vs. Usha Kumar (1977 (4) SCC 12) is very often cited. Therein this Court taking note of the factual position that the only allegation made in the written statement was that the petitioner refused to receive some of the letters written by the appellant and did not respond to her other attempts to make her live with him, held that the allegations even if true, did not amount to misconduct grave enough to disentitle the wife to the relief she has asked for. In that connection this Court observed that in order to be a wrong within the meaning of section 23(1) 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. The decision cannot be read to be laying down a general principle that the petitioner in an application for divorce is entitled to the relief merely on establishing the existence of the ground pleaded by him or her in support of the relief; nor that the decision lays down the principle that the Court has no discretion to decline relief to the petitioner in a case where the fulfillment of the ground pleaded by him or her is established.

In this connection another question that arises for consideration is the meaning and import of section 10(2) of the Act in which it is laid down that where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by

petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so. The question is whether applying this statutory provision to the case in hand can it be said that the appellant was relieved of the duty to cohabit with the respondent since the decree for judicial separation has been passed on the application filed by the latter. On a fair reading of the sub-section(2) it is clear that the provision applies to the petitioner on whose application the decree for judicial separation has been passed. Even assuming that the provision extends to both petitioner as well as the respondent it does not vest any absolute right in the petitioner or the respondent not to make any attempt for cohabitation with the other party after the decree for judicial separation has been passed. As the provision clearly provides the decree for judicial separation is not final in the sense that it is irreversible; power is vested in the Court to rescind the decree if it considers it just and reasonable to do so on an application by either party. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and re-adjustment. The decree may fall by a conciliation of the parties in which case the rights of respective parties which float from the marriage and were suspended are restored. Therefore the impression that section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship.

Now we come to the crucial question which specifically arises for determination in the case; whether refusal to pay alimony by the appellant is a wrong within the meaning of section 23(1) (a) of the Act so as to disentitle the appellant to the relief of divorce. The answer to the question, as noted earlier, depends on the facts and circumstances of the case and no general principle or straight-jacket formula can be laid down for the purpose. We have already held that even after the decree for judicial separation was passed by the Court on the petition presented by the wife it was expected that both the spouses will make sincere efforts for a conciliation and cohabitation with each other, which means that the husband should behave as a dutiful husband and the wife should behave as a devoted wife. In the present case the respondent has not only failed to make any such attempt but has also refused to pay the small amount of Rs.100 as maintenance for the wife and has been marking time for expiry of the statutory period of one year after the decree of judicial separation so that he may easily get a decree of divorce. In the circumstances it can reasonably be said that he not only commits the matrimonial wrong in refusing to maintain his wife and further estrange the relation creating acrimony rendering any reapprochement impossible but also tries to take advantage of the said wrong for getting the relief of

divorce. Such conduct in committing a default cannot in the facts and circumstances of the case be brushed aside as not a matter of sufficient importance to disentitle him to get a decree of divorce under section 13(1A).

In this connection the decision of a single Judge of the Calcutta High Court in the case of Sumitra Manna vs. Gobinda Chandra Manna AIR 1988 Cal 192 may be referred where it was held that if alimony or maintenance is ordered to be paid under the provisions of the Hindu Adoption and Maintenance Act, 1956 or the Codes of Criminal Procedure of 1973 or of 1898 and the husband does not comply with the order, the same may under certain circumstances secure an advantage to the wife in obtaining a decree for divorce under section 13(2) (iii) of that Act. But no advantage can or does accrue to a husband for his failure to pay any alimony or maintenance to the wife in obtaining a decree for divorce against the wife under section 13(1A) and, therefore, the husband cannot be said to be in any way taking advantage of such non-payment within the meaning of section 23(1)(a) in prosecuting his petition for divorce under section 13(1A). This decision, which proceeds upon a narrow construction of the relevant provisions throwing overboard the laudable object underlying Section 23(1)(a) of the Act, in our view, does not lay down the correct position of law.

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 the 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 into such an adulterous life with no remorse, even thereafter, is yet another wrong which he deliberately continued to commit, to thwart any attempt to re-unite 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 mistress. The learned counsel appearing for the appellant placed reliance on a Division Bench decision of the Gujarat High Court in the case of Bal Mani v Jayantilal Dahyabhai, AIR 1979 Guj. 209, in which the view was taken that matrimonial offence of adultery has 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 Madras 294, in which a single Judge took the view that the husband who continued to live in adultery even after decree at the instance of wife could not succeed in 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.

On the discussions and the analysis in the foregoing paragraphs the position that emerges is that the question formulated earlier is to be answered in the affirmative. Therefore, the High Court, in the facts and circumstances of the case, was right in declining the relief of a decree of divorce to the appellant. Accordingly the appeal is dismissed with costs. Hearing fee assessed at Rs.15,000/-.