NON RESUMPTION OF COHABATATION AS A FAULT GROUND OF DIVORCE UNDER THE HINDU MARRIAGE ACT

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CHAPTER-I

INTRODUCTION

For non-resumption of cohabitation between the parties for a period of one year after the passing of a decree of judicial separation, either party may file a petition for divorce under sec. 13 (1)(a) of the Hindu Marriage Act, 1955. The period in case of Hindu Marriage is also one year from the date of decree of judicial separation.2

The exact connotation of the expression “cohabitation” therefore seems important. There cannot be any exhaustive definition of the term “cohabitation” and each case must be decided on its own facts and merits. Mummery v. Mummery3, Abercrombie v. Abercrombie4 and Lowry v. Lowry5 are a few examples. Resumption of Cohabitation depends upon the intention of the parties. The test of cohabitation is the same as that of living with each other which is to be construed as referring “to their living with each other in the same household”6 Cohabitation consists on the husband acting as husband towards the wife and the wife acting as a wife towards the husband and the husband cherishing and supporting his wife as a husband should.7

The mere fact that sexual intercourse has taken place between the parties is not decisive on the issue of resumption of cohabitation, though it is of great weight.8 Sexual intercourse is of more consequence when it takes place at the home the parties have earlier lived together as man and wife.9 The age of the spouses is also relevant consideration in determining the significance of sexual intercourse.10 In Mummery v. Mummery11 there was a single act of sexual intercourse, but it was held that there occurred no resumption of cohabitation. The legal effect of sexual intercourse may well be substantially different where the case is constructive as opposed to simple desertion.12

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2 Sec 13(1A)(i) of the Hindu Marriage Act, 1955.
3 LR 1942 P 107.
4 (1943) 2 All ER 465.
5 (1952) 2 All ER 61.
7 Evans v. Evans, (1947) 2 All ER 656.
8 Supra, n 3.
9 Perry v. Perry, (1952) All ER 1076.
10 Ibid.
11 Supra n. 2.
12 Howard v. Howard, (1952) 2 All ER 539.
The Hindu Marriage Act, 1955, recognizes nine fault grounds of divorce which are available to both the spouses and four-fault grounds are available to wife alone.

Section 13(1) of the Hindu Marriage Act, 1955 under which either spouse can seek divorce runs:

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

(ii) Has, after the solemnization of marriage, treated the petitioner with cruelty; or

(iii) Has deserted the petitioner for the continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) Has ceased to be a Hindu by conversion to another religion; or

(v) 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.

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 if mind 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) Has been suffering from a virulent and incurable form of leprosy; or

(v) Has been suffering from a 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.

A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the following 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 petitioner. Provided that in either case the other wife is alive at the time of the presentation of the petition;

(ii) 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, or in a proceeding under section 125 of the Code of Criminal Procedure, 1973, 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.
CHAPTER-II  

CASES LAWS RELATING TO THE PROVISION

Section 13 (1A) (i) of the Hindu Marriage Act, provides that either party to a marriage, whether solemnized before or after the commencement of the Act may present a petition for divorce on the ground of non-cohabitation between the spouses for a period of one year or upwards after the passing of the decree of judicial separation. The relief of divorce under section 13 (1A)(i) cannot be obtained in the same proceeding in which the decree of judicial separation has been passed. For such a relief a separate suit is to be instituted one year after the decree of judicial separation.¹⁵

Originally, the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 contained two fault grounds under which divorce could be obtained by a petitioner in whose favour a decree of restitution of conjugal rights had been passed and respondent had not complied with it for a period of two or more years, and a petition at whose instance a decree of judicial separation has been passed and no cohabitation has been resumed for a period of two or more years. Obviously these were contemplated as fault ground. In 1964, on a Private Member’s Bill, these grounds were converted into breakdown of marriage grounds, by laying down that in each of these cases either party could sue for divorce.¹⁶

The period of two years was reduced to one year by the Marriage Laws (Amendment) Act, 1976.

Evidently by laying down that either party could sue for divorce- and not merely the so-called innocent party- and divorce could not be denied to the other party-the so called guilty party- the amendment sought to give up the guilt theory and sought to introduce the irretrievable breakdown principle of divorce. Non-compliance with a decree for restitution of conjugal rights and non resumption of cohabitation after a decree of judicial separation for a period of one year is treated as a conclusive evidence of breakdown of marriage. As per the statement of Objects and Reasons, the right to seek divorce on any one of grounds should be available to both husband and wife as in such case it is clear that the marriage has proved a complete failure. There is, therefore, no justification for making the right available only to the party who has obtained the decree in each case. In such a case, Parliament felt that no useful purpose will be served by

¹⁵ Sadam Singh v. Resham, AIR 1982 All 52.
maintaining a union which has ceased to exist but in name and further no useful purpose will be
served in determining at whose fault marriage has broken down- may be one of the parties was at
fault, may be no one was at fault, may be both were at fault, may be no one was at fault, may be
it has broken down by incompatibility. Interestingly, in Sneh Prabha v. Ravinder Kumar\textsuperscript{17}, the
Supreme Court granted divorce after reaching to the conclusion that marriage had irretrievably
broken down and appeal against an order confirming decree of Restitution and after making
much effort at reconciliation.

However under both the statutes, irretrievable breakdown of marriage is not per se a
ground of divorce\textsuperscript{18} It is only one version of irretrievable breakdown which constitutes a ground,
i.e. non-compliance with decree of restitution or non-resumption after a decree of judicial
separation for a period of one year.

While introducing these breakdown grounds, it seems that Parliament overlooked the
 provision of section 23(1)(a) of the Hindu Marriage Act, 1955, which lays down that relief will
not be granted to a petitioner who is shown to be taking advantage of his or her own wrong or
disability. With the result, the “taking advantage” of his or her own wrong principle has been
applied by the court to the breakdown ground also. When the Hindu Marriage Act, 1955 was
amended, no amendment was made in this regard, though its application was excluded when
marriage is sought to be annulled on the ground of insanity.

In cases coming after 1976\textsuperscript{19}, the High Courts have taken the view that the post- decree
conduct of the petitioner is material and in case it would be found that in seeking divorce on the
ground of non-resumption of cohabitation after a decree of judicial separation or non-compliance
with the decree of restitution of conjugal rights, the petitioner is taking advantage of his own
wrong, he would not be allowed relief. Thus where the husband obtained a decree of restitution
but did not allow the wife to comply with it and when later on he sued for divorce on the ground
of compliance of the decree for the statutory period, the courts refused to grant him divorce, as
they felt that it would amount to giving him advantage of his wrong- his not allowing the wife to
comply with the decree was such a wrong. In some more cases also this view had been
expressed.

\textsuperscript{17} AIR 1995 SC 2170.
\textsuperscript{18} Ashok Kumar v. Shabnam, AIR 1989 Del 121.
\textsuperscript{19} Geeta v. Sarveshwara, AIR 1983 AP 111.
In Sumitra Manna v. Chandra Manna, the wife had obtained a decree of judicial separation. The parties continued to live separately and after the completion of statutory period as laid down in sec 13 (1A)(i), the husband did not make any effort at resuming cohabitation after the decree of judicial separation and had also failed to pay her alimony granted by the Court, his petition for divorce should not be granted as it would amount to taking advantage of his own wrong. According to the wife, non-payment of the amount of alimony and no effort at resuming cohabitation were wrong on the part of the husband within the meaning of section 23(1)(a). After a review of authorities, the Calcutta High Court, granting the husband’s petition, observed that both these facts did not amount to his taking advantage of his own wrong.

It has been submitted earlier also that if that technical view of section 23(1)(a) is taken then there will be hardly a petition under section 13(1A), where divorce could be granted. Thus a spouse who had obtained a decree of restitution of conjugal rights fails to impress the other spouse to join him, or a spouse against whom a decree had been obtained fails or refuses to comply with it, he or she will be in the wrong and the petition for divorce under section 13(1A) will fail. On the other hand, if he successfully impresses the other spouse to join him then there is no cause of action left to file a petition for divorce. It appears that when the Amendment of 1964 was debated in Parliament, no one gave any thought to the possibility of the applicability of section 23 to a petition under section 13(1A). Since the divorce structure in the original Hindu Marriage Act, 1955 was based on fault theory - it is in that structure only that section 23 has any relevance and when a new structure of irretrievable breakdown of marriage was laid down, the projecting arm of section 23 was not cut down but rather allowed to cast its shadow, and the courts applied section 23 to the irretrievably breakdown of marriage basis of divorce also. They overlooked the spirit and the law behind section 13(1A), and adhered as they do to mechanical jurisprudence, applied section 23. As a result, section 13(1A) was almost rendered nugatory.

In Dharmendra Kumar v. Usha Kumar20, the wife applied for divorce under section 13(1A)(ii) after a little over two years of passing of the decree of restitution of conjugal rights in her favour, on the averment that the decree had remained unfulfilled. The husband in his defence alleged that the wife refused to receive or reply to the letters written to her and also did not respond to his other attempts to her agree to live with him. The Supreme Court observed that

20 AIR 1977 SC 2218.
these allegations even if true, did not amount to misconduct, grave enough, to disentitle the wife to the decree of divorce.

In **N. Varalakshmi v. N. V. Hanumantha Rao**\(^{21}\), the husband had obtained a decree of judicial separation. The wife made several attempts to resume cohabitation but the husband did not allow her to do so. After the completion of statutory period, the husband petitioned for divorce on the basis of non-resumption of cohabitation after the decree of judicial separation. The wife averred that cohabitation could not be resumed because the husband did not allow her to do so, and now granting him the decree of divorce would amount to giving him advantage of his own wrong. The court rejected the plea and passed a decree of divorce. The court said that the resumption of cohabitation had to be voluntary and mutual. Similarly, in **Pranjiwan v. Bai Dhirajban**\(^{22}\), the husband had obtained a decree of restitution of conjugal rights but the wife refused to comply with it. After the completion of statutory period, the husband sued for divorce and the wife averred that her husband did not invite her to live with him. Again, the Court granted divorce.

The following observation made in the case of **M. Someshwara v. Sudhaben**\(^{23}\) is instructive: The policy of law seems to be that if the period reflection provided by the decree of judicial separation namely, one year, has not produced any reconciliation between the parties, it is fair to conclude that the marriage has broken down irretrievably and it is not in public interest or conducive to the happiness of the spouses themselves, to keep them tied by the technicality of law when their minds are apart and refuse to unite. Is the purpose of the Hindu Marriage Act to inflict suffering on unwilling spouses or to advance hypocritical life-style by closing doors to respectability? The trend of the policy of the law in abundantly clear by the introduction of section 13B, the legislature has given recognition even to a consensual divorce to end an unhappy marriage. Law has an object and any interpretation which frustrates it has to be avoided.

It is opined by learned authors\(^{24}\) that post-decree conduct of the parties is material and therefore Parliament has deliberately retained the application of the provision of section 23(1)(a) of the Hindu Marriage Act 1955 in respect of section 13 (1A). They say that after the amendment, the difference between the parties in whose favour the decrees were passed and

\(^{21}\) AIR 1978 AP 6.

\(^{22}\) 1977 HLR 398.

\(^{23}\) AIR 1968 Mys 274.

\(^{24}\) V.S. Deshpande, DIVORCE UNDER THE HINDU MARRIAGE ACT, AIR 1971 (J) 113.
against whom the decrees were passed has been eliminated. The mere fact that after the passing of these decrees, cohabitation has not been resumed or the restitution of conjugal rights has not come about is regarded as sufficient to give either of the parties a right to apply for divorce. This is a new way of looking at the phenomenon of judicial separation and the non-restitution of conjugal rights between them. This phenomenon by itself is regarded as a breakdown of the marriage necessitating the grant of divorce irrespective of the question by whose fault the breakdown of the marriage had resulted. After the amendment of 1964, the question whether marriage has or has not broken down has to be looked at in ways:

(a) On the basis of fault grounds contained in section 13(1), once it was shown that the respondent has committed a matrimonial offences and there is no possibility of reconciliation the decree of divorce may be pronounced, and

(b) When it is shown that a decree of restitution has not been complied with or cohabitation has not been resumed after a decree of judicial separation for one year or more, a decree of divorce may be passed.

The conduct of the parties in both cases is material. Sub-section (1A) does not differ from sub-section (1) of section 13 in one fundamental respect. Both these provisions merely enable application for divorce to be made. They do not say that courts shall grant divorce on such applications. They only enable the application to be made on the grounds stated in the provisions. Neither sub-section (1), nor sub-section (1A) of section 13 is, therefore, a complete code in itself for the grant of divorce. The other provisions of the Act have to be read along with them. The provision with which we are concerned is section 23. There can be no controversy that section 23 had to be read with section 13 as the latter stood prior to the amendment of 1964. For, the act has to be read as a whole. Can it be said that sub-section (1A) if section 13 overrides section 23? It is true that sub-section (1A) of section 13 was enacted in 1964 while section 23 was enacted in 1955. If, therefore, sub-section (1A) of section 13 is inconsistent with section 23, one argument can be that the subsequently enacted part of the Act would prevail against the previously enacted part of it. But this rule is subject to context to the contrary. While section 13 is concerned with enumerating the grounds for divorce, section 23 is of a general nature. It opens with the words “in any proceeding under this act”. It therefore applies to every proceeding under the Act. It could not, therefore, be overridden by sub-section (1A) of section 13 which applies to
the divorce proceeding. Section 23(1) (a) further says that “if the court is satisfied that any of the grounds for granting relief exists.” This means that section 23(1)(a) applies only after the court is satisfied that the petitioner is entitled to relief on one of the grounds enumerated in section 13. This applies not only to the grounds enumerated in sub-section (1) but also to the ground enumerated in sub-section (1A) of section 13. Section 23 has therefore to be read with sub-section (1A) of section 13. Section 23 has therefore to be read with sub-section (1A) of section 13.

Accordingly, only such conduct of the decree-holder or the judgment-debtor would become irrelevant in considering his application under sub-section (1A) of section 13 as had been already considered in the making of the decree against him. But other conduct which had not been so considered in the proceedings leading to the decree would not be precluded from consideration. For, the argument that the judgment-debtor and the decree-holder are placed on the same footing under sub-section (1A) would not be available to rule out the consideration of such conduct as it was never the subject matter of consideration in the proceeding leading to the decree.

For the same reason, the conduct of the decree holder after the passing of the decree would also have to be taken into consideration. For, the equation of the judgment-debtor and the decree-holder for making the application has no bearing on the conduct of either party whether the judgment-debtor or the decree-holder after the decree is passed.

The learned Chief Justice\textsuperscript{25} made the following suggestions for reconciling the two provisions:

(1) Under section 23 conduct of both the husband and the wife has to be considered by the court as would have a bearing on the exercises of the discretion by the court in granting the relief of divorce. For, the nature of the jurisdiction of a divorce court, is not only merely to decide a dispute between the parties but also to investigate the “facts of life” between the parties. This is why under sub-section (1) of section 23 the court has to satisfy 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 the petitioner is not guilty of various other things which may also operate as a bar to the relief. This is also the reason why under

\textsuperscript{25}Ibid.
sub-section (2) of section 23, the court has to try to bring about reconciliation between the parties.

(2) The specific and limited effect of sub-section (1A) of section 13 is to prelude the court from taking into account that portion of the conduct of the parties which has already been considered by the court in the proceeding leading to the decrees for judicial separation and restitution of conjugal rights. The intention of the legislature is giving both the right to make an application for divorce was to eliminate the considering of such conduct.

(3) All other conduct of the parties not considered in the proceedings leading to the decrees and in particular the conduct of the parties subsequent to the decrees has very much to be considered by the court under section 23 of the Act. Instance of such subsequent conduct not considered in the proceedings leading to the decrees would be:

(i) Failure of the husband to provide for the maintenance to the wife; and

(ii) When one of the spouses attempted to come and live with the other spouse and the latter spouse defeated such an attempt after the passing of the decree, the court would have to consider under section 23 whether in such circumstances it could be said that there has been no resumption of cohabitation or no restitution of conjugal rights as between the parties. The court may come to the conclusion that the spouse who prevented the other spouse from cohabitation and restitution of conjugal rights was taking advantage of his or her own wrong in pleading that there has been resumption of cohabitation for over two years. He or she could not be allowed to take such a stand on view of his or her conduct.

According, to section 13 (1A) a decree either for judicial separation or for restitution of conjugal rights is essential. A spouse is entitled to a decree for divorce of the decree of restitution is not complied with even though the latter is an ex parte decree. Until a decree for divorce is obtained under this provision the marital relationship continues in spite of the decree either for judicial separation or for restitution of conjugal rights. In such an event, the wife is entitled to claim partition as heir of her deceased husband. Failure to resume cohabitation for a period of one year or upwards after a decree for judicial separation has to be proved for obtaining a divorce under this section. Once a right to move the court had accrued to the petitioner, it has to

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be adjudicated upon de hors the pendency of appeal against the judgment and decree passed in proceedings under section 9 of the Act.\textsuperscript{28} Where there was a consent decree for judicial separation without proving any of the grounds alleged in the petition, it was held that in a subsequent petition for divorce, the former consent cannot form the basis for divorce on the ground that there was no resumption of cohabitation between the parties, because the decree for judicial separation is in violation of section 23 (1) which is mandatory, for (i) consent of parties does not confer jurisdiction, (ii) it amounts to collusion which the legislature wanted to prevent.\textsuperscript{29}

In \textit{Lakshmi Bai} v. \textit{Lakshmi Chand},\textsuperscript{30} it was held that the object of this section was merely to enlarge the right to apply for divorce, and not to make it compulsory that a petition for divorce under section 13(1A) must be allowed on mere proof that there was no cohabitation for the required period. It was further held that section 23 is in the nature of an overriding provision not only for the reason that it covers any proceeding under the Act but for more important reason that it provides that is only if the conditions therein are satisfied but not otherwise, that the court shall decree the relief sought. Merely, because on few occasion, the parties came together either in the temple or anywhere, that will not amount to cohabitation as contemplated under section 13 (1A) (i) of the Act.\textsuperscript{31}

Under this provision, not only the spouse who obtained a decree for judicial separation but also the other spouse can file a petition after the period of one year from the date of the decree for judicial separation.\textsuperscript{32}

Section 13 (1A) only enables either party to a marriage to file an application for dissolution of the marriage by a decree of divorce on any grounds stated therein. The section does not provide that once the applicant makes an application alleging fulfillment of one of the conditions specified therein the court has no alternative but to grant a decree of divorce. Such an interpretation will run counter to the provisions in court 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 wrong or disability for the purpose of such relief. On a reading together of sections 13 (1A) and 23 (1)(a) the position that emerges is that the petitioner does not have a vested right for

\textsuperscript{28} Surjit Kumar v. Kusum Sharma, 2000 (2) HLR 260 (P & H).
\textsuperscript{29} Hira Kali v. Ram Asray Awasti, 1971 All 201.
\textsuperscript{30} 1968 Bom 332.
\textsuperscript{32} Gajnadevi v. Purshothamgiri, 1977 Del 178.
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.\(^{33}\)

So far as sub-clause (ii) of section 13(1A) is concerned, mere non-compliance per se would not amount to taking advantage of his or her own wrong under section 23 as there is no obligation placed by the statute on the party asking for relief that he or she should call upon the other party to satisfy the decree. It may be noted that under section 10(2) it is specifically stated that where a decree of judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent. Such a provision is not contained in section 8 which deals with granting a decree for restitution of conjugal rights.\(^{34}\) In *Ganjna Devi v. Purushotam Giri*\(^ {35}\), it was observed “had Parliament intended that a party which is guilty of matrimonial offences and against which a decree for judicial separation or restitution of conjugal rights had been passed was in view of section 2 of the Act not entitled to obtain divorce, then it would have inserted an exception to section 13 (1A) and with such exception the provision of section 13 (1A) would practically obtain redundant, as the guilty party could never reap the benefit of obtaining divorce while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act therefore cannot be construed so as to make the effect of the amendment of the law by insertion of section 13 (1A) nugatory. The expression “Petitioner is not in any way taking advantage of his or her own wrong” occurring in section 23 (1) (a) does not apply to taking advantage of the statutory right to obtain dissolution of marriage conferred by section 13(1A). In such a case a party is not taking advantage of his own wrong but of the legal right following the passing of the decree and the failure of the parties to comply with the decree.”

The Supreme Court in *Dharmendra v. Usha*\(^ {36}\) approved of these observations and of the decision in *Ramkali v. Gopal Das*\(^ {37}\) and held that in order to be wrong within the meaning of section 23(1)(a) the conduct has to be something more than a mere disinclination to agree to an offer of reunions. It must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

Where however before filing a petition under section 13 (1A) the husband had filed a petition for divorce on the ground of wife’s adultery it was held that the wife was justified in not

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\(^{33}\) Hirachand Shrinivas Mangaonkar v. Sunanda AIR 2001 SC 1285.

\(^{34}\) Anil v. Sudha Ben, 1978 Gaj 74.

\(^{35}\) ILR (1976) 1 Del 125.

\(^{36}\) 1977 SC 2218.

\(^{37}\) ILR (1971) 1 Delhi 6.
resuming cohabitation in view of the allegation of adultery and the husband cannot take advantage of his own wrong. In such circumstances, section 23 prevails over section 13 (1A)\textsuperscript{38}

There is no obligation on the decree holder to execute the decree according to the provision of the CPC before applying under this provision\textsuperscript{39} or do any positive act of inviting the other spouse to live together. Where a wife obtained the decree and also gave a notice to take her back and the husband was silent, It was held that the husband is not entitled to a decree under section 13(1A) as his silence is a wrong committed against his wife.\textsuperscript{40} In one case it was held that the court need not look into the fact as to who was the party at fault for not resuming cohabitation.\textsuperscript{41} In Santosh Kumari v. Mohan Lai,\textsuperscript{42} it was observed on an analysis of the provision of section 13(1A) and section 23 of the Hindu Marriage Act and order 21, rule 32, CPC providing for execution of decrees for restitution of conjugal rights, it would be clearly firstly that under section 13(1A) 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 the decree. Secondly, that the question as to who is at fault for not coming together is to be gone into by the court, thirdly, that the words “wrong or disability” referred to in section 23(1)(a) when read with 13(1A) mean a wrong or disability other than mere disinclination to agree to an offer to reunion in pursuance of a decree; fourthly, that a decree for restitution can be executed symbolically under order 21, rule 32, CPC, fifthly that simply because a spouse refuses to resume cohabitation in spite of an execution application filed by the other spouse, it cannot be said that the decree stands satisfied and the spouse refusing to resume cohabitation is not entitled to file an application for divorce. Where the husband did not comply with the decree obtained by the wife for restitution of conjugal rights and also ill-treated her and drove her away it was held that the husband was not entitled to a relief of divorce under this provision.\textsuperscript{43}

Where the wife pleaded that the husband refused to comply with the decree such plea cannot be granted to disentitle the husband from obtaining the relief.\textsuperscript{44} But where the husband

\begin{itemize}
\item Mehta (O P) v. Saroj Mehta, 1984 Delhi 159.
\item 1967 Mys LJ 373.
\item (1977) Mah LJ 453.
\item (1977) HLR 395.
\item 1983 Punj
\item Geetalakshmi v. Sarveswara Rao, 1983 AP 111.
\item Jaswinder Kaur v. Kulwant Singh 1980 Punj 220.
\end{itemize}
did not create any obstacles for the wife to join him and the wife did not resume cohabitation it was held that the husband cannot be refused a decree of divorce.\textsuperscript{45} 

In the case of a decree obtained by the husband for restitution of conjugal rights though the wife did not comply with the decree, she is entitled to divorce under this clause notwithstanding section 23(1)(a)\textsuperscript{46}.

The Madras High Court held that a petition under this section 13(1A) could be opposed on the same ground as can be pleaded in an application for judicial separation, if the lapse on the spouse is a continuing wrong.\textsuperscript{47}

Merely recording of satisfaction of the decree on the basis of the statements of the parties that they are willing to live together does not tantamount to restitution of conjugal duties. And therefore either spouse can apply under this section for divorce.\textsuperscript{48} The Allahabad High Court pointed out a fresh proceeding has to be filed for obtaining the relief under this provision after the decree for judicial separation or restitution of conjugal rights and not in the same proceedings in which the decree was passed.\textsuperscript{49}

The section states that if there has been no resumption of cohabitation for a period of one year or upwards after the passing of a decree or there has been no restitution of conjugal rights. It has to be noted that the period has to be reckoned from the date the decree becomes final. In \textit{Sruti Benerjee v. Tapankumar banerjee},\textsuperscript{50} it was held that when the decree for restitution passed by the trial court is affirmed by the appellate court, time has to be reckoned from the date of the decree of the trial courts. However, where trial court had dismissed the petition for restitution of conjugal rights and the decree was passed by the appellate court, the statutory period of one year would commence running from the date of appellate decree.\textsuperscript{51} Where an appeal was filed against the decree of the trial court but was soon withdrawn, the time would run from the passing of the decree by the trial court.\textsuperscript{52}

\textsuperscript{47} Gajna Devi v. Purushottam, 1977 Del 179.
\textsuperscript{48} Harobajan Kaur v. Bhagwant Singh, 1982 Punj 208.
\textsuperscript{49} Sadan Singh v. Reshma, 1982 All 52.
\textsuperscript{50} 1986 Cal 284.
\textsuperscript{51} Sukhwinder Singh v. Dilbagh Singh (1996-1) 112 Punj LR 448.
\textsuperscript{52} Ibid.
The expression “on passing of decree” means passing of judgment and the period of one year has to be calculated from the date of the judgment and not from the date of drawing up the decree.\textsuperscript{53}

\footnotesize{\textsuperscript{53} Balabhadra Pradhan v. Sundarimani Devi, 1995 Ori 180.}
CHAPTER-III

CONCLUSION AND SUGGESTIONS

In my opinion, to conclude, section 13(1-A) along with section 9 of the Hindu Marriage Act is one of the most grossly misunderstood sections of the Hindu Marriage Act. However despite the controversy it has continuously been upheld by the Judiciary. Even the legislature through various committees and its reports has supported this section. All the reasons so stated by abolitionists can be easily encountered if this socially benefiting section is read in the right light and its essence is understood.

First of all, it cannot be said that the concept of conjugal rights and that its embodiment in section 9 is foreign to the Indian culture and society. Such a right is inherent in the very institution of marriage itself. The only thing is new is the embodiment of this concept which has been prevailing since antiquity.

Sec. 13(1-A) is provided and applicable under the Hindu Marriage Act, 1955 only as a last resort when the judiciary is convinced that the marriage has completely broken down between the parties and there is no scope for reconciliation. The objective of the preservation of marriage is provided under section 9. According to the Hindu Marriage Act marriage is a civil contract and a religious ceremony. It is a contract of the greatest importance in civil institutions, and it is charged with a vast variety of rights and obligations, cohabitation being one of them. It is the very soul of marriage and this section enforces the right of cohabitation. If there is no reasonable ground for living apart, the court orders for cohabitation and enforces the Contract there is nothing wrong as the parties had voluntarily stipulated this at the time of entering into the marriage bond.

Section 9, in actuality, is a means of saving the marriage, it is in a sense an extension of sub-sections (2) and (3) of section 23 of the Act which encourage reconciliation by the court. It is the policy of the Act that the parties should live together and assist in the maintenance of marriages. By enforcing cohabitation, the court is serving this purpose of the Act.

56 Supra. n. 52.
57 Ibid.
Further, it is criticized on the ground that it allows the withdrawing spouse to take an advantage of his/her own wrong, which is against the scheme of section 23 and allows him/her to apply for a decree in case of non consummation of the marriage within one year of passing of decree. However in Dharmendra Kumar v. Usha Kumari, the Hon'ble Court clearly stated that the expression "in order to be a 'wrong" within the meaning of section 23(1) (a) the conduct alleged has to be something more than 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 to.

It is also often claimed to be gender discriminatory and violative of Article 14. T. Sareetha case confirmed this view. It is obvious that the judge considered the entire question of restitution from the point of view of the woman. It seems that it has been overlooked that restitution of conjugal rights can also be claimed by the wife. It is relevant to state that the section is gender neutral as by the Amending Act 44 of 1964 either party to a marriage has been allowed to present a petition for divorce on the ground given in section 13(1-A). Even the party found guilty in restitution proceedings is entitled to petition for divorce under the section. There is complete equality of sexes here and equal protection of the laws. Therefore this claim of the abolitionist is incorrect.

In Halsbury's Laws of England it is observed: (cohabitation) aces not necessarily mean serial intercourse, which the court cannot enforce, so that refusal of sexual intercourse by itself does not constitute refusal to cohabit. In cases like T Sareetha, the concept of marriage is pictured as if consists as if it consists of nothing else except sex. Chaudhary, J.'s over-emphasis on sex is the fundamental fallacy in his reasoning. He seems to suggest that restitution decree has only one purpose, that is, to compel the unwilling wife to "have sex with the husband". To say that restitution decree "subject a person by the long arm of the to a positive sex act" is to take the grossest view of the marriage institution. Therefore, it is fallacy to hold that the restitution of conjugal rights constituted "the starkest form of governmental invasion" of "marital privacy".

63 Supra, n.60.
65 Supra, n.62.
Further, applying the standard that law has to be just, fair and reasonable as enunciated in Maneka Gandhi, section 9 said tries to bring the parties together. Whether to grant restitution decree would be just, fair and reasonable in the facts and circumstances of a given case is left to the court to be decided in its judicial discretion. What better guarantee can the law afford for the "inviolability of the body and mind" of the wife and her "marital privacy" And therefore it can be safely stated that section 9 is not violative of Article 21.

In spite of the growing outrage against it, the Law Commission, in their Fifty-ninth Report have not recommended its abolition nor in their Seventy-First Report of 1978. The Commission was aware that it had been abolished in England under section 20 of the Matrimonial Proceedings Act 1970. However, it is germane to state that retaining this section all these years is not without reason. The truth is that the legislature has not accepted the breakdown theory in total, as has been accepted in England. Adding on, a recent writer has suggested that "the opinion of Derrett is more realistic and that the Hindu society is not mature enough to do away with the remedy. Its abolition would be like throwing away the baby with the bathwater."

Hence, in the researcher’s view, restitution decree serves as a stepping stone to divorce and is condemned to be a passage or passport to divorce. The reason behind the scheme of putting non consummation of marriage after one year of passing the decree of restitution of conjugal rights under section 13 of the Act is that the Indian Legislature believes that there should not be a sudden break of the marriage tie. It believes in reconciliation and that that cooling-off period is not only desirable but essential. If the marriage cannot be saved even after passing the decree of restitution it must be dissolved. A factual separation gives an easily justifiable indication of breakdown, i.e. under the Act it serves a double purpose. It first finds the fault and where it lies. Secondly it leads to the dissolution of the marriage, if there is no resumption of cohabitation.

Further, recognizing non-consumption of marriage after one year of passing of Restitution Decree as a ground of divorce enables the aggrieved spouse to apply to the court for maintenance under section 25; and maintenance pendente lite may also be claimed by making

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66 Mrs. Maneka Gandhi v. Union of India (UOI) and Anr, A.I.R. 1978 S.C. 597.
67 Supra,n.64.
68 Supra,n.66.
70 Supra,n.68.
out a case for the same as provided in section 24. This enables a wife, who does not desire
disruption of the marriage or even judicial separation from the husband, to secure provision for
her support by an order of the court under the matrimonial jurisdiction conferred on it, instead of
filing a suit for maintenance under the law relating to maintenance now embodied in the Hindu
Adoptions and Maintenance Act 1956. 71

To sum up, it is justified and it may be stated that the grounds and arguments are baseless
and they do not sufficiently prove that the Remedy of Restitution of Conjugal Rights is archaic,
barbarous and violative of the basic Human Rights. It cannot be said that this remedy is
unconstitutional. Section 13(1-A) has sufficient safeguards to prevent the marriage from being a
tyrranny. 72 In truth, it serves the social good purpose, by promoting reconciliation between the
parties and maintenance of matrimonial. It protects the society from denigrating. And all the
years that it has been enforce it has efficiently played it's a role.

72 Ibid.
BIBLIOGRAPHY


