appeal but in the circumstances of the case, I would make no order as to costs.

Falshaw, J.—I agree.

B. R. T.

APPELLATE CIVIL

Before Grover, J.

MST. GURDEV KAUR,—*Appellant.*

versus

SARWAN SINGH,—*Respondent;*

First Appeal from Order No. 125 of 1957.

Hindu Marriage Act XX of 1955)—Section 9—Decree for restitution of conjugal rights—When to be granted—"Reasonable excuse"—Meaning of—Wife kept in illegal confinement—Whether sufficient to refuse restitution of conjugal rights.

1958

Oct., 17th

Held, that although sub-section (2) of Section 9 of the Hindu Marriage Act confines pleas in defence only to those grounds which can be taken under sections 10, 12 and 13 of the Act, sub-section (1) itself lays down certain conditions which must be fulfilled before a decree can be granted. It will have to be seen firstly whether the husband or wife, as the case may be, has withdrawn from the society of the other *without reasonable cause.* The second requirement is that the court must be satisfied of the truth of the statements made in such a petition. Thirdly, there should be no legal ground why the relief should not be granted.

Held, that while granting restitution is has to be seen whether the respondent had a reasonable cause for leaving the petitioner and the Court has discretion to refuse relief if reasonable cause exists even in the absence of matrimonial offence. The test, however, as what constitutes reasonable cause would vary with the circumstances of each case. It will have to be applied in the changed social

conditions as they obtain today and not with the rigid background of the tenets of the old texts of Manu or other Hindu law-givers.

Held, that where the husband is guilty of conduct which falls short of legal cruelty in the sense that it is not cruelty of the kind mentioned in section 10(1)(b) of the Hindu Marriage Act, but his misbehaviour or misconduct is such that the wife is fully justified in separating herself from him, the husband cannot succeed in his petition under section 9 as it will not be possible for the Court to say that the wife has withdrawn herself from his society without reasonable excuse. In a case of this nature the petition shall fail not because of any defence set up by the wife under section 9(2), but it cannot succeed on account of the non-fulfilment of one of the essential ingredients of sub-section (1) of section 9. Apart from the provisions of section 9(1) even if a proceeding is undefended it is obligatory on the Court to be satisfied under section 23(1)(a) that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief. This makes the position clearer that the Court is bound to take into consideration the conduct of the petitioner. If the petitioner has by his own misdeeds forced his spouse to leave him, he cannot be allowed to take advantage of his own wrong and ask for the assistance of the Court to perpetuate his own wrong doing.

Held, that if the wife was being kept in illegal confinement by the husband, the petition would merit dismissal on two grounds (1) keeping a wife in illegal confinement is certainly an act of a nature which is cruel and is bound to have a harmful and injurious effect on the health of the wife, and (2) there is a reasonable excuse for the wife to withdraw herself from the society of her husband. The theory that in order to constitute cruelty there must be physical acts of violence was abandoned long ago and is now ancient history.

Held, that cruelty need not necessarily be physical cruelty. A course of conduct which, if persisted in, would undermine the health of the wife would be sufficient.

Case law reviewed.

First Appeal from the Order of the Court of Shri Charan Singh Tiwana, Sub-Judge, 1st Class, Bassi, dated the 20th June, 1957, passing a decree for restitution of conjugal rights and and leaving the parties to bear their own costs.

B. R. AGGARWAL, for Appellant.

M. R. SHARMA, for Respondent.

JUDGMENT

Grover, J.

GROVER, J.—This is a wife's appeal against a decree for restitution of conjugal rights which has been granted in favour of the husband under the provisions of the Hindu Marriage Act, 1955. The marriage took place between the parties about 14 or 15 years ago. Two and a half years prior to the filing of the petition for restitution, the appellant lost her sight of one eye. According to her version she was always subjected to cruel treatment and she lost her eyesight because of an injury inflicted on her by her husband in one of the beatings given to her. According to the respondent the appellant had a squint when she was married and then also her eyesight was weak and she could not see much. It is alleged by the appellant that about two years ago a Panchayat came to her husband's home to remonstrate with him, but he gave slaps to her in the presence of the members of the Panchayat and they were turned away. She was being kept in illegal confinement by the husband and her mother had to apply to the competent Magistrate for warrants of search under section 100 of the Code of Criminal Procedure. Pursuant to those warrants the wife was produced before the Magistrate First Class, Amloh. She made a statement there on 14th August, 1956, making an allegation that the husband was treating her very badly and was forcing her to have sexual

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relations with his own brother Chhajju Singh and that he used to let other persons loose on her for the purpose of misconduct. When she made the statement she was pregnant. She was allowed by the Magistrate to accompany her mother. An application under section 9 of the Hindu Marriage Act, was filed by the respondent soon after in September, 1958. The only issue that was framed by the trial Court was as follows:—

> Whether the petitioner has treated the respondent with such cruelty as to cause a reasonable apprehension in the mind of the respondent that it will be harmful and injurious for the respondent to live with the applicant."

The trial Court decided the issue against the wife on the ground that cruelty of the nature covered by the aforesaid issue had not been established. The version of the wife with regard to the injury to her eye was not accepted. As regards the other allegation that the appellant was being forced to commission of sexual intercourse with the husband's brother Chhajju Singh, the trial Court considered that it had to be disregarded as in her statement in Court all that she stated was that her husband wanted her to marry his brother.

It is contended on behalf of the appellant that the Court below was in error in attaching importance to the omission with regard to the infliction of injury to the eye in the statement made by the wife in the Court of the Magistrate on 14th August, 1956, in connection with the proceedings under section 100 of the Code of Criminal Procedure. It is pointed out that the said statement was neither relevant nor admissible in the present

proceedings. It contained no admission on the part of the wife with regard to the non-infliction of the injury to the eye, nor was it admissible and relevant under any of the provisions of the Indian Evidence Act. No effort had been made to contradict the wife under section 145 of the Evidence Act by her previous statement on the point. There can be little doubt that the Court below was not justified in taking into consideration the previous statement of the wife made on 14th August, 1956, on account of the aforesaid reasons. Even if her previous statement is excluded from consideration on the point, the question still remains whether the wife has succeeded in showing that the injury to her eye was inflicted by her husband as a result of which she lost her eyesight so far as that eye was concerned. The Court below has considered the medical evidence which had been produced as also the other circumstances, and it appears that its appreciation of evidence is in no way wrong or defective.

It is, however, an admitted fact that the mother of the appellant had to apply for warrants under section 100 of the Code of Criminal Procedure which were ordered to be issued and pursuant to which the appellant was taken away by her mother to her own home. The warrants under section 100 of the Code of Criminal Procedure are issued only if the Magistrate has reasons to believe that a person is illegally confined. It is not possible to believe that the mother of the appellant would have resorted to the extreme course of moving a criminal Court unless there had been a substantial and genuine reason for doing so. These circumstances corroborate the statement of the wife that she was being kept in illegal confinement by the husband at the time when the warrants were issued at the instance of her mother. If that

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be so there can be no doubt that the husband was treating her with cruelty which may not be physical cruelty in the sense of beatings being administered, but would certainly be cruelty in the broader and general sense. In *Kondal Rayal* v. *Ranganayaki Ammal* (1), it was considered that cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in, would undermine the health of the wife, was regarded to be sufficient justification for refusing to the husband a decree for restitution of conjugal rights. In *Soosannamma* v. *Varghese Abraham* (2), where the provisions contained in the Indian Divorce Act came up for consideration, the learned Judges after considering all the relevant case law were of the view that it would be wrong to hold that only physical cruelty would be a defence in an action for restitution of conjugal rights. It was held that the word "cruelty" as used in section 22 of the Indian Divorce Act was not restricted to physical cruelty and it was observed that if the cruelty alleged and proved was such as to undermine the foundation of conjugal life and make it impossible for the wife to live with the husband and discharge the duties of a married life that would be a sufficient ground for declining the relief with regard to restitution of conjugal rights.

An action for restitution was in its origin not Hindu. It was borrowed from the old Ecclesiastical Courts in England. In England changes came to be effected in the law by judicial decisions mostly after the enactment of Matrimonial Causes Act, 1884. The result was that in cases where the conduct of the petitioner had led to desertion of the respondent and had amounted to a sufficient

(1) A.I.R. 1924 Mad. 49.
(2) A.I.R. 1957 T.C. 277.

cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the Court refused to pronounce a decree compelling the respondent to return to cohabitation with the petitioner. The jurisdiction of the old English Ecclesiastical Courts could not be applied to the Hindus and Muslims in India and it became necessary to evolve a remedy. In *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), their Lordships of the Privy Council observed that a suit for restitution of conjugal rights was in the nature of a suit for specific performance. It was pointed out that the very fact that the parties were not subject to the rather rigid principles of the Ecclesiastical jurisdiction might really be to their benefit by allowing rather wider defences to be put forward.

In England prior to the Matrimonial Causes Act of 1884, a petitioner was always granted a decree for restitution unless the respondent could prove that the petitioner had committed a matrimonial offence which would have entitled the respondent to a decree for judicial separation. But the effect of the decision of the Court of Appeal, in *Russel* v. *Russel* (2), was that the Court had a discretion to refuse restitution if the petitioner had behaved in such a manner as would, in the absence of a matrimonial offence, afford the respondent a reasonable excuse for withdrawing from the society of the petitioner. In *Osgood Hanbury Mackenzie* v. *M. A. Edwards-Moss or Mackenzie* (3), the question was whether the conduct of the petitioner, though it fell short of a matrimonial offence, yet if it had conduced to the desertion of

(1) (1867) 11 M.I.A. 551.
(2) (1895) P. 315.
(3) 1895 Appeal Cases 384.

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the other spouse, it should bar the relief for restitution. The following observations made deserve notice :—

> "It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short at that which the law regards as *saevitia or* cruelty; can he, when his own misconduct has allowed his wife to separate herself from him, come into Court, and, avowing his misdeeds, insist that it is bound to give him a decree of adherence might not the court refuse its aid to one who has so acted and regard his conduct as bar to his claim to relief?"

The English Courts developed the theory that it was essential to the success of such a petition that the petitioner should prove that there was a sincere desire for restitution and that *bona fides* were of the essence of the relief: *Harnett* v. *Harnett* (1); *Palmer* v. *Palmer* (2). In recent years the Courts had shown a tendency to take the view that their powers were so wide as virtually to amount to a general discretion to determine whether the petitioner by his or her conduct had lost the right to *consortium vitae*: Rayden on Divorce (7th Edition) pages 195 and 196.

It has become necessary to refer to the Indian as well as the English Law prior to 1955 with regard to the principles governing the action for

(1) (1924) P. 126.
(2) (1923) P. 180.

restitution of conjugal rights for the reason that in this country, the Hindu Marriage Act, 1955, gave a statutory recognition to that remedy and made provisions for enforcing the same when the parties are Hindus. Section 9 is as follows:—

> "9. *Restitution of Conjugal Rights.*—(1) when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.
>
> (2) Nothing shall be pleaded in answer to a petition of restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce."

It is on account of the proposition which has been canvassed on the strength of sub-section (2) above that a closer scrutiny of all the relevant provisions becomes necessary. It is submitted that it is not open to the respondent in a petition for restitution of conjugal rights to take up any plea outside the provision of sections 10, 12 and 13 and the Court cannot decline relief of restitution unless any of the grounds given in the aforesaid sections can be made out by the answering respondents. In the instant case it is pointed out that the wife having failed to prove that she had been treated with such cruelty as to cause reasonable apprehension

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in her mind that it will be harmful and injurious for her to live with her husband; which was a ground taken under section 10(1) (b), the petition of the husband was rightly decreed and the wife cannot possibly be allowed to fall back on any other ground in defence. Under section 23, if the court is satisfied that any ground 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 and there is no other legal ground why the relief should not be granted then the court has to decree such relief.

The Indain Divorce Act, 1869, as amended contains identical provisions with regard to restitution of conjugal rights. Section 32 of that Act is the same as sub-section (1) of section 9 of the Hindu Marriage Act. Section 33 of the Indian Divorce Act is equivalent to sub-section (2) of section 9 of the other Act. The only difference is that in section 33 of the Divorce Act the words, "or for divorce" do not occur. Under the Indian Divorce Act, the point which is under consideration does not seem to have arisen in any Indian cases but it has been considered to be settled law that courts in India, following the principle of English divorce law, would refuse to order restitution, where it has become a practical impossibility for the parties to live together. The Courts should not only refuse a decree to a petitioner who has been guilty of a matrimonial offence but also if his conduct was responsible for the respondent withdrawing from his society. Further the conduct falling short of cruelty may also disentitle the petitioner to any relief. In the Law and Practice of Divorce by S. C. Manchanda, at page 249 it is stated:—

> "If the Court is satisfied as to the *bona fides* of a petitioner, it should grant a decree

for restitution, notwithstanding the fact that the petitioner subsequently intends to have recourse to a petition for judicial separation in the event of the decree not being complied with. But, if the Court is not so satisfied and finds that the petitioner seeks only the form and not the real rights and duties of real married life, it should refuse to order restitution."

Although sub-section (2) of section 9 of the Hindu Marriage Act confines pleas in defence only to those grounds which can be taken under sections 10, 12 and 13 of the Act, sub-section (1) itself lays down certain conditions which must be fulfilled before a decree can be granted. It will have to be seen firstly whether the husband or wife, as the case may be, has withdrawn from the society of the other *without reasonable cause.* The second requirement is that the court must be satisfied of the truth of the statements made in such a petition. Thirdly, there should be no legal ground why the relief should not be granted.

The first requirement seems to incorporate the rule accepted in English law that while granting restitution it has to be seen whether the respondent had a reasonable cause for leaving the petitioner and the Court has discretion to refuse relief if reasonable cause exists even in the absence of matrimonial offence; *Greene* v. *Greene* (1). The test, however, as what constitutes reasonable cause would vary with the circumstances of each case. It will have to be applied in the changed social conditions as they obtain today and not with the rigid background of the tents of the old texts of Manu or other Hindu law-givers. According

(1) 1916 P. 188.

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to Bhandari C.J. in the Full Bench decision in *Pt. Ram Parkash* v. *Smt. Savitri Devi* (1), which was a case arising under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946—

> "* * * it is the duty of the wife to live with her husband wherever he may choose to reside and to fulfil her duties in her husband's home. She has no right to separate residence or maintenance unless she satisfies the Court that the husband had refused or neglected to maintain her in his own place of residence or that the wife by reason of the husband's misconduct was justified in living separate and apart from him .....With the passage of time and the advancing march of civilisation people began to recognize that it was somewhat inequitable that the husband should be at liberty to pick all the plumes from the tree of marriage and the wife should be left only with stones. The Legislature accordingly proceeded to enact a number of measures with the express object of emancipating married women from the liabilities which the Hindu Law attached to them with the object of enlarging their rights and with the object of protecting the wife from the importunities of the husband. These measures introduce a fundamental change of public policy and lay down a new foundation of equality of husband and wife."

(2) A.I.R. 1958 Punj. 87.

Mr. B. R. Aggarwal suggests an additional test for determining the scope of the expression "without reasonable cause" occurring in section 9(1). It is pointed out that at the time when the Hindu Marriage Act was enacted the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, was in force. According to subsection (2) of that Act notwithstanding any custom or law, a married Hindu woman is entitled to separate residence and maintenance from her husband on one or more grounds stated therein. The last ground is "for any other justifiable cause". This expression has come up for consideration before Courts in India. In *Anjani Devi* v. *Krushna Chandra and another* (1) it was observed by Mahapatra, J.—

> "Apart from the question of physical cruelty, torture, or assault by any member of the family, if the circumstances are such that it is not possible for the wife to live as a wife with self-respect and dignity in the house of the husband, indeed she is entitled to a separate maintenance and residence."

In a case arising under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, a Division Bench of the Madras High Court in *Musunuru Nagendramma* v. *Musunuru Ramakotayya* (2) has examined at length the origin and development of the rght of a Hindu married woman to separate residence and maintenance as also the considerations which are relevant for granting the aforesaid relief. It has been laid down that the grounds which would be available

(1) A.I.R. 1954 Orissa 117.
(2) 1955 (1) M.L.J. 25.

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to a wife to defeat a suit for restitution of conjugal rights would also entitle her to live apart from her husband and claim separate maintenance. The learned Judges covered the case law from 1875 to 1950, by referring to *Sitanath Mukherjee* v. *Sreemutty Haimabutti Debee* (1), and *Mallava Siddappa Ujjannavar* v. *Siddappa Bhimappa Ujjannavar* (2). In the Bombay case it has been pointed out that justifying cause has to be deduced from the circumstances of each case and if on equitable grounds it is found that the conduct of the husband is such that the wife consistently with her self-respect and with due regard to her position as a wife cannot live in the house of her husband she can claim separate maintenance. The Act of 1946 has been repealed by the Hindu Adoption and Maintenance Act 1956 but section 2 of the Act of 1946 has been bodily incorporated in section 18 of the Act 1956.

Reading all these enactments together it can be legitimately said that if a wife has been found entitled to separate maintenance on the ground that she has justifiable cause for living separately that right cannot be defeated by the husband subsequently filing a suit for restitution under section 9 of the Hindu Marriage Act and by showing that the wife cannot establish any of the grounds covered by sections 10, 12 and 13 of the said Act. The cases, therefore, deciding what is justifiable cause under the other enactment would become relevant and helpful for deciding the meaning of the expression 'reasonable excuse' in section 9(1) of the Hindu Marriage Act.

Where the husband is guilty of conduct which falls short of legal cruelty in the sense that it is

(1) (1875) 24 W.R. 377.
(2) A.I.R. 1950 Bom. 112.

not cruelty of the kind mentioned in section 10(1)(b) of the Hindu Marriage Act, but his misbehaviour or misconduct is such that the wife is fully justified in separating herself from him, the husband cannot succeed in his petition under section 9 as it will not be possible for the Court to say that the wife has withdrawn herself from his society without reasonable excuse. In a case of this nature the petition shall fail not because of any defence set up by the wife under section 9(2), but it cannot succeed on account of the non-fulfilment of one of the essential ingredients of sub-section (1) of section 9. Apart from the provisions of section 9(1) even if a proceeding is undefended it is obligatory on the Court to be satisfied under section 23(1)(a) that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief. This makes the position clearer that the Court is bound to take into consideration the conduct of the petitioner. If the petitioner has by his own misdeeds forced his spouse to leave him, he cannot be allowed to take advantage of his own wrong and ask for the assistance of the Court to perpetuate his own wrong doing.

In the present case what has to be decided is whether the relief for restitution should have been withheld from the husband inasmuch as the wife has failed to show that the husband was guilty of physical cruelty towards her. But if, as has been found by me, the wife was being kept in illegal confinement by the husband, the petition would merit dismissal on two grounds—(1) keeping a wife in illegal confinement is certainly an act of a nature which is cruel and is bound to have a harmful and injurious effect on the health of the wife, and (2) there is a reasonable excuse

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for the wife to withdraw herself from the society of her husband. The theory that in order to constitute cruelty there must be physical acts of violence was abandoned long ago and is now ancient history. Mookerjee, J., in his lucid judgment in *Dular Koer* v. *Dwarka Nath Misser* (1), referred to several English cases in which instances of cruelty were given which were not based on acts of physical violence. In the *Calcutta case* a Hindu husband had brought a low caste woman as his mistress in the house to live with him as a member of the family and had expelled his wife and son from family residence. This was considered tantamount to cruelty with the meaning of law which justified the wife to live separately from the husband and deprive him of his right to a decree of conjugal rights. This was in the year 1905. In majority of later decisions, it has been laid down that cruelty need not necessarily be physical cruelty. A course of conduct which if persisted in would undermine the health of the wife would be sufficient. I have no doubt that the conduct of the husband in the instant case is such that it constitutes cruelty of a nature which can legitimately give rise to a reasonable apprehension in the mind of the wife that it will be harmful or injurious for her to live with him, and, therefore, the petition of the husband should have been dismissed on that ground.

Even if it be held that cruelty of the nature contemplated by section 10(1) (b) has not been established, there can be no doubt that the petition must fail because it stands proved that the wife has not withdrawn from the society of her husband without a reasonable excuse. If she was being kept in illegal confinement and was being treated in that manner by the husband, she

(1) I.L.R. 34 Cal. 971.

had every reason to leave her husband's house and stay away from him, and the Court will not assist the husband in forcing her to live under such conditions.

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For all these reasons the appeal is allowed and the petition of the husband for restitution is hereby dismissed. In the circumstances of the case, however, there will be no order as to costs.

B.R.T.

LETTERS PATENT APPEAL

Before Bhandari, C. J., and Dulat, J.

HUKAM CHAND,—*Defendant-Appellant*

versus

HARISH CHANDER,—*Plaintiff-Respondent*

Letters Patent Appeal No. 86 of 1955

1958

Oct., 22nd

The Partition Act (IV of 1893)—Section 7—Order dismissing objections to a sale held under—Whether appealable—"Procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees"—Meaning of.

Held, that when objections to the sale held under the provisions of the Partition Act, 1893, are dismissed and a final decree is passed then an appeal lies against the final decree and not against the order dismissing the objections as an order under section 47 of the Code of Civil Procedure. The Partition Act does not declare expressly or by necessary implication that a person who is dissatisfied with an order declining to set aside a sale under the Partition Act shall have the same rights of appeal as have been conferred upon a person who is dissatisfied with an order declining to set aside a sale in the execution of a decree.

Held, that the words "procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees" in Section 7 of the Partition Act mean that, as