

Gulzara Singh  
 v.  
 Tej Kaur  
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 Dua, J.

The counsel lastly contended that the Court below was wrong in burdening the defendant with the costs of the suit. Apart from his bare assertion, the counsel did not rely in his support on any statute or precedent; nor did he advance any sound and cogent reason for our interference with the order as to costs. In the circumstances of the case and on the present record, I do not find any good reason for holding that the order with respect to costs passed by the Court below is contrary to law or otherwise opposed to any sound principle. This contention is, therefore, also rejected. For the reasons given above, this appeal fails and is hereby dismissed with costs.

P. C. Pandit, J.

PREM CHAND PANDIT, J.—I agree.

R.S.

APPELLATE CIVIL.

Before P. C. Pandit, J.

DEEPO,—Appellant.

*versus*

KEHAR SINGH,—Respondent.

F. A. O. 170(M) of 1958

*Hindu Marriage Act (XXV of 1955)—Section 9(2)—Application for restitution of conjugal rights—Grounds available in answer thereto—Sections 13(2)(i) and 23(1)(2)—Effect of—Second wife—Whether can plead the presence of first wife by way of defence to such application—Principle of condonation—Whether applicable.*

1960

Oct., 26th

Held, that under sub-section (2) of section 9 of the Hindu Marriage Act, 1955, a wife, in answer to the petition, cannot plead anything which is not a ground for judicial separation or for nullity of marriage or for divorce. It is enough for her to show that the ground that she has pleaded in answer to the petition is a ground for divorce as given in the Act. It is not necessary for her to show that she would have positively succeeded in getting a

decree for divorce on that ground, if she had actually filed such a petition. Under section 13(2)(i) the presence of another wife is a ground for divorce and this ground is available to the second wife as a defence to her husband's application for restitution of conjugal rights against her. Section 23(1) (a) of the Act has no application to such a case because it is applied to deprive the petitioner of the relief claimed, if he or she is taking advantage of his or her own wrong. This section might apply if the second wife files a petition for divorce on this ground. In the present case the second wife is not the petitioner, she is only defending the petition for restitution of conjugal rights filed by her husband against her. Moreover, this section applies only at the stage when a decree is going to be passed by the Court in any proceedings under this Act, whether defended or not. It does not give the grounds for divorce which are contained in section 13 and for the purposes of section 9(2), one has to look only to the grounds for divorce etc., and they can be pleaded in answer to a petition for restitution of conjugal rights. The principle of condonation also does not apply in such a case.

*Appeal from the decree of the Court of Shri Gurnam Singh Sub-Judge Ist Class, Bhatinda—under the Hindu Marriage Act dated the 30th day of June, 1958 granting a decree for the restitution of conjugal rights in favour of the petitioner (husband) against the appellant and leaving the parties to bear their own costs.*

S. D. BAHRI, ADVOCATE, for the Appellant.

RAJ KUMAR, ADVOCATE, for the Respondent.

#### JUDGMENT

PANDIT, J.—This appeal is directed against the order of the Subordinate Judge, First Class, Bhatinda, granting Kehar Singh, petitioner a decree for restitution of conjugal rights against his wife Mst. Deepo.

Pandit, J.

The allegations of Kehar Singh in his petition under section 9 of the Hindu Marriage Act, No. 25

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of 1955, were that the parties were married in December, 1942, and had lived as husband and wife but no child was born to them, that Mst. Deepo left his house without reasonable excuse in August, 1956, and went to her parents and resided with them, that he had gone to bring her back but at first she made excuses and later on refused to return. It was also stated in the petition that the Court in which the application was filed had jurisdiction to try the suit, because the parties had lived together in village Behman-Jassa-Singh which was within the jurisdiction of that Court.

This petition was contested by Mst. Deepo,

who pleaded that the Court had no jurisdiction to try the petition as she had never lived with the petitioner in village Behman-Jassa-Singh, that she had been turned out by Kehar Singh from his house after she had been given a beating, that they had been living in Mari Mustfa where they had settled after the formation of Pakistan, that she had filed an application for maintenance under section 488 of the Code of Criminal Procedure because she had been neglected by her husband, and that the application under section 9 of the Hindu Marriage Act, 1955, hereinafter called the Act, had been filed *mala fide* in order to escape the liability of paying maintenance to her. It was also stated by her that the petitioner was living with his first wife Mst. Mukhtiar Kaur in village Behman-Jassa-Singh and under the circumstances she was unable to perform the duties of a wife.

On the pleadings of the parties, the following issues were framed :—

- (1) Whether this Court has jurisdiction to try this application ?

(2) Whether the respondent has left the society of the applicant without any reasonable excuse ?

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(3) Whether the applicant had been guilty of cruelty towards the respondent and turned her out from his house after mal-treatment ?

(4) Whether the applicant has filed this application to save himself from the payment of maintenance allowance ? If so, what is its effect on this application ?

The trial Judge held that he had jurisdiction to try the petition, that Mst. Deepo had left the society of her husband without any reasonable excuse, that the husband had not been guilty of cruelty towards her and had not turned her out of his house after mal-treatment, and that the petition had not been filed by the husband to save himself from the payment of maintenance allowance to his wife.

On these findings, a decree for restitution of conjugal rights was granted in favour of Kehar Singh.

Aggrieved against the order of the Court below, Mst. Deepo has filed the present appeal. Learned counsel for the appellant submits that this application should succeed on the short ground that no decree for restitution of conjugal rights could be passed in favour of Kehar Singh when admittedly he has another wife living with him.

It is common ground that Kehar Singh has got another wife, Mst. Mukhtiar Kaur, from whom he has a number of children, that Mukhtiar Kaur was his first wife, and that both the marriages were

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solemnised before the commencement of the Hindu Marriage Act, 1955.

The argument raised is that under sub-section (2) of section 9 of the Act, nothing can be pleaded in answer to a petition of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce ; and for Mst. Deepo the presence of another wife, Mst. Mukhtiar Kaur, was a ground for divorce as given in section 13(2)(i) of the Act, which says—

“(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage 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 marriage of the petitioner :

Provided that in either case the other wife is alive at the time of the presentation of the petition ;”

The argument proceeds that under these circumstances, this was a perfect defence for Mst. Deepo in answer to a petition under section 9 of the Act by her husband Kehar Singh, who could not be given a decree for restitution of conjugal rights. Firstly, it would be considered to be a reasonable excuse for Mst. Deepo for withdrawing from the society of her husband, and secondly, this would be a legal ground for the Court for not granting the application of the husband, under section 9 of

the Act. Both these requisites have to be proved by the husband under section 9(1) of the Act before his petition can be granted.

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Learned counsel for the respondent, on the other hand, contends that the first marriage of Kehar Singh with Mst. Mukhtiar Kaur was not a valid ground for divorce for Mst. Deepo since she could not get a decree for divorce on this ground, because she had married Kehar Singh knowing full well that he had been previously married to Mst. Mukhtiar Kaur, and under the provisions of section 23(1)(a) of the Act, she could not be permitted to take advantage of her own wrong and granted a decree for divorce on this ground. His submission was that the provisions of section 13(2)(i) and section 23(1)(a) of the Act must be read together in order to find out the ground on which a wife could resist the petition for restitution of conjugal rights under sub-section (2) of section 9 of the Act.

After hearing the learned counsel for the parties, I am of the opinion that the contention of the learned counsel for the appellant is well founded. Under sub-section (2) of section 9 of the Act, Mst. Deepo, in answer to the petition, could not plead anything which was not a ground for judicial separation or for nullity of marriage or for divorce. It cannot be disputed that the ground which she had taken in her reply to this petition was a ground for divorce as given in section 13(2)(i) of the Act. For the purpose of section 9(2) of the Act, we have not to go further and see whether on that ground Mst. Deepo could actually get a decree for divorce. It is enough if Mst. Deepo shows that the ground that she had pleaded in answer to the petition was a ground for divorce as given in the Act. It is not necessary for her to show that she would

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have positively succeeded in getting a decree for divorce on that ground, if she had actually filed such a petition. If this were the intention of the legislature, the words of section 9(2) of the Act would have been different. It is conceded by the learned counsel for the respondent that this would be a ground for divorce as contemplated by section 13(2)(1) of the Act, but the main argument of the learned counsel is based on the provisions of section 23(1)(a) of the Act, which according to him must be taken into consideration in order to determine whether it would be a ground for defence for Mst. Deepo within the meaning of section 9(2) of the Act.

In my opinion, section 23(1)(a) of the Act has no application to the present case, because it is applied to deprive the petitioner of the relief claimed, if he or she is taking advantage of his or her own wrong. But in the present case, Mst. Deepo is not the petitioner. This section might have applied if Mst. Deepo had filed a petition for divorce on this ground. In this case, she is only defending the petition for restitution of conjugal rights filed by the husband against her. Moreover, this section applies only at the stage when a decree is going to be passed by the Court in any proceedings under this Act whether defended or not.

If the interpretation of the learned counsel for the respondent were to be accepted, then a second wife could never successfully file a petition for divorce on this ground, unless she could show that she had no knowledge about the first marriage of her husband. Such is not the language of subsection (2)(i) of section 13 of the Act. Besides, section 23 of the Act does not give the grounds for divorce, which are contained in section 13, and for the purpose of section 9(2), one has to look only to

the *grounds* for divorce, etc., and they can be pleaded in answer to a petition for restitution of conjugal rights.

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Assuming for the sake of argument that the provisions of section 23(1)(a) of the Act have also to be taken into consideration as contended by the learned counsel for the respondent, can it be said that Mst. Deepo was taking advantage of her own wrong for the purpose of getting a decree for divorce on this ground? It is difficult to follow as to what wrong she had committed and for which she was taking advantage for the purpose of getting a decree for divorce, especially when it is conceded that both the marriages of Kehar Singh were valid in law.

Learned counsel for the respondent suggests that Mst. Deepo when she married Kehar Singh fully knew that he was already married and consequently she herself created a situation of which she was later on taking advantage by asking for divorce on that very ground. In the first place, it is not clear on the record that she knew that her husband had been previously married, and this question will have to be gone into if I do not agree with the submission of the learned counsel for the appellant. Secondly, even assuming that she knew that Kehar Singh was already married, how can it be said that she had done any wrong in marrying him when the law at that time permitted Kehar Singh to marry a second time even when the first wife was already alive?

Then it was suggested by the learned counsel for the respondent that Mst. Deepo had been living with Kehar Singh and his first wife Mst. Mukhtiar Kaur for a number of years and therefore she could not now, after such a long period,



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make the first marriage of Kehar Singh with Mst. Mukhtiar Kaur as a basis for divorce. He argued that the principle of condonation came into play when Mst. Deepo had been living together with Kehar Singh and Mst. Mukhtiar Kaur for a number of years.

In the first place, this principle of condonation is dealt with in sub-clause (b) of section 23(1), which sub-clause admittedly does not apply to the facts of the present case. In the second place, in a Bombay case reported in *Chandrabhagabai Rajaram v. Rajaram* (1), where the plaintiff (first wife), was married to the defendant (husband) in 1938 and the defendant married a second wife in 1941, and the plaintiff continued to reside with the defendant till 1951, the plaintiff was granted a decree for divorce on the ground of the husband's second marriage, and the defence of condonation based on the plaintiff's living with the defendant for ten years after his second marriage was not sustained.

Following this Bombay authority, I am of the view that the principle of condonation will have no application to the facts of the present case.

In view of the facts and circumstances of this case, I hold that Kehar Singh was not entitled to a decree for restitution of conjugal rights. In this view of the matter, I have thought it needless to go into the other questions arising in the case.

I, therefore, accept this appeal, set aside the decree of the trial Court and dismiss the petition of Kehar Singh under section 9 of the Hindu Marriage Act, 1955. The respondent shall bear the costs of the appellant in this Court.