
(1995) 10 BOM CK 0035

In the Bombay High Court

Case No : Family Court Appeal No. 76 of 1993 with Civil Application No. 2516 of 1994

Mrs. Sunita Rajendra Nikalje

APPELLANT

Vs

Rajendra Eknath Nikalje

RESPONDENT

Date of Decision : 07-10-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127
Hindu Marriage Act, 1955 — Section 13(1A)(ii), 9

Citation : AIR 1996 Bom 85 : (1996) 2 BomCR 422 : (1995) 97 BOMLR 55 : (1996) 1 MhLj 572

Hon'ble Judges : P.S. Patankar, J;A.V. Savant, J

Bench : Division Bench

Advocate : P.B. Shaligram, for the Appellant; S.S. Hardikar, for the Respondent

Judgement

P.S. Patankar, J.

1.The marriage between Appellant-wife and Respondent-husband came to be solemnized according to Budhist Rites on 17-1-1988. The couple was blessed with a daughter by name Sampada born on 15-12-1988. The delivery took place at the place of Appellant's parents which is situated nearby the matrimonial house. Thereafter the Appellant resumed co-habitation. However, on 24-2-1989 the Respondent left Appellant and the daughter at Appellant's parents house and was not allowed to return. The Appellant filed Petition No. PE-1964/89 for her maintenance and for maintenance of the daughter u/s 125 of Criminal Procedure Code. The Respondent filed Petition No. PE/969/89 for restitution of conjugal rights. The Application filed by the Appellant for maintenance and the petition filed by the Respondent came to be heard together. The learned Judge of the Family Court granted maintenance for the daughter at the rate of Rs. 100/- per month from 16-4-1989 and refused for the Petitioner. The petition filed by the Respondent for restitution of conjugal rights was decreed on 20-1-1991.

2. The Respondent filed Petition No. PA/116/92 on 15-2-1992 claiming divorce u/

s 13(1-A)(ii) of Hindu Marriage Act 1955 (hereinafter referred to as Hindu Marriage Act) on the ground that there was no resumption of co-habitation, for more than 1 year after the date of passing of the decree for restitution of conjugal rights. It was the case of the Respondent that he had sent a letter dated 8-3-1991 (Ex. 21) by registered post A.D. to the Appellant calling upon her to resume cohabitation. She received the same but neither replied nor resumed cohabitation. Thereafter he (sent another letter on 16-4-1992 (Exh. 22). The same was refused by the Appellant (Exh. 23), another letter was sent on 26-9-1991 (Exh. 25). It was also refused and returned on 28-9-1991 (Exh. 26). Thereafter on 14-10-1991 one more letter was sent (Exh. 27) calling upon the Appellant to resume cohabitation, but it was refused on 16-10-1991 (Exh. 28). She has not resumed cohabitation. Therefore, she has failed to resume cohabitation in spite of the attempts made by the Respondent and there is no bar in granting the decree for divorce.

3. The Appellant filed written statement Exh. 8 on 23-8-1992 and inter alia contended that immediately after the decree for restitution of conjugal rights was passed on 20-1-1991, the Appellant went to the house of Respondent along with daughter for resuming cohabitation. However, mother of Respondent declined to accept her and she was driven out. After she received the first letter dated 8-3-1991, she went along with her mother and neighbours to the house of Respondent on 18-9-1991. However, the Respondent and her mother threatened her and others, and she was forcibly driven out along with the child. This has happened in the afternoon and in the evening she filed complaint Exh. 40 with Janwadi Police Chowky. Respondent was called at the Police Chowky. However, he declined to accept her pointing out the litigation between the parties. She contended that she has not received other letters. It was contended that Respondent was in the wrong and was trying to take advantage of his own wrong and cannot get the decree in view of provisions of Section 23(1)(a) of Hindu Marriage Act.

4. The learned Judge of the trial Court came to the conclusion that there was no cohabitation between the parties for more than one year after the decree for restitution of conjugal rights was passed. He held that there was no bar for granting the decree of divorce in favour of the Respondent. He declined to accept that the Respondent was taking advantage of his own wrong. He held that bar of Section 23(1)(a) is not attracted. Therefore, he passed the decree for dissolution of marriage and also directed the Respondent to pay maintenance at the rate of Rs. 300/- per month to the Appellant by way of permanent alimony from the date of the said order. The judgment and order was passed on 30-5-1993. The same is challenged by the Appellant in this Appeal.

5. After the petition was decided, the Appellant filed PE 1166/93 u/s 127 of Criminal Procedure Code for enhancement of maintenance granted to the daughter. The said petition came to be allowed after hearing both the sides on 10-9-1993 and maintenance was enhanced to Rs. 250/-.

6. In this appeal the Appellant filed Civil Application No. 25161/1994 on 20-4-1994 praying that interim maintenance pending the appeal at the rate of Rs. 1000/- be granted to her and she be granted permanent alimony at that rate. The Division Bench of this Court passed the order on 20-4-1994 granting ad-interim maintenance at the rate of Rs. 500/- per month pending the appeal.

7. The learned Advocate for the Appellant submitted that the trial Court has erred in holding that the Respondent was not taking advantage of his own wrong and has failed to appreciate the evidence in that respect. He submitted that the Bar of Section 23(1)(a) is clearly attracted and no decree for dissolution of marriage could have been passed. The learned Advocate for the Respondent disputed this submission and supported the judgment passed by the trial Court.

8. In view of the submissions at the Bar, the point that arises for our consideration is whether Respondent is trying to take advantage of his own wrong or that the bar of Section 23(1)(a) is attracted in this case. Our answer is -- yes.

9. We shall first set out the background of the parties.

The Respondent husband is working in a canteen run by Rustom Engineering Company. He is aged about 30 years and was getting about Rs. 2250/- per month as salary. The Appellant is a house wife. Both are semi illiterate and come from ordinary families. Both the families are staying at Pune. Their houses are situated at 5 minutes walking distance, from each other.

10. The Respondent in support of his petition led his own evidence (Exh. 20) and that of his mother Sushila (Exh. 37), while the Appellant in support of her case led her evidence (Exh. 39), of her mother Shantabai (Exh. 41) and neighbour Chandrabai's (Exh. 42) evidence.

11. The document produced on record are the letters sent by Respondent by Registered Post A.D. at Exhs. 21, 22, 25 and 27 and the refusal A. Ds at Exhs. 23, 26 and 28. The Appellant produced complaint filed by her at Exh. 40 with Janwadi Police Station, Pune.

12. The Respondent in his evidence has deposed about sending letters at Exhs. 21, 22, 25 and 27 and proved the refusal thereof by producing postal acknowledgments. He also stated that he tried to see that Appellant resumed cohabitation. But the Appellant neither replied nor resumed cohabitation. In the cross-examination he denied the case of the Appellant that she went to the house of the Respondent for cohabitation after the decision of PA 969/89 and his mother drove her out. He also denied that Appellant came to his house on 18-4-1991 along with her mother and others in the afternoon and that the Respondent and his mother quarrelled with them and drove them out of the house. However, he admitted that the Police called him on 18-4-1991 as per complaint filed by the Appellant. He also admitted that he went to the Police Station at about 6-00 p.m. and that he did not take back the Appellant on that

day. However, he added that he did not take her as the Appellant demanded separate residence. The mother of the Respondent Sushila has denied in her evidence that the Appellant came to her house after the decision in PA No. 969/1989 and she drove her out of the house. She also denied that the Appellant came to her house in the noon along with her mother and others and that she was driven out by her and the Respondent.

13. The Appellant deposed that after 3rd day of the decision she went to the Respondent's house for cohabitation. However, Respondent's mother did not permit her to stay and she was driven out. She further stated she received the letter on 8-3-1991 and went to the house of the Respondent along with her mother, brother-in-law and neighbour on 18-4-1991 for cohabitation. At that time the Respondent's mother abused her and they declined to accept her. This was done in spite of entreaties of her mother to accept the Appellant. When she tried to go in the house she was forcibly driven out and Respondent gave threats to her life. She deposed that she filed complaint with Janwadi Police Station (Exh. 40) and the Police called the Respondent at Police Station. The Appellant tried to convince him, but the Respondent declined to accept and demanded divorce. She denied that she demanded any separate residence from the Respondent at the Police Chowky. In the cross-examination she denied that she refused letter Exh. 22 dated 16-4-1991 on 18-4-1991 and then went to the Police Station and filed a false complaint. The Respondent also examined Shantabai, her mother at Exh. 41. She deposed that she went along with the Appellant to the Respondent's house on Thursday (incidentally 18-4-1991 was Thursday). She went along with her son-in-law and neighbours at about 4-30 p.m. In spite of their requests the Respondent and his mother declined to accept the Appellant for cohabitation. They abused them and drove them out by giving threat to Appellant that she should not come to their house. Appellant lodged complaint with the Police. The Police called the Respondent to Police chowky. However, the Respondent demanded divorce. In the cross-examination suggestion was given that Appellant wanted separate residence but it was denied. She admitted that no letter was sent to the Respondent, but she went to him four times. Neighbour Chandrabai was examined by the Appellant at Exh. 42. She deposed that she went along with the Appellant and her mother-in-law and brother-in-law to the house of the Respondent. The Respondent and his mother did not permit the Appellant to join the Respondent. Thereafter they went to the Police chowky. In the cross-examination she admitted that she went to the Police chowky along with the Appellant for lodging the complaint.

14. The oral evidence on record leaves no manner of doubt that the Appellant went to the house of the Respondent immediately after the decree for restitution of conjugal rights was passed, but the Respondent's mother drove her out. The learned Judge of the trial Court has committed an error in holding that such case was not pleaded by the Appellant in the written statement. We find that this has clearly been pleaded by her in para 7 of the written statement. Similarly appellant went along with her mother and other neighbours to the house of

Respondent on 18-4-1991, but they were abused and threatened by Respondent and his mother. They were driven out, which forced them to file the criminal complaint at police station. It is to be noted that Respondent has not disclosed in the plaint that he was called at the Police Station on 18-4-1991. He tried to suppress this. This was elicited in his cross-examination. Exh. 40 clearly mentions about what had happened in the house and how the threats were given. The Appellant prayed to the Police that Respondent be asked to accept the Appellant and the child. In view of this, it is not possible to accept the case tried to be made out by the Respondent that she simply went to the Police Station on 18-4-1991 i.e. after declining to accept the letter dated 16-4-1991 at Exh. 22 and that this was done by her to create a show or that she never went to the house of Respondent on that day. This was not even the case of the Respondent in the plaint or in his evidence. He tried to suggest this only in cross-examination of appellant that Appellant filed the complaint Exh. 40 after receipt of 2 notices. There is no reason to brush aside the evidence of Appellant and her other witnesses as nothing was elicited in the cross-examination to disbelieve them. Further we find that there is no reason to accept the case of the Respondent that he declined to take the Appellant as she demanded separate residence. He has not stated this in the plaint or in examination in chief. This was not deposed to even by his mother Sushila. On the contrary the evidence of the Appellant and her other witnesses is supported fully by the complaint at Exh. 40 that she had gone to the house of the Respondent, but she was threatened and driven out by the Respondent and his mother. Further in none of these letters sent by Respondent subsequently at Exs. 25 and 27, it was tried to suggest that he declined to accept the Appellant because she demanded separate residence. It was clear that he was trying to cover up his wrong and put forward a false case. The learned Advocate for the Respondent submitted that evidence regarding the time of which the Appellant went to the house of the Respondent differs considerably. He pointed out that Appellant has stated that it was at 2 O' Clock in the noon while her mother has stated that they had gone to the residence of Respondent at 4-30 p.m. In our opinion that does not make their evidence unbelievable, particularly when they are not literate. The fact remains that the complaint Exh. 40 was filed in Janwani Police Station pointing out as to how the threats were given by the Respondent and his mother to her. The learned Advocate for Respondent further tried to point out that the case tried to be made out by the Appellant that she went to the house of Respondent on 18-4-1991 should be disbelieved as she had not gone immediately after the receipt of the 1st letter, Exh. 21, dated 8-3-1991. He pointed out that no explanation was given by the Appellant in that respect. It is not possible to disbelieve the case of the Appellant on this ground and it cannot be accepted that she was not inclined to resume cohabitation because of this delay, particularly when she tried to resume cohabitation immediately after the decree for restitution was passed and she was not allowed to return. The learned Advocate for the Respondent then submitted that the registered letters Exhs. 22, 25 and 27 were declined by the Appellant. According to him this shows that she was not prepared to come back.

It is not possible to accept this as it is clear that Appellant was required to file the complaint with Police Exh. 40 due to serious threats earlier given. This conduct of not accepting the letters by the Appellant cannot lead to the conclusion that she was not ready to cohabit with the Respondent.

15. Taking into consideration the family background and the residential places of the parties, as mentioned above, we feel that the case made out by the Appellant is more credible.

16. The next question is whether the facts proved attract the provisions of Section 23(1)(a). One of the conditions required to be satisfied by the Court before granting relief to a party is contained in Section 23(1)(a), which reads as follows:--

23. (1) In any proceedings 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 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief;

(b) to (d).....

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

Section 13(1A)(ii) deals with granting relief of dissolution of marriage when there is no restitution of conjugal rights for more than one year after passing the decree of restitution, which reads as under:--

Section 13(1A)(ii) :

(1A) Either party to a marriage, whether 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)

(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.

17. The learned Advocate for the parties relied upon various judgments to point out the meaning of "is not in any way taking advantage of his or her own wrong" appearing in S. 23(1)(a). The learned Advocate for the Appellant relied upon AIR 1968 Mys 274, M. Someswara v. Leelavati. In this case the husband filed petition for restitution of conjugal rights under S. 9 of Hindu Marriage Act. The parties entered into compromise under which the wife agreed to join the husband who accepted to take her back and live cordially. Accordingly wife went. But she was ill treated by the husband and other members of the family and threatened. Six days later she left with her son and came to her parents' place. Then she wrote

a letter to the husband to come and give her protection and take her away. Husband replied and refused to come and meet her. Then he filed the petition for divorce under S. 13(1A)(ii). The Division Bench held "We think the learned Civil Judge was right in believing the evidence of the respondent and her sister in preference to that of the appellant in coming to the conclusion that it was the appellant who obstructed the resumption of the marital life between the spouses, and that the respondent had to leave the matrimonial home on account of his refusal to cohabit with her, and on account of the ill-treatment meted out to her by him and other members of his family." It was found that husband refused her access and ill treated her and denied his society to her. It was therefore held that he cannot take advantage of his own wrong. It was observed (Para 30 of AIR):

"There is yet another reason why the petition for a decree for divorce should fail. S. 23(1)(a) of the Act provided that even if any of the grounds for granting a relief under the Act exists, the Court shall decree such relief only when it is satisfied that the petitioner has not, in any way, taken advantage of his or her own wrong or disability for the purpose of such relief. As we have already held, that the appellant refused to resume cohabitation with the respondent even when she offered to perform her marital obligation and that he ill-treated her, we should refuse the relief of divorce even assuming for the sake of argument that he had grounds to pray for that relief."

The next judgment relied upon is O.P. Mehta Vs. Saroj Mehta, . In this case the petition was filed by the husband for restitution. It was decreed. Then the wife also filed the petition for maintenance. The husband made allegations of adultery against her and denied liability to pay. Thereafter husband filed petition for divorce under S. 13(1A)(ii) of Hindu Marriage Act. It was held that by making allegations of adultery, the husband made it impossible for his wife to resume cohabitation and hence he cannot take advantage of his own wrong. It was held (Para 7 of AIR):

"In our view, when S. 13(1A) permits either party to move a petition for dissolution of marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties, it obviously requires a normal situation, in which without any threat at the hands of a party the other party does not resume cohabitation. In that case, of course, mere non-compliance is not taken as a wrong as to deny the right to seek a divorce under S. 13(1A) but where the party consciously by force prevents the decree of restitution being complied with the situation is different and he cannot be allowed to take advantage of his own criminal act."

The next judgment relied upon is Geeta Lakshmi Vs. G.V.R.K. Sarveswara Rao, . Shri Justice Jeevan Reddy speaking for the Division Bench observed (Para 15) :

"Presently, we are concerned with a case where a decree for restitution of conjugal rights was obtained by the appellant-wife under S. 9 of the Act, on the ground that the husband had without reasonable cause withdrawn from her

society. A decree for restitution of conjugal rights was granted to the wife. After the decree, the husband not only, not complied with the decree, but did positive acts by ill-treating her and finally drove her away from the house. It is not a case of mere non-compliance of the decree, but fresh positive acts of wrong. We therefore, hold that the respondent is not entitled to the relief under S. 13(1A) of the Act."

In the said case wife obtained a decree for restitution of conjugal rights under S. 9. After the decree the husband did not comply with the decree, but did positive acts of ill treating her and finally drove her away from the house. After 2 years, husband filed a petition for divorce under S. 13(1A) alleging that there was no resumption of cohabitation for 2 years. The wife opposed the said petition contending that husband was taking advantage of his own wrong. Ratio in AIR 1968 Mys 274 was relied upon. It was held that it was not the case of mere non-compliance of a decree, but fresh positive acts of cruelty. It was held that husband was not entitled to a decree under S. 13(1A) of the Act, in view of the commission of wrong as contemplated under S. 23(1)(a) of Hindu Marriage Act.

18. The learned Advocate for the respondent relied upon ILR (1971) Del 6 , Ram Kali y. Gopal Dass. In this case wife obtained the decree of restitution of conjugal rights on 17-3-1961. There was no resumption of cohabitation for 2 years (as it was required at that time) after the said decree. The husband filed petition for divorce under S. 13(1A)(ii) of Hindu Marriage Act for a decree of divorce. It was sought on the ground that there was no restitution of conjugal rights during the statutory period. The wife contested alleging that there was cohabitation during November/December 1962, i.e. within 2 years. This was not accepted by the trial Court as well as by the learned single Judge and decree of divorce was granted, holding that there was complete break down of marriage. The contention raised before the Full Bench was in view of S. 23(1)(a) --husband cannot take advantage of his own wrong by failing to comply with the decree for restitution of conjugal rights awarded against him. This was negated by observing :

"The underlying object of the legislature in inserting sub-sec. (1A) in S. 13 seems to be that if there has been no resumption of cohabitation or no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards, after the passing of a decree for judicial separation or for restitution of conjugal rights, the Court should assume that the relations between the parties have reached a stage where there is no possibility of reconciliation and as such it might grant the decree of divorce. The aforesaid object is in consonance with the modern trend not to insist on the maintenance of union which has utterly broken down. It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife."

Thus it is clear that there was no circumstance alleged against husband in this case disentitling him to the decree of divorce.

19. A single Judge of Delhi High Court in *Gajna Devi Vs. Purshotam Giri*, -- relied upon the above Full Bench Judgment of Ram Kati ILR (1971) Delhi 6 (cited supra) and held (Para 15 of AIR):

"In my view the expression "petitioner is not in any way taking advantage of his or her own wrong" occurring in Cl. (a) of S. 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by S. 13(1A) of the Act subsequent to the passing of the decree for judicial separation or restitution of conjugal rights. In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon the passing of the decree and the failure of the parties to comply with the decree or resumption of cohabitation after its passing. Nevertheless, if after the passing of the previous decree, any other facts or circumstances occur, which in view of sub-sec. (1) of S. 23 of the Act, disentitle the spouse from obtaining the relief of dissolution of marriage by a decree of divorce under S. 13(1A) of the Act the same can be legitimately taken into consideration and must be given due effect."

In the said case wife filed petition under S. 10 of Hindu Marriage Act for judicial separation. It was decreed ex parte. Then husband filed the petition under S. 13(1A)(i) of Hindu Marriage Act claiming the divorce on the ground that there was no resumption of cohabitation for 2 years after passing of the decree of judicial separation. The wife denied that there was no resumption. She stated that she stayed with the husband for 2 months at his house at Delhi. The trial Court and learned single Judge negated this contention. Then the only question remained was that whether the husband was taking advantage of his own wrong as contemplated by S. 23(1)(a). This was also negated by observing as mentioned above. Again in this case facts and circumstances show that there was no conduct amounting to "wrong" committed by the husband to disentitle him to decree of divorce.

20. Then the next judgment relied upon is *Smt. Bimla Devi Vs. Singh Raj*, . Husband got the decree of restitution of conjugal rights against the wife. The wife did not comply and filed the petition under S. 13(1A)(ii) for divorce. The question arose whether she has committed any "wrong" to disentitle her to such a decree in view of S. 23(1)(a). It was held that merely because the spouse who suffers the decree refuses to resume cohabitation would not be a ground to invoke provisions of S. 23(1)(a) and it cannot be said that the said spouse is taking advantage of his/her own wrong. It was also observed that "We are, therefore, inclined to hold that in a case covered under S. 13(1A)(ii) of the Act, either of the parties can apply for dissolution of marriage by a decree of divorce if it is able to show 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 proceedings in which they were parties. The plea that the party against whom such decree was passed failed to comply with the decree or that the party in whose favour the decree was

passed took definite steps to comply with the decree and the defaulting party did not comply with the decree and, therefore, such an act be taken to be taking advantage of his or her own wrong would not be available to the party, who is opposing the grant of divorce under Cl. (ii) of sub-sec. (1A) of S. 13 of the Act.

21. The next judgment relied upon is Dharmendra Kumar Vs. Usha Kumar, . The respondent wife in the said case obtained the decree of restitution of conjugal rights. Husband-appellant thereafter wrote several registered letters and otherwise invited the respondent to live with him. But she did not comply with his request and instead filed a petition for divorce after 2 years under S. 13(1A) (ii). The apex Court observed "There, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order, to be a "wrong" within the meaning of S. 23(1)(a) 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 :

"In the case before us the only allegation made in the written statement is that the petitioner refused to receive or reply to the letters written by the appellant and did not respond to his other attempts to make her agree to live with him. This allegation, even if true, does not amount to misconduct grave enough to disentitle the petitioner to the relief she has asked for."

22. The next judgment relied is 1981 M LJ 917. Vatsala w/o Niranjan Gulwade v. Niranjan Ramchandra Gulwade. It was the case where simply no marital relations were resumed for more than 2 years after the decree for restitution of conjugal rights was obtained. The wife filed petition for divorce under S. 13(1A)(ii). The question arose whether she is taking advantage of her own "wrong". The learned single Judge considered S. 13(1A) and S. 13(1)(a) of Hindu Marriage Act. He differed from the view taken in Chaman Lal Chuni Lal Vs. Smt. Mohinder Devi, to the effect that when the decree for restitution of conjugal rights was passed against the husband and he has made no efforts to comply with it and has avoided the restitution of conjugal decree, he was taking advantage of his own wrong and therefore not entitled to the decree of divorce. The learned Judge observed that "There is thus no unqualified, right to divorce as soon as condition of S. 13(1A) are fulfilled. Decree can be refused if any spouse is taking advantage of his or her own wrong for the purposes of relief claimed. Keeping principles of harmonious construction and so also these two provisions in view, it seems that wrong prior to passing of the decree is not the wrong contemplated under S. 23 at all, and the past conduct cannot be used as a valid defence against a petitioner seeking divorce under these provisions. Concept of "wrong" as used in S. 23 even otherwise seems to be different than what has been held in the Chamanlal's case (supra). It means, an act of causing some injury to the other side in the sense that action has some direct or indirect relation to the

marital offence committed by the other spouse and on which the cause of action for the petition is based. The terminology "taking advantage" also has to be kept in view."

The learned single Judge was right in not following the case of Champaklal. But not in spelling out the meaning of "wrong" and interpreting terminology "advantages" of his/ her own wrong. We do not approve the observations in that respect i.e. It means, an act of causing some injury to the other side in the sense that action has some direct or indirect relation to the marital offence committed by the other spouse and on which the cause of action for the petition is based." In our opinion, as observed by the apex Court in Dharmendra Kumar Vs. Usha Kumar, , "wrong" means only serious or grave misconduct on the part of the party seeking divorce or relief against the other. It is not necessary that there should be fresh marital offence. It depends upon the facts and circumstances of each case to judge whether it was "wrong" or not. Take the case where the party makes accusation of adultery or infidelity or brings about a situation to make it impossible for one party to resume cohabitation or causes injury to other or is living with another woman/man or gives threats scaring the other party. There is some such positive conduct after the decree for restitution of conjugal rights is passed. Mere disinclination or reluctance to accept the other spouse is not sufficient. There should be attempt of making it impossible for a spouse to resume cohabitation after the decree for restitution of conjugal rights is passed. Discretion is conferred to strike a balance. The Court should not grant the decree lightly or defeat it when the marriage is broken down completely. All this is necessary to be viewed against the back drop of facts and circumstances of each case.

23. First it was not the case of respondent in the petition or evidence that marriage has broken down completely. Further, evidence on record shows that respondent and his mother gave threats to the appellant and made it impossible for her to resume cohabitation. Appellant was driven out when she made attempts to resume cohabitation. She was required to file police complaint in respect of threats given to her. The respondent tried to suppress this from the Court. Further S. 23(1)(a) is couched in negative terms and burden lay upon the respondent to prove that he was not taking advantage of his own wrong. He has failed in it. He was guilty of taking advantage of his own wrong and cannot get decree for dissolution of marriage.

24. The Civil Application is filed for getting permanent alimony at the rate of Rs. 1,000/-. The order was passed by this Court on 20-4-1994 granting ad-interim maintenance at the rate of Rs. 500/- p.m. for appellant. The respondent is working in a company and gets about Rs.2250/-. As against this the appellant is not working and having no source of income. She is a housewife. The respondent has no other liability except his mother. The respondent is also required to pay for maintenance of daughter at the rate of Rs. 250/- per month. Taking into consideration all these aspects, in our opinion, the respondent should pay

permanent alimony at the rate of Rs. 500/- per month to the appellant. Accordingly the order is passed in the Civil Application and it disposed of.

25. The following order is passed in Appeal.

The appeal is allowed. The impugned judgment and order dated 30-5-1993 passed by the Family Court, Pune in Petition No. A/116/1992 is set aside. The respondent to pay the costs of the appellant.

26. Appeal allowed.