view of the decision of their Lordships in the case of *Express Newspapers Ltd.* (1) that the second proviso to section 10(2)(vii) brings to charge escaped profit or gain of a business carried on by an assessee and that second proviso is not a provision which provides for any allowance to which reference is made in sub-section (3) of section 12 in relation to clause (vii) of sub-section (2) of section 10. The matter of allowance is then covered only, for the purpose of this case, by the main body of clause (vii) of sub-section (2) of section 10. So that if this was a case to which sub-section (3) of section 12 applied, then second proviso to clause (vii) of sub-section (2) of section 10 would obviously not have been attracted, not being a provision making allowance. This is a view which finds support from *Commissioner of Income-tax, M.P.* v. *Nandlal Bhandari and Sons (Private) Ltd.* (11), a decision of the Madhya Pradesh High Court. The assessee will bear costs of the Commissioner of Income-tax in this reference. Counsel's fee Rs. 200.

R. S. NARULA, J.—I agree.

R. N. M.

APPELLATE CIVIL

Before Tek Chand, J.

CAPTAIN B. R. SYAL,—*Appellant*

versus

SHMT. RAMA SYAL,—*Respondent*

F.A.O. 6-M of 1967

January 9, 1968

Hindu Marriage Act (XXV of 1955)—Ss. 9 and 13—Decree for restitution of conjugal rights in favour of the husband—Wife not denying right of cohabitation—Resort to proceedings for restitution of conjugal rights by the husband for extraneous reasons—Husband—Whether can claim divorce—Divorce by dissolution of marriage and judicial separation—Difference between—Decree for restitution of conjugal rights—Requisites for obtaining of—Such decree not complied with—Remedies available to the Decree-holder.

(11) (1963) 47 I.T.R. 803.

Held, that the essence of a decree for restitution of conjugal rights is that the husband desiring the company of the wife makes an effort through the court for its assistance in order to restore his wife back to him so that they may be able to lead conjugal life. Intrinsically, the plaintiff in proceedings for restitution of conjugal rights is the aggrieved party who desires to live with his spouse. The husband is not genuninely an aggrieved party if his wife never denied to him the right of living together. Where the facts and circumstances suggest that the request for restitution of conjugal rights on the part of husband is merely a pretence and sham, and the proceedings are intended for an extraneous and different purpose, he cannot obtain divorce on grounds referred to in section 13(1) of the Act. If one of the grounds, namely, adultery or of conversion to a different religion or of unsoundness of mind, or the wife's suffering from leprosy, or a venereal disease, or that she had entered into any religious order or had not been heard of as being alive for a period of seven years, are not available to the husband, the proceedings for restitution of conjugal rights would be the only convenient handle in order to cut the marital bonds. Where in an application for divorce under section 13 of the Act the husband has taken up position inconsistent with the desire of the wife, that the husband should return to the respondent and the circumstances that there was no desertion by the wife, the relief of divorce should not be granted to the husband.

Held, that the remedies by way of divorce by dissolution of marriage, judicial separation and restitution of conjugal rights are distinctive in character, and have been devised with a set purpose. Judicial separation which did not sever the matrimonial bond was at one time styled as divorce *a mansa at thoro* which was separation "from bed and board" in contradistinction to a divorce *a vinculo matrimonii* which absolutely dissolved marriages by snapping the matrimonial bond. The term 'divorce' is of Latin origin *divortium* which means to turn aside, to separate from *Divortium dicitur a divertendo quia vir divertitur ab uxore*—divorce is said to be from *divertendo* because a husband is diverted from his wife. This *divortium* may be either absolute when marriage stands dissolved, or limited when the marriage relation is suspended, and the duties and obligation are modified, though the matrimonial bond remains in full force. Under Indian law, a decree for judicial separation can be passed on grounds enumerated in section 10 of the Act which include desertion, cruelty, unsoundness of mind, etc. The petitioner seeking judicial separation does not wish to share bed and board with the other party to the marriage. When a decree for judicial separation is passed, it is no longer obligatory for the petitioner to cohabit with the respondent.

Held, that in the case of restitution of conjugal rights, the grievance of the petitioner is that the respondent has withdrawn from the society of the other and desires that this should not be done. The petitioner seeks cohabitation. The respondent, opposing a decree for the restitution of conjugal rights in order to succeed, has to urge and establish one of the grounds for which a judicial separation, or nullity of marriage or divorce could be decreed. The petitioner seeks a

renewal of cohabitation with the spouse who has started living separately. The significant feature of petition for restitution of conjugal rights is, that it is a remedy aimed at preserving the marriage and not at dissolving it, as in the case of divorce, or judicial separation. The court cannot enforce sexual intercourse but only cohabitation. That being the purpose of the petition for restitution of conjugal rights, the petitioner must show that he is sincere, in the sense, that he has a bona fide desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation. The petitioner who is sincere in that sense is entitled to a decree even though the parties may not evince any affection for each other. A petitioner has, therefore, to satisfy the court of his sincerity in wanting to resume cohabitation with the respondent.

Held, that prior to the amendment of order 21, rule 32, Code of Civil Procedure, by Act XXIX of 1923, if a wife disobeyed a decree for the restitution of conjugal rights passed against her, the decree could be enforced by her imprisonment, or by attachment of her property, or by both, but since the amendment, that is no longer so. Now when a decree for restitution is passed, the respondent is directed to comply with it, if compliance is refused, the respondent is at fault, and the decree-holder may then seek divorce under section 13 of the Act.

First Appeal from the order and decree of the Court of Shri B. L. Mago, Senior Sub-Judge, Ludhiana, dated the 27th October, 1966, dismissing the plaintiff's application for dissolution of marriage by a decree of divorce under Section 13 of the Hindu Marriage Act, 1955, against Shrimati Rama Syal, defendant with costs.

J. N. Kaushal, Senior Advocate, with M. R. Agnihotri and V. P. Sarda, Advocates, for the Appellant.

K. S. Thapar, Advocate, for the Respondent.

ORDER

Tek Chand, J.—This is an appeal in a matrimonial cause by Major B. R. Syal, appellant, against his wife Shrimati Rama Syal, from the decision of the Senior Subordinate Judge, Ludhiana. dismissing his application for dissolution of his marriage.

The facts of this case are that the petitioner was married to the respondent on 13th of July, 1955. A daughter was born to them on 11th of April, 1956 and she now is over eleven years old. Up to 19th of February, 1960, the parties lived together at Ludhiana. The petitioner has stated that on that date, she left Ludhiana for Agra

in order to attend the marriage of her cousin and did not come back. She stayed at Delhi and has been living away from her husband without any reason. On 12th of August, 1960, the husband filed an application under section 9 of the Hindu Marriage Act for restitution of conjugal rights and obtained an *ex parte* decree on 10th of November, 1960. He took out execution on 20th of January, 1962, alleging that the decree had not been satisfied and his wife had refused to accept notice of the execution application.

On 15th of June, 1962, she made an application for maintenance under section 488 of Code of Criminal Procedure. On 24th of July, 1962; the wife made an application to the Subordinate Judge for setting aside the decree for restitution of conjugal rights. On 7th June, 1963, her application was dismissed. She went up in appeal to the High Court from the order of the Subordinate Judge dismissing her application for setting aside the *ex parte* decree for restitution of conjugal rights vide F.A.O. 152 of 1963. In the High Court, the parties made their statements and order was passed in terms of the agreement they had arrived at. The husband had made a statement on 21st of January, 1966, in this Court before Mahajan, J., to the effect that he would pay a sum of Rs. 250 per mensem for her maintenance so long as she did not remarry. In the event of her obtaining an employment, the maintenance amount would be proportionately reduced. Besides, he would pay a sum of Rs. 75 per mensem for the maintenance of their daughter so long as she lived with the mother. He would bear the expenses of education of their child. There were other conditions relating to the future maintenance of the daughter which need not be mentioned for purposes of disposing of this case. The wife also made a statement agreeing to the terms proposed by the husband. In terms of the above statements, an agreed order was passed on 21st of January, 1966.

The present petition for divorce was filed before the trial court on 7th of August, 1963, on the ground contained in section 13(IA)(ii) which runs as under:—

"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 two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

Reference at this stage may also be made to section 23(1)(a) and sub-section (2) which are given below :—

"23(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that--

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

* * * *

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties".

This petition has been dismissed by the Senior Subordinate Judge on 27th of October, 1966, giving rise to the present first appeal from order at the instance of the husband.

The petition before the trial court was contested by the respondent on the ground that she had not failed to comply with the terms of the decree for restitution of conjugal rights, but it was the petitioner who refused to take her back; she also complained that the *ex parte* decree for restitution of conjugal rights was deliberately, kept as a secret from her; and that as soon as she learnt about it, she made all efforts to have it set aside. The following issues were framed :

(1) Has the respondent failed to comply with the decree for restitution of conjugal rights passed against her?

(2) Relief ?

An additional issue was framed which was as under:—

> Whether the petitioner is not in any way taking advantage of his own wrong for the purpose of obtaining the relief claimed ?

On the first issue, the trial court said that the respondent's counsel during the arguments had conceded that the decree for restitution of conjugal rights passed against her had not been complied with and, therefore, the issue was deemed proved in favour of the petitioner. On the additional issue, the respondent's contention was that her husband would be taking advantage of his own wrong if the relief claimed by him was granted. She maintained that the husband did not allow her to live with him and to perform her conjugal obligations despite her having made several attempts. The trial court referred to certain letters sent by the wife to her husband requesting him to take her back. These letters will be considered presently. Statements of witnesses were also recorded. After referring to oral and documentary evidence, the trial court came to the conclusion that on account of the wrongful act of the petitioner, respondent could not perform her marital obligations. The petitioner was refused relief and his petition was dismissed with costs.

Before taking up the points urged by the learned counsel, a brief resume of the events and of the evidence both oral and documentary may be given. The appellant produced three witnesses besides making his own statement. His first witness is Niranjan Dass who has simply stated that once the appellant, his father and the witness went to Jammu four years ago and tried to persuade the respondent to return and live with her husband but the overtures were of no effect and they returned. The next witness is Sohan Lal Mohindra who merely stated that once he talked to the respondent's sister's husband, Shri Sita Ram Mangal, regarding the dispute between the parties and was told that the respondent's parents wanted the parties to live in East Africa where they were settled. The third witness is one Kesar Mall who stated that he met the respondent's *masar* (her mother's sister's husband), Inder Singh Marwah, seven months ago and was informed that the respondent did not want to go to her husband and her parents were unwilling to send her either. These three witnesses do not depose to anything which is material. The petitioner appeared as A.W. 4 and stated that he had a daughter

born to the respondent and his wife lived with him up to 19th February, 1960. On that date, she left the house in order to attend the marriage of a relation. She took along with her ornaments and clothes besides Rs. 2,000 in cash. She never returned to his house after that. On 12th of August, 1960, he had applied for restitution of conjugal rights in which he obtained *ex parte* decree on 10th November, 1960. He took out execution of the decree on 20th January, 1962, but she refused to accept service. She applied for setting aside of the *ex parte* decree passed against her but her application was dismissed on 7th June, 1963. He approached her on two occasions requesting her to live with him but she simply said, that she would reply after obtaining consent of her parents and uncle. During this period, he was posted at different places which were not family stations. During the course of cross-examination, he said that he had made up his mind not to let her live with him. He denied having obtained an *ex parte* decree in his favour by furnishing wrong address of the respondent.

The respondent produced some witnesses and also appeared herself. Respondent's witness Harbans Lal stated that he accompanied the respondent, her mother and her *masar* Inder Singh to the house of the petitioner in Ludhiana. The father of the petitioner met them and a request was made to keep the respondent in their house but it was rejected. The next witness is Inder Singh who related the several efforts which he made in order to persuade the petitioner and his father to let respondent live in her husband's house, but these overtures were of no avail. The respondent's mother, Shrimati Ram Piari, appeared as P.W. 4. She deposed to the efforts made to persuade the petitioner to take his wife and she stated that she had always been and even then was willing to send her daughter to her husband's house. The respondent made a detailed statement stating that she had been trying her level best that the petitioner should take her and that she should live with him. She had been maltreated by her father-in-law and at whose instance, she used to be beaten by the sister of her husband but not by the husband. Her father-in-law and the members of his family wanted money from her parents. Sometimes she was not given meals for days together and was kept confined in a room.

She said that she came to know about the *ex parte* decree against her in the middle of 1962 and then applied for getting the

ex parte decree set aside. In that application, she specifically mentioned that she was willing to go to the petitioner. The application is Exhibit R.W. 5/1. It is also mentioned that the *ex parte* decree was obtained by giving wrong address and the summons was never duly served on her and no process-server ever met her in Delhi. She said that she had been making best efforts that her husband should keep her. Twice, she approached him at Ludhiana in the company of Harbans Lal, Inder Singh and her parents and similar efforts were also made in Delhi. Every time he refused her request. She denied having come to know that her husband had taken out execution of the decree for restitution of conjugal rights. Neither the petitioner nor any of his relative had ever approached her to live with him. She was subjected to lengthly cross-examination in which she said that after leaving Ludhiana on 19th of February, 1960, for attending the marriage, she returned to the house of the petitioner and on that very day, she was beaten and turned out. She learnt of the *ex parte* decree against her when one Col. Balwant Singh wrote to her. She said that she still wanted to live with her husband.

Reference at this stage may also be made to several letters written by her. Exhibit P/1 is her letter, dated 17th of February, 1962, addressed to her husband's younger brother expressing her wish to return soon. On 18th of February, 1962, she addressed a letter Exhibit D/1 to the Officer Commanding, Military Hospital, Delhi Cantt., complaining that her husband refused to let her live with him and that his attitude was adament though pressure was being put on her to let him divorce her which she flatly refused. She had mentioned other grievances of her and requested the Officer Commanding that he might bring him to see reason and to accept her as his wife. On 3rd of April, 1962, she addressed a letter to the Area Commander, Delhi Cantt., detailing her complaints against her husband requesting that he should be posted to Delhi and should be asked to take his wife and family back to live with him.

On 5th of September, 1962, the respondent addressed a letter to her husband (R.W. 5/3) begging him to let her return to him and that they should start their life afresh as husband and wife. She said that either he should come and take her along with him or write to her to come at the agreed place so that they might start a new chapter. She further gave him assurance that he would be treated

with courtesy by her parents. A fortnight later, she again wrote to her husband (R.W. 5/4) on 18th of September, 1962, repeating the same request and pleading for reconciliation. This was followed by letter dated 24th of September, 1962 (R.W. 5/5). She referred to an incident when she and her people were insulted by him but still pleaded that he should let her and their daughter live with him. In October, 1962, she sent another letter (R.W. 5/6) to her husband similarly worded begging him to take her. It may be said that all the letters which the respondent addressed to her husband are couched in respectful and loving terms. The tenor and tone of all these letters is imploratory and not accusatory. No letter from her husband has been produced on the record and it is not the case of the appellant that he ever replied to her requests. He has maintained indifference in regard to his wife's several requests and to many approaches she made through others. To all her requests and petitions, he turned a deaf ear. Her letters remained unreplied.

I may now take up the arguments addressed by learned counsel. He has relied in the main on the provisions of section 9 read with section 13(1-A)(ii) and on their basis, has argued that once decree for restitution of conjugal rights is passed, and there has been 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, it is open to either party to present a petition for the dissolution of the marriage by a decree of divorce, and the marriage may then be dissolved.

It was argued on behalf of the husband that if the wife wanted to comply with the decree for restitution of conjugal rights, she could do so by returning to him. It was within her power to comply with the decree by taking her abode in his house. The decree would have been satisfied provided that she had done so within two years. Instead, she asked for setting aside of the decree, which, according to the appellant's counsel, showed that she never wanted restitution of conjugal rights. He also commented on the fact that she did not adopt the correct course which was to go to the executing court and ask the court to send for her husband so that he might take her with him in token of compliance with the decree.

In the instant case, the important fact is, that the husband after he obtained his decree, never evinced any desire on his part

to take his wife and daughter back despite the fact that she had made a number of approaches direct and through others to make him relent. The question of going back to his house would have arisen, if he had expressed willingness to receive her or if he was stationed at places which were family stations. His calculated silence to the overtures made by the wife showed that the decree of restitution of conjugal rights was intended as a step towards getting divorce from her and to this course, he seemed to be resolved.

The essence of a decree for restitution of conjugal rights is that the husband desiring the company of the wife makes an effort through the court for its assistance in order to restore his wife back to him so that they may be able to lead conjugal life. Intrinsically, the plaintiff in proceedings for restitution of conjugal rights is the aggrieved party who desires to live with his spouse. The facts of this case were, however, quite the opposite. It was the wife who all along wanted to live with her husband and was making a number of attempts to achieve that object. The husband was not genuinely an aggrieved party as his wife had never denied to him the right of living together. In other words, what the husband sought by making an application under section 9 of the Act, was a matter of the keenest desire on the part of the wife which she was anxious to comply with. The facts and the circumstances suggest that the request for restitution of conjugal rights on his part was merely a pretence and sham, and the proceedings were intended for an extraneous and a different purpose. He could not obtain divorce on grounds referred to in section 13(1) of the Act. There is no suggestion of adultery, or of conversion to a different religion, or of unsoundness of mind, or the wife's suffering from leprosy, or a venereal disease, or that she had entered into any religious order or had not been heard of as being alive for a period of seven years. Not one of these grounds was available to the husband, and the proceedings for restitution of conjugal rights seemed to be the only convenient handle in order to cut the marital bonds. It was the husband who without any cause was keen to snap *vinculum matrimonii.* The proceedings under section 9 were resorted to as a device for attaining his purpose, namely, to obtain a divorce from a wife against whom the charges justifying a divorce could not be levelled and who was free from blame or blemish and was physically and mentally sound.

The remedies by way of divorce viz. dissolution of marriage, judicial separation and restitution of conjugal rights are distinctive in character, and have been devised with a set purpose. Judicial separation which did not sever the matrimonial bond was at one time styled as divorce *a mensa et thoro* which was separation "from bed and board" in contradistinction to a divorce *a vinculo matrimonii* which absolutely dissolved marriages by snapping the matrimonial bond. The term 'divorce' is of Latin origin *divortium* which means to turn aside, to separate from *Divortium dicitur a divertendo, quia vir divertitur ab uxore*—divorce is said to be from *divertendo,* because a husband is diverted from his wife. This *divortium* may be either absolute when marriage stands dissolved, or limited when the marriage relation is suspended, and the duties and obligations are modified, though the matrimonial bond remains in full force. For this type of divorce which is only from bed and board—*a mensa et thoro*. The term used in the modern statutes is judicial separation. Under our law, a decree for judicial separation can be passed on grounds enumerated in section 10 of the Hindu Marriage Act, which include desertion, cruelty, unsoundness of mind, etc. The petitioner seeking judicial separation does not wish to share bed and board with the other party to the marriage. When a decree for judicial separation is passed, it is no longer obligatory for the petitioner to cohabit with the respondent.

In the case of restitution of conjugal rights, the grievance of the petitioner is that the respondent has withdrawn from the society of the other and desires that this should not be done. The petitioner seeks cohabitation. The respondent, opposing a decree for the restitution of conjugal rights in order to succeed, has to urge and establish one of the grounds for which a judicial separation, or nullity of marriage or divorce could be decreed. The petitioner seeks a renewal of cohabitation with the spouse who has started living separately. At one time, under ecclesiastical law, restitution of conjugal rights was understood as a compulsory renewal of cohabitation between a husband and wife who have been living separately. The significant feature of petition for restitution of conjugal rights is, that it is a remedy aimed at preserving the marriage and not at dissolving it, as in the case of divorce, or judicial separation. The court cannot enforce sexual intercourse but only cohabitation. That being the purpose of the petition for restitution of conjugal rights, the petitioner must show that he is sincere, in the sense, that he has a bona fide desire to

resume matrimonial cohabitation and to render the rights and duties of such cohabitation. The petitioner who is sincere in that sense is entitled to a decree even though the parties may not evince any affection for each other. A petitioner has, therefore, to satisfy the court of his sincerity in wanting to resume cohabitation with the respondent; if the decree is disobeyed, then the petitioner may move the court for obtaining a decree for dissolution of marriage in accordance with law and procedure.

Prior to the amendment of order 21, rule 32, Code of Civil Procedure, by Act XXIX of 1923, if a wife disobeyed a decree for the restitution of conjugal rights passed against her, the decree could be enforced by her imprisonment, or by attachment of her property, or by both, but since the amendment, that is no longer so. In this case, the position as between the parties is converse. The respondent wife is anxious for the restitution of conjugal rights and for her re-instatement in the house of the husband and for resumption of matrimonial cohabitation. According to her, she never deserted the husband but had gone to attend a marriage of a relation and when she returned, she was beaten and turned out. The proof of her desire is abundantly established from the attitude taken by her before, during and after the proceedings, and also from her letters and the overtures, she has been making directly and through others. Her letters and her conduct establish her sincerity to live with the husband as a dutiful wife discharging all her obligations and respecting the matrimonial rights of her husband. The conduct of the husband, on the other hand, shows that he had never been keen for restitution of conjugal rights, since it was he who turned his wife out, and later, refused to cohabit with her despite her anxiety and keenness to be allowed to live with him. The recourse to law by making a petition under section 9 was not for the purpose of getting his wife to stay with him, but with the object of treating these proceedings as a step to final dissolution of marriage. It is a misnomer to call the proceedings taken by the husband under section 9 for restitution of conjugal rights in the real sense. It was a case of observance of the form without the substance.

Another curious factor in this case is, that the proceedings under section 9 were *ex parte*, and so also the execution taken out by the husband. The wife throughout maintained that she was never

served with the process, and had she come to know of these proceedings, she would have taken immediate steps to comply with the decree.

It cannot be said that there are insufficient indications on the record, that the wife was kept out of the knowledge of these proceedings, which were *ex parte*. No service was effected on the wife even when execution was taken out. Her contention that she was never served has not been refuted. The process server who is said to have effected service of execution application, has not been produced. In her statement as witness, she stated that she had no notice of execution and she never refused service and she would have happily joined him if her husband has been willing to take her. On this important aspect of her statement, she was subjected to no cross-examination at all. It has not been proved that the wife refused process on 12th of February, 1962. If that were so, she would not have addressed the letter which she wrote to her husband's brother on 17th of February, or to his Officer Commanding on 18th of February, 1962.

As to the argument that she was wrong in trying to get the decree set aside and the correct course for her was to comply with the decree, it does appear that she was ill-advised by her counsel, but that error on her part is technical. Her intention is made absolutely clear from her application made to the court for setting aside the *ex parte* decree . She clearly stated in para 4 of her application (R.W. 5/1) that her parents were living in East Africa, and she was staying with some relatives in Delhi at House No. 4733, Gali No. 47, Rehgar Pura, Karol Bagh, New Delhi-5; and the respondent, though he knew of this address, gave a wrong and false address to the court in order to get an *ex parte* decree. It was stated, that the petitioner (wife) was even now ready to live and reside with the revered respondent (husband) as wife and at any place, suitable to the respondent. Her case in that petition was that the summons was not duly served upon her on any occasion during the pendency of the petition of restitution of conjugal rights and that no process server ever met at Delhi. In connivance with the process server, a wrong and false report was got made by the husband and the affixation of the summons was not on her residence. She never resided permanently or temporarily at the Delhi address which was given to the court by the husband.

When a decree for restitution of conjugal rights is passed, the respondent is directed to comply with it, and if compliance is refused the respondent is at fault, and the decree-holder may then seek divorce under section 13 of the Act. But in this case the tables were turned on her and despite her best efforts, she was hindered from complying with the decree because of the unco-operative attitude of the husband. The exigencies of service enabled him to stay for long periods in non-family stations. Even when he could have lived with her, he did not let her come near him. It is rather a case of the respondent, being anxious to comply with the purpose underlying proceedings for restitution of conjugal rights. What the husband formally sought in the petition for restitution of conjugal rights, he, by his conduct, opposed its compliance. In his statement in court in these proceedings, he did not mince words, and expressly said, that he would not take her back. Learned counsel for the husband has not been able to indicate any incident, or any fact or circumstance from which it was possible to conclude that the husband was genuinely wanting restitution of conjugal rights. Conversely, he has not been able to indicate any fact or circumstance showing that the wife was not keen to live with the husband. Only one circumstance has been expressed, that her letters were written without any genuine intention of complying with the decree, because if she wanted to comply with the decree, she would not have made an application for setting it aside. It was urged that it was within her power to comply with the decree by walking into the house of her husband. It was argued, that the mere fact that she asked for the setting aside of decree was sufficient to show, that she never wanted restitution of conjugal rights, and the only correct course for her to adopt, was to go to the executing court and say that she was willing to go to her husband and the court should send for him to take her. This would have been in token of compliance with the decree. As already stated, the wife was not rightly advised to ask for the setting aside of the *ex parte* decree, and it would have been better to inform the court that she wanted to comply with the decree. It seems to me, that her position was that there was never an occasion when she denied conjugal rights to her husband and he need not have petitioned the court for their restitution. Her other grievance was that she was not served with the notice, and *ex parte* decree was obtained by keeping from her the knowledge of such proceedings. She wanted the *ex parte* decree to be set aside because of her keenness to live with her husband.

One fact which is remarkable in this case is, that the husband has exhibited a distinct tendency to find pretext, which may be sufficient in law to relieve him from his marital obligations. The court disposing of his petition for restitution of conjugal rights should have satisfied itself as to the sincerity of the desire on the part of the husband to live with his wife. He led no evidence to show, that he was sincere in his request and willing to resume the position and duties of a husband. It was observed by Hill, J. in *Harnett* v. *Harnett* (1) there must—

> "in my opinion, be a sincere desire to obtain not merely the form of cohabitation but the reality of conjugal rights; and that implies readiness to render them to the other spouse."

The husband has not shown his readiness to live on terms of affection with his wife, and he has exhibited no desire on his part to resume real married life. What he was after was a formal decree and not restitution in its true sense.

The court must proceed not upon pretence of desertion but upon facts. The husband had desired to create an artificial state of desertion which was not in consonance with reality.

Relief deserves to be refused to the petitioner, where he has taken up a position inconsistent with the desire of the wife that her husband should return to her; and the circumstances show, that there was no desertion by her.

In *Joseph* v. *Joseph* (2) a wife had deserted her husband. Six months later, she expressed a *bona fide* intention to return to him but he refused to take her back. She petitioned for a decree of restitution of conjugal rights. It was held that a spouse who was initially in the wrong in such circumstances could put himself or herself in the right by making a *bona fide* offer to return and remedy the wrong. On the facts of that case, the court was satisfied that the wife, by making a *bona fide* offer to return, had remedied the wrong, and that she was only seeking her legitimate rights in asking for an order that her husband should take her back. The wife in that case was held entitled to a decree.

(1) 1924 P. 41 (44).
(2) 1939 P. 385.

The case of *Pratt* v. *Pratt* (3) which came up before the House of Lords, is in point. The facts of the case were that the respondent had deserted her husband in August, 1934 and in September, 1936, she wrote to him twice, asking him, in each letter to see her with a view to discussing a resumption of cohabitation. He refused to do so, saying that an interview would serve no useful purpose. The House of Lords held that after this refusal by the husband, the respondent could not be said to continue to desert him without cause. The husband had appealed to the House of Lords from the decision against him of the Court Appeal. The House of Lords dismissed the appeal, holding that as the appellant had pointblank repelled the overtures contained in his wife's letters, he had failed to prove that she had been in desertion without cause for the statutory period. By the attitude which the appellant took up, he himself caused the desertion to continue or, at least, he prevented the possibility of its termination.

A similar argument, as has been advanced in the instant case, was also presented by the husband's counsel to the House of Lords that she merely wrote letters desiring to resume the normal relationships of marriage but did not actually go to the husband. Lord Romar observed:

> "It is plain, therefore, that before the respondent could return there would have to be some sort of discussion between her husband and herself in person or by letter. It could not be expected that she should suddenly make an unherlded entry into his house. But even so, it was argued, it was necessary in order to put an end to her desertion, for the respondent, to take some active steps towards returning to the matrimonial domicil. This, no doubt, is true. But in writing the letters of September, 1936, she did take such a step, and the only one that she could reasonably be expected to take in the circumstances. Whether the meeting for which she asked would have brought about a reconciliation between the two is a question that must ever remain unanswered. The respondent never in fact returned to her husband. But in view of his refusal to allow a meeting to take place, her

(3) 1939 A.C. 417.

continued absence thereafter cannot without an utter misuse of language be called a desertion." In *Lacev* v. *Lacey,* (4) Lord Merrivale said—

"a demand or request for resumption of cohabitation must be sincere. In this case, what is honestly desired, for unselfish and praiseworthy motives, is not, in my view, a sincere desire for re-cohabitation. The proposal does not spring from a simple desire that these people should live together as man and wife."

The petition was dismissed.

No room is left for doubt that the motives and sincerity of the petitioner are of fundamental importance for judging the genuineness of the petition for restitution. The crux being that such a petition is for the purpose of the fulfilment of obligation of married persons to live together, and not to use the proceedings as a device for reversing the object for which they are intended.

In *Ishwar Chander Ahluwalia* v. *Shrimati Pomilla Ahluwalia,* (5), which was a case under the Hindu Marriage Act, where after a decree for restitution of conjugal rights had been passed, the husband proceeded with a petition for annulment of marriage under section 12(1)(c) of the Act. After its dismissal, and after expiry of the period of two years from the date of the passing of decree for restitution of conjugal rights, he filed a petition for dissolution of marriage under section 13 on the ground of non-compliance of the decree by the wife. It was held by Falshaw J. that it was quite impossible for the wife to make any effort to comply with the decree for restitution of conjugal rights, as long as the husband was proceeding with a petition for nullity of the marriage and that, it was doubtful whether any sincere effort were made on behalf of the husband to get his wife to comply with the decree. The husband's petition was dismissed.

In this case, on the other hand, every sincere effort was made by the wife to comply with the decree of restitution of conjugal

(4) 1931—146 L.T. Page 48.
(5) A.I.R. 1962 Punj. 432.

rights by expressing a desire to live with her husband, even if she was not aware of any such decree. Her conduct throughout had been that she felt that she had been neglected but begged of her husband to take her and her daughter back and not to desert her.

Reliance was placed by the learned counsel for the appellant on *Tej Kaur* v. *Hakim Singh* (6). In that case, wife was granted decree for judicial separation on grounds of cruelty. She was not willing to resume cohabitation. In that case, the husband was anxious but was prevented because he was undergoing a term of imprisonment for life in jail. Wife was found entitled to a decree for divorce. Neither the facts nor the principle involved are in *pari materia.* and the observations cannot be invoked in a case like the present where the facts are quite different.

There are observations in *M. P. Shreevastava* v. *Mrs. Veena* (7) on which reliance has been placed on behalf of the wife. The decree for restitution of conjugal rights, it was said, must be deemed to be satisfied if the conjugal rights of the aggrieved party had been restored, and the particular grievance redressed. In case, however, the judgment debtor is willing to obey the decree but the unjustified obstruction towards the performance of the decree comes from the decree-holder, then the judgment-debtor would be fully entitled to approach the court and pray that the decree be regarded as satisfied, so that the decree-holder may not fraudulently or *mala fide* utilise the decree for the purpose of securing a decree for divorce.

Under section 23(1)(a) of the Hindu Marriage Act, a decree for dissolution of marriage may be passed 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......".

For reasons discussed above, I am satisfied that the husband had throughout the proceedings against his wife been taking

(6) A.I.R. 1965 J. & K. 111.
(7) A.I.R. 1965 Punj. 54.

advantage of his own wrong in order to get his marriage with the respondent dissolved. The facts of his case make it abundantly clear that no impropriety or illegality was ever committed by the wife who at all times was anxious and willing to live with him as his wife and has been imploring him, to take her back which he did not do and for no justifiable reason. She had never deserted him but was driven out of the house. There is convincing evidence, direct and circumstantial showing that the husband was taking advantage of his own wrongful acts and wanted to get rid of his wife and resorted to the legal proceedings with that objective. I agree with the conclusion arrived at by the trial court. I find the appeal devoid of merit and I consequently dismiss it with costs.

R. N. M.

APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

BANARSI DASS, AND OTHERS,—*Appellants*

versus

RAJ KUMAR AND OTHERS,—*Respondents*

Civil Misc. No. 2147 of 1967

R. S. A. No. 147 of 1968

January, 11, 1968.

Code of Civil Procedure (Act V of 1908)—Order 22 Rule 4 and Order 30 Rule 4—Suit by a firm for rendition of accounts—One of the partners of the plaintiff firm dying before preliminary decree—His legal representatives brought on record—One of such legal representatives dying—His legal representatives not brought on record —Suit—Whether abates in toto.

Held, that the principle that in suit by a firm, the death of a partner will not cause abatement of the suit, will not apply where the partner had died and his legal representatives had been brought on the record, some of whom died subsequently. The rule is that the personal representatives of a deceased partner are entitled to an account from the surviving partners. Therefore, moment the legal representatives were brought on the record they were clothed with a legal right to demand accounts from the partner who may ultimately be held to be accounting partner. Each of the parties to a suit for rendition of accounts for a partnership holds a