

that is, section 6 of the Prevention of Corruption Act excludes the general provisions of Section 197 of the Code which is hence not attracted to the trial of offences before the Special Judge.

(17) The appeal would now go back before the Single Bench for decision on merits in the light of the answer given to the questions above.

D. S. Tewatia, J.—I agree.

H. S. B.

Before S. S. Sandhwalia, C.J. & S. S. Kang, J.

ANGREZ KAUR,—Appellant.

versus

* BALDEV SINGH,—Respondent.

Letters Patent Appeal No. 197 of 1979.

April 14, 1982.

Hindu Marriage Act (XXV of 1955)—Section 13-A Matrimonial court holding that grounds for divorce not made out—Court thereby refusing to grant decree of divorce but granting a decree for judicial separation instead—Such decree—Whether can issue if grounds for divorce not made out—Scope of Section 13-A—Stated.

Held. that a plain look at Section 13-A of the Hindu Marriage Act, 1955 would indicate that primarily it vests discretion in the Court that instead of granting a decree of divorce it may pass a decree of judicial separation. What, however, calls for notice is that this discretion is not an unguided and uncanalised one. Again it must be plain that the Legislature has intended to vest this power only for the grant of an alternate relief in a petition for divorce, where the grounds necessary therefor are established. Both the larger import of the language as also its heading highlights the fact that once the basic question is established, then the relief therefor may be moulded in the alternative, if the court considers it just. An option has now been given to the Court to grant a decree of divorce on the established grounds or to give the lesser relief of judicial separation, as a last hope of saving a wrecked marriage. This view is further buttressed by the designed use of the word 'instead' in the penultimate part of the section. The said section

Angrez Kaur v. Baldev Singh (S. S. Sandhwalia, C.J.)

when read incisively lays down that instead of granting a decree of divorce, the Court may, in the particular facts of the case, give only the lesser relief of judicial separation. As such the grounds for grant of a decree of divorce are a necessary postulate before the Court can decree judicial separation 'instead'.

(Paras 6, 7 and 8).

Letters Patent Appeal under Clause X of the Letters Patent from the decree of the Court of Hon'ble Mr. Justice Harbans Lal, dated the 27th day of July, 1979 reversing that of the decree of divorce passed by Mrs. Harmohinder Kaur, Additional District Judge, Sangrur, dated the 21st September, 1978 and granting the Appellant a decree for judicial separation.

Amarjit Markan, Advocate, for the Appellant.

T. S. Mangat, Advocate, for the Respondent.

JUDGMENT

S. S. Sandhwalia, C.J.

I. The true scope and ambit of the discretion vested in the Matrimonial Court by the recently inserted Section 13-A of the Hindu Marriage Act, 1955 is the primary question which has come to the fore in this appeal under Clause X of the Letters Patent.

2. For the determination of the aforesaid legal issue (upon which alone, the fate if the appeal would turn), it seems unnecessary to delve deeply into the long drawn out conjugal bitterness betwixt the spouses, which stands fully recapitulated in the judgment under appeal. It suffices to mention that the marriage took place way back on February 16, 1948 and two daughters were born out of the wedlock of whom the elder survived. It would appear that the marriage virtually broke up after four years and a separation between the two spouses was brought about. On January 15, 1962, the respondent-husband, filed a petition for the restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 (hereinafter called 'the Act', which was dismissed with the findings that in fact he had maltreated his wife and turned her out of the house. No appeal was filed against the said judgment and these findings achieved finality. The appellant-wife on February 8, 1962 had preferred a petition under Section 488, Criminal Procedure Code, 1898, for maintenance which was allowed by the Magistrate by granting Rs 30 per mensem

for the appellant and Rs. 20 per mensem for her daughter from the date of her application. In the revisional proceedings, before the District Judge and later in the High Court, the said judgment was maintained on March 6, 1967. The High Court further took the view that the alleged offer made by the respondent-husband before it to take the appellant-wife back to resume matrimonial ties, was not *bona fide*.

3. Nearly 29 years after the solemnization of the marriage and decades after the separation of the parties, the respondent-husband on October, 25, 1977 preferred a petition for divorce under Section 13 of the Act. The learned Additional District Judge, Sangrur, allowed the same and granted a decree for dissolution of marriage by divorce between the parties on September 21, 1978.

4. On appeal, by the appellant-wife, the learned Single Judge, on merits, took a view entirely in favour of the appellant-wife and held as follows :—

“From the above narration of events and the assessment of evidence on record, I have no doubt in my mind that it was the respondent who was responsible for turning the appellant out of his house by maltreating her for one reason or the other and his offer even in March, 1977 during the pendency of the revision petition in the High Court to restore the matrimonial relations and to accept her back in his house was not *bona fide*. In the petition, there was no averment that any Panchayat had been taken to bring the appellant back. In view of the same, the evidence of the respondent that he along with some witnesses had gone to the house of the appellant for compromise or reconciliation cannot be given any credence”.

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“.....As the appellant cannot be held guilty of desertion, the respondent was not entitled to the decree of divorce and the same passed by the trial court cannot be sustained ..”.

Despite the aforesaid findings, the learned Single Judge observed that an unfortunate situation had arisen where both the spouses had

Angrez Kaur v. Baldev Singh (S. S. Sandhawalia, C.J.)

taken categoric stands which rendered the resumption of matrimonial ties no longer possible. On that premise alone, and purporting to Act under Section 13-A of the Act, he granted a decree for judicial separation. On the question of laches, under Section 23(1) (d) of the Act, he opined, that because the decree for divorce was being declined, therefore, the question of delay had no relevance.

5. The solitary, though meaningful contention, raised on behalf of the appellant-wife herein is that the learned Single Judge having unreservedly found that the respondent-husband alone was at fault and thus not the least ground for the grant of divorce was made out, then he could not invoke Section 13-A of the Act to pass a decree for judicial separation.

6. Inevitably, the submission of the learned counsel for the parties revolve around Section 13-A of the Act. However, before one adverts to its specific language, the matter calls for a perspective in the context of its legislative history. This Section was inserted in the Act by the Marriage Laws Amendment Act, 1976, and was part of significant changes simultaneously brought out in the Act as also in the Special Marriage Act. Amongst other reasons, the legislature had intended to give effect, to the 59th Report of the Law Commission. The penultimate part of the statement of Objects and Reasons is as under:—

“...The objects of the legislation are mainly, (1) to liberalise the provisions relating to divorce; (2) to enable expeditious disposal of proceedings under the Act; and (3) to remove certain anomalies and handicaps that have come to light after the passing of the Act.

The Bill seeks to achieve the above-mentioned purposes.”

Further, clause (8) of the notes on clauses of the said Bill, evidences the undermentioned reasons for introducing Sections 13-A and B in the Act :—

“.. New Section 13A is proposed to be inserted to provide that under certain circumstances the court may, while dealing with a petition for divorce, have a discretion to grant a decree for judicial separation *instead*. New Section 13B seeks to provide for divorce by mutual consent.”

With the aforesaid background, one can now turn to the particular provision itself, which is in the following terms :—

“13A. Alternate relief in divorce proceedings

“.... In any proceedings under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (iv) and (vii) of sub-section (1) of Section 13, the Court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.”

A plain look at the aforesaid provision would indicate that primarily it vests a discretion in the Court that instead of granting a decree of divorce, it may pass a decree of judicial separation. What, however, calls for notice is that this discretion is not an unguided and uncanalised one. It is expressly provided that no such discretion can be exercised where the claim for a divorce is rested on the ground of one of the spouses has ceased to be a Hindu by conversion to another religion; has renounced the world by entering any religious order, or has not been heard of as being alive for a period of seven years. In all these three situations, the exercise of the power under Section 13A of the Act is expressly prohibited.

7. Again, it seems to be plain that the legislature has intended to vest this power only for the grant of an alternate relief in a petition for divorce, where the grounds necessary therefor are established. Both, the larger import of the language as also its heading highlights the fact that once the basic postulate is established, then the relief therefor may be moulded in the alternative, if the Court considers it just. One may revert back to the position prior to the insertion of this provision. Earlier, in a petition for divorce where the petitioner had successfully established his claim, the only relief could be that of a decree of divorce. The change brought about appears to be only to the effect that now an option has been given to the Court either to grant a decree of divorce on the established grounds or to give the lesser relief of judicial separation, as a last hope of saving a wrecked marriage. This is so because if a decree of judicial separation remains unsatisfied for a period of one year, that itself, would be a strong ground for seeking the ultimate relief. What

Angrez Kaur v. Baldev Singh (S. S. Sandhawalia, C.J.)

deserves highlighting is the fact that either of the two reliefs can only be granted on the *terra firma* of one or the other of the grounds specified under section 13 of the Act for the grant of divorce barring those mentioned in clauses (ii), (iv) and (vii) of sub-section (1) thereof.

8. The aforesaid view is again buttressed by the designed use of the word 'instead' in the penultimate part of the section. Keeping this in mind, the Section when read incisively lays down that instead of granting a decree of divorce, the Court may, in the particular justice of the case, give only the lesser relief of judicial separation. It follows that the grounds for the grant of a decree of divorce are a necessary postulate before the Court can decree judicial separation 'instead'. I do not think that the section does or could ever have been intended to give a total *carte blanche* to a matrimonial Court to grant a decree of judicial separation where no ground whatsoever for a decree of divorce has even remotely been established.

9. Equally instructive it is to turn to Section 10 of the Act providing for judicial separation. This provides for presenting a petition for judicial separation on any of the grounds specified in sub-section (1) of Section 13 of the Act and in case of the wife, on the added grounds specified in sub-section (2) thereof. It is thus obvious that the legal grounds for the grant of judicial separation and divorce (prescribed by Section 13) are identical. That being so, the statute has now rightly provided that where these identical grounds are established, the Court may have the discretion to grant only the lesser relief even though the major relief of divorce alone, had been prayed for. It bears repetition that the establishment of the prescribed grounds for either of the relief has not in any way been abrogated.

9. The matter merits consideration from another angle as well. Whilst there have been certain changes in the law and rumblings of further amendments, but as yet the relief for divorce or judicial separation under the Act is still rested broadly on the foundation of a matrimonial offence or disability. Unless the pre-requisites of the prescribed matrimonial misconduct or disability under section 13 of the Act are established, no decree for divorce or judicial separation can be granted under the Act, apart from further impediments prescribed in section 23 of the Act. To repeat, some misconduct or fault-liability is the *sine qua non* for the grant of either of the

reliefs of divorce or judicial separation. To my mind, section 13-A only provides for the alterations of these reliefs once the necessary ingredients of the matrimonial offence or disability has been established as a fact. The view I am inclined to take is buttressed by the following lucid observation of Avadh Behari Rohatgi, J. in *Sqn. Ldr. J. S. Sodhi v. Smt. Amar Jit Kaur*, (1):—

“The divorce law of India is founded on the concept of the matrimonial offence. The offending spouse is charged with cruelty. Before marriage can be dissolved the complaining spouse has to prove that the other party is guilty of cruelty. Cruelty is not a crime, it is true. But the offending spouse has to be found guilty. In some jurisdictions the expression “guilty of cruelty” is used instead of “treated with cruelty”. This concept of guilt is the underlying assumption in the divorce law which gives some justification for breaking an indissoluble union against the will of the offending spouse. If relief is granted, each party must alike forfeit the status of matrimony. One party loses it voluntarily, the other involuntarily. But the guilty party cannot take advantage of his own wrong.”

Equally, in this context, the analogy of criminal law, though somewhat remote, seems to highlight the issue. Therein also, the ingredients of the offence have to be first established on the foundation of facts before the imposition of sentence which can be provided in the alternative. To take the extremist example in this context, once the factual ingredients of murder are established, section 302 of the Indian Penal Code provides alternative punishments of a sentence of death or that of imprisonment for life. However, either of the two sentences can only be rested on the firmest foundation of the establishment of the criminal offence beyond reasonable doubt. One cannot, therefore, imagine that these necessary ingredients may not be established, yet one or the other sentences be imposed in the alternative. On a somewhat similar analogy, it would follow that if the matrimonial offence or fault which is a pre-requisite, has not been established at all, then in fact no relief under the Act can be granted either. Section 13-A of the Act, therefore, only provides alternative reliefs but these can come into play only once the pre-requisite of establishing one of the requisite grounds for divorce are made out.

(1) 1981 Marriages Law Journal 84.

Commissioner of Income-tax Haryana & Chandigarh v. O. P. Khanna
& Sons (Surinder Singh, J.)

10. To conclude, section 13-A of the Act vests a discretion in the court only to grant the alternative lesser relief of judicial separation in a petition for divorce provided the requisite ground therefor prescribed by section 13 of the Act, has been established.

11. Now applying the abovesaid rule, it seems plain that the learned Single Judge himself held that the respondent-husband entirely was at fault and, therefore, was not entitled to the decree of divorce passed by the trial court which could not be sustained. It having been established beyond cavil that the respondent-husband was wholly the guilty party, the wife's stand that because of the same, she would not resume cohabitation with him, was obviously justified. No matrimonial misconduct even remotely could be laid at the door of the appellant-wife far from the same having been established. Consequently, no relief against her could be granted. Section 13-A of the Act, therefore, could not be attracted to the situation and with great respect, the learned Judge erred in making resort thereto. It is significant to recall that the findings of fact by the learned Single Judge have in a way achieved finality because the respondent-husband did not choose to file any appeal against the same and even otherwise not the least meaningful challenge could be raised against them. This appeal has, therefore, to be allowed. The judgment of the learned Single Judge is, hereby set aside as also that of the trial court and the petition for divorce preferred by the husband dismissed. The appellant would be entitled to her costs as well.

H.S.B.

Before R. N. Mittal and Surinder Singh, JJ.

COMMISSIONER OF INCOME-TAX HARYANA &
CHANDIGARH,—Applicant.

versus

O. P. KHANNA & SONS,—Respondent.

Income tax Reference No. 146 of 1976.

April 23, 1982.

Income-tax Act (XLIII of 1961)—Section 32(1)—Building acquired by an assessee for the purposes of his business—Electrical fittings and machinery etc. installed in the building—Business, however, actually started after sometime—Depreciation for the building and electrical fittings—Whether could be claimed from the date of its purchase—Word 'used' occurring in section 32(1)—Meaning of.