

Bench: B Marlapalle, S Vazifdar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY APPELLATE SIDE

FAMILY COURT APPEAL NO.78 OF 2004

Mrs.Kanchan Sanjay Gujar Appellant Vs.

Mr.Sanjay Bhikan Gujar Respondent Mr.Shriram S.Kulkarni for appellant.

Mr.A.A.Kumbhakoni with Mr.T.D.Deshmukh for respondent. CORAM: B.H.MARLAPALLE & S.J.VAZIFDAR,JJ. Reserved on : June 24, 2009.

Pronounced on: July 17, 2009

JUDGMENT (PER B.H.MARLAPALLE,J.)

1. This appeal filed under Section 19 of the Family Courts Act read with Section 23 of the Hindu Marriage Act, 1955 ("the Act" for short) arises from the judgment and order dated 10/12/2003 rendered by the Family Court at Pune thereby dissolving the marriage between the parties under Section 13(1-A) of the Act by allowing Petition No.A-345 of 2001 filed by the respondent husband.

2. The parties were married on 13/12/1980 as per the Hindu Customs and Rites at Pune and they begot three children, elder 2

son Kunal was born on 17/1/1983, younger son Mayur was born on 28/9/1984 and daughter Sayali was born on 23/5/1988. As of now all the three children have attained majority but Sayali is still unemployed and, therefore, has no independent source of income The appellant filed Petition No.A574 of 1995 seeking the decree of restitution of conjugal rights under Section 9 of the Act on 29/7/1995 and on the same date she filed Petition No.C-38 of 1995 claiming maintenance for herself as well as the children under Sections 18 and 20 of the Hindu Adoption and Maintenance Act, 1956. On 13/6/1996 the respondent filed Petition A.No.455 of 1996 seeking divorce on the ground of desertion and cruelty i.e. Section 13(1)(i-a) and (i-b) of the Act. He also filed Petition No.D-62 of 1996 under Section 26 of the Act and sought the custody of the children. By a common judgment dated 30/3/1999 the Family Court at Pune was pleased to allow the petitions filed by the wife i.e. Petition No.A-574 of 1995 thereby granting a decree of restitution of conjugal rights in favour of the appellant whereas the petition filed by the husband i.e. Petition No.A-455 of 1996 for divorce came to be dismissed. Petition No.D-62 of 1996 filed for custody by the respondent was dismissed whereas petition No.C-38 of 1995 filed by the appellant for maintenance was 3

allowed.

3. On or about 28/4/2001 the respondent filed Petition No.A-345 of 2001 for seeking divorce under Section 13(1-A) of the Act stating that after the decree under Section 9 of the Act was passed on 30/3/1999 there had been no resumption of cohabitation between the parties and, therefore, the marriage between the parties was required to be dissolved by a decree of divorce. The wife also filed Petition No.C-28 of 2002 along with her younger son and daughter and prayed for maintenance under Section 25 of the Hindu Adoption and Maintenance Act, 1956. By the impugned common judgment the following order came to be passed:

"1. Petition No.A-345/2001 stands decreed as under: The marriage between Mr.Sanjay Bhikan Gujar and Mrs. Kanchan Sanjay Gujar stands dissolved by a decree of divorce under Section 13(1A) of the Hindu Marriage

Act w.e.f. the date of this order.

2. Petition No.C-28/2002 stands decreed partly. The respondent husband Sanjay Bhikan Gujar to pay enhanced allowance of Rs.14,000/- p.m. to the petitioner Kanchan 4

Sanjay Gujar, Master Mayur Sanjay Gujar, Kum. Sayali Sanjay Gujar w.e.f. the date of this order.

3. Costs shall be proportionate.

4. The Respondent husband do clear the arrears of electrical, water and other society authorities charges if any within one month from the date of this order and should go on depositing such charges punctually in future."

4. It is stated by the appellant that the respondent left the matrimonial home and started living in an adulterous relationship with Sunita Gawde and even after the decree for restitution of conjugal rights was granted by the Family Court on 30/3/1999, the respondent continued to live with the very same lady as her husband. It is further alleged that he had performed second marriage with Sunita Gawde and settled in a separate home with her and even as of now he continues to live with his second wife / mistress. On these grounds it has been contended by the wife that it was the respondent husband who acted against resumption of cohabitation and, therefore, having regard to the scheme of Section 23(1)(a) of the Act, he was not entitled for a decree of divorce. In short it is the case of the 5

appellant that the respondent was trying to take advantage of his own wrong.

5. The respondent has filed affidavit-in-reply on or about 12/8/2004 and reiterated that he filed a petition under Section 13(1-A) of the Act for seeking a decree of divorce on the sole ground of non resumption of cohabitation between the appellant and him even after the lapse of period of one year since the decree for conjugal rights was passed. He further claims that the only issue before the Family Court was whether there had been restitution of conjugal rights between the parties for a period of one year after passing of the decree for restitution of conjugal rights on 30th March 1999 in Petition No.A-574 of 1995. He further claims that as per the settled position of law mere non-compliance of decree for restitution of conjugal rights per se could not amount to taking advantage of his own wrong under Section 23(1)(a) as there is no obligation placed by the statute on him under the Act for compliance before asking for the relief under Section 13(1-A) of the Act. As per the petitioner, the petition was filed on the ground of non- compliance of the decree of conjugal rights and even the defaulting party can also seek divorce if there was no restitution 6

of conjugal rights for a period of one year or more after the decree under Section 9 of the Act was passed. He further submitted that the respondent failed to show that the petitioner was taken advantage of his own wrong occurring in Section 23(1)(a) of the Act. In her Petition No. 28 of 2002 filed by the wife for enhancement of maintenance, she had stated the address of the petitioner as "Pratibha Society, Dhankawadi, Pune 411 043" and this is an admission by her that both the parties have been living in separate residences and have not resumed cohabitation. However, he did not state as to what efforts he had taken to resume cohabitation after the said decree was passed and before he approached the Family Court in the second round for seeking divorce under Section 13(1-A) of the Act. In this appeal he supported the impugned judgment of the Family Court but did not state as to what steps he had taken from 30th March 1999 to resume cohabitation with the appellant. In the said affidavit filed on 12/8/2004 he has stated that he got married to Sunita Yashwant Gawade on 14/3/2004 at Alandi near Pune and this marriage was after expiration of the limitation period to challenge the decree of divorce dated 10/12/2003. He further claims that he registered the said second marriage on 4/7/2004 with the Registrar of Marriages. The learned counsel 7

for the respondent in his oral arguments which have been placed before us as "Written Submissions" has opposed the appeal on the following grounds :-

(a) On expiration of one year from 30th March 1999 the respondent was in law entitled to apply for a decree of divorce under Section 13(1-A) of the Act and he has been rightly granted the decree of divorce as there was no resumption for a period of more than one year and above after the decree for restitution of conjugal rights was granted. (b) Appeal was not filed in time and in the mean while the respondent is remarried. Hence the second marriage is required to be protected. A pragmatic / practical approach warrants that when one of the parties is already married after the period of limitation had expired, the second marriage is required to be protected.

(c) To constitute a "wrong" in terms of Section 23 of the Act, there has to be a positive act and/or action / conduct which is more than disinclination to cohabit on the part of the husband to 8

frustrate decree for restitution and such a case has not been made out by the appellant while opposing his petition before the Family Court. There is no pleading nor any evidence regarding the alleged adulterous life even after passing the decree of restitution. Reliance is placed on the decision in the case of Saroj Rani v. Sudarshan Kumar Chadha [(1984) 4 SCC 90]. (d) In order to be a 'wrong', the conduct of the husband should be something more than mere disinclination to agree to an offer of re-union, it must be a misconduct so as to justify denial of relief (Dhirendra Kumar AIR 1977 SC 2218). The wife had failed to show that the husband was taking advantage of his own wrong occurring in Section 23(1)(a) of the Act. (e) The photostat copy of the courier receipt which was put to the respondent during his cross-examination before the Family Court has not been exhibited and not proved and, therefore, it is not admissible in evidence. The evidence as a whole is contrary to the theory of alleged second marriage. (f) If the appeal is allowed, the second marriage would be destroyed. His marriage has already ended de facto and if the 9

appeal is allowed it would end de jure and dismissal of the appeal is in consonance with the law laid down in the case of Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511] and Naveen Kohli v. Neelu Kohli [(2006) 4 SCC 558]. (g) Subsequent events pending appeal must be considered for doing complete and substantial justice.

6. Sub-Section (1-A) in Section 13 of the Act has been incorporated by the Act 44 of 1964 and by the subsequent amendment of the Act 68 of 1976 the period of two years has been brought down to one year w.e.f. 27/5/1976. It has been rightly held by the Family Court and it is not even disputed by the learned counsel for the appellant, that a petition for divorce under Section 13(1-A) of the Act could be moved by either of the parties and it is not necessary that the party at whose instance the decree of restitution has been passed can only file such a petition. Thus maintainability of the petition filed by the respondent before the Family Court under Section 13(1-A) of the Act is not disputed. The only issue raised by the appellant in this petition is that the petition was required to be dismissed 10

under Section 23(1)(a) as the respondent was taking advantage of his own wrongs.

In the case of Laxmibai Laxmichand Shah vs. Laxmichand Ravaji Shah [AIR 1968 Bombay 332], this court distinguished the amendment in the Act by incorporating Section 13(1-A) as per Act No. 44 of 1964 and the effect of the retaining the scheme of Section 23 of the said Act as it is in the following words, "9.In the first place, it is necessary to get rid of the notion that to introduce consideration arising under Section 23(1) into the determination of a petition filed under sub-section (1-A) of Section 13 is to render the amendments made by amending Act No. 44 of 1964 wholly meaningless. That is the principal ground on which the learned trial Judge has held that sub- section (1-A) of Section 13 confers an absolute right on a party to get a decree for divorce and that is also one of the main arguments which was 11

urged before me by Mr. Vyas. Prior to the amendments introduced by the amending Act of 1964, the position which obtained under clauses (viii) and (ix) of Section 13(1) was that a marriage could be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the grounds, respectively, that the other party had not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party or that the other party had failed to comply with a decree for

restitution of conjugal rights, for a period of two years or upwards after the passing of the decree against that party. Under these clauses, the right to apply for divorce was restricted to the party which had obtained a decree for judicial separation or for restitution of conjugal rights. Such a right was not available to the party against whom the decree was passed. 12

Sub-section (1-A) of Section 13 which was introduced by the amendment confers such a right on either party to the marriage, so that a petition for divorce can after the amendment, be filed not only by the party which had obtained a decree for judicial separation or for restitution of conjugal rights but also by the party against whom such a decree was passed. This, in my opinion, is the limited object and effect of the amendment introduced by Act No. 44 of 1964. The amendment was not introduced in order that the provisions contained in Section 23 should be abrogated and that is not the effect of the amendment.

10. The purpose of the amendment and the effect of sub-section (1-A) of Section 13 can be appreciated by reference to the provisions contained in Section 13 itself. In the first place, 13

the opening words of sub-section 13 provide a sharp contrast, and a comparison of the respective provisions of the two sub-sections would show that the object of sub-section (1-A) was merely to enlarge the right to apply for divorce and not to make it compulsive that a petition for divorce presented under sub-section (1-A) must be allowed on mere proof that there was no

cohabitation or restitution for the requisite period..... It is clear on a comparison of the opening words of the two sub-sections, that all that sub-section (1-A) deals with is the right to apply for a decree of divorce. It does not provide that a petition for dissolution of a marriage by a decree of divorce shall be allowed on proof of either of the two conditions mentioned in that sub- section. Once it is appreciated that the object of the amendment by which sub-section (1A) was introduced in Section 13 and by which clauses 14

(viii) and (ix) were deleted from sub-section (1) of that section is merely to confer a right to apply for divorce on both the parties to the marriage irrespective of whether the decree for judicial separation or the decree for restitution of conjugal rights was obtained by this or that party, there would be no difficulty in holding that the provisions contained in Section 13(1-A) are subject to those contained in Section 23(1). Section 23(1) provides that "in any proceeding" under the Act, if the Court is satisfied regarding the facts and circumstances mentioned in clauses (a) to (e) of sub-section (1), "then and in such a case, but not otherwise, the Court shall decree such relief accordingly." The very language of this sub-section shows that it governs every proceeding under the Act and a duty is cast on the Court to decree the relief sought only if the conditions mentioned in the sub-section are 15

satisfied, and not otherwise. In fact, it is difficult to see how one can make any distinction between sub-sections (1) and (1A) of Section 13 in so far as the applicability of Section 23(1) is concerned. Sub-section (1) of Section 13 is clearly subject to the provisions contained in Section 23(1). If that be so, sub-section (1A) would equally be so subject. There is nothing in the language of the two sub-sections to justify the view that sub- sections to justify the view that sub-section (1), but not sub-section (1-A) is subject to the provisions of Section 23(1)."

In the case of Savitri Pandey vs. Prem Chandra Pandey [(2002) 2 SCC 73], the Supreme Court held, "13. In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the 16

petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on 17

facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such

marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in V. Bhagat v. D. Bhagat held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.

7. A Division Bench of this court in the case of Sunita Rajendra Nikalje vs. Rajendra Eknath Nikalje [1996 (1) Mh.L.J. 572], after referring to the decision in the case of Dharmendra Kumar vs. Usha Kumar [AIR 1977 SC 2218], elaborated the meaning of the word "wrong" in the following words: ".....`wrong' means only serious or grave misconduct on the party of the party seeking divorce or relief against the other. It is not 18

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 19

against the backdrop of facts and circumstances of each case." (emphasis supplied)

This court further went on to state that Section 23(1)(a) of the Act is couched in negative terms and burden lay upon the petitioner to prove that he/she was not taking advantage of his/her own wrong.

8. In the case of T. Srinivasan vs. T. Varalakshmi (Mrs.) [(1998) 3 SCC 112], the husband had obtained a decree of restitution of conjugal rights and the wife made a demand of the husband to let her join him but he refused to allow her to enter the house, rather he drove away as also her relatives, whoever attempted to rehabilitate the wife. A three Judge Bench of the Supreme Court held that these acts of the husband were positive wrongs amounting to "misconduct", uncondonable for the purpose of Section 23(1)(a) of the Act and, therefore, he was rightly denied the relief under Section 13(1-A) of the Act.

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In the case of Chetan Dass vs. Kamloa Devi [(2001) 4 SCC 250], the Supreme Court stated,

"In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the courts below have recorded a finding to the same effect. In such circumstances, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial 21

alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile, easily to be broken which may serve the purpose most welcome to the wrongdoer who, in his heart, wished such an outcome by passing on the burden of his

wrongdoing to the other party alleging her to be the deserter leading to the breaking point." In the case of Tejinder Kaur vs. Gurmit Singh [AIR 1988 SC 839], the Supreme Court held that the second marriage, if any, during the pendency of the appeal, does not make the appeal infructuous. Following the said decision, a Division Bench of this court in the case of Smita Dilip Rane vs. Dilip Dattaram Rane [1990 Mh.L.J. 69] stated thus,

"..... Therefore, in our view, only because the second marriage had taken place, the husband is not entitled to a decree for divorce. He cannot be 22

allowed to take advantage of his own wrong. It is well settled that what cannot be granted directly cannot be achieved indirectly....."

On the touchstone of the above referred settled legal position, we are required to examine whether the decree of divorce granted by the Family Court is sustainable in law and in the obtaining circumstances of this case. The Family Court framed the following issues and answered them as shown as shown below:-

Issues in Petition No.A-345/2001

1. Whether there has been no restitution of conjugal rights between the parties for a period of one year after passing of decree for restitution of conjugal rights on 30/3/1999 in Petition A-574/1995?

In the affirmative

2. Whether Petitioner husband is entitled to get decree of divorce under Section 13(1A)(ii) of Hindu Marriage Act? 23

In the affirmative. Petition stands decreed as prayed for. Issues in Petition No.C-28/2002

1. Whether there is change in the circumstances to award more maintenance to Petitioner Nos.1 to 3? In the affirmative.

2. Whether Petitioner No.2 is entitled to get maintenance as he had already attained majority?

In the negative. Petition stands allowed partly.

9. In para 10 of the impugned order, the Family Court set out the following reasoning to grant the decree of divorce under Section 13(1-A) of the Act:

"10. If in the light of the above authorities evidence on record is scrutinized carefully and it carefully merges then why Mrs. Kanchan herself was least concerned and bothered to comply with the decree of restitution of conjugal rights because she herself came in the case that after deserting her, her 24

husband Sanjay entered into second marriage with the sister of his brother-in-law. Thus, from her own side, she has not adduced any evidence to indicate that she had any time took any concrete steps to implement that decree in its real letter and spirit. Husband Sanjay has on the other side has asserted that he has been making attempt to resume cohabitation with the wife but it is his wife who did not show any inclination to resume cohabitation with him. He has very strongly denied the fact of having entered into second marriage as alleged by the wife. Further the wife Mrs. Kanchan has not taken care to adduce any clinching evidence to

substantiate her charge of the alleged second marriage. Whatever may be the cause of personal conflict between the husband and wife one material fact emerges on record that the wife never bothered to take any steps for resuming cohabitation with her husband nor initiated any execution proceedings for the implementation of the terms and conditions of the decree of the restitution of the conjugal rights for a 25

period of more than one year. Once this fact stands conclusively established from the materials on record then the prayer of the husband Mr. Sanjay for a decree of divorce on the ground contemplated under section 13(1A) of the Act appears to be proper and justified. And accordingly, I record my affirmative findings on Point No.1 in Petition No.A-345/2001. Now, comes the last question i.e. Whether the quantum is to be enhanced as prayed by wife Mrs. Kanchan under section 25 of the Hindu Adoption and Maintenance Act, 1956, quantum can be altered provided changed circumstances are established by the parties seeking to avail such relief. Section 25 of the Act reads as under:-

"Amount of maintenance may be altered on change of circumstances:- The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in 26

the circumstances justifying such alteration."

10. The Family Court did not refer to its earlier judgment dated 30/3/1999 and the findings recorded therein for dismissing the husband's petition, seeking divorce on the ground of cruelty and desertion. While deciding Petition No.A-574 of 1995, Petition No.C-38 of 1995, Petition No.A-455 of 1996 and Petition No.D-62 of 1996, in addition to the parties and PW 2 Sanjay Tawate and PW 3 Sanjay Hendre, the Court had examined DW 2 Master Mayur, the younger son of the parties and Mayur was of 14 years of age when he had entered the witness box. This minor witness was examined on the backdrop of the wife's allegation that the husband was living with his mistress Smt. Sunita Gawade. He had deposed before the court about the relationship between his father and Sunita Gawade as under:-

"One lady namely Sunita Gawade also used to come to see us alongwith my daddy. My mummy used to come alone i.e. Alongwith my sister SAYALI. She used to come by bus. My father alongwith Sunita Gawade used to come 27

by TATA SUMO and thereafter by ESTEEM. We never wished to talk to our father. We wanted to forget him as he accompanied Sunita Gawade, who created family problems between our

mummy and daddy. We never wished to talk to our father. We have intimated our displeasure of his accompanying Sunita Gawade. He told me that she is our new mother. Sunita Gawade used to try to talk to us. Once she told me that my mother should be treated as dead and that I should call her (Sunita) as my mother. I asked my father why he brings Sunita Gawade with him to Panchagani. He told me that he has performed marriage with her. I also asked him why he deserted my mother. He told me that I should forget about her.

During the two years (1997-98) I have not met my father. I do not wish to meet him. He spoiled our studies. He removed us from Panchagani school. I am not ready to go to my 28

father. My mother takes all my care of my studies, of my school times, of my meals, of my cloths, of my medicines and everything. I love my mother too much. I can forget the world but I can never forget my mother.

It is true that quarrels between my mother and father took place because of Sunita

Gawade. I am aware that after marriage to love another woman than the wife is a bad thing. Sunita Gawade is our distant relative. It is not true that I am deposing false at the instance of my mother If my father joins

my mother then only I am ready to reside with him."

The Family Court had observed that the evidence of Mayur was impressive and flawless. The minor witness had also admitted that the father was paying for all education expenses of the three children and the father wished that the children should progress their studies. The Family Court, therefore, noted that the testimony of the witness inspired confidence and 29

there was no reason to discard the same.

11. Now coming to the issue of the purported second marriage, allegedly performed by the present respondent with Sunita Khedekar on 14/3/2004 at Alandi, it is important to note that the instant appeal was filed belatedly and, therefore, Civil Application No. 56 of 2004 was filed for condonation of delay. In the said application, an affidavit-in-reply was filed by the respondent opposing the prayer for condonation of delay caused in filing the appeal and this affidavit, verified on 29/4/2004, did not mention anything about the alleged second marriage that had purportedly taken place on 14/3/2004. It is for the first time that in an affidavit-in-reply which came to be filed in the instant appeal on or about 12/8/2004 that he stated about the second marriage. In fact, on 29/7/2004 when the appeal came up before this court, no reply was filed opposing the appeal though by an order dated 15/7/2004 the impugned order was stayed to the extent it granted a decree of divorce and the affidavit-in-reply was filed in Civil Application No. 56 of 2004 prior to 15/7/2004 in which the respondent had not disclosed anything about his second marriage with Sunita Khedekar. This clearly indicates that the respondent was trying to defeat the appeal on 30

the false/fabricated plea of his second marriage allegedly held on 14/3/2004 at Alandi, despite the fact that in the earlier judgment dated 30/3/1999, the Family Court recorded a finding that the testimony of Master Mayur inspired confidence and in the said testimony it was more than clear that the respondent had treated the said Sunita Khedekar as his wife and both of them were living as husband and wife. In any case, the story of second marriage performed on 14/3/2004 at Alandi deserves to be discarded.

12. On record there is a receipt of Sky-Birds Air Courier Services dated 7/1/2002 and the name and address of the consignee is shown as under in the said receipt: Sunita Sanjay Gujar, Zambre Estate,

Mukund Nagar, Pune 31.

While the husband was in the witness box in support of his petition for divorce in the second round, he was shown this receipt and he stated in his cross-examination as under: ".....I am now shown one receipt issued by Sky Bird Courier service and that the addressee shown in this receipt is my wife...."

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He further stated in his cross-examination, ".....Incorrect to state that since 1992 this Sunita is living with me as my wife and before that she was living with me. Incorrect to state that in the beginning we were residing in Zambre Estate and that I have bought a flat in her name in Zambre Estate....." The husband, thus, accepted this Sunita as his wife and he only denied that he was living with her since 1992 as his wife. The fact remains that on the date the courier service receipt was issued, Sunita was shown as the wife of the present respondent. Mr. Kumbhakoni the learned counsel for the respondent submitted that the said receipt is not exhibited and, therefore, it cannot be relied upon as evidence. We are not impressed by this submission. It was necessary for the Family Court to exhibit the said receipt when it was put to the respondent while he was in the witness box and during the course of his cross-examination. It is not the case that the receipt was not shown or it was sought to be brought on record in this appeal for the first time. The procedural lapse committed 32

by the Family Court in not exhibiting the said receipt cannot come to the rescue of the respondent and the said receipt goes to show that the respondent accepted Sunita as his second wife. In the cross-examination, he

further admitted before the Family Court that he left the wife's company (the Appellant) in the year 1991-92 and started staying separately. It is also proved that in the year 1991-92 he had admitted his two sons Kunal and Mayur in the residential school at Panchagani and his youngest child i.e. daughter Sayali who was couple of years old stayed with the appellant. He was visiting both the sons at Panchagani along with Sunita and was asking the sons to treat her as their mother and forget about their natural mother. It is also evident from the record that Smt. Sunita Khedekar separated from her husband sometimes in the year 1992.

13. It was imperative for the party applying under Section 13 (1-A) of the Act to prove before the Family Court that he / she was not guilty of committing a "wrong" or "misconduct" in resumption of cohabitation pursuant to the decree of restitution of conjugal rights granted under Section 9 of the Act. The onus is clearly on the party applying to the Family Court for divorce under Section 13(1-A) of the Act and it is not for the opponent party to prove what steps he / she had taken for resumption of 33

cohabitation after the decree was passed and within one year from passing of such a decree under Section 9 of the Act, if he / she claims that the petition for dissolution of marriage is not hit by Section 23(1)(a) of the Act. In the instant case the Family Court fell in serious errors in shifting the onus on the wife to prove the steps she had taken for resumption of cohabitation after she obtained the decree of conjugal rights while she was opposing the petition filed under Section 13(1-A) of the Act. The Family Court totally misdirected itself in failing to assess whether the petitioner husband had committed a "wrong" even after the decree under Section 9 of the Act was passed against him. It was manifestly clear on the face of the record that the husband continued to live with the second lady Sunita Khedekar as her husband and he had treated her as his wife and this relationship continued from the year 1992 onwards. The only saving grace for the husband was that he was taking care of the maintenance of the children, their education and other expenses. He was also keen that all his children should complete higher education to do well in life. Even as of now it is undisputed that he has been paying for the education of the second son and the daughter. The elder son admittedly is staying with him and Sunita under the same roof. 34

14. If the husband, by his own acts, has made resumption of cohabitation impossible or unworkable by living with another woman as husband and wife or in a domestic relationship and he continues to live with such another woman even after the decree under Section 9 was passed at the behest of the first wife, the husband's behaviour ought to be treated as a "wrong" or "misconduct" within the meaning of Section 23(1)(a) of the Act and thereby disentitling him to seek a decree of divorce under Section 13(1-A) of the Act. It is not the case of the husband, when he approached the Family Court in the second round, that after the decree under Section 9 of the Act was granted in favour of the wife, he discontinued to stay with Sunita and approached the present appellant to resume cohabitation. In fact in the pleadings before the Family Court it was his case in support of petition under Section 13(1-A) of the Act that he continued to live in a separate residence at Pratibha Society, Dhankavadi, Pune. He also claimed that even if he was a defaulting party, he was entitled to apply for dissolution of marriage under Section 13(1-A) of the Act. As has been well settled by the decisions set out hereinabove that any party to the decree passed under Section 9 of the Act is entitled to approach with a petition under Section 13(1-A) of the Act for 35

dissolution of marriage. However, such a right is circumscribed by the provisions of Section 23(1)(a) of the Act which states that in any proceeding filed under the Act, whether defended or not, if the Court is satisfied that 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, the Court shall decree such relief accordingly. As noted earlier a Division Bench of the this Court in the case of Sunita Nikalaje (Supra) while dealing with the term "wrong" as set out under Section 23(1)(a) of the Act stated that it was not necessary that there should be fresh marital offence and it all depended upon the facts and circumstances of each case to judge whether it was "wrong" or not. If the party makes an 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, certainly there would be a case of "wrong" or "misconduct" within the meaning of Section 23(1)(a) of the Act. These are all such positive acts after the decree for restitution of conjugal rights is passed

and in the instant case the husband made it impossible for the appellant wife to resume cohabitation after the decree of restitution of conjugal rights was passed, on account of his 36

establishing a separate home with other lady Sunita and he continued in these acts even after the decree under Section 9 of the Act was passed in favour of the appellant in the first order. We have no doubt that the petitioner husband not only played a fraud on his wife and children (at least two of them), but also indeed on this Court as well by coming out with an afterthought story that he got married to Sunita on 14/3/2004 at Alandi. This fabricated story has been put up by the appellant only to wriggle out of the injunction order passed by this Court on 15/7/2004 and after hearing both the parties. The said order reads as under:

"Heard Mr.Apte for the Appellant.

Mr.Bandal appears for Mr.Warunjikar for

the Respondent. Matter to stand over to

22nd July 2004 on the request of both the Counsel. In the meanwhile, the impugned

order will stand stayed to the extent it grants a decree of divorce."

At any time before the said order was passed, he did not disclose about his second marriage that had purportedly taken 37

place on 14/3/2004 at Alandi with Sunita and if it was factually correct, then nothing stopped him from mentioning the same when he filed affidavit-in-reply opposing Civil Application No.56 of 2004 filed in the present appeal for condonation of delay. Undoubtedly this plea of second marriage taken place on 14/3/2004 is a deliberate attempt to mislead this Court and further to protect the said second marriage even though the appeal filed by the wife was pending before this Court. As held by a three-Judge Bench of the Supreme Court in T. Srinivasan's case (Supra), in the instant case it is the husband who has acted with deliberate efforts to keep the wife deprived of her right to perform her conjugal rights and he made it impossible to the wife to resume cohabitation. He never returned to the matrimonial home of the appellant from where he left in 1991-92 and, therefore, it does not lie in his mouth to say that the wife did not take any steps to resume cohabitation after she obtained the decree under Section 9 of the Act from the Family Court or within one year therefrom.

15. In the premises, the petition filed by the present respondent before the Family Court under Section 13(1-A) of the Act and listed as Petition No.A-345 of 2001 was required to 38

be dismissed as the husband was taking advantage of his own wrong / misconduct within the meaning of Section 23(1)(a) of the Act and the Family Court committed gross and manifest errors in allowing the said petition which ought to have been dismissed with the help of Section 23(1)(a) of the Act.

16. Hence this appeal succeeds and the same is hereby allowed. The impugned decree of divorce dated 10/12/2003 granted under Section 13(1-A) of the Act is hereby quashed and set aside. Consequently Marriage Petition No.A-345 of 2001 hereby stands dismissed.

17. Having regard to all the obtaining circumstances and peculiar facts of this case, the respondent is directed to pay by way of exemplary costs an amount of Rs.50,000/- (Rupees fifty thousand only) to the appellant within a period of two weeks from today.

18. R. & P. be returned forthwith.

(S.J.VAZIFDAR,J.) (B.H.MARLAPALLE,J.) 39