

Sub-section a duty to  
make every  
endeavour in



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Sub-section (2) however enjoins upon the court a duty to make every endeavour in the first instance to bring about reconciliations between the parties in every case where it is possible to do so consistently with the nature and circumstances of the case. Sub-section (1) lays down that only after the court is satisfied with the existence of the conditions mentioned in sub-clauses (a) to (e). The court shall decree the relief prayed for, but not otherwise. The petitioner is required to prove those grounds strictly upon which he relies and it makes no difference whether the proceedings is defended or not. Normally the courts require that the evidence of a spouse who charges the other spouse with a matrimonial offence should be corroborated. But there is nothing to prevent the court from passing a decree even on uncorroborated testimony of the petitioner where the facts otherwise justify so.

In *Bipin Chandra v. Prabhawati*, the Supreme Court ruled that though corroboration is not required as an absolute rule of law in proof of a matrimonial offence, the court insists upon corroborative evidence as a precaution unless its absence is accounted for to the satisfaction of the court. The correct test is that the court must be satisfied beyond reasonable doubts about the commission of the matrimonial offence and that evidence must be clear and satisfactory beyond mere balance of probabilities.

The section has been considerably amended by the Marriage Laws (Amendment) Act, 1976 and some new provisions have been added, and e. g., clause (bb) in sub-section 1 and sub-sections 3 and 4 have been inserted. Even where a divorce is sought on the ground of mutual consent of the parties, a duty has been cast on the courts to ensure that the consent of any

party has not been obtained by force, fraud or undue influence. The conditions which the court must take into consideration before passing decree in any proceedings under the Act can be examined under the following heads:

**Sub-section (I) (a)—Taking advantage of his or her own wrong or disability:**

The rule is based on the principle “ one who comes to equity must come with clean hands”.

The Amendment Act of 1976 has effected a small change and provided that in a case where the petitioner is insane or suffering from mental disorder, the question of petitioner taking advantage of his or her own wrong or disability docs not arise. Sub-section (I) (a) provides that in case the court is satisfied that any of the grounds for granting relief exists and the petitioner is not taking in any way advantage of his or her own wrongs or disability for the purpose of relief it shall decree such relief. In Mohan lull v. Moot Chattel, the wife filed a suit for dissolution of marriage on the ground that her husband married a second wife. The husband contended that the second marriage was the outcome of the first wife’s refusal to live with him and therefore she cannot take advantage of her own wrong. It was held that even supposing that first wife refused to live with her husband it could not be conceived that the second marriage was necessarily the result of her living separately from her husband. Further a wife living separately from her husband cannot be considered to have committed wrong and thereby, caused any injury. In Suman v.

Anand Rao, the petitioner for his ulterior motive preferred a petition under Section 9 taking benefit of his own wrongs. The court rejected the petition and held the petitioner not entitled to any relief. But where a decree for restitution of conjugal rights had been passed against the wife and for two years thereafter there is no compliance of the decree, it was held that the wife could move a petition for divorce and in such a situation it is not open to contend that she had herself been guilty of non-compliance with the decree against her, so as to disentitle her to decree for divorce. In *Meera Bai v.*

*Rajinder Kumar Sabti*, the husband contracted a second marriage and he allowed an ex parte decree for restitution of conjugal rights to be passed against him at the instance of his wife. He neither cared for his first wife nor for his children from her. Neither did he pay any maintenance to them. The husband subsequently filed a petition for dissolution of marriage against his first wife under Section 13 (1-A) (ii) on the ground that restitution decree had remained uncomplished for a period of one year. Rejecting the petition, the court held that it would amount to taking advantage of his own wrong.

Where the wife has secured a decree of judicial separation against her husband and he did not resume cohabitation as he was under no obligations to do so, a petition later on by him under Section 13 (1-A) would not fasten any guilt upon him so as to disentitle him under Section 23(1) (a). In order to be a 'wrong' within the meaning of Section 23(1) (a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be a misconduct serious enough to justify denial of the relief, to which the husband or wife is otherwise entitled. Where after a little over two years of passing of decree of restitution of conjugal rights in her

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favour, the wife applied for dissolution of marriage under Section 13 (1-A) (ii) and the husband in his written statements alleged that the wife refused to receive or reply to the letters written by the husband and did not respond to his other attempts to make her agree to live with him, this allegation, even if true did not amount to misconduct grave enough to disentitle the wife to the Relief under Section 23 (1) (a). According to Madras High Court, the wrong referred to under Section 23 (1) (a) was of more serious nature and had to be comprehended from the circumstances of each case. The law could also not be construed to help a wrongdoer merely as the plea that subsequent amendments were intended to usher in liberalisation in the matter of divorce. In this case the husband who continued to live in adultery even subsequent to the decree for judicial separation at the instance of wife, could not succeed in his petition seeking a decree for divorce. Where it is found that it was the husband and his parents who harassed the wife with dowry demands and abandoned her, he cannot be allowed to take advantage of his own wrong and seek a decree of divorce without establishing the legal ground of desertion and cruelty on which he founded his petition and on ground that marriage has irrevocably broken down. In the case of M.

Ajith Kumar v. K. Jeeja the court observed that, the ground for relief of divorce can be denied by the court if it is satisfied that the person is taking advantage of his or her own wrong by virtue of Section 23(I) (a) of the Act. Because the word satisfied used in the section has to be construed as satisfied on the basis of the legal evidence adduced before the court and not merely on probabilities. It must be on the matter on record and based on evidence.

**Sub-section (1) (b)—Has not in any manner been accessory to or connived at or condoned:**

The second condition is that the petitioner is one who has been in any way accessory to the offence complained against, or connived with the respondent or has condoned the act of the respondent. The word “accessory” is intended to mean aiding to produce or contribute to the bringing about of the offence complained against. Thus where the ground of the petition is that “the other party has, after the solemnisation of the marriage, sexual intercourse with any person other than his spouse or that “the other party is living in adultery”, the court will satisfy itself that the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of in the petition. In the case of *N. G. Dastan v.*

*S. Dastan*, the court accepted the contention of the petition that he was subjected to inexcusable cruelty by his wife and the contents of cruelty were sufficient to establish a case for judicial separation, yet the remedy was refused on the ground that the petitioner by his conduct has condoned the offence of cruelty to which he was subjected. To undergo a state of cruelty for more than a decade in one's marital life is sufficient to establish a case of condonation. Even though condonation is not pleaded as a defence by the respondent, it is the duty of the court in view of Section 23 (1) (b) of the Act, to find whether the cruelty or adultery stands condoned. The section casts an obligation on the courts to consider the question of condonation, as obligations which have to be discharged even in undefended cases' Mere forgiveness is not condonation. It must restore the offending spouse to the previous position and must be followed by cohabitation. Living together as

husband and wife in spite of matrimonial separation amounts to condonations.

**Sub-section (1) (bb)—Consent Decree:**

In case of parties seeking divorce by mutual consent it is not required to prove anything in addition to that laid down in Section 13-B. But by inserting a new clause (bb) in Section 23(1) of the Act, it has been provided that in any petition for divorce by mutual consent, the court should satisfy itself that such consent has not been obtained by force, fraud or undue influence. It is the duty of the court to verify the above facts before passing the decree.

**Sub-section (1) (c)—Collusion:**

“ Collusion in judicial proceedings is a secret agreement between two persons that one should institute against the other in order to obtain the decision of judicial tribunal for some sinister purpose the judgment obtained by such collusion is a nullity.” All the definitions given of the word “ collusion” indicate that an improper or an ulterior purpose has brought together the contesting parties in order to snatch a decision of divorce from the hands of the court. The contents of Section 23(1) (c) in the Hindu Marriage Act, 1955 although purports to put an embargo upon divorce by collusion, yet it cannot be considered as a bar to the court’s jurisdiction under Section 13-B of the Act or under Order 23 Rule 3 of the C.

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**Sub-section 1(d)—Delay:**

The fourth condition which a court has to consider is that “ there has not been unnecessary or improper delay in instituting the proceedings”. For this purpose the court has to take into consideration the conduct of the parties to see if the delay was really culpable. Unnecessary delay is indicative of condonation and acceptance by silence.

Thus where adultery is imputed, the court must see that there has not been undue delay in presentation of the petition because that state of affairs would establish that the petitioner had condoned the alleged guilt. Where the petitioner offers a satisfactory explanation of the delay, the court can condone the delay. Commenting on the reasonableness of delay the court observed that it would be proper for the court to give consideration to the conditions of the society, the environment in which the parties to marriage were living, their economic status and family background etc. In the case of *Nirmo v.*

*Nikka*, the wife presented a petition for divorce after a lapse of even years. The wife alleged that she maintained the silence all the while and did not intend to approach the court of law but since her husband has crossed all the limits to torture she was obliged to prefer the petition as the last resort. The court held it to be a reasonable cause of delay.

In *Jyotish Chandra v. Meera*, the wife filed petition after a delay of twenty one months. The wife explained the delay by saying that the marriage of her sister was impending. Had she filed the petition, it would have brought a bad reputation and this fact would have caused some difficulties in the



finalisation of marriage of her sister. Therefore she preferred to file the petition after that marriage has taken place. This explanation was held to be justified and sufficient to condone the delay.

In *Tobiya v. Tobiya*, the court accepted the justification for delay to the extent that she had to remain waiting for the intervening period of twenty six years so that both her daughters and one son might be brought up and get settled in life. After the settlement of all the children the wife preferred the instant petition after such a long delay. The court held the given explanation of delay as justified and sufficient.

**Absence of legal bar—Section 23 (1) (c):**

The last condition to be satisfied is that the petition contains no valid legal basis which could suffice refusal of relief prayed for. The court has to see that there is no other legal ground why relief should not be granted. Such legal bar can be those which are mentioned in the Act in the form of exceptions and proviso.

**Reconciliation—Section 23 (2):**

The Amendment Act of 1976 has cast a duty on the courts to make an endeavour to bring about a reconciliation between the parties to the marriage. The Act has introduced the principle that a broken marriage can be treated like other civil wrong.

Taking a fatherly interest in their welfare, it is desirable that efforts for reconciliation should be made in the beginning of the proceedings but the provisions of law will be satisfied if the efforts have been made before the

final stage of the case. The words 'in the first instance' only denote the court must make endeavour for reconciliation before granting relief. Where in a case reconciliation efforts were not made, the case could be remanded with the direction to make efforts for bringing about reconciliation. In case of a petition for divorce on the grounds of conversion, unsoundness of mind, virulent form of leprosy, communicable form of venereal disease, renunciation of the world or untraceability of one of the parties to marriage there is no duty cast on the courts to make an endeavour to bring about a reconciliation between the parties for obvious reasons.

Sub-section (3) of Section 23 further enjoins the courts to adjourns the proceedings and refer the matter to any person named by the parties or to any person nominated by it, to bring about reconciliation between the parties to marriage. The court could dispose off the proceedings thereafter having due regard to the report of the conciliation. According to a judgment of Delhi High Court, "though the provision does exist, the practical experience is that there is in fact no proper working of said provision. The reason is twofold: (1) The inherent constraint of the infra-structure of the Civil Court which deals with such matters of family law; (2) the absence of any indication either in the statute or in the rules or any of the directions issued by this court, providing identifiable set of persons or organisations to whom matter may be referred. Section 23-A has been introduced by the Marriage Laws (Amendment) Act, 1976. It is intended to give relief to the respondent in divorce and other proceedings. The respondent may not only oppose the relief sought by the petitioner on the ground of adultery, cruelty or desertion, but can also make a counter claim for any relief under the Act.

The respondent need not file a separate application for that purpose. He can take up the matter in written statement itself by affixing a court fee stamp of rupees fifteen. The Section 5 helps the other party and saves him from the botheration of filing a separate petition for that purpose.