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Legal Examination of Restitution of Conjugal Rights: Whether A Peril to Right to Freedom and Privacy

Dr. Divya Sharma

Assistant Professor, Khalsa College of Law, Amritsar.

Introduction

According to ancient Hindu Law, marriage is the last of the ten sacraments and is a tie, a sacred tie, a tie which can never be broken. According to Smritikars even death cannot break this relation of husband and wife which is not only sacred and religious but is a holy union also.¹ In the case of ***Gopal Kishan v. Mithilesh Kumari***,² the Allahabad High Court observed "The institution of matrimony under the Hindu law is a sacrament and not mere socio-legal contract. It is not performed for mere emotional gratification and is not a mere betrothal. Its content is religious. It is regarded as part of the life of the soul. It is a holy spiritual union corresponding to consortium omntum vitoe of Rome, a process by which the husband and the wife become one." Since marriage was considered a sacrament under the old Hindu Law, therefore, it was mandatory to perform religious ceremonies at the time of marriage as marriage was regarded as an eternal union. An everlasting bond comes into existence between both the

¹ B.M.Gandhi, *Hindu Law*, 246 (Eastern Book Co., Lucknow, 2008).

² AIR 1979 ALL.316.

spouses and therefore the question of breaking off the marriage can never arise. There was modernisation of various institutions of our society with the passage of time and concept of Hindu marriage also undergone drastic change in the modern times. The concept of religious sanctity associated with Hindu marriage lost its relevance with the passing of Hindu Marriage Act, 1955.

Remedy of Restitution of Conjugal Rights under Hindu Marriage Act and its Enforcement under CPC

After marriage the husband is entitled to the society of his wife and the wife to the society of her husband. A cause of action, therefore, arises when one of the parties to the marriage withdraws from the society of the other. Section 9 of the Hindu Marriage Act, 1955, deals with the subject of the restitution of conjugal rights. The foundation of the right is the fundamental rule of matrimonial law that one spouse is entitled to the society and comfort-consortium-of the other spouse and where either spouse has abandoned or withdrawn from the society of the other without reasonable excuse or just cause the court should grant a decree for restitution.³ The remedy of restitution of conjugal rights has been incorporated under section 9 of the Hindu Marriage Act which is as follows:

“When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the district Court for restitution of conjugal rights and the Court, on being satisfied the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation: Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden

³ R.K.Agarwal, *Hindu Law*, 61 (Central Law Agency, Allahabad, 2021).

of proving reasonable excuse shall be on the person who has withdrawn from the society.”

Following are the main ingredients of this section:

- a.) There must be a withdrawal of one spouse from the other.
- b.) The withdrawal must be without any reasonable excuse.
- c.) The aggrieved party has the right to file a petition in the District Court.
- d.) The petition is to grant a decree of restitution of conjugal rights.
- e.) The court if satisfied with the truthfulness of the petition may grant the decree of restitution of conjugal rights.

Prior to the enactment of the Hindu Marriage Act, 1955, the remedy of the aggrieved party was by way of regular suit for the restitution of conjugal rights. Section 9 of the Act has barred this remedy now. Previously, under Hindu Law, there was no express provision in any Act for the suit for such restitution. But now in the view of such express provision in section 9 no court has jurisdiction to entertain a suit after the 18th day of May, 1955. The remedy now is by way of petition under section 9.⁴

Order 21 Rule 32 of C.P.C: Decree for specific performance for restitution of conjugal rights or for an injunction:

(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property, or in the case of a decree for the specific performance of a contract, or for an

⁴ R. Aggarwal, *Hindu Law*, 284 (New Era Law Publications, Faridabad, 2019).

injunction) by his detention in the civil prison, or by the attachment of his property, or by both.

(2).....

(3) Where any attachment under sub rule (1) or sub-rule (2) has remained in force for (six Months) if the Judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the Judgment-debtor has obeyed the decree, and paid all costs of executing the same which he is bound to pay, or where, at the end of (six months) from the date of the attachment on application to have the property sold has been made or if made has been refused, the attachment shall cease.

Rule 33. Discretion of court in executing decrees for restitution of conjugal rights:

(1) Notwithstanding anything in R. 32, the Court either at the time of passing a decree (against a husband) for the restitution of conjugal rights or at any time afterwards may order that the decree (shall be executed in the manner provided in this rule).

(2) Where the Court has made an order under sub-rule (1), it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payment as may be just and if it thinks fit, require that the judgment -debtor shall, to its satisfaction secure to the decree-holder such periodical payment.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money

so ordered to be paid and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money".

A decree for restitution of conjugal rights, by its very nature, cannot be executed by sending the person (husband or wife as the case may be) to civil prison and the only mode applicable is the mode of executing the decree is the attachment of the property of the judgment debtor. The only sanction provided by the law is by attachment of the property of the defaulting judgment debtor. This is a sort of inducement offered by the court in an appropriate case to husband or wife to live together in order to give them an opportunity to settle the matter amicably. It serves a social purpose as an aid to the prevention of break of marriage.⁵

Restitution of Conjugal Rights Under Other Personal Laws

The phrase "Conjugal Rights" has not been defined in the Hindu Marriage Act. However in the Dictionary of English law, 1959 ed.at 453(page), Earl Jowitt defines conjugal rights thus: The right which husband and wife have to each other's society and marital intercourse. *"The suit for restitution of conjugal rights is a matrimonial suit, cognizable in the Divorce Court, which is brought whenever either the husband or the wife lives separate from the other without any sufficient reason in which case the court will decree Restitution of Conjugal Rights but will not enforce it by attachment, substituting*

⁵ T.P.Tripathi, *The Code of Civil Procedure*, 659 (Allahabad Law Agency Publications, Allahabad, 2019).

however for attachment, if the wife be the petitioner, an order for periodical payments by the husband to the wife.”⁶

The remedy of restitution of conjugal rights has never been recognized either by Dharmashastra nor under the Muslim Law. This concept has its roots in the English Raj as during the reign of Britishers marriage was like a deal of property where wife was considered as a chattel of husband. The seeds of restitution of conjugal rights were sown in the case of *Moonshee Buzloor Ruheem vs. Shumsoonissa Begum*, whereas in modern India, the remedy of restitution of conjugal rights is recognized under section 9 of the Hindu Marriage Act, 1955. Not only has the Hindu Marriage Act recognized this concept other laws like Muslim Law, Christian Law, Indian Divorce Act, Parsi Law and Special Marriage Act have also included the provision of restitution of conjugal rights.⁷ The following are the provisions under various laws:

Muslim Law: Where either the husband or wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage, the court may decree restitution of conjugal rights, may put either party on terms securing to the other the enjoyment of his or her rights. A petition/suit for restitution of conjugal rights is nothing more than an enforcement of a right to consortium under this contract and is, therefore, of the nature of a suit for specific performance. The Court assists the husband by an order compelling the wife to return to cohabitation with the husband.

Section 32 of Christian Law: Under Section 32 and 33 of the Indian Divorce Act, 1869, the remedy of restitution of conjugal

⁶ *Naba Kumar Katari vs. Kalyani Katari*, 18 Nov., 2009 , available at : <http://www.indiankanoon.org>.

⁷ *Mohammad Anuj vs. Mrs. Sarah @ Sonia Dhir*, 30 May, 2011, available at: <http://www.indiankanoon.org>

rights is available to Christians. A petition for restitution of conjugal rights by the husband/wife can be filed before the District Court or the High Court under Section 32 of the Indian Divorce Act, 1869, when either the husband or the wife, without reasonable excuse, withdraws himself/herself from the society of the other. Accordingly, the Court may decree restitution of conjugal rights on being satisfied of the truth of the statements made in such petition, and there being no legal ground why the application should not be granted.

Section 36 of Parsi Law: Where a husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the Court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

Section 22 of the Special Marriage Act: It states that when either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for Restitution of Conjugal Rights.

Relevance of Restitution of Conjugal Rights in the Era of Right to Freedom and Privacy

Marriage is constantly viewed as an extremely devout and sacred relationship that exists between two people as well as between two families. Nonetheless, at times the marriage doesn't appear to be working and a circumstance could emerge where a life partner probably won't feel open to residing with the other companion. Therefore, the restitution of conjugal

rights gives a right to the life partner to get back to the next companion to live with him/her once more. While this right is by all accounts legitimate according to the perspective that it is a cure or an opportunity to safeguard the relationship and to save the family, the equivalent doesn't appear to be so from the point that it drives one to remain with an individual with whom he/she would rather not stay. Consequently, this right has forever been an exceptionally disputable point with questions in regards to its protected legitimacy that whether this right disregards the right to privacy as ensured by the Constitution of India? Does this right encroach the right to privacy of a mate by compelling him/her to live with the other life partner and hence tearing the right over the own body?⁸

Under Article 19 of the Indian Constitution six freedom have been granted out of which Freedom to reside or settle in any part of India (19)(1)(e) and Freedom to practice any profession 19(1)(g) are violated by the decree of the restitution of Conjugal Rights. Every citizen of India has the right to reside or move in any part of India and practice any profession or carry out any job but when this decree of restitution is passed then a spouse is forced to come back and live with his/her spouse and perform the matrimonial duties. In this way the remedy under Section 9 of the Hindu Marriage Act comes in conflict with the freedoms guaranteed under Article 19 (1) (e) and (g) of the Indian Constitution. Now let's have a look at the judicial perspective in this regard.

In ***T. Sareetha v. T. Venkata Subbaiah***⁹ the Andhra Pradesh High Court gave a remarkable judgment and held that "*The constitutional doctrine of privacy is not only life giving but also*

⁸ Kritika Garg, *Does Restitution of Conjugal Rights Violate the Right to Privacy?* Available at:

<http://www.blog.ipleaders.in>

⁹ AIR 1983 AP 356.

is lifesaving. It gives spiritual meaning to life which sankara described as emanation of Brahman and saves such a life from "inhuman and degrading treatment" of forcible sexual cohabitation. Nothing much that is reasonable in my opinion can be urged in support of this barbarous remedy that forces sex at least upon one of the unwilling parties. Section 9 of the Hindu Marriage Act, should be declared as unconstitutional for the reason that the remedy of restitution of conjugal rights provided for by that section is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of our Constitution."

But the Delhi High Court in the case of **Harvinder Kaur v. Harmander Singh Choudhry**¹⁰ disagreed with the opinion shared by the Andhra Pradesh High Court in T.Sareetha case and held that *"If the view taken in Sareetha is allowed to prevail it will undermine the foundations of our social organisation. The consequences of the judgment are so grave as to destroy the very foundation of conjugal life. Moreover, the wisdom of the legislation the courts cannot question. It is the duty of the judges to give effect, as best as they can, to the laws as Parliament ends them, whatever be their private opinions or in some cases their religious beliefs. The judgment in Sareetha is based on a misconception of the rule of law and marriage."*

Furthermore the Supreme Court of India in the case of **Saroj Rani v. Sudarshan Kumar Chadha**¹¹ overruled the case of T.Sareetha and upheld the decision of Delhi High Court in the case of Harvinder Kaur v. Harmander Singh Choudhry. The apex court held that right of restitution of conjugal rights is not violative of right of privacy enshrined under Article 21 of the

¹⁰ AIR 1984 Delhi 66.

¹¹ AIR 1984 SC 1562.

Indian Constitution. Section 9 was upheld by the Court as a provision to preserve the sanctity of marriage. It distinguished sexual relations from the concept of consortium or cohabitation concerning marriages. And Section 9 merely imposes cohabitation upon spouses and does not compel sexual relations in a marriage. Thus, this judgment narrowed down the scope of the right to privacy by holding that courts have no authority to enforce this fundamental right in the private space of individuals.

Although the judge rightly pointed out the true intent behind Section 9 it erred in stating that this provision does not affect the right to privacy of individuals. In a country where marital rape is still not categorized as an offense, enforcing cohabitation upon a spouse puts them and their fundamental rights at grave risk. The Court was correct in stating that the said provision does not compel sexual relations, however, the absence of legislation to prevent marital rape creates a loophole that can be misused by obtaining a decree of restitution of conjugal rights. The landmark case of ***K.S. Puttaswamy v. Union of India***¹² conclusively laid down that right to privacy also includes a person's right to exercise autonomy over their own body. Hence, it is highly unfair to put an individual at the risk of losing his/her autonomy over their own body, freedom integral to the fundamental right to live with dignity guaranteed under Article 21 of the Constitution. Thus, it can be fairly concluded that restitution of conjugal rights is an encroachment upon the personal liberties and fundamental rights of an individual.¹³

¹² Writ Petition (Civil) No.494 of 2012.

¹³ Ruchitha Devu and Ananya Mohapatra, *Limitations of Restitution of Conjugal Rights*,

Available at: <http://www.articles.manupatra.com>

The Supreme Court, in its recent ***Joseph Shine*** judgment, concluded that the State cannot exercise authority in a person's private affairs. "The right to privacy is an inalienable right, closely associated with the innate dignity of an individual, and the right to autonomy and self-determination to take decisions," the court said. The court has also held that any interference by the State in a person's choice of partners causes "serious chilling effect on the exercise of the freedoms guaranteed by the Constitution".¹⁴

Section 9 of the HMA is one of the most debatable provisions in matrimonial law, since it is hardly ever used for its intended purpose of preserving marriage. It is mainly used by the husband as a tool to defeat the claim of the wife for maintenance or as a counter-blast to divorce and Section 498A proceedings, or simply a means for harassment. The provision is, therefore, the subject matter of challenge before the Supreme Court in *Ojaswa Pathak & Anr v. Union of India*, where its relevance is being considered in light of the right to privacy under Article 21, as well as Articles 14 and 15 of the Constitution of India. In fact, the *High-Level Committee on Status of Women in India* in its Report dated June 1, 2015 has recommended that the provision relating to restitution of conjugal rights in various statutes - including Section 9 of the HMA, Section 22 of the Special Marriage Act and Section 32 of the Divorce Act - be deleted.¹⁵

Arguments in Support of Restitution of Conjugal Rights

¹⁴ Krishnadas Rajagopal, *Plea of Conjugal Rights Pending in Supreme Court*, available at:

<http://www.thehindu.com>.

¹⁵ Shashank Garg and Monisha Honda, *Decree for Restitution of Conjugal Rights Not a Bar on Grant of*

Maintenance: What the Delhi High Court Held, available at:

<http://www.barandbench.com>.

1. It is a remedy to bring cohabitation and consortium between the estranged couples so as they can live in peace and harmony.
2. It's main is to protect the sanctity of marriage which encourages the court to bring about reconciliation between the parties.
3. Section 9 gives one year time to the spouses to reconcile which is a cool off period. If the parties do not reconcile in this period of one year then the parties can move for divorce.
4. The decree of restitution of conjugal rights serves a legislative purpose in the family law and it is constitutionally valid.
5. Such a right is inherent in the very institution of marriage itself.
6. It serves a social purpose as an aid to the prevention of break-up of marriage.

Arguments Against Restitution of Conjugal Rights

1. The remedy under section 9 is a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. It is argued in the oppose of Restitution of Conjugal Rights that to live or not to live with anybody is a matter of personal concern and it is the right of wife or husband to live or not to live with each other. It is violative of Article 21 of the Indian Constitution and despite of several reforms, the remedy of restitution has come to stay unabolished and so.¹⁶
2. Section 9, promoted no legitimate public purpose based on any conception of the general good. It did not

¹⁶ Sharavari Vaidya, *Family Law*, 25 (Allahabad Law Agency, Faridabad, 2012).

therefore subserve any social good. Section 9 of the said Act was, therefore, held to be arbitrary and void as offending Article 14 of the Constitution.

3. The concept of restitution of conjugal rights has its origin in English law where women were considered as property so this concept does not hold good in present times.
4. Hindu law itself even while it lays down the duty of the wife of implicit obedience and return to her husband, has laid down no such sanction or procedure as compulsion by the courts to force her to return against her will. {Bai Jiva vs.Narsingh Lalbhai}.
5. That a Court decree enforcing restitution of conjugal right constitutes the starkest form of Government invasion of personal identity and individual's zone of intimate decisions.
6. Firstly, section 9 of the Act does not satisfy the traditional classification test. Secondly it fails to pass the test of minimum rationality required of any state law.

Remedy of Restitution of Conjugal Rights Need to be Retained or Not?

While the issue of constitutional validity of a restitution decree is no longer in suspense, one needs to reflect on the efficacy of such decrees. A mere paper decree cannot compel parties to live together in conjugal relationship. The real purpose of restitution decree seems to be use it as a spring board for obtaining a divorce. Since the ground for divorce under S.13 (1A) (ii), viz. non compliance of a restitution decree for one year, is available to both the judgment debtor and the decree holder, it gives an additional and easier ground for divorce, especially in situations where one party is reluctant and does

not want a divorce and the process of proving a matrimonial fault by the petitioner is long, difficult and cumbersome. However, if this is the only purpose it serves and so it seems, one wonders whether it is expedient to retain it at all? Would it not be more logical and decent to provide an honest and simple ground for divorce rather than retain a provision which abets and assists parties to obtain divorce circuitously via a non complied decree of restitution?¹⁷

Conclusion

The remedy of restitution of conjugal rights has roots of the colonial era and although being gender neutral it adversely affects the rights of the women. The author agrees with the view that this remedy is unconstitutional as it affects the right of freedom and privacy of a spouse. There is no utility to retain this remedy in the present era when we have entered into the technological era. Section 9 of Hindu Marriage Act has become one of the most debatable provisions under the matrimonial laws as it is an instrument in the hands of the husband to harass her wife or to make a ground for divorce. Though the purpose of this remedy is to preserve the institution of marriage but in reality this provision is misused rather than becoming a boon for the parties.

¹⁷ Kusum, *Family Law Lectures*, 45 (Lexis Nexis Butterworths Wadhwa Nagpur, Gurgaon, 2012).