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Restitution of Conjugal Right: It's Constitutionality with respect to Marital Privacy

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ABSTRACT

Marriage can be considered as a legal union of a man and a woman and can be said as one of the sturdy pillars of the society. Marriage is the union of two different families, who coalesce as one. In India, marriage is existent in different forms in different religion, such as it is considered as a sacrament under the Hindus, but, on the other hand it is considered as a contract in Islam. For Christians it is considered as a holy union. It is beyond the bounds of possibility to attain an absolute and perfect marriage. Law gives several matrimonial remedies/reliefs to the married couple to escort them at peace and preserve the sacred institution of marriage. This paper shall focus on one such remedy/relief under Hindu law which is known as Restitution of Conjugal Rights enshrined under Section 9 of Hindu Marriage Act, 1955. The author shall plunge deep into the historical perspective of this remedy in order to uncover its origins and the foundation. In this paper, the author has also dealt about the decree for restitution of conjugal rights from an international perspective and also attempt to examine the same from the judicial as well as the societal point of view to conclude that whether the same is still relevant in today's time or not. Subsequently this paper shall also elucidate upon the current situation and practice of this remedy in the Society and laborious upon its constitutional validity. The core discussion of the research is to behold whether or not restitution as a remedy, is ethical and whether or not this practice is constitutionally valid with respect to Marital Privacy and other fundamental right enshrined under Indian Constitution.

Keywords: *Marriage, sacrament, Hindu Marriage Act, 1955, restitution of conjugal right, constitutional validity.*

I. INTRODUCTION

Marriage can be defined differently by different entities, based on their cultural, religion, and

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personal factors. A commonly acquired and circumscribed definition of the marriage is “a formal union and social and legal contract between the two person which combines their lives legally, economically, and emotionally. Marriage is ‘the state of being united as spouses during a consensual and contractual relationship recognized by law’. Marriage gives rise to very sympathetic but composite interrelationship between the spouses from which a superfluity of rights and obligations emerges. According to the Hindu philosophy, there are three objects, purpose and motive of the marriage: (1) Dharma i.e. justice (2) Praja i.e. procreation (3) Rati i.e. pleasure or sex. The two essential institutional pillars in our society are the family and the marriage.

Hindu Law has been connected to idea that on marriage husband and wife are considered as one. With the passage of time, complexity increased within the areas of divorce, judicial separation and the concept conjugal rights came up in the field of personal law and it embellish requisite to codify the laws related to the marriage in India. The result was that the only prophylactic that a deserted spouse had against the other was the petition for the restitution of conjugal rights. The prophylactic of restitution of conjugal rights is a positive remedy that requires both parties to the marriage to live together and have a sexual relationship. Marriage under all the matrimonial laws inflicting certain marital obligation and accords to each of them indubitable legal rights. The important inference of marriage is that parties will live together. Each of the spouse is authorized to comfort of the other.

After the solemnization of the marriage both the husband and the wife are legally pranced by the law to continue their conjugal life together. If either of the spouse depart/leave from the other then the aggrieved spouse may obtain a statutory matrimonial relief protected under the codified personal law to replace their status of the other subject to the validation of certain facts. This can be done by filing a petition before the court demanding for the continuation of cohabitation. This right is considered as the Restitution of Conjugal rights.

Restitution of Conjugal Rights is a remedy, which means the restoration or reinstatement of one’s marital rights or privileges (like, comfort and consortium of one another³) which the marriage or the marital bond authorizes him to. There is a constant provision regarding the Restitution of the Conjugal Rights in all of the personal laws. Section 9 of the Hindu Marriage Act, 1955 creates this remedy which available to the Hindus. A survey of case laws under the head 'restitution of conjugal rights' discloses that even though the decree of restitution of the conjugal rights has been questioned for by the husband against his wife in almost in all cases

³ Ela Dasu v. Ela Lachamma, (1990) 2 H.L.R. 249 (India).

it has been proved that either he was himself guilty of the cruelty or brought the petition only in order to get away from the liability to pay the maintenance.

Social organization in a society is inaugurated on the basis of the marriage. Under the Hindu Law, the marriage is a sacrament. Manu's proclamation was that "neither by the sale nor by the desertion is the wife released from the husband." These rights were only available to the husband and not to the wife. In order to stop such inequality between the husband and the wife, the Hindu Marriage Act, 1955, incorporated various matrimonial remedies such as the judicial separation and divorce on the grounds of the desertion, cruelty, and the refusal to carry out the matrimonial obligations, et cetera. However, the insertion of the provision of restitution of conjugal rights that is Section 9 in Hindu Marriage Act, 1955, led to pandemonium.

II. RESTITUTION OF CONJUGAL RIGHTS: MEANING AND SCOPE

Restitution of conjugal rights basically consists of two main words, the "Restitution" which means 'the restoration of something lost' and "Conjugal Right" which means 'rights related to the marriage or the relationship between the husband and the wife.' The Concept of the Restitution of Conjugal Rights is a result of a legal and a Valid marriage.

Essentials: 1. Withdrawal from the community; 2. The withdrawal shall be without any rational cause, excuse or the legitimate reason. 3. No other legal grounds for repudiating the relief should exist. 4. The court must be satisfied with the reality of the statement which is made in the petition.

There is an exception to the concept of Restitution of Conjugal Right that if the withdrawal is for a just and reasonable ground then it would not amount to unreasonable and unjust withdrawal from the society of the other. Some examples of reasonable excuse include: **a.** Cruelty; **b.** Impotency; **c.** Act or conduct which makes it impossible for respondent to continue sexual relationship with the petitioner; **d.** Demand for Dowry; **e.** False accusations of Adultery; **f.** Refusal to have sex.

The concept of Restitution of Conjugal Right was introduced in India for the first time in the case of *Moonshee Buzloor v. Shumsoonissa Begum*⁴, where such actions were regarded as considerations for certain performance. The Hon'ble Privy Council laid down that it was available to Muslims in *Kateeram Dokanee v. Mst. Gendhenee*⁵, so on the basis of this decision it was held by the court that such a suit was also allowed for the Hindus as well as mutatis mutandis. This was further followed in the case of *Jogendronundini Dossee v. Hurry Doss*

⁴ *Moonshee Buzloor v. Shumsoonissa Begum*, 1866, II M.I.A. 551 P.C (India).

⁵ *Kateeram Dokanee v. Mst. Gendhenee*, 1875 23 South W.R. 178 (India).

Ghose,⁶ *Brindabun v. Chundra*⁷, *Binda v. Kaunsila*⁸ and *Dadaji Bhikaji v. Rukmabai*⁹. Then onwards the matrimonial remedy in the nature of the Conjugal rights was also available to the Hindus which can be enforced by civil courts. After the passing of the Hindu Marriage Act, 1955, Section 9 incorporates a statutory sanction to a proceeding for the restitution of the conjugal rights. This section in the Hindu Marriage Act is the reproduction/genesis of the Section 32 and Section 33 of the Indian Divorce Act.¹⁰

In *Ranjana Kejriwal v. Vinod Kumar Kejriwal*¹¹, the Petitioner Wife alleged that the husband was already married and had conquered the fact from her. The Hon'ble Court held that the petition for the restitution of the conjugal rights is not maintainable in the present case since there is no legal marriage. In *Sushila Bai v. Prem Narayan*¹², the husband deserted his wife and afterwards was totally insensitive towards her. This behavior of the husband was held enough to show that he had withdrawn himself from the society of his wife, and therefore the wife's petition for the restitution of conjugal rights was allowed in this case. The defense to this principle reclines in the conception of a 'reasonable excuse'. If the respondent has withdrawn himself/herself from the society of his/her spouse for a valid reason, it is a complete defense to any restitution petition.¹³ In *Gurdev Kaur v. Sarwan Singh*¹⁴, the wife's appeal against a decree of the restitution of conjugal rights was given in favor of the husband. It was held by the Hon'ble Court that there was presence of the reason to believe that the actions of the husband were taken by way of a 'reasonable cause' and thus the conjugal rights had to be reinstated.

III. HISTORICAL BACKGROUND

The origin of this remedy namely, restitution of conjugal rights, can be discovered back to the Jewish family law, which has been taken by most of the personal laws in India. This was the only matrimonial relief available during the British India, under the general law. But this remedy/relief was subject to a lot of condemnation over the years.

When Hindu Marriage Act, 1955, was in its natal stage, this relief for the marriage led to heavy debates between the drafters and makers of this Act. The concept of Restitution of Conjugal

⁶ *Jogendronundini Dossee v. Hurry Doss Ghose*, I.L.R (1880) 5 Cal. 500 (India).

⁷ *Brindabun v. Chundra*, I.L.R (1996) 12 Cal. 140 (India).

⁸ *Binda v. Kaunsila*, (1899) I.L.R. 13 All. 126 (India).

⁹ *Dadaji Bhikaji v. Rukmabai*, (1886) I.L.R. 10 Bom. 301 (India).

¹⁰ Section 32 & 33, The Indian Divorce Act, 1929.

¹¹ *Ranjana Kejriwal v. Vinod Kumar Kejriwal*, A.I.R. 1997 Bom. 380 (India).

¹² *Sushila Bai v. Prem Narayan*, A.I.R. 1964 M.P. 225 (India).

¹³ *Shakuntala v. Babu Rao*, A.I.R. 1963 M.P. 10 (India).

¹⁴ *Gurdev Kaur v. Sarwan Singh*, A.I.R. 1959 P & H 162 (India).

Right was also opposed in the case of *Russell vs. Russell*¹⁵, one of the judges of the bench discussed that, “I have not once known a restitution petition to be true and actual, that these were merely an appropriate device either to enforce a money demand or in order to obtain divorce.”

Under the Muslim Law of Marriage, the restitution of conjugal rights, is identified with the freedom to enjoy or to acquire the enjoyment of the legal rights to the spouse. Previously, a contract of marriage was attached with the concept of the specific performance. But in consequent phase, it was decided in *Abdul Kadir vs. Salima*¹⁶, that conjugal rights will be distributed with on basis of the Muslim Law rather on the notion of justice, equity and good conscience.

As mentioned by the Paras Diwan, the remedy/relief of the restitution of conjugal rights was neither recognized by the Dharmashastra nor did the Muslim law made any provisions related to it. Restitution of conjugal rights have its origin in the feudal England, where the marriage was considered as a property deal and wife was the part of the man’s possession like other chattels. The notion of the restitution of conjugal rights was brought in India in the case of *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*¹⁷, where such actions were regarded as considerations for particular act.

In modern India, the remedy is available to the Hindus under the Section 9 of the Hindu Marriage Act, 1955, to Muslims under general law, to Christians under the Section 32 and 33 of the Indian Divorce Act, 1869, to Parsi under the Section 36 of the Parsi Marriage and Divorce Act, 1969 and to the persons who is married according to the provisions of the Special Marriage Act under the Section 22 of the Special Marriage Act, 1954.

IV. INTERNATIONAL PERSPECTIVE

The concept of remedy of Restitution of Conjugal Rights is an issue which has been perceived in whole of the world.

1. UK: In English law, there was a common faith that the decree for the restitution of conjugal rights was the only matrimonial matter over which the ecclesiastical courts had the jurisdiction. It was that the decree could be issued against the person, either the husband or wife who has withdrawn himself/herself from the society of the other without any reasonable ground and if completely the parties would be forced to stay together. It was practiced for a very long period

¹⁵ *Russell vs. Russell*, L.R. 14 Ch D 471 (1880).

¹⁶ *Kadir vs. Salima*, (1886) I.L.R. 8 All 149 (India).

¹⁷ *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, (1867) Moo I.A. 551 (India).

of time Beirut in 1969 a report was published by the law commission mission which recommended the abolition of such action and as a result it was abolished in England by the Matrimonial Proceedings Act, 1970.

2. Scotland: In Scotland the term which is used for the restitution of conjugal Rights laws was “adherence” and it was abolished by the Section 2(1) of Law Reform Act, 1984.

3. Ireland: In Ireland the restitution of conjugal right was abolished by the Family Laws Act, 1988 as it was held unconstitutional by the courts in number of cases.

4. South Africa: It is another one of those countries which had got rid or abolished the Restitution of Conjugal Rights in as early as 1979 through the Section 14 of the Divorce Act, 1979.

5. Canada: The family law in this country differs from time to time, and till now it is continuously evolving but it is somewhat based on the common English Law. The Decree for the Restitution of Conjugal Rights was contemplated as in law but not in all provinces of Canada but only in some and it was after the 20th century only that levelness of the Family Law has taken place and after that only the Restitution of Conjugal Rights has been held as a valid law in whole of Canada.

V. LEGAL PROVISIONS IN INDIA RELATING TO RESTITUTION OF CONJUGAL RIGHTS

In India different personal laws authorize different provisions related to the restitution of conjugal rights, the basic being that when either the husband or the wife withdraws himself/herself from the society of other than the other person may move to the court for decree of the restitution of conjugal rights. Some of the provisions where restitution of conjugal right mentioned includes: **1)** Section 9 of the Hindu Marriage Act, 1955; **2)** Section 22 of the Special Marriage Act, 1954; **3)** Section 32 of the Indian Divorce Act, 1869; **4)** Section 36 of the Parsi Marriage and Divorce Act, 1936.

Burden of Proof

Burden of Proof mainly talks about two things in context of this: **a.** Initial burden is on the petitioner to prove that the respondent who has withdrawn from the society had withdrawn himself/herself without any reasonable excuse; **b.** If the petitioner is able to discharge its burden, then the burden of proof shifts on to the respondent who has withdrawn himself/herself to prove that the withdrawal was for a good/reasonable excuse.

Constitutionality of Section 9 of the Act

To check the constitutional validity of any section or any act, one must compare it with the

fundamental rights enshrined under Part III of the Indian Constitution. I have compared the section 9 of the Hindu Marriage Act with the fundamental rights enshrined under Indian Constitution and attempted to give a well understanding as to why and how the section is or isn't in violation of that particular article. There have also been many cases in this regard which have been dealt in order to consider its constitutional validity. Our Constitution is based on principles of equality, human dignity and personal liberty. The marital relations are very arduously concerned with the fundamental rights of Indian Constitution.¹⁸ In *Shafin Jahan v. Asokan*,¹⁹ the Hon'ble Supreme Court held that the choice of a spouse whether within or outside marriage lies within the exclusive domain of every individual.

- **T Sareetha v. Venkata Subbaiah**²⁰: The question of constitutional validity of section 9 of Hindu Marriage Act, 1955, for the first time came in this case. It was held by Hon'ble Court that the remedy of restitution of conjugal rights is in violation of **Articles 14, 19 and 21** of the Constitution of India. In this case, Justice **Choudhary** termed the remedy as “*savage*”, “*uncivilised*”, “*barbarous*”, “*engine of oppression*”. He observed that the remedy was surfaced towards the husband and through this decree the husband gets a right, not only to the company of the wife but also to have the sexual intercourse with her. Hence, he considered this remedy as the crudest form of violation of human liberty and ending of human choice.

Here, the Hon'ble court held that a person acquire access to “*one's body to be used as a vehicle for the procreation of another human-being*”. Therefore, the Hon'ble Andhra Pradesh High Court held that it is a “*savage and barbarous remedy violating the right to privacy and human dignity guaranteed under Article 21 of the Indian Constitution, hence the section is void*”. Sexual cohabitation is imposed through this remedy against any individual's choice which violates article 19 of Indian constitution which states about the freedom of expression. As to being violative of Article 14 of the Constitution, i.e., right to equality, the Hon'ble court held that though it does not make any discrimination, but “*bare equality of treatment regardless of any inequalities of realities shall neither a justice nor a homage to our constitutional principle*”.

- **Harvinder Kaur v. Harmandar Singh**²¹: The Delhi High Court upheld the constitutional validity of Section 9 of hindu Marriage Act, soon after the case of T. Sareetha. Justice **A.B. Rohtagi** in this case observed, “*it is to clasp the vulgar view of the remedy to say*

¹⁸ Vijender Kumar, “Restitution of Conjugal Rights: An Analysis with reference to Fundamental Rights”, Ranbir Singh and Vijender Kumar, (eds.), MATERIALS AND CASES ON FAMILY LAW – I, p.42.

¹⁹ Shafin Jahan v. Asokan, A.I.R. 2018 S.C. 1933 (India).

²⁰ T Sareetha v. Venkata Subbaiah, A.I.R. 1983 A.P. 356 (India).

²¹ Harvinder Kaur v. Harmandar Singh, A.I.R. 1984 Del. 66 (India).

that it subjects a person by the long arm of the law to a positive sex act". It was observed in this case, that this remedy is equally available to both the spouses and pretends to save marriage, reconstruct a broken home and restore the "two-in-one" relation between the antagonized spouses. According to Justice Avadh Behari, the restitution decree performs as an index of connubial felicity. If the decree remains against for a period of one year, it manifests that the relationship has outstretched a stage of no-return and embellishes a ground for the divorce. It proposes a cooling off term to the estranged spouses. Hence Section 9 of Hindu Marriage Act doesn't enforce any sexual act in any way. Therefore, Section 9 doesn't violate any of the provision of the constitution.

- **Saroj Rani v. Sudarshan Kumar Chadha**²²: The Hon'ble Supreme Court upheld the decision of the Delhi High Court given in Harvinder Kaur case. In this case, it was observed by Hon'ble Supreme Court that: "*The right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself... There are sufficient prophylactics in section 9 of Hindu Marriage Act in order to prevent it from being a tyranny.*"²³ It was remarked in this case, "*It serves a social purpose and acts as an aid to prevent the breakdown of any marriage*".

It was observed by the Hon'ble Supreme Court in the present case that the remedy provides the husband and the wife a chance to cordially sort out their differences and live together. It acts as a social purpose and as an aid to reconstruct the marital tie. It was submitted in the present case that no spouse could get the decree merely by filing a petition. If the court believes that the withdrawing spouse had any reasonable excuse for his/her withdrawal, then the decree is refused by the court. The "*reasonable excuse*", for withdrawal is "built in safeguard" is incorporated against the misuse of section 9 of Hindu Marriage Act. Thus, Section 9 is not in violation of any constitutional provision.

(A) The Inadequacy in Harvinder Kaur Case²⁴ and Saroj Rani Case²⁵

As considered earlier, it has been held in both the cases of Harvinder Kaur and that of Saroj Rani that Section 9 of Hindu Marriage Act is not in violation of any constitutional provision. In *Harvinder Kaur v. Harmandar Singh*,²⁶ the Hon'ble Court held that as the remedy was available to both, it was not violative of Article 14, i.e., the fundamental right to equality, given under the Indian Constitution. But the equality provided in the Indian Constitution is not only

²² Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 S.C.C. 90, para 14 (India).

²³ Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 S.C.C. 90, para 14 (India).

²⁴ Harvinder Kaur v. Harmandar Singh, A.I.R. 1984 Del. 66 (India).

²⁵ Saroj Rani v. Sudarshan Kumar, A.I.R. 1984 S.C. 1562 (India).

²⁶ Harvinder Kaur v. Harmandar Singh, A.I.R. 1984 Del. 66 (India).

that of equality in the eye of law, but also of equality in reality.²⁷ Equality doesn't only mean physical equality between husband and wife, but it also means the equality of thought, action and the self-realization which, is sadly not given under this remedy because, practically, this remedy is highly biased towards the husbands and gives a powerful tool to them. Moreover, it is misdate for educated women to be forced by State power to go and live in a place, where from they have withdrawn herself.

Then, it had also been provided in the case of *Harvinder Kaur v. Harmandar Kaur*²⁸ that “it is to take the grossest view of the remedy to say that it subjects a person by the long arm of the law to a positive sex act”. It had also been observed that the **Justice Choudhary** in *T Sareetha* case by recapitulating about enforcement of sexual cohabitation, has disregarded every other aspect of marriage and of the decree. The view in *Harvinder Kaur* case was, again, upheld by the Hon'ble Supreme Court in the case of *Saroj Rani v. Sudarshan Kumar*. But, what Justice Choudhary wanted to demarcate was that the marital cohabitation will unavoidably leads to the sexual cohabitation and this would be one of the indecent violations of the human rights. He never repudiated the existence of any other components and consequences of this remedy. He concentrated on this aspect, because this aspect was the one of the main causes of its unconstitutionality and desires to press on the point that enforced sexual cohabitation is an inevitable result arise out of this remedy.

To know the constitutionality of a provision it should be contrasted with its unavoidable consequences.²⁹ Sexual activity can be imposed ignoring of a person's will and it give on to capitulating of her choice, in making “one's body a vehicle for the motive of procreation of another human being”, as mentioned in the case of *T. Sareetha v. Venkata Subbaiah*.³⁰ Such forced sex can be considered as the mental torture to her, humiliating to her dignity and ghastly to her spirit. Forced marital and sexual cohabitation are considered to be the gross violations of her right when observed in light of the ruling of the Supreme Court in the cases of *Kharag Singh v. State of Uttar Pradesh*³¹ and *Govind v. Madhya Pradesh*³² which strikes that the right under Article 21 of the Indian Constitution extends to the privacy and personal autonomy of the person; forced marital and sexual cohabitation ergo is gross violation of this right.

Then again, in India, as we know that the majority of households are male-dominated. The real

²⁷ *Matd. Works v. The Asst. Collector*, A.I.R. 1974 S.C. 497 (India).

²⁸ *Harvinder Kaur v. Harmandar Singh*, A.I.R. 1984 Del. 66 (India).

²⁹ *State of Bombay v. Bombay Education Society*, A.I.R. 1954 S.C. 561 (India); *R.C.Cooper v. Union of India*, A.I.R. 1970 S.C. 564 (India).

³⁰ *T. Sareetha v. Venkata Subbaiah*, A.I.R. 1983 A.P. 356 (India).

³¹ *Kharag Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 1295 (India).

³² *Govind v. Madhya Pradesh*, A.I.R. 1975 S.C. 1378, 1385 (India).

liberalization of women hasn't trickled into the ground actuality as yet. In such a social backdrop, it is but clear that the remedy of restitution of conjugal rights would be a right which would be pruned towards the men and would give a propulsion to the patriarchal society. This, makes this remedy going against the right of Equality as mentioned under Article 14 of the Constitution. This also backs the contention of "enforced sexual cohabitation", which also violates Article 21 of the Indian Constitution.

Freedom in personal matters and an unrestricted discretion in the use of one's body is the foundation of human dignity. Such proclamation has been made in the Courts of Law all over the world. Such right is one that is most basic for the human existence and it cannot be relinquished.³³ As an individual loses the option to choose or discretion to allow one's body to be used for a peculiar purpose, this embellishes violative of Article 19 of the Indian Constitution which gives the Right of Expression to an Individual. The protection given in the Saroj Rani case (that of reasonable cause) doesn't help in fixing the unconstitutionality of this remedy because the willfully cohabitation is not escort about making an enforced sexual cohabitation inevitable.

It has also been contended by supporters of this remedy that the sanction for the decree is merely financial and it involves no mandatory enforcement as such. Hence, it cannot be said that it enforces an involuntary sexual cohabitation. But, in my opinion, a sanction is a sanction and its motive are to enforce that peculiar decree. As the remedy inevitably pretends to escort about an enforced sexual cohabitation, it cannot be considered that there was not the presence of any motive of such a consequence. Therefore, this remedy ceases violating the constitutional provisions of Article 14, 19 and 21. The protection do not help in anyway, in stopping the "tyranny". The judgements of *Harvinder Kaur v. Harmandar*³⁴ and *Saroj Rani v. Sudarshan Kumar*³⁵ are inadequate and insufficient.

(B) Right to Equality, Privacy and Section 9 of Hindu Marriage Act

Under Section 9 of the Hindu marriage Act, the use of the word 'either of the spouse' gives ample opportunity to both the 'husband' and the 'wife' and in this regard, it cannot be considered that this section is in violation Article 14 of the Indian constitution. But the worst thing is that 'equality' under the section 9 is only 'apparent equality' not in its true sense. A study shows that even though both husband and wife can apply, but mostly it is the 'husband' who extrapolates himself as the 'aggrieved party' and goes for the remedy under this section

³³ *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180 (India).

³⁴ *Harvinder Kaur v. Harmandar Singh*, A.I.R. 1984 Del. 66 (India).

³⁵ *Saroj Rani v. Sudarshan Kumar*, A.I.R. 1984 S.C. 1562 (India).

and the miserable part is that it is because of him that the wife forced to leave the matrimonial home. The offender takes the benefit of his own act and the real victim has been administered by the court to unite the company of the so-called aggrieved party. This abuse of the right in fact violates the 'equality'. Though the right is meant for both the parties but is practically abused (rather exploited) by the husband only.

As far as 'privacy' is concerned under Article 21 of Indian Constitution, every individual is at his/her latitude to choose his/her life partner, profession etc. But, in the name of restitution of conjugal rights when one of the spouses is forced to leave her job, asked to live under the roof of the other and pushed to give rise to a child where the abyss is the privacy? Moreover, every woman is having a right over her body and this right entitled her to choose how, when and by whom her body will be touched. However, restitution of conjugal rights also violates this basic fundamental right of the woman. Though the decree nowhere states that the sexual intercourse rather 'cohabitation' and 'consortium' but these two terms include the sexual intercourse within its meaning. Thus, the judgement delivered by the Andhra Pradesh High Court regarding the violation of Article 14 and 21 even though dissented by the Delhi High Court and overruled by the Supreme Court is unjustified.

(C) Infringement of freedom of association or union 19(1)(c)

By the decree under section 9 of the Hindu marriage Act, a wife is forced by the court to have association with her husband which is against her will and vice versa. In *Huhhram v. Misri Bafi*,³⁶ the wife grumbled to the court that her father-in-law has an evil eye on her and her husband ill-this, in response to the husband's maintain for restitution passed a decree in favor of the husband. If the father-in-law after her association with her husband due to the but the court decree shall be accountable for the mishap. In the case of *Atma Ram v. Narbada Devi*,³⁷ though the husband clearly entreated wants to live with his wife but the decree of restitution rights was passed in favor of the wife. It is also the forced union which is brought about by a restitution decree.

(D) Infringement of freedom to settle and to practice 19(1)(e) & 19(1)(g)

In the present social setup when woman are trying hard to get jobs for becoming economically and self-dependent and also to live a dignified life, mere denial of the wife to leave her job at the occurrence of the husband is not an adequate reason for granting a decree of restitution in

³⁶ *Huhhram v. Misri Bafi*, A.I.R. 1979 M.P. 144 (India).

³⁷ *Atma Ram v. Narbada Devi*, A.I.R. 1980 Raj. 35 (India).

favor of the husband. In *Swaraj Garg v. K.M. Garg*,³⁸ violation of article 19(1)(e) and (g) were not prayed but the court refused decree on certain social grounds. Mentally and physically parted husband and wife cannot be consolidated by a decree of the restitution of conjugal rights. A horse can be escorted to the water pond but cannot be forced to drink it. Jurists observed that the constitutional provisions should not be permitted to control the family affairs. In *Harvinder Kaur's case*,³⁹ it was observed that, "commencement of the constitutional law in the home is most indecorous, it is like bringing a bull in a China shop". *Saroj Rani*⁴⁰ was the divorce which was on the basis of delinquency of the decree of restitution of conjugal rights. However, the Supreme Court was neither under any obligation to pass a judgment regarding the constitutionality of restitution of conjugal rights decree nor the matter could be scrutinized and probed entirely before the court. It is a decision sub-silentio, which can't be fully argued.

To conclude, I feel that the decree of restitution of conjugal rights is contrary to the principles of natural law. It cannot be underpinned on the ground of justice and fairness. It cannot be reinforced on social or legal criteria. There is a big estuary between the legal norms and the social norms, which furnish a legal norm lack of content.

VI. CONCLUSION

From the above expressed long dialogue one thing is very explicit that the answers to the question of constitutionality of restitution of conjugal rights has found an ambiguity over its existence into the legal system. Taking possibility to the uncovering of the debate I can conclude that after many judgements of all the three major cases as discussed above, the concept of restitution has totally changed its possibility and taken new aspect which has more convoluted the base of the remedy. Section 9 of the Hindu marriage Act appears more a punishment than a remedy because of its implementation in the society. It is in fact the devising period to obtain divorce. As per the section if there is no cohabitation between the parties for one year, then the party who sought for restitution gets a good and reasonable ground to file petition for divorce. This may be considered to be the only benefits of Section 9 of the Hindu Marriage Act.

Restitution of Conjugal Rights is a notion, which had considerable importance at the time, when it had evolved. But, with the changing social scenario and with changing time, it has lost its importance. Though this remedy is constructed on a gentle cause, its consequences are far more harmful and it fails to bring about the desired effect in most of the cases, statistically. The

³⁸ *Swaraj Garg v. K.M. Garg*, A.I.R. 1978 Del. 296 (India).

³⁹ *Harvinder Kaur v. Harmandar Singh*, A.I.R. 1984 Del. 66 (India).

⁴⁰ *Saroj Rani v. Sudarshan Kumar Chadha*, A.I.R. 1984 S.C. 1562 (India).

occasion of its abuse is increasing fast and its redundancy too. Despite the Supreme Court ruling, it can be considered that the provision of Section 9 of the Hindu Marriage Act is in violation of the constitutional provisions of Article 14,19 and 21.

After T. Sareetha & Saroj Rani's cases, the issue of constitutional validity has got hold of a new aspect. Today, one views this as a highly labile area where there is a confrontation between the personal laws and fundamental rights altogether. As discussed earlier, personal laws don't come under the ambit of Constitutional Review, but I have used an in arguendo in mentioning that even if they don't come, they are not violative of some of the provisions of the Constitution. As we understand, this concept introduced in England from where India has adopted now stands abolished. In my opinion, the restitution of conjugal rights under Section 9 of Hindu Marriage Act is a farce and should not exist in India. Thus, it can be said that, it is right time now to repeal the Section 9 of Hindu Marriage Act, 1955 which is certainly violative of important Fundamental Rights of the Indian Constitution.

VII. SUGGESTIONS

Such a provision which is irreconcilable with the changing times and societal scenario, is detrimental and obsolete, should be done away with and novel ideas for reconciliation which can be considered effective in its execution. A member of the Indian Parliament once proposed that the remedy of restitution of conjugal rights can be substituted by the reconciliation. In a form of suggestion, I would like to suggest that the remedy of restitution which is been aching from a problem that most of the time it is been misunderstood by many and is also abused very blatantly must be substituted by the reconciliation. The harsh, jarring, offensive and forcing quality of restitution in which we ask the spouse to cohabit with the other spouse unwillingly it will result in the breakage of the relationship. Reconciliation sounds more lenient, more justifiable and more inoffensive in which both the spouse not only cohabit but it also clears all their misunderstandings which is being created between them.

A Reconciliation Body can be formed by the Judiciary in every court, consisting of the competent professionals (such as Psychologists or any other person qualified for the purpose). This body can form a serious effort in reconciling the spouses and resuscitating the lost love and affection which were present between them. Such Reconciliation Bodies should be instituted at all the levels and only the cases, wherein the marriage has not shattered down irretrievably and there is a scope for reconciliation, should be mentioned to them. R.K. Agarwala has given out a somewhat same system in her article named "*Restitution of Conjugal Rights: A Plea for the Abolition of the Remedy*".

Therefore, in brief, inessential of the provision of restitution has become evident due to the rapid increase of social change, the change in the nature and form of marriage after the enactment of the Marriage Laws (Amendment) Act, 1976 and after the enactment of the other legislations, the inadequacy of the outcome of this remedy, remaining of the arguing in the marital home due to this provision which seeks to attain a healthy cohabitation, hypocrisy of the petitioner who has underlying objectives and motives in most of the cases, inability of the judiciary in making a difference to an emotional bond and its unconstitutionality.
