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The Restitution of Conjugal Rights: An Analysis from Privacy Conundrum

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ABSTRACT

The necessary implication of union of marriage is that the spouses with lead together a matrimonial life. Marriage has been considered as a sacrament bond in Hindu marriage laws. The conception of restitution of conjugal rights is bolstered on this conception of marriage. Thus, the union is considered unbreakable and is believed to last for seven lives. The decree of restitution provides restoration or reinstatement of person's marital rights or privileges under Section 9 of the Hindu Marriage Act, 1955. The provision prohibits the dissolution on marriages on the whims and fancies of one spouse. The recent entitlement of right to privacy under article 21 of the Constitution of India has triggered the moot question of constitutionality of the provision. The paper discusses the concept of restitution of Conjugal Rights in light of various case laws. It examines the historical notion of the restitution of conjugal rights and change in notions of marriage and marriage over the years. The author explains the arguments in favour of the restitution of conjugal rights and against the restitution. The research analyses the right to privacy and it studies the provision of restitution in context of privacy jurisprudence.

Keywords: Restitution of Conjugal Rights, Privacy, Fundamental Rights, Autonomy, Marriage.

I. INTRODUCTION

The Constitution of India guarantees certain rights under part III which are fundamental to the very existence of human beings. These safeguards check the misuse of power by the government as is evident from the saying “power tends to corrupt, and absolute power corrupts absolutely”. One of the fundamental rights guaranteed under Article 21 of the Constitution is the right to life and personal liberty. The right has been expansively interpreted to include right to privacy within its ambit.² The recognition of privacy as fundamental right the honourable Supreme Court has questioned the validity of various existing laws. One of the emerging debates is the constitutionality of restitution of conjugal rights available under family laws. The

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² INDIA CONST., art. 21.

peculiarity of the issue lies in the domain of two related issues; one being as basic as right to life and the other related to personal ties and marriage. Howsoever, these queries are related to the very existence of person and hence cannot be ignored.

The concept of marriage in all civil jurisdictions implies the unification of two people which confers certain legal rights and marital obligations against the spouses. The necessary implication of union is that the spouses will lead together a matrimonial life. In other words, it can be stated that each spouse is entitled to comfort consortium of the other. So after the solemnization of the marriage, if either of the spouses without reasonable excuse withdraws himself or herself from the society of the other, then the aggrieved party has a legal right to file a petition in the Court for the restitution of conjugal rights. The Court if after hearing the petition of the aggrieved spouse becomes satisfied that there is absence of legal ground for refusal of such application and that statements made in the petition are true, then it may pass a decree of restitution of conjugal rights.

The Restitution of Conjugal Rights is a remedy that provides restoration or reinstatement of person's marital rights or privileges (like, comfort and consortium of one another),³ which is entitled by the marriage or the marital bond. Section 9 of the Hindu Marriage Act, 1955 makes this remedy available to the Hindus. The section states:

*“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 of 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”.*⁴

The explanation to the section states,

*“Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.”*⁵

Thus, the necessary conditions for obtaining the decree are:

- The respondent has withdrawn from the society of the petitioner.

³ Ela Dasu v. Ela Lachamma, (1990) 2 HLR 249 (Ori).

⁴ The Hindu Marriage Act, 1955 No. 45, Acts of Parliament, 1955, s.9.

⁵ Id.

- The withdrawal by the respondent party is without a reasonable excuse.
- The court is satisfied that the statements made in the petition are true.
- There is no legal ground for refusing to grant application

Thus, there is withdrawal from the society when one of the spouses, without reasonable excuse, terminates an existing relationship with the intention of forsaking the other, and permanently or indefinitely abandoning such relationship. There is no withdrawal from society where the separation is brought about by exigencies of work. Thus, while a husband and wife might at times be living apart, but maintaining a frequent and regular social and conjugal relationship, in such case, there would be no withdrawal from society. Conversely, there may be withdrawal even while the parties are under the same roof.⁶

II. HISTORICAL BACKGROUND

The remedy of restitution of conjugal rights was not initially recognized by any of the personal laws in India. It came, only with the British Raj. It is remarkable that this was the only matrimonial remedy, which was made available by the British rulers of India to all the Indian communities under the general law. Like any other archaic remedy, the restitution of conjugal rights dates back to feudal England, where marriage was primarily a property deal, and the wife and the children were part of man's possessions as other chattels. The remedy finds its origin the ecclesiastical courts of England.

Subsequently, the sacredness of marriage was recognized. The texts of Hindu law also recognized the principle "let mutual fidelity continue till death". Hindu law enjoined upon the spouses to have society of each other. While, the old Hindu law stressed on the wife's implicit obedience to her husband, it did not lay down any procedure for compelling her to return to her husband against her will. It became necessary to find some remedies and procedures so as to see that the marriage is intact and would not be disturbed by petty quarrels between the spouses. Restitution of conjugal rights is a remedy, which was made available to members of all communities, including the Muslims, at a very early period of the British rule in India.⁷

Professor Derrett stated that, "*the practical utility of the remedy is very little in the contemporary England, but in India where the spouses separate at times due to the misunderstanding, failure of mutual communication due to the intrigues of relatives, the*

⁶ KUSUM, FAMILY LAW LECTURES, FAMILY LAW I 36 (LexisNexis, Nagpur, 2011).

⁷ PARAS DIWAN, MUSLIM LAW IN MODERN INDIA 105 (Allahabad Law Agency, 2005).

remedy of restitution is still of considerable value...”⁸

III. THE CONSTITUTIONALITY AND SIGNIFICANCE OF PROVISION

The provision of restitution was initially set up to preserve the very sacramental bond of marital relationship and to protect it from mere whims of the spouses or from petty wear and tear of marriage. It is to see that an aggrieved spouse is not deprived of all the marital pleasures just because of some unreasonable cause of his spouse. It is to see that the parties are able to find a way back to each other and sort out their differences. Marriage has been a union of two families apart from a union of two persons. It is an emotional, sacramental and sublime bond to which paramount importance is attached since olden times. Hence, it has been considered to be the duty of the judiciary to see that marriage doesn't cease to exist because of any whimsical or petty reasons and the institution of marriage is preserved.

However, the very foundation on which the strength of the marital bond rested has suffered a change with the passage of time. The concept of joint families is crumbling and we are switching to nuclear families instead. Several legislations such as the Marriage Laws (Amendment) Act, 1976 have changed the entire conception of marriage in Hindu Law. It has increased the contractual nature of marriage by leaps and bounds, leaving the sacramental character just on the outline. Moreover, this remedy suffers with several loopholes, which are adding to its detrimental effect. This has put a question mark as to its efficacy. Its constitutional validity has also been questioned.

IV. ARGUMENTS FOR ABOLITION OF PROVISION

When the provision of Restitution of Conjugal Rights was debated in parliament in the context of Special Marriage Bill and Hindu Marriage and Divorce Bill, many members voiced their opinion against it. J.B. Kriplani said: “*This provision is physically undesirable, morally unwanted and aesthetically disgusting.*”⁹ Mr. Khardekar had opposed the remedy, saying, “*to say the least this particular cause is uncouth, barbarous and vulgar. That the government should be abettors in a form of legalized rape is something very shocking.*”¹⁰ Sir J. Hannen in *Russell v. Russell*¹¹ vehemently opposed the remedy saying, “*I have not once known a restitution petition to be genuine, that these were merely a convenient device either to enforce a money demand or to obtain divorce.*”¹²

⁸ J.D.M. Derrett, A CRITIQUE OF MODERN HINDU LAW 292(1970)

⁹ Parliamentary Debates on Special Marriage Bill (10th December, 1954)

¹⁰ Id.

¹¹ (1897) AC 395.

¹² Id.

(A) Futility of the Interference by Court

Marriage is an emotional bond. Making a withdrawing spouse resume cohabitation with the aggrieved spouse doesn't bring about the emotional connection. The stress or the wear and tear of marriage cannot be sorted by a decree, which dictates the parties to cohabit. It has been rightly said, in the report given by the Law Commission, which proposed to abolish this remedy in England, "*A court directing individuals to live together is hardly an effective measure of attempting to effect reconciliation*".¹³

(B) Ulterior Motives of the Petitioner in Restitution Cases

One of the most fundamental problems with the remedy is the insincerity of the petitioner. The remedy is blatantly misused to achieve ulterior purposes other than reconciliation. There are two ulterior motives for this:

1. Passport to divorce

Section 13(1-A)(ii) of the Hindu Marriage Act, 1955 says that if a restitution decree has not been complied with for a period of one year then the parties can file for divorce. Generally, in restitution proceedings, after getting the decree the "aggrieved spouse" does not comply with the decree willingly and after the statutory period of one year, files for divorce under S. 13 (1-A)(ii) on the ground of non-compliance with the decree.

The argument can be corroborated by the case of *Malkiat Singh v. Shinderpal Kaur*,¹⁴ where the Court found out the insincerity of the petitioner who deliberately kept the decree unsatisfied to obtain divorce and refused to grant divorce on this premise. Justice Rohtagi in *Harvinder Kaur v. Harmander Singh*¹⁵ recognised that "the legislature has created restitution of conjugal rights as an additional ground for divorce".¹⁶

2. Defense for maintenance suits

There have been gargantuan cases in which the husbands filed petitions for the restitution of conjugal rights just to counterblast the applications of their wives for maintenance under section 125 of the Code of Criminal Procedure. In case of *Veena Handa v. Avinash Handa*,¹⁷ the husband in order to frustrate his wife's claim for maintenance sold all his property and distributed all his property to his relatives and claimed that he did not own any property in land.

¹³ Law Commission of England, Proposal for the Abolition of the Remedy of Restitution of Conjugal Rights, Report No.23, (1969).

¹⁴ AIR 2003 P. & H. 283.

¹⁵ AIR 1984 Del 66.

¹⁶ Id.

¹⁷ AIR 1984 Del 444.

After the decree of restitution was passed, he filed for divorce, after a year, on the ground that there has been no restitution for a year. When the trial court granted the relief, he immediately married another girl, notwithstanding the wife's appeal against the divorce decree in the higher Courts.

(C) Violative of Fundamental Rights

The question of constitutional validity of section 9 of Hindu Marriage Act, 1955, for the first time arose in case of *T Sareetha v. Venkata Subbaiah*.¹⁸ It was held that the remedy of restitution of conjugal rights is violation of Articles 14, 19 and 21 of the Constitution of India. Here, the Court observed that a person gets access to "one's body to be used as a vehicle for procreation of another human-being".¹⁹ The A.P. High Court observed that it is a "savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution, hence void".²⁰ Sexual cohabitation is enforced through this remedy against an individual's choice violating article 19, which talks about freedom of expression. As to being violative of Article 14 of the Constitution, i.e, right to equality, the court held that though it does not make any discrimination between husband and wife, but "*bare equality of treatment regardless of inequalities of realities is neither justice nor homage to the constitution principle*"²¹.

V. ARGUMENTS IN SUPPORT OF PROVISION

The Constitutional validity of Section 9 of the Hindu Marriage Act, 1955 was upheld by the Delhi High Court in case of *Harvinder Kaur v. Harmandar Singh*.²² Justice A.B. Rohatgi held, "*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*"²³. It was observed, that this remedy is equally available to both the spouses and purports to preserve marriage, rebuild a broken home and re-establish the "two-in-one" relation between the estranged spouses. According to Justice Avadh Behari, "*the restitution decree acts as an index of connubial felicity. It is sort of a litmus paper. If the decree remains disobeyed for a period of one year, it shows that the relationship has reached a stage of no-return and becomes a ground for divorce. It offers a cooling off period to the estranged spouses*".²⁴ Hence, it doesn't enforce any sexual act in any way. Therefore, it doesn't violate

¹⁸ AIR 1983 AP 356.

¹⁹ Id at 365.

²⁰ *Supra* note 17.

²¹ Id. at 368.

²² AIR 1984 Del. 66

²³ Id., para 15.

²⁴ *Supra* note 21.

any provision of the constitution.

The decision of the Delhi High Court was upheld by the Hon'ble Supreme Court in *Saroj Rani v. Sudarshan Kumar Chadha*,²⁵ In this case, it was observed 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 safeguards in section 9 to prevent it from being a tyranny.”*²⁶ It was observed that the remedy gives the husband and the wife an opportunity to amicably resolve their differences and live together. It serves a social purpose and as an aid to restore the marital tie. It was submitted that no spouse could obtain the decree merely by filing a petition.

VI. RIGHT TO PRIVACY

Privacy presupposes the existence of a private realm. The struggle for privacy has been, among other things, a struggle between rival understandings of how to define the private realm. In the early judgments of the United States Supreme Court, privacy was understood as a spatial concept, summed up in the old aphorism, “a man’s house is his castle.” Gradually, that concept evolved to include relationships and institutions such as marriage and the family: for example, the US Supreme Court struck down a ban on contraceptives on the basis that it amounted to an illegal interference with the marital relationship²⁷. However, it was only later that privacy came to be understood as the individual’s right to make private (or intimate) *decisions and choices*, such as her choice of sexual partner, her choice to abort her foetus, and so on.

As stated earlier, the right to privacy as a fundamental right is one of the recent additions in category of fundamental rights provided under the constitution of India. Although a precise legal definition of ‘privacy’ is unavailable, some legal experts tend to define privacy as a “human right enjoyed by every human being by virtue of his or her existence”. It is independent of instrument or charter. However, Privacy can also extend to other aspects, including bodily integrity, personal autonomy, informational self-determination, protection from state surveillance, dignity, confidentiality, compelled speech and freedom to dissent or move or think. In case of *Govind v. State of M.P.*²⁸ the Hon’ble Court held the right to privacy as a part of Article 21 of the Constitution and stressed on its constitutional importance.

²⁵ AIR 1984 SC 1562.

²⁶ (1984) 4 SCC 90, para 14.

²⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁸ (1975) 2 SCC 148.

VII. K.S. PUTTASWAMY RIGHT TO PRIVACY JUDGEMENT

In the year 2017, the nine-judge bench of the Supreme Court declared that the right to privacy is a fundamental right. This declaration settled a long debate on the issue that whether right to privacy exists or not; and if yes, then what is the status of that right.. The court unanimously held that right to privacy is a fundamental right. The court also held that it is a vital part of right to life and personal liberty guaranteed under Article 21 of the Constitution.

The judgment of the Supreme Court in *Puttaswamy*²⁹ enshrines the gradual progression of the understanding of privacy over time. Although the fact cannot be ignored that the six separate opinions formulated are slightly different, but there are wide areas of intersection, echoing a general consensus among the nine judges.

Justice Chelameswar held that privacy has three facets – “*repose, sanctuary, and intimate decision.*”³⁰ His illustrations ranged across bodily integrity (corporal punishment), control over personal information (data collection and telephone tapping) and intimate choices (euthanasia and abortion).³¹

Justice Bobde focused on the individual’s right to seclusion in physical as well as mental aspects.³² Justice Nariman explicitly framed the private realm around the body (“*the right to move freely*”), the mind (control over the dissemination of personal information), and “*autonomy over fundamental personal choices*”.³³ Justice Kaul’s opinion, which was centred around privacy and technology, placed great importance upon the individual’s “*right to control dissemination of personal information.*”³⁴ Justice Chandrachud expressed his views as follows:

*“ . Privacy must not be utilised as a cover to conceal and assert patriarchal mindsets....Yet, it must also be noticed that women have an inviolable interest in privacy. Privacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state imposed sterilization programmes or mandatory state imposed drug testing for women. The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty”*³⁵

²⁹ K.S. Puttaswamy (Retd.) v. Union of India (2018) 1 SCC 908.

³⁰ Id., para 36.

³¹ Id., para 38-40.

³² Id., para 31.

³³ Id., para 81.

³⁴ Id., para 53.

³⁵ Id., para 140.

The nucleus of the judgment as deduced from the views of judges is individual and his will. The view encompasses the right available to each person to take decisions related to his body. The autonomy further enshrines the power that an individual has with regard to all the decisions of his body. The right is to be regarded as a legal right. The main emphasis of judgment being on an individual does not render that reasonable restrictions can in no means be imposed upon him. The right in similarity to other fundamental rights cannot be absolute. Though not expressly provided by the Supreme Court. The restrictions to be regarded as reasonable or not was left to be decided by courts depending upon the facts and circumstances of each case. The primary focus is with advent of the judgment, is shadowed over the individual in the place of age long traditions. Though the importance of customs has not been ignored, the centre stage is occupied by the individual instead of the society.

The landmark judgment has brought a new dawn in understanding of many legal situations. The Supreme Court has read right to privacy as a part of right to life and liberty of the individual which has been given under article 21 of the constitution of India. The Right to Life of a person is regarded as the most important aspect of a person's fundamental rights. It is stated in the Constitution as follows "No person shall be deprived of his life or personal liberty except according to the procedure established by law". Article 21, though couched in the negative language, confers on every person the fundamental right to life and personal liberty.

The case despite of bringing new interpretations to the constitutional provisions has also brought a conflict between the interpretation of Section 9 of the Hindu Marriage Act, 1955 that constitutionally justifies the decree of restitution of conjugal rights and the fundamental right to privacy. In other words with coming up of such a decision an argument could be forwarded that Section 9 of the Hindu Marriage Act, 1955 violates the right to privacy of an individual being denial of ones choice with regards to one's body.

A restitution decree violates bodily privacy as it attempts to control the right of an individual to choose with whom they wish to cohabit. A restitution decree strips a person of his associational ability by mandating that he must cohabit with a particular person. The choice of a partner. Marital intimacy forms integral part of privacy which is inviolable.³⁶ Further, with the conjugal home being a personal space, the provision meddles in this private area and vitiates the spatial autonomy of a person by guiding them to share this space with another. The right to cohabitation and sexual autonomy are indispensable angles over which the individual has

³⁶ Shafin Jahan v. Asokan K.M. & Ors., 2018 SCC OnLine SC 201.

outright control. In this manner, the state can't meddle into choices relating to cohabitation and sexual intercourse as it would add up to a infringement of the right to privacy.

The *Puttaswamy*³⁷ Precedent was followed by the Supreme Court in its landmark judgment of *Joseph Shine v. Union of India*.³⁸ wherein it was held that familial spaces cannot be regarded as private spaces where constitutional dictum are violated.³⁹ Presently, a writ petition is pending at the Supreme Court which challenges the constitutional validity of all provisions providing the remedy of restitution of conjugal rights.⁴⁰

VIII. CONCLUSION

The very nature of marriage being an amalgamation of sacrament and contract has led to new domain of interpretations. It being an all-inclusive part of lifestyle, its importance cannot be ignored. Though with passage of time its longevity and irretrievability has changed from a bond lasting for seven lives to the introduction of divorce laws but the fact remains that its preservation is also of equal importance. Marriage even today is one such institution that forms the foundation of peace and stability in society. Having said that, the fact cannot be denied that an individual being the master of his will and body cannot be forced to remain in bond be it for societal peace or orthodox approach.

At the same time the fact cannot be denied that every individual is distinct and has own perceptions. The difference in outlook and upbringing may lead to disputes among spouses. That does not mean that they are allowed to end up marriage at their whims and fancies. No form of social relationship can be completely immune to disputes. Some minor disputes might arise due to different ideologies, tastes, preferences etc. one of the major reasons behind recent disputes is ego clashes, such ideology cannot be justified to be reasonable so as to end marriage. In such unreasonable circumstances the restitution of conjugal rights comes to rescue. Hence keeping in mind, the utility of decree and importance and sanctity of marriage, the provision in no means can be completely abolished. However, if the decree is left unsatisfied for more than one year, can serve as a ground for divorce.

Hence the present circumstances might have reduced the sanctity of marriage but it has not completely abolished it. The major ideology of Indian heritage being enshrined in values like tolerance, the marriage cannot be merely said to be a contract. The changing time though recognized the autonomy of individual has also put some reasonable restrictions so as to ensure

³⁷ Supra note 29.

³⁸ *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

³⁹ Id.

⁴⁰ *Ojaswa Pathak v. Union of India*, W.P. (C) No. 250 of 2019.

that the order and peace in society is not compromised and a sacred bond is not reduced to a child's play.
