

RESTITUTION OF CONJUGAL RIGHTS VS THE FUNDAMENTAL RIGHTS ENshrINED IN
THE INDIAN CONSTITUTION

SOHOM NANDI

AMITY UNIVERSITY, KOLKATA

ABSTRACT

Restitution of Conjugal rights is a remedy that significantly restores one's marital rights to which he or she is entitled either through marriage or marital bond. There has been a lot of debates regarding the constitutional validity of this provision. Along with that, it was argued that the provision violated the Right to Equality of the Indian Constitution. As a result, Section 9 of the Hindu Marriage Act was declared to be in contravention of Article 14 and 21 of the Constitution of India by the Hon'ble Andhra Pradesh Court in a particular case. Subsequently, this major issue was put forth again before the Delhi High Court and Supreme Court of India who categorically stated that the ultimate focus was to create "co-existence" between spouses and hence, it solely focused on "consortium". Nonetheless, what may not have been stressed by the Supreme Court and the Delhi High Court is the fact that marital rape is still legal in India and isn't an offence till date. Simultaneously, it can also be concluded that these regulations aren't of that much value with the evolving times and cause more damage than good.

KEYWORDS

Restitution of Conjugal Rights, Constitution, Equality, Constitutional validity, Fundamental Rights.

INTRODUCTION

Both husband and wife are bound by law to keep their married life together and are also entitled to the enjoyment of rights that they can exercise along with the obligation of duties following their solemnization of marriage. The Law mentions that an aggrieved spouse may obtain a matrimonial relief if either the husband or the wife departs from the other so that he or she can restore his or her status to the other person subject to the fact that there isn't any reasonable action justifying it. This can very well be achieved by filing a petition before the respective courts to re-establish coexistence or cohabitation. This right is called Conjugal Rights.

If either of the spouses have withdrawn from society without adequate or reasonable excuse, the aggrieved personnel may request a refund of marriage privileges guaranteed by law, by an application to the district court, and the Court after being satisfied by the reality of the statements made in relation to such an application, along with the fact that there is no lawful justification why the request should not be awarded, may restore the order. While this right seems to be a valid one from one point of view i.e. it is a remedy or a chance to save the relationship and to protect the family, the same although does not seem to be so from the view point that it forces one of the spouses to stay with the other spouse with whom he/she does not want to reside. Hence, this right has always been a very controversial issue right from the onset with questions regarding its constitutional validity that whether or not this right violates the right to privacy which is guaranteed by the Constitution of India? Does this right violate the right to privacy of a spouse by forcing him/her to reside with the other spouse and thus taking away the right over the self-body? This paper tries to answer questions regarding the constitutional validity of the restitution of conjugal rights in relation to the right to privacy. There are a lot of unanswered ambiguities in this Section with terms that are not clearly defined. Terms such as ‘withdrawn’ and ‘reasonable excuse’ have not been specifically defined with accordance to this Section. Withdrawal might may also be forceful instead of a wilful one but still the burden of proof lies on the individual who withdraws from the society which might not have happened willingly but forcefully. Similarly, the term “reasonable excuse” is also very ambiguous in the sense that what may be a reasonable excuse for one person might not be reasonable for others. Along with that questions like, what does the term “withdrawing from society mean?”, will a wife’s refusal to quit a job amount to withdrawal from the society? have been raised before the court several times. A few more primary issues are there i.e. whether or not the right to privacy extends to the home and marital relationships of a couple and whether the decree of restitution of conjugal rights violate article 19 (1) (c), 19 (1) (e) and 19) 1) (g).

RESEARCH METHODOLOGY

This is basically a descriptive, doctrinal, secondary and qualitative data based research with the objective of finding and understanding the legal provisions of the aforesaid issue. It finds and rigorously analyses those provisions, before coming up with the logical reasoning behind it. The literature preferred in doctrinal research is statutory material, case laws, legal articles, and other primary and secondary legal sources.

Doctrinal research is subjective as it is limited to the researcher's perception and interpretation of the law. It is also not concerned with factors that lie outside the boundaries of the law and does not focus on the practical practices prevailing in society and the judiciary.

REVIEW OF LITERATURE

Section 9 of Hindu Marriage Act, 1955 has always been in controversy regarding the question that whether it is constitutional validity or not. Nonetheless, the same question was finally taken into account in a true sense in 1983 by the Andhra Pradesh High Court. In the case of **T. Sareetha v. T. Venkata Subbaiah**¹, the High Court held that Section 9 of the HMA, 1955 is unconstitutional as it is violative of the right to privacy and human dignity which is guaranteed under **Article 21** of the **Constitution of India**. Justice P.A. Choudhary opined that Section 9 is a cruellest form of violation of the right to privacy as it is literally forcing a spouse to have sexual relations with the other spouse and as a result deprives her of the right to have control her own body. The state is not in a position to coerce a spouse to continue with the voluntary union of her with her spouse in their marital relationship. The state on the other hand by coercion can neither soften the stressed feelings between a couple nor can it clear the misunderstanding which might have occurred between them. The judge even stated that Section 9 is not at all promoting any public purpose, rather it is in contravention of right to equality under **Article 14** of the Indian Constitution as well. Justice Chaudhary held Section 9 to be "savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution, hence void. Justice Chaudhary traced the history and effectiveness of the remedy in providing the judgment and observed that Section 9 promotes no legitimate purpose based on any conception of the general good. It does not sub-serve any social good".

However, the observations of Justice Chaudhary were not liked by the Delhi High Court when it was questioned in **Harvinder Kaur v. Harminder Singh**. Justice Rohtagi observed that Justice Chaudhary in the case of T. Sareetha has stressed and given more importance on sex and he seems to suggest that the decree of restitution of conjugal rights serves only a maiden purpose, that is, to force the already withdrawn wife to enter into sexual intercourse with her husband.

¹ T. Sareetha vs T. Venkata Subbaiah, AIR 1983 AP 356

The matter then eventually came before the Supreme Court in **Saroj Rani v Sudarshan Kumar Chadha**² where the Apex Court overruled T Sareetha judgement and relied on the judgment of Justice Rotagi in Harvinder Kaur. Justice Sabyasachi Mukarji opined that it cannot be viewed in the manner as to what the learned single Judge bench of the Andhra Pradesh High Court has viewed it and as a result they are unable to hold that S.9 contravenes Article 14 and Article 21 of the Constitution. Hence, the judgment was held in favor of Section 9 of the Hindu Marriage Act of 1955, in the legal domain as held by the apex court.

In relation to the contravention of Article 14 of the Constitution, the Court categorically specified that there is complete equality of both the genders and equal safeguard or protection of the laws so far as the aforementioned remedy is concerned, hence, Section 9 could not be held to be in contravention of Article 14 of the Constitution because by the amendment Act of 1964 “either party to a marriage” is permitted to present a petition on the ground specified in Section 13 (I-A).

In relation to the contravention of Article 21 of the Constitution, the Court opined that the only purpose of this relief is ‘cohabitation’ or co-existence and it is not enforcing sexual intercourse between the unwilling husband or wife. The court denied introducing the Constitutional Law aspect into family law since it will prove to be a ruthless destructor of the institution of marriage. The focus of this aforesaid Restitution Decree was only to encourage a united or healthy marriage and to prevent an unwilling woman from being involved in sexual intercourse with the husband. The sole objective was to achieve ‘cohabitation’ and nothing else between spouses, and thereby, ‘consortium’ was solely concentrated.

Nonetheless, it was probably not given importance by the Supreme Court and the Delhi High Court that marital rape is still legal in India and it doesn’t constitute an offence till date. The husband can very well force his wife to engage herself into sexual relationships without any further implications, except for a remedy by a long-drawn-out petition for divorce based on physical cruelty or a petition for domestic violence based on sexual violence. In reality this decree may efficiently put a wife under the pressure of forceful or unwilling sex with her husband and as a result of this process also unruffle her of physical autonomy, dignity, and the basic freedom which she possesses to make her own choices relating to her own life and body.

² Saroj Rani v Sudarshan Kumar Chadha, 1984 AIR 1562

As discussed earlier questions like, “what does withdrawing from society mean?”, “Does a wife’s refusal to leave a job amount to withdrawal from society”, have also been raised before the court several times in a lot of cases. In the case of **Tirath Kaur v. Kripal Singh**³, the wife had withdrawn herself from her husband’s house to pursue her job. The husband frequently visited her and she used to give him a part of her income to him. When his demand for money increased after few days and the wife wasn’t able to fulfil his demands, the husband asked her to quit the job. When the wife refused him to quit her job, the husband moved to the court and filed a petition to bring her back under Section 9 of the HMA, 1955 before the Punjab & Haryana High Court. Justice Grover, after relying on the opinion of Mulla that it is the ultimate duty of the wife to surrender herself obediently to her husband’s authority and to reside under the same roof with his protection, stated that no rule or principle is applied to him which will uphold that the wife might be allowed to withdraw ‘virtually’ from the society of the husband in this manner. Hence, the denial of the wife to leave her job amounted to withdrawal from society. A lot of judgements in chronological order were then based on this line. Nonetheless, in the famous case of **Shanti Devi v. Ramesh Chandra Roukar and Ors.**, the Allahabad High Court had a different view and thus gave a different judgement where it was held that mere refusal of the wife to resign from her job will not amount to withdrawal from the society. Hence, it shouldn’t be a reasonable ground for granting a decree under the restitution of conjugal rights. Subsequently, in the case of **Smt. Vibha Shrivastava v. Dinesh Kumar Shrivastava**⁴, the Madhya Pradesh High Court observed that a wife’s denial to quit her job does not amount to withdrawal from her husband’s society, and, as a result it is not a valid or sufficient ground for the husband to seek relief for the restitution of conjugal rights.

RESTITUTION OF CONJUGAL RIGHTS VS ARTICLE 19 (1)(c), 19 (1)(e) and 19 (1)(g)

Now talking about whether the decree of restitution of conjugal rights violates article 19(1)(c), It has been held In the case of **Huhhram v. Misri Bai**⁵ where the wife left her husband because her father-in-law had a bad attitude towards her and the husband treated her in a cruel manner. Even after all that, the Madhya Pradesh High Court granted a decree of restitution to the husband. It can thus very well be concluded that if she was indeed molested by her father-in-law because of her association that she had with her husband due to the decree, then impliedly the decree of the court would certainly be responsible for this mishap.

³ Tirath Kaur v. Kripal Singh, AIR 1964 Punjab 28.

⁴ Smt. Vibha Shrivastava v. Dinesh Kumar Shrivastava, AIR 1991 MP 346.

⁵ Huhhram v. Misri Bai, AIR 1979 MP 144

Subsequently, in the case of **Atma Ram v. Narbada Devi**⁶, the Rajasthan High Court granted a decree of restitution of conjugal right in favour of the wife even after the husband very well stated that he does not want to reside with her under the same. This clearly is contravening the freedom of association of the husband. Hence, it can be observed that the decree of restitution of conjugal rights indeed violate article 19(1)(c) of the Indian Constitution.

The decree of restitution of conjugal rights also violates article 19 (1)(e) and article 19 (1)(g) i.e. the freedom to reside in any part of India as a spouse is forced to come and reside with another spouse in his/her matrimonial home and also contravenes the freedom of practising any profession in most of the situations. In the case of **Tirath Kaur v. Kripal Singh**⁷, which is already discussed above the wife was residing in a place which is far from her husband in order to practice her job. Nonetheless, due to certain conflicts which arose, the husband asked his wife to quit her job and on denial, he moved to the court and filed a petition for restitution of conjugal rights. The court granted him the decree which resulted in forcing the wife to live with her spouse. This is indeed a clear violation of freedom to settle in any part of India and to practice any profession.

RECENT DEVELOPMENTS

As per the reports which are presented by the High-Level Committee on the status of women in 2015, the restitution of conjugal rights doesn't have a significance in independent India. The Law Commission of India, on the basis of the recommendation of the report, suggested that Section 9 of the HMA, 1955 should be repealed and Section 22 of the SMA, 1954 in its 'Consultation Paper on Reform of Family Law' in 2018. Subsequently, in the case of **K.S. Puttaswamy v. Union of India**⁸ Subsequently, the Apex Court upheld the fundamental right to privacy which grants every individual complete autonomy over his/her body. In Addition to that, in the case of **Joseph Shine v. Union of India**⁹, the apex court observed that the right to privacy is subjective and as a result depends on the exercise of autonomy by individuals. If a person is not allowed to exercise his/her the right to privacy, then the court should take necessary steps to ensure that the individual's right is realised in its truest sense. The Court subsequently observed that an individual's right to privacy must not be violated by regarding familial structures as a private space. Subsequently, after all these verdicts, a

⁶ Atma Ram v. Narbada Devi, AIR 1980 Raj 35

⁷ Tirath Kaur v. Kripal Singh, AIR 1964 Punjab 28

⁸ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁹ Joseph Shine v. Union of India, AIR 2018 SC 1676.

petition was filed in the Apex Court challenging the constitutional validity of Section 9 of the HMA and Section 22 of the SMA. The petitioner challenged that granting a decree for restitution of conjugal right is a 'coercive act' on the part of the state as it compels a spouse to live with another spouse against his/her will. Subsequently, the act is in contravention of one's sexual autonomy, the right to privacy along with the right to live a dignified life as enshrined in Article 21 of the Constitution of India. The petitioner further went on to contend that even though the abovementioned sections provide a right to both husband and wife to move to the court, Nonetheless, these sections are quite discriminatory against women and women are undoubtedly treated as 'chattel' by these laws. This particular petition which was heard by a two-judge bench led by the former Chief Justice of India Ranjan Gogoi has been referred to a larger bench of the Apex court. This petition is pending before a three-judge bench of the Supreme Court of India and let's see what is the outcome of it.

SUGGESTIONS

Whenever a decree for restitution of conjugal rights is passed or granted by the court which compel spouses to live together but in no way it can ensure an effective or healthy relationship. Subsequently, if such a decree is in contravention of any constitutional right, then it becomes extremely crucial to repeal it. With all the doubts that are there within these ambiguous sections pertaining to restitution of conjugal rights, it has become quite important especially in recent times for the Supreme Court to look into this matter and to ensure that this right which is in itself considered as a remedy does not violate someone's fundamental rights and in case if it is in contravention of the fundamental rights, then the same must be held unconstitutional at the earliest. Nonetheless, as already stated above since marital rape is not considered as an offence till now in India, forcing a wife to stay with her husband is equivalent or similar to taking away her choice of having sexual intercourse because the husband can anytime infringe her right over her body without any legal actions.

CONCLUSION

Sec 9 of Hindu Marriage Act 1955 is like two sides of the same coin. It has some positive as well as negative implications. The negative sides being that reconciliation between the husband and wife to save their marriage is the fundamental reason for the restitution of conjugal rights. Nonetheless, when filing for the same, people

often have other ancillary motives. In addition to that, section 13 (1-A) of the Hindu Marriage Act, 1955 specifically lays down that it can be used as a ground for divorce if there is any infringement. This undoubtedly defeats Section 9's own agenda as its purpose is to prevent divorce. If any people fail to comply, the Court may execute the decree.

On the other hand, just because a section has the scope to be misinterpreted, it doesn't mean that it should cease to exist. Its focus is to save one of the primary facets of marriage and resume co-existence between the spouses. There is no specific reason to prevent cohabitation or co-existence if there is nothing harmful for the marital life and the way consent has been acquired. Also, Article 14 is incorrectly alleged to be in infringement: this section has become gender-neutral after the Amending Act 44 of 1964 which was passed, where either of the parties can initiate divorce proceedings under section 13(1-A). On top of that even if, in the restitution proceedings the party is found to be in guilt, they can file for divorce. Restitution may also be a ground for divorce if it is not complied within a year. The reason being is that a sudden break-up in a marriage should not be there between a couple. The one year which is mentioned is needed as a "cooling period" in order to avoid any hurried choice. Even then it offers for divorce if there is no co-existence or cohabitation between the spouses.

On top of that, when conjugal rights are restored, it is not only sexual rights that must be taken into consideration and as a result refusal of sexual intercourse alone does not constitute a denial of cohabitation at all as held in several judgements. It is also not humanly possible for the courts to force sexual intercourse. Hence, the restitution of conjugal rights is an essential component of the individual's personal laws and is supported by values such as faith, tradition, and custom. A very significant characteristic to prioritize the restitution of conjugal rights is that it is a remedy intended to preserve or safeguard marriage. It serves a sole purpose i.e. to help protect and safeguard marriage break-up, so it is a way to save the marriage. This remedy hence cannot be claimed to be completely unconstitutional. In reality, by encouraging restitution and reconciliation between the parties and maintaining an effective marriage, it serves the social purpose.
