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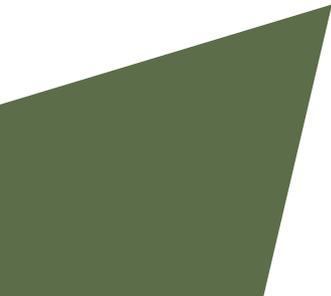
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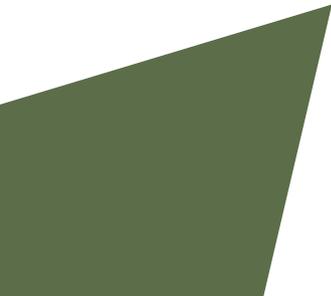
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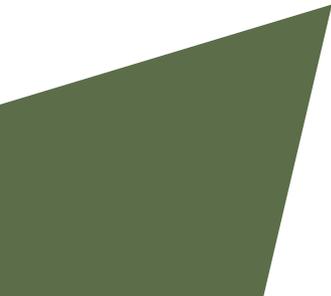
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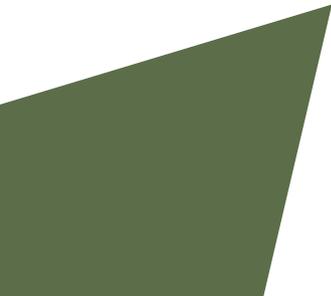
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**‘ANALYSIS OF RESTITUTION OF CONJUGAL RIGHTS AS A
MATRIMONIAL REMEDY’ SECTION 9 OF THE HINDU MARRIAGE
ACT, 1955**

PIYUSH SINGH PHOGAT

INTRODUCTION TO RESTITUTION OF CONJUGAL RIGHTS

Restitution of conjugal rights is matrimonial remedy where either the husband or the wife withdraws from the society of the other without any reasonable excuse. It is the last resort to establish amicable relations between the married couple. The aggrieved party may approach the court under Section 9 of the Hindu Marriage Act, 1955 seeking directions for cohabitation.

P. Ramanatha Aiyar, defines 'conjugal rights' as one of the species of matrimonial causes and is brought when either the husband or wife lives separate from the other without any sufficient reason, in which case the court will compel them to come together again. If either party be weak enough to desire it, contrary to the inclination of the other.¹

In India conjugal rights i.e. right of the husband or the wife to the society of one another is not merely a creature of the statute. Such a right is inherent in the institution of marriage itself. The legislation serves a social purpose as an aid to the prevention of breakup of marriage.²

Section 9 of the Hindu Marriage act, 1955 reads 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 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.*³

The leading idea of section 9 is to preserve marriages, the outstanding fact is that the husband and the wife are living apart and leading their own separate lives. The court seeks to enquire into this separation. An enquiry is made into the existence of any just cause for the respondent to live apart and from the petitioning spouse.

DEFINITION AND SANCTITY OF MARRIAGE

Marriage is the sanctioning by a society of a durable bond between one male and female established to permit sexual intercourse for the implied purpose of the parenthood.⁴ The

¹ P RAMANATHA AIYAR'S, CONCISE LAW DICTIONARY p.253. 5th ed., Lexis Nexis.

² Saroj Rani v. Sudarshan Kumar Chadda, A.I.R. 1984 S.C. 1562.

³ Section 9 Hindu Marriage Act, 1955

⁴ ANDERSON AND PARKER, SOCIETY p.144.

more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring.⁵

According to Vedas marriage is “the union of flesh with flesh and bone with bone” It is the union which vedas regard as indissoluble. The wife is regarded as the half body of her husband (Ardhangini) who shares with him equally the fruits of all his acts whether they be good or bad.”

In *Gopala Krishna v. Mithilesh Kumar*⁶ the Allahabad high court observed, “The institutions of matrimony under the Hindu law is sacrament and not a mere socio legal contract. It is not performed mere emotional gratification and is not mere betrothal. Its context is religious. It is regarded as part of life of the soul. It is a holy spiritual union corresponding to consortium omnium vitoc of Rome a process by which the husband and the wife become one. The bride on the seventh step of saptapadi loses her gotra and acquires the gotra of her bridegroom and a kinship is created which is not merely a friendship for pleasure. A Hindu marriage thus performed is regarded indissoluble.” Hindu marriage is a sacrament and not a contract, it creates an indissoluble union between the parties.⁷

Smritikars held the view that even death cannot break this relation between the husband and wife which is not only sacred and religious, but it is holy union. The intention of the sacrament is to make the husband and wife one, physically and psychically, for secular and spiritual purposes for this life and for after lives.⁸

DIVORCE UNDER HINDU MARRIAGE ACT, 1955

As discussed above marriage a Hindu marriage was not capable of being dissolved. Narada and Parasara mention five exceptions in which a woman can dissolve a Hindu marriage: a) when the husband is missing, b) when he is dead, c) when he has become an ascetic, d) when he is impotent and, e) when he is an out caste.⁹

In modern law, a decree of divorce can be obtained under Section 13 of the act. Which states that a marriage may be dissolved by a decree of divorce. Such as (i) voluntary sexual intercourse with any person other than his or her spouse, (ii) has treated the petitioner with cruelty, (iii) has deserted the petitioner for a continuous period of not less than two years, (iv)

⁵ C.N. SHANKAR RAO, PRINCIPLES OF SOCIOLOGY: INTRODUCTION TO SOCIAL THOUGHT p.327 (6th ed. 2007).

⁶ *Gopala Krishna v. Mithilesh Kumar*, A.I.R. 1989 S.C. 1247.

⁷ PARAS DIWAN, MODERN HINDU LAW p. 62-67 (1990).

⁸ J. DUNCAN M. DERRETT, A CRITIQUE OF MODERN HINDU LAW p. 287 (1970).

⁹ JANARDAN SHASTRI PANDEY, MANUSMRITI p.147 (1998).

has ceased to be a Hindu by conversion to another religion,(v)of unsound mind, or suffering intermittently from mental disorder. Also, Section 13(b) deals with Divorce by mutual consent.

In the case of Naveen Kohli v. Neelu Kohli stated “We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.”¹⁰

Hence, a marriage solemnized under The Hindu Marriage Act cannot be said to be a sacrament which cannot be dissolved.

CONSTITUTIONAL VALIDITY OF SECTION 9: OPINION OF THE JUDICIARY

The constitutional validity of Section 9 of the Hindu Marriage Act has been previously challenged with regards to Article 21 and Article 14 of the Indian Constitution. In March 2019 the question was brought before a three-judge bench of the Hon’ble Supreme Court by means of a Public Interest Litigation which argued that the provision was anti-women as it forces a woman to return to her husband against her wishes and in violation of her fundamental rights. The Hon’ble Apex court has previously dealt with the question of constitutional validity in the following cases:

T. SAREETHA V. T. VENKATA SUBBAIAH¹¹

A civil revision petition was filed before the Andhra Pradesh High Court by the petitioner, a well-known film actress against an order passed by the subordinate court. The court had not allowed her objection against a petition filed by one Venkata Subbaiah, under section 9 of the Hindu Marriage Act for restitution of conjugal rights with her.

The Hon’ble court held that Section 9 of The Hindu Marriage Act violates right to privacy guaranteed and contained in Article 21 of the Constitution of India.

¹⁰ Naveen Kohli v. Neelu Kohli, (2006) 3 SCALE 252.

¹¹ T. Sareetha v. T. Venkata Subbaiah, A.I.R. 1983 AP 356.

The court stated “*Enforcing restitution of conjugal right constitutes the starkest form of Government invasion of personal identity and individual’s zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being. Clearly the victim loses its autonomy of control over intimacies of personal identity.*” The Hon’ble court also opined that the ancient Hindu society and its culture never approved of forcible marital intercourse and such coercion carried out by the state can never preserve the marital bond which is based on love and affection.”

Learned Judge P Choudary opined that the sexual autonomy which enables an individual to choose his or her partner to a sexual act is one of the major characteristics that differentiates humans from animals. A sexual relationship between a man and a woman rested on mutual consent and freewill, under no circumstances can such consent be forced. The Hon’ble court concluded that Restitution of Conjugal Rights was a coercive action of the state which forces sexual intercourse between the husband and wife which is a great constraint and torture imposed on the mind of the unwilling party.

In Russel v. Russel¹² Lord Herschel opined “*I think the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call bardarous*”.

While criticising restitution as a matrimonial remedy the court investigated the British law to determine that British parliament through section 20 of the Matrimonial Proceedings and Property Act, 1970 abolished the right to claim restitution of conjugal rights in the English courts. Whereas, the British Indian courts thoughtlessly imported that rule into our country and blindly enforced it among the Hindus and the Muslims thus the court concluded that such remedy is wholly illegitimate.

It was held that Restitution of Conjugal Rights fails to pass the test of minimum rationality required of any state Law. The court held that the provision was violative of Right to Equality under article 14 on the basis that the remedy was almost exclusively used by the husband and is rarely resorted to by the wife.

The court referred to Gupte’s Hindu law in British India’ the learned author recorded that “although the rights and duties which marriage creates may be enforced by either spouse against the other and not exclusively by the husband against the wife; a suit for restitution

¹² Russel v. Russel, 395 AC (1897).

by the wife is rare". The Hon'ble High court of Andhra Pradesh allowed the revision holding that Section 9 i.e. Restitution of Conjugal Rights was unconstitutional.

HARVINDER KAUR VS HARMINDER SINGH CHOUDHRY¹³

In this landmark case the husband petitioned for restitution of conjugal rights which was opposed by the wife. The Additional District Judge granted a decree of restitution of conjugal rights to the husband. An appeal was filed by the Wife before the Hon'ble Delhi High Court. The judgement of the Delhi High Court came down heavily upon the decision of the Andhra Pradesh High Court. The court opined that the decree for restitution does not force or coerce any party into "forced sex", "coerced sex" and "forcible marital intercourse" as it was opined by the Andhra Pradesh High Court.

This remedy is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation. The court cannot enforce sexual intercourse, but only cohabitation, and restitution of conjugal rights cannot be ordered where the respondent refuses sexual intercourse but continues to cohabit with the petitioner.¹⁴

The court referred to the definition of cohabitation as defined in *Evans v. Evans* “ 'Cohabitation' means living together as husband and wife, cohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering house-wifely duties to the husband and the husband cherishing and supporting his wife as a husband Sexual intercourse usually takes place between parties of moderate age if they are cohabiting, and if there is sexual intercourse it is very, strong evidence- in fact it may be conclusive evidence that they are cohabiting but it does not follow that because they do not have sexual intercourse they are not 'cohabiting'.”¹⁵ The Delhi Court referring to various judicial pronouncements of English courts held that restitution of conjugal rights serves the purpose of saving marriage and does not merely promote sexual intercourse.

Learned Judge explained the same with an illustration “This can be proved by a simple illustration. A husband and a wife are living under the same roof. But the wife does not allow the husband sexual intercourse with her because she thinks that it is a horrid and beastly thing. Will the court pass a restitution decree? The answer is 'No'. Since they are living together as one household, as one unit and not as two, the law cannot go further and compel

¹³ *Harvinder Kaur vs Harminder Singh Choudhry*, A.I.R. 1984 Delhi 66.

¹⁴ Tolstoy, *LAW AND PRACTICE OF DIVORCE* p.99 (6th ed.).

¹⁵ *Evans v. Evans*, 175 I.B. (1948).

them to have sexual intercourse. The court has neither the means nor the capacity to enforce its decree in the marriage bed.” The appeal was not allowed and it was stated that it was upon the legislature to abolish the remedy of Restitution and not upon the court to strike it down. The constitutional validity of the provision was upheld. The appeal was dismissed.

SMT. SAROJ RANI V. SUDARSHAN KUMAR CHADHA¹⁶

The question before the Hon’ble Supreme Court was that, whether Section 9 of the Hindu Marriage Act violates right to human dignity, right to privacy and personal liberty?

The Court after referring to both the judgements of the Andhra Pradesh and Delhi High court pointed out that *“The object of the restitution decree is to bring about cohabitation between the estranged parties so that they can live together in the matrimonial home in amity. The remedy of restitution aims cohabitation and consortium and not merely sexual intercourse.”*

The Supreme Court agreed with the Delhi High Court in its case of Harvinder Kaur vs Harmander Singh Choudhry¹⁷ held that the judgement in T. Sareethas was based on wrong understanding of law. The issue of constitutional validity of section 9 was finally settled by the Apex Court by overruling T. Sareeta relying on the judgement of Delhi High Court in Harvinder Kaur. Justice Sabyasachi Mukherjee observed that “it cannot be viewed in the manner learned single judge bench of Andhra Pradesh High Court has viewed it and we are unable to hold Section 9 to be violative of Article 14 and 21 of the Constitution”.

Hence, Section 9 of HMA i.e. Restitution of Conjugal Rights was held to be constitutionally valid by the Supreme Court.

ARGUMENTS FOR RETENTION OF REMEDY

1. In marriages though sometimes one of the spouses might wander from his or her path and forget the obligation and responsibilities of a married life due to mere wear and tear of human relationships hence withdrawing himself or herself from the society of the other, sometimes for oblique motives. It is hence the duty of the court in such cases to order the spouse to fulfil marital obligations and cohabit, it is done by the courts to bring them back together. Restitution of conjugal rights is a hope of bringing nearer both the spouses and to avoid the conflicts. It is a ray of hope. It is the last resort to establish amicable relations between them. Sometimes, conflicts may arise between spouses and force them to live separately due to that. The

¹⁶ Saroj Rani v. Sudarshan Kumar Chadha A.I.R. 1984 S.C. 1562.

¹⁷Harvinder Kaur vs Harmander Singh Choudhry, A.I.R. 1984 Delhi 66.

decree of restitution of conjugal rights may bring them together and get them united which is the object of the marital life.

2. The court in the case of T. Sareetha has dealt with the question of constitutionality of restitution of conjugal rights only from the point of view of the wife in the marital relationship whereas Section 9 is gender neutral law under which the wife can also claim the restitution of her conjugal rights. The court has wrongly based its reasoning of unconstitutionality solely on the presumption that restitution of conjugal rights forces sexual relations between the husband and the wife. The same view can be supported by Jackson v. Jackson “*To say that restitution decree subjects a person to forced sexual intercourse is to take the grossest view of the marriage institution.*”¹⁸

3. It is to be noted that the restitution of conjugal rights, unlike specific performance, is only wilful in nature. The institution of marriage has been inherent in the Indian Society and all must be done to protect it. Furthermore, if a spouse does not wish to stay with his/her partner then he may make use of remedies such as judicial separation and divorce. Leaving a partner without a reasonable excuse cannot be justified.¹⁹

4. The provision does not enforce cohabitation. The policy of the act is to assist in the maintenance of marriages other than those reduced to a mere shell. Where there is a complete cessation of cohabitation and the parties are living apart, Section 13 can properly be invoked. Where any of the two parties fail to follow the decree of restitution it becomes a valid ground for divorce as under section 13 of The Hindu Marriage Act, 1955. Even if the judgement debtor fails to come back to the society of the decree holder the court doesn't physically enforce this decree, rather it becomes a valid ground for divorce. The court does not enforce a matrimonial relation of cohabitation if the marriage has reduced to a mere shell, to establish whether the marriage can still be saved or it has become a mere shell the period of one year is observed by the courts.

5. Every person has a right to marry and also a right to cohabit with her or her spouse. In circumstances wherein one spouse leaves the other without any justifiable reasons it is violative of the rights of the spouse who has been left alone. In another cases²⁰ it was held that the “right to family life has, however, been placed at the highest pedestal and has attained comprehensive recognition and protection in international law. It is noteworthy that several international conventions are centred on the family as a unit and list such right as a fundamental and basic

¹⁸ Jackson v. Jackson, 19(2) Probate (1924).

¹⁹ Saroj Rani v. Sudharshan Kumar Chadha, A.I.R. 1984 S.C. 165.

²⁰ Captain Krishna vs Union of India.

human right. Every person has a right to family relations in context of a matrimonial setting, and deserting ones spouse is violative of right to family of the person who has been left.”

The United Nations Universal Declaration of Human Rights, 1948, to which the India is also a signatory, in which Article 16 provides that "(1) Men and Women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution; (2) Marriage shall be entered into only with the free and full consent of the intending spouses; (3) The family is the natural and fundamental group unit of society and is entitled the o protection by society".²¹

6. The preamble of the family courts act reads “An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.” The Indian legislature as well as the judiciary have always aimed at saving the institution of marriage unless circumstances become such that cohabitation becomes impossible. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.²²

7. The argument that section 9 is violative of the fundamental right under article 14 is baseless, on the grounds that a suit for restitution by wife is rare, the section gives a right to file for restitution of conjugal rights to both genders and does not classify between the husband and the wife. It is gender neutral law. The guiding of Article 14 principle is that all persons and things similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.²³ The concept of gender discrimination has not been incorporated in the Hindu Marriage Act and all are treated as equals under this section. This section acts as the last shelter for either spouse or the court to seek and save the matrimonial bond.

8. The golden rule of interpretation of statutes provides that the intention of the legislature is to be looked into to gather the purpose of the statute.²⁴ The objective of Section 9 of the Hindu Marriage Act, 1955 is to prevent any one of the husband or the wife to desert or leave the other without a reasonable excuse, which has to be a legitimate reason to not continue cohabitation, and leave the society of another.

²¹ Sumeet Bajwa vs State Of Punjab

²² KUSUM, FAMILY LAW LECTURES FAMILY LAW I p.3 (2nd. ed.).

²³ Satish Chandra v. Union of India, A.I.R. 1953 S.C. 250.

²⁴ Kehar Singh v. State, A.I.R.1988 S.C. 1883.

ARGUMENTS FOR ABOLITION OF REMEDY

1. When the judgement debtor defaults in complying with decree of restitution of conjugal rights the court has the power to enforce the decree under Order 21 Rule 32 of CPC 1908. Under rule 32(1), the court can attach the property of the withdrawing spouse and sell it under rule 32(3). Attachment of property is not practical as most women in India do not have property in their name.
2. The fact that in some cases no steps are taken in restitution proceedings after the petition is filed establishes nothing, the reason for no further steps being taken may be due to the petitioner realising that to continue the proceeding would not bring the respondent back in cohabitation. Nor does the fact that in some cases a reconciliation takes place after a restitution petition is filed establish that such proceedings tend to bring about reconciliation, for reconciliation can and does occur in all types of proceedings and even in divorce proceedings, reconciliation sometimes occurs outside the very doors of the court, or even after decree was granted.²⁵
3. The judgment debtor as well as the petitioner are both consenting adults a court order is hardly an appropriate method of attempting reconciliation.
4. The mere fact that the remedy of restitution of conjugal rights is so rarely used of itself indicates that the remedy is not an effective one.
5. 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.²⁶

ABOLITION OF RESTITUTION OF CONJUGAL RIGHTS IN THE UNITED KINGDOM

The remedy for restitution of conjugal rights did not originate in the United Kingdom, the remedy was first enforced by Ecclesiastical courts and later ordinary courts. The British Law commission presided over by Justice Scarman, recommended the abolition of this 'uncivilized' remedy of restitution of conjugal rights accepting that recommendation of the British Law commission the British parliament through section 20 of the Matrimonial proceedings and property Act, 1970

²⁵ The Law Commission, Law Com. No. 23, United Kingdom (24 July 1969).

²⁶ Bai Jiva v. Narsingh Lalbhai, I.L.R. 1927 Bom. 264.

abolished the right to claim restitution of conjugal rights in the English courts. Section 20 of that Act reads thus:

"No person shall after the commencement of this Act be entitled to petition the High Court or any country Court for restitution of conjugal rights"

CONCLUSION

The leading idea of section 9 is to preserve marriages, the outstanding fact is that the husband and the wife are living apart and leading their own separate lives. The court seeks to enquire into this separation. The enquiry is to be made on the question that, Is there a just cause for the respondent to live apart and from the petitioning spouse.

Law will not permit a man to exercise his right where his intention is solely to hurt another; which in law-language is termed the acting in *aemulationem vicini*. A husband or a wife withdrawing from the society of other without any justified excuse cannot claim that the decree violates their right to liberty, the maxim of *aemulationem vicini* will apply.

It can be concluded that Section 9 of the Hindu Marriage Act cannot be declared unconstitutional as it is not in contravention with the fundamental rights. The words either husband or wife in the section imply that the right to restitution of conjugal rights is available to both husband and the wife. Section 9 is a means of saving the marriage. It can be that the erring spouse comes on the right path and a broken home is rebuilt. Section 9 in a sense is an extension of sub-sections (2) and (3) of section 23 of the Act which encourage reconciliation by the court. The court is enjoined to make every endeavour to bring about a reconciliation between the parties.²⁷

If the rift between husband and wife is no more than the ordinary wear and tear of married life, there should be no great difficulty in parties coming together and living as ordinary husband and wife. But if the differences are deep – seated and there is no resumption of co habitation in spite the decree of restitution the only course open to the legislation is to end the marriage.

²⁷Harvinder Kaur v. Harminder Singh Chaudhary, A.I.R. 1984 Delhi 66.