Need for the Revocation of Section 9 under the Hindu Marriage Act, 1955

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- T. Sareeta v. T. Venkata Subbaiah, AIR 1983 AP 356
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- Sunita v Suresh, 1997 DMC 303
- Dr. Ina Jain v Dr. Deepak Jain
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- Dr. Malathi Ravi v Dr. B.V. Ravi, 2014 7SCC 640
- Joseph Shine v Union of India, 2018 SCC SC 1676

Introduction

" The legal relationship between two people who are married to each other."[1] This is the definition given by the prestigious Oxford Dictionary to one of the most sacred institutions not only in India but also all over the world, Marriage. Marriage is considered to be a safe haven for two people. This holy relationship binds two individuals in a lifelong bond. Therefore, the laws of the country had to imbibe certain legislations in order to maintain stability in the lives of its citizens and society. In India, marriage is a crucial part of the personal laws of all religions. Earlier, there were no requirement for laws relating to marriages i.e., divorce, or custody of children or conjugal rights. However, with the passage of time, due to the lack of harmony and stability between couples, it became imperative to legislate laws dealing with marriage in India. Restitution of conjugal rights is a remedy, which is available to either husband or wife, where either of the two has deserted or ceased to cohabit with his/her spouse without a valid reason or cause. The courts step in such case and once the claim has been proved, the court directs the respective couple to cohabit.

Marriage is a religious institution in our country in which various marital responsibilities and duties are imposed on both husband and wife. Both of them are legally bound to cohabit together. It is expected of each spouse to provide comfort and love to one another not only in times of joy but also in sorrow. Under the law, there are certain legal rights available to the husband and wife. These rights are the essence of a marital union and are known as conjugal rights. It basically means "The rights, especially to sexual relations, regarded as exercisable in law by each partner in a marriage."[2] Thus, if either of the partners leaves without providing any reasonable excuse, the aggrieved person can approach the court. Indian personal laws have provided the remedy of restitution of

[1] 'Marriage Noun - Definition, Pictures, Pronunciation And Usage Notes | Oxford Advanced Learner's Dictionary At Oxfordlearnersdictionaries.Com' (*Oxfordlearnersdictionaries.com*, 2021) <https://www.oxfordlearnersdictionaries.com/definition/english/marriage> accessed 1 November 2021.

[2] 'CONJUGAL RIGHTS | Meaning & Definition For UK English | Lexico.Com' (*Lexico Dictionaries | English*, 2021) <https://www.lexico.com/definition/conjugal_rights> accessed 1 November 2021.

conjugal rights is available to Hindus under Section 9 of the Hindu Marriage Act[3]; to Muslims under the general law; to Christians under Section 32[4]; Divorce Act; to Parsis under Section 36 of the Parsi Marriage and Divorce Act[5]; and in the cases of inter-caste marriages under Section 22 of the Special Marriages Act[6].

1.History

The conjugal right or restitution of conjugal rights has its roots in the Jewish laws and is said to have originated from it. Under English law, restitution of conjugal rights was one of the laws relating to marriage. Since in feudal England, wives were treated as chattels and were regarded as a man's property, for them marriage was nothing more than a property deal. Moreover, this English law was imported to many parts of the globe through colonization. Similarly, the law of restitution of conjugal rights made its way to the British colonies including India. It is not a part of Indian personal laws but is a colonial concept. The remedy for such a right cannot be tracked down in any of the ancient scriptures like Hindu's Dharmashastra or the Muslim's Islamic law[7]. At the time of the drafting of the Hindu Marriage Act, 1955, the provision of restitution of conjugal rights was described as uncouth, barbarous, and vulgar by Khardekar, a Member of Indian Parliament[8]. However, after Independence, the Hindu Marriage Act, 1955 was enacted which specified relief under section 9 of the act. It was from this point in time that the right was legislated. The notion of restitution of conjugal rights was first articulated in India in the case of *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1867) by the Privy Council[9]. The 71st Law Commission Report emphasized the significance of this idea. The sole remedy, according to this study, is divorce and separation; nonetheless, marriage is a sacramental bond, and efforts should be made to reconcile rather than dissolve the bond completely.

[3] The Hindu Marriage Act 1955, s 9.
[4] The Indian Christian Marriage Act 1872, s 32.
[5] Parsi Marriage and Divorce Act, 1936, s 36.
[6] The Special Marriage Act 1954, s 22.
[7] Paras Diwan, *Paras Diwan Book Family Law* (2019 edn, Allahabad Law Agency).
[8] Raj Kumari Agarwal, 'Restitution of Conjugal Rights Under Hindu Law: A Plea For The Abolition of the Remedy' [1970]
[9] [1867] 11 M.I. A. 551

2.Comparative Analysis of UK

Indian laws borrowed the concept of restitution of conjugal rights from English laws. Herein a comparison between English law and Hindu law has been specified. Firstly, though Hindu marriages were patriarchal in nature, they never went to the extent of attaching a wife's chattel to a man. On the other hand, within the ambit of English common law, once the marriage has been solemnized, the wife's chattels and assets become that of a husband.[10] Secondly, under English law, the actions for the restitution of the conjugal rights were initially brought in the ecclesiastical courts that were known as Court Christian or Court Spiritual, and later the court for Divorce and Matrimonial Causes issued the decree for the same. While, under Hindu law, a petition can be filed in the district court which can be further transferred by the application to the High Court and Supreme Court. Thirdly, the legislation was so harsh during a period, in England, the defaulter's assets may be attached, and he may be excommunicated, while, in India, a defaulter could be imprisoned.[11] Fourthly, in 1969, a law commission report suggested that the provision of restitution of conjugal rights be abolished since it was considered outdated and was rarely used. The Matrimonial Proceedings and Property Act of 1970 repealed the action in the year 1970.[12] Whereas, India still has it legalized and continues the codify law till date. Most of the colonies and countries like UK, Australia, Canada, South Africa have repealed the law concerning restitution of conjugal rights, however, India is the only country where this concept still exists.

3.Infringement of Rights

Section 9 of the Hindu Marriage Act, 1955[13] violates a number of fundamental rights, i.e., the right to privacy and human dignity guaranteed under Article 21 of the Constitution of India as well as freedom of association under Article 19(1)(c),

[10] Saumya Uma, 'Wedlock Or Wed-Lockup? A Case For Abolishing Restitution Of Conjugal Rights In India' [2021] 35 International Journal of Law, Policy and the Family.
[11] Raj Kumari Agarwal, 'Restitution of Conjugal Rights Under Hindu Law: A Plea For The Abolition of the Remedy' [1970]
[12] M Gangadevi, 'Restitution of Conjugal Rights: Constitutional Perspective' [2003]
[13] Ibid.

freedom to reside or settle in any part of India under Article 19(1)(e) and freedom to practice any profession under Article 19(1)(g).

One of the major cases was taken up in Andhra Pradesh High Court in 1983, which was the case of *T. Sareeta v. T. Venkata Subbaiah*[14], where it was held by Justice P.A. Choudhary that Section 9 of the HMA, 1955[15] was found unconstitutional for infringing on the right to privacy and human dignity guaranteed by Article 21 of the Indian Constitution. Sexual cohabitation is an unavoidable component of a decree for the restitution of conjugal rights. A spouse's right to regulate her own body is violated when she is forced to have sexual intercourse with her spouse. A spouse's consensual union with her husband in their relationship cannot be coerced by the state. Instead of resolving the problem, government intervention may exacerbate it. The judge was also of the view that Section 9 does not serve any public purpose but rather violates Article 14 of the Indian Constitution which is right to equality. However, in the case of *Harvinder Kaur v. Harmander Singh*[16], the Delhi High Court reversed the decision, reasoning that enforcing cohabitation between a husband and wife, does not imply mandating sexual intercourse between the two, and that sexual intercourse is not an essential condition for cohabitation. The objective of the restitution decree is to reunite the two parties so that they can live together in harmony. Eventually, in the case of *Saroj Rani v Sudarshan Kumar Chadha*[17], Supreme Court upheld the Delhi High Court judgment by stating that section 9 is constitutionally valid, as its purpose is to strengthen matrimonial ties and advocate togetherness.

What the courts did not take into consideration is the fact that despite the courts not mandating sexual intercourse between the couple; marital rape is not a crime in India. Thus, by coercing a wife to stay with her husband, she loses her freedom to choose whether or not to have sexual relations with him, since the husband can violate her right to her body at any time without facing legal consequences. Along with this, in the recent

[14] [1983] AIR 356 AP
[15] Ibid.
[16] [1984] AIR 66 Delhi
[17] [1984] AIR 1562

judgment of *K.S. Puttuswamy v Union of India*[18], the Supreme Court ruled that individuals have a right to privacy, which grants them autonomy over their bodies. As a result, the Court has adopted Justice P.A. Choudhary's individualistic understanding of privacy *in T.Sareetha v T.Venkata Subbaiah*[19]. Hence, section 9 of Hindu Marriage Act infringes the fundamental right of privacy.

If the court issues a decree of restitution of conjugal rights, it compels a spouse to reside with his/her spouse against their free will, which violates Article 19 of the Indian Constitution, which guarantees freedom of association. The cases of Suk*ram v Misri Bai*[20] and *Atma Ram v Narbada Devi*[21] portray the same opinion. In the former case, because the wife's father-in-law had an evil eye on her due to which her husband treated her cruelly leading to she leaving her marriage. Yet the Madhya Pradesh High Court ruled in the favor of the husband. Not considering the fact that if she would be abused her father-in-law or her husband, then the court's ruling would be responsible for the same. In the latter case, even though the spouse explicitly stated that he does not wish to live with his wife, the Rajasthan High Court issued a restitution judgment in her favor thus, violating the freedom of association of the husband.

Our fundamental rights provide us with complete autonomy to choose our profession as well as the freedom to reside in any part of the country without any restrictions. However, this freedom is violated by section 9 of the HMA, 1955. As in the case of *Tirath Kaur v. Kripal Singh*[22] wherein the court held that it was justified even if the wife had to quit her employment in order to stay with her husband since it was her duty to submit herself to his authority and remain under his roof and protection. This is an obvious infringement on one's right to settle in any part of the country and to practice any profession.

[18] [2017] AIR 4161 SC
[19] Ibid.
[20] [1979] AIR 144 MP
[21] [1980] AIR 35 Raj
[22] [1964] AIR 28 Punjab

4.Recent Case Laws

The most recent case law in the subject is *Sunita v Suresh*[23] dated 14th October 2021 wherein the wife brought a petition for section 9 into action. Since the wife failed to prove the marriage with the husband, the petition was dismissed by both the family court and the High Court.

In another instance, in the case of *Dr. Ina Jain v Dr. Deepak Jain*[24] dated 10th August 2021, the latter submitted a plea for restitution of conjugal rights, but it was dismissed since the former had filed a divorce petition.

Vijay Kumar Gupta v Kiran Bala[25] is another recent case decided in November 2019. In this case, the wife had filed a petition under section 9 of HMA[26], alleging that she and the infant child had been abandoned in the matrimonial house where she was subjected to cruelty by her mother-in-law and brother-in-law while the husband moved to Mumbai for employment. Following the filing of a petition by the wife, the husband sought a decree of divorce on twin grounds of cruelty and desertion. However, the husband failed to establish the allegation of cruelty and that it is not the wife but the husband who deserted his wife. Therefore, the court ruled in favor of the wife by granting a decree of restitution of conjugal rights against the husband. While the appeal of divorce filed by the husband was dismissed.

In *Dr. Malathi Ravi v Dr. B.V. Ravi* of 2014[27], the wife filed a petition in the family court, appealing for a grant of a decree of restitution of conjugal rights. Upon examining the evidence, the family court gave the verdict in favor of the wife. However, the malicious intention of the wife was noted by the High Court, as upon returning to her matrimonial home she had filed a case of dowry against her husband, mother-in-law, and sister-in-law, leading to the husband being arrested. The high court set aside the decree of restitution for conjugal rights and passed the verdict of dissolution of the marriage between the parties. The Supreme Court upheld the decree for divorce.

[23] [1997] DMC 303
[24] *Dr. Ina Jain v Dr. Deepak Jain*
[25] [2017] MCC 828
[26] Ibid.
[27] [2014] SCC 640

5. Recent Development and Suggestions for Improvement

The concept of restitution of conjugal rights has no relevance in independent India. A high-level committee presented a report in 2015 on the status of women in India. Based on the recommendations of the report, the Law Commission of India in 2018 [28] recommended the elimination of Section 9 of the HMA, 1955.

As held in the 2019 well-known case of, *K.S. Puttuswamy v Union of India*[29], by the apex court, the right to privacy is a fundamental right under article 21 of the Indian Constitution. The court also recognized that under the right, individuals have absolute autonomy over their bodies. Furthermore, the Supreme Court of India ruled in *Joseph Shine v Union of India*[30] in 2019 ruled out that marriage does not take away a woman's sexual freedom or choice, thus emphasizing on a married woman's right to privacy and bodily autonomy.

Following the verdicts, a petition by two law students of Gujarat National Law University was filed in the Supreme Court contending Section 9 of the HMA and, Section 22 of the Special Marriage Act. It was argued by the petitioners that the provisions of HMA infringed on a spouse's private rights, individual autonomy, and dignity under Article 21 of the constitution as the State coerces a spouse to live with another against his/her will. They further asserted that, despite appearing to be facially neutral, by allowing both the husband and wife to move court, it is highly discriminative towards women and imposes a "disproportionate burden on women". Since, it is based on feudal English law, which saw a woman as her husband's chattel, the plea was forwarded to a larger bench after being heard by a two-judge panel led by former Chief Justice of India Ranjan Gogoi. A

[28] (*Lawcommissionofindia.nic.in*, 2021) <https://lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> accessed 1 November 2021.

[29] Ibid.

[30] [2018] SCC 1676

three-judge bench consisting of Justices R.F. Nariman, K.M. Joseph, and B.R. Gavai, deemed the plea important and directed the Centre to file its response within 10 days.[31]

Personally, section 9 of the HMA, is constitutionally invalid because it contends Article 21 which is a fundamental right of an Indian as per the ruling in *K.S. Puttuswamy v Union of India*[32]. As previously stated, in the landmark case of *T. Sareeta v. T. Venkata Subbaiah* of 1983[33], wherein it was ruled unconstitutional for violating the right to privacy by compelling a wife to reside with her husband as opposed to her will. The learned judge of the given case, Justice P.A. Choudhary, also held the provisions to be in violation of Article 14, the Indian Constitution's right to equality. Regardless of the fact, that it permits both the partners to move court. It is impossible to disregard the intrinsic differences between a man and a woman. Women in India and other parts of country continue to have a lower social and financial status in society than men. In male-dominated societies, both sexes are not equal, and the wife is mostly socially and economically dependent on the husband. Due to this reliance on the husband, in the majority of instances, the wife is frequently placed in an unfavorable situation. As a result, men are usually the ones who are benefitted from these laws and remedies.

Therefore, it is a suggestion that rather than applying provisions of a rigid and barbaric Act like HMA, the notion of reconciliation can be introduced. In place of court, a committee shall be constituted which must be appointed and supervised by the court. The committee must include an expert in the field of counselling and psychology. If the committee fails to counsel even with expert assistance, it must be considered the failure of the marriage and treated as a reason for divorce.

[31] 'SC Terms 'Important' Pleas Seeking Striking Down Of Provisions On Conjugal Rights' (*The Hindu*, 2021) <https://www.thehindu.com/news/national/sc-terms-important-pleas-seeking-striking-down-of-provisions-on-conjugal-rights/article35210962.ece> accessed 1 November 2021.
[32] Ibid.
[33] Ibid.

Conclusion

Conjugal Rights Restitution is a fiercely debated and a contentious topic. It has received mixed opinions by people from all walks of life. For some, preserving the marriage is crucial for others; it leads to an ineffective relationship, whereas some argue that it is incompatible with the concept of natural law theory, as it has no mention in our ancient scriptures. The decree violates constitutional rights and is unconstitutional in nature, making it extremely crucial to be repealed. Though, as it was seen in the case of *Vijay Kumar Gupta v Kiran Bala*[34], that the law proved valuable in assisting the woman in reinstating her marital life. Although, it cannot be overlooked that in cases such as *Dr. Malathi Ravi v Dr. B.V. Ravi*[35], a woman or a man might utilize the laws to further their personal agenda, which is not acceptable morally. All the ambiguities, i.e., right to equality, marital rape, forcible habitation, coercion by the state, that lie within the section pertaining to restitution of conjugal rights, must be thoroughly reviewed. It is critical that the Supreme Court investigates the situation and guarantee that this right, which is deemed a remedy, does not violate anyone's fundamental rights, and that if it does, it be declared illegal as soon as humanly feasible. As a result, restitution of conjugal rights is a matrimonial remedy that will compel a person to save their marriage but does not ensure its efficiency. In my judgment, it shall be revoked at the earliest, because it has resulted in instability rather than the intended goal of giving stability in marriage and society.

[34] Ibid.
[35] Ibid.