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RESTITUTION OF CONJUGAL RIGHTS UNDER HINDU LAW : A DEAD LETTER

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ABSTRACT

Restitution is a remedy to protect the institution of marriage provided in general law and specifically under Section 9 of Hindu Marriage Act,1955[1]. The remedy is based on forcing the person who has withdrawn from the matrimonial obligation to perform his obligation by intervention of the court. This is undue interference in the right to privacy to compel a person to perform marital obligations through the agency of state. With the passage of time it is realised that remedy of RCR turned out to be a total failure when it comes to the execution of the decree. One cannot be compelled to perform conjugal duties when body and mind are not willing to do so. This research paper try to analyze the constitutional validity of RCR on the platform of Fundamental Rights provided under the Constitution of India. Supreme Court is also expected in the pending petition to come out with positive development to struck down this redundant and outdated law, which is not serving any valid purpose in society.

Keywords- Restitution of Conjugal Rights (RCR), Hindu Marriage Act (HMA), Civil Procedure Code (CPC)

I. INTRODUCTION

Marriage is an essential part of society where man spends his whole life. Hindus conceived of marriage as a sacramental union, holy union. This implies several things first the marriage between man and woman is of religious or holy character and not a contractual union. Secondly a sacramental union implies that it is a permanent union. Marriage is a tie which once tied cannot be untied. This implies that marriage cannot be dissolved. Thirdly the sacramental union means that it is an eternal union, it is valid not merely in this life but in lives to come.[2]Matrimony binds two people who are consequently placed on equal footing in

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[1] Section 9 of Hindu Marriage Act "Restitution of conjugal right.—When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being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. [Explanation.—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.]

[2]Diwan, paras., *Modern Hindu Law,*64 (Allahabad law agency,21st ed. 2012)

terms of rights and liabilities arising out of their marital ties. Manu's idea about society being "neither by sale nor by desertion is the wife released from the husband"[3] has become controversial with the progress in the society. Evidently, in India a wife has been underplayed as a dispensable counterpart furthering unequal treatment of women in our society. Hindu Marriage Act,1955 provides many remedies to protect the sacramental aspect of marriage. Restitution of Conjugal Rights was treated as a positive concept but has been misused thereby adversely affecting the sanctity of a wife. The inappropriate usage of this matrimonial remedy has been attacked many times on the footing of being violative of right to life, liberty, privacy and equality. Thus one can render it unconstitutional as it attacks the very basis of the Constitution of India. The flaws need to be rectified to ensure Restitution of conjugal rights is either embraced as a socially viable remedy or to be removed from statutory books. "When spouses who have previously entered into marital ties start living separately i.e. one spouse leaves the society (matrimonial home) of the other then in order to have some remedial measures for the disadvantaged party, which acts as a kind of restoration there comes the concept which in a way tries to fulfill one of the most important objectives of these personal laws i.e. to prevent the marriage ties from being getting broken and fulfilling one of the most fundamental purposes of marriage i.e. spouses must live together after the marriage and that one spouse is entitled to the society and comfort of the other spouse. This concept is known as "restitution" of these all important conjugal rights."[4]

Every piece of legislation must be in accordance with the basic structure of the Constitution of India. Recently, numerous issues have been raised in the courts of law, particularly the Supreme Court (guardian of fundamental rights) questioning whether the laws related to restitution of conjugal rights are against the principles of natural justice and part III of the Constitution of India or not? This debatable question is being discussed at all platforms amongst members of the legal fraternity. For the survival of any law in the legal system of India it should confirm with the basic structure of the Constitution and Fundamental Rights (i.e. Part III is the basic structure of the Constitution).

"The principle of restitution of conjugal rights, was never documented under the Dharmashastra nor did the Muslim law made any provisions for it."[5] Nevertheless, it entered India during the much detested British Invasion where it was introduced with the name of

[3] The Laws of Manu,c.1500 BCE,Indian History Sourcebook (ChapterIX Rule 46) *available at* http://hinduism.about.com / library/ weekly / extra / bl-lawsofmanu8.htm(last visited Aug.10,2013)
[4]Meurar, Dave,"Restitution of conjugal rights:A Debate over Its constitutionality", *available at* http:// thelawbrigade.com(last visited on 12th Jun 2022)
[5]Diwan,Paras, *Law of Marriage and Divorce,* 328(Universal Law Publishing Co,Delhi,5th ed. 2008)

social reforms (as per the British Raj).[6] Restitution of conjugal rights has its roots in the period of feudal England, where marriage was merely considered as a property deal and a wife was rendered as a meager part of man's possession like other chattels, but this concept was never welcomed by the English Society. This demonstrates that the concept of restitution of conjugal rights is very barbarous, moreover it has been blatantly misused resulting in the ultimate abolishment of this remedy in England by the Law Reforms (Miscellaneous Provisions) Act, 1947.[7] Thus, it was brought by the Britishers as a social reform and for the first time this concept was introduced in India in the case of Moonshee *Buzloor Rahim* v. *Shamsunnisa Begum*[8], where such actions were regarded as considerations for specific performance.[9]

The restitution of conjugal rights means the re-establishment of marital relationship between husband and wife because the prime objective of marriage is that parties will enjoy the society and comfort of each other. The idea of providing restitution of conjugal rights by the Court is to preserve the marriage union as far as possible by enabling the courts to intervene between the parties. This research paper deals specifically with the concept of Restitution of conjugal rights under section 9 of Hindu Marriage Act,1955.

II. CONSTITUTIONAL CHALLENGE TO PERSONAL LAWS

"Statutory as well as customary laws which were in existence prior to coming into force of the constitution have to conform to the Constitutional mandate."[10] Judiciary is confronted with the question of whether the personal laws which were in existence prior to the enactment of constitution came within the purview of Article 13 which stipulates that all laws and custom must adhere to the constitutional mandate.[11] The question whether the stipulation of equality can be applied to the private domain of family life has been another concern that was addressed by the judiciary.

The first Constitutional challenge to the provision of Hindu Marriage Act,1955 came from the Hindu male challenging the provision of monogamy before the Bombay High Court in the *State of Bombay* v.*NarasuAppa Mali*.[12]A petition was filed in the Bombay High Court challenging the monogamy imposed by the Bombay Hindu Marriage Act, 1946. A Hindu

[6] *Ibid*
[7] .Gupte, S.P.,*Hindu Law in British India*, 186 (Premier Publishers, Delhi,2nd ed.1947)
[8] *Moonshee Buzloor Rahim* v. *Shamsunnisa Begum*(1877) ILR 1 Bom 164
[9] *Ibid*
[10] Agnes,Flavia, *Family Laws and Constitutional claims*, (Oxford University Press ,New Delhi, vol 1, 2011)
[11] *Ibid*
[12] *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84

husband pleaded that the law relating to monogamy violates his personal freedom and hinders the practice of religion. He also argued that this law is discriminatory against the Hindu man since Muslim men are permitted to practice polygamy. But the High court held that personal laws are not "laws in force" as per the stipulation of Article 13 of the constitution and hence they are not void even when they came into conflict with the provision of equality under the Constitution because Fundamental Rights cannot be applied to the personal laws.

In *Srinivasa Aiyer* v.*Saraswati Ammal*[13] a similar question was raised. It was argued that prohibiting polygamy denied Hindu men equality before law and equal protection of laws and further that it is discriminated against Hindu men on the grounds of religion as it restricted the right to freely profess or practice and propagate religion. The Madras High Court did not address the core issue whether the term laws in force include personal laws. Instead it was held that even assuming that term laws in force under Article 13 includes personal laws, the Act does not offend Article 15 which stipulates non discrimination on the basis of sex.

In *C. Masilamani Mudaliar* v. *Idol of Sri Swaminatha Swami Thirukoil*,[14] the Supreme court while not referring specifically to the principle laid down in *Narasu Appa Mali*[15] has impliedly overruled the same and held that personal laws come within the purview of Article 13 and hence are subject to the application of Fundamental Rights. This case concerned the rights of a Hindu woman to executive will in respect of the property acquired or possessed by her under Section 14 of Hindu Succession Act, 1956.

Now the Judiciary has started applying or included personal laws within the word "laws in force" under Article 13 of Constitution therefore in T. Sareetha v. Venkatasubbaiah,[16] Justice Chaudhary of Andhra Pradesh High Court struck down the provision of Section 9 of Hindu Marriage Act regarding restitution of conjugal rights as unconstitutional, as it violates the individuals right to privacy. Therefore the process of application of fundamental rights to personal laws were given due recognition by this revolutionary judgment.

Recently in *Ojaswa Pathak* v *Union of India*,[17] students Of Gujarat National Law University, Gandhinagar have filed a public interest litigation challenging various restitution of conjugal rights provision under codified family laws. They specifically challenged the constitutional validity of Section 9 of Hindu Marriage Act 1955 and Section 22 of Special Marriage Act

[13] AIR 1952 Mad 193
[14] *C. Masilamani Mudaliar* v. *Idol of Sri Swaminatha Swami Thirukoil*(1996) 8 SCC 525
[15] *Supra* note 12
[16] *T. Sareetha* v. *Venkatasubbaiah* AIR 1983 AP 356
[17] *Ojaswa Pathak* v. *Union of India*https://www.scobserver.in/reports/union-india-restitution-conjugal-rights-writ-petition-ojaswa-pathak-summary/

1954 and Order 21 rule 32 and 33 of the Code of Civil Procedure 1908.[18] The students argued the legislative validity of conjugal rights which are inherently violative of right to life and equality. The petitioners also argue that the provisions are in violation of Article 21 this is because restitution of conjugal rights violate the respondent spouse's right to privacy and individual autonomy.[19] They have argued that though the provisions are gender-neutral, it places undue burden on women in real sense. They noted an unequal power structure in Indian families and how this makes it more difficult for women to return to their husband's home. It is noted that the origin of laws on restitution of conjugal rights is feudal English law where women were considered chattel or property.[20] They argue that this makes the provisions violative of Article 14 and 15(1) of our Constitution. They have further argued that Section 9 of Hindu Marriage Act states that if a spouse withdraws from the society of the other spouse without reasonable excuse the District Court may decree a restitution of marital rights of the appellant spouse. Section 22 of Special Marriage Act, 1954[21] also provides the same but is applicable to persons marrying under Special Marriage Act, 1954. Order 21 rule 32 of CPC[22] provides for enforcement of a decree of restitution of conjugal rights by District court by attachment of property of the judgment debtor.

The petitioners referred to *Puttaswamy* judgment[23] on privacy to highlight that right to privacy includes the right to bodily integrity and mental sanctity. They argued restitution of conjugal rights violates this right.[24] The petition refers to the finding of a committee formed by the Ministry of women and child development on the status of women and children.[25] The committee had noted that the main focus of the framework around conjugal rights was to

[18] *Ibid*
[19] *Ibid*
[20] *Ibid*
[21] Section 22 in The Special Marriage Act, 195**4,** Restitution of conjugal rights.—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. [Explanation.—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.]
[22] Rule 32 Order 21 of Code of Civil Procedure 1908 "Decree for specific performance for restitution of conjugal rights or for an injunction",(1)Where the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of decree for restitution of conjugal rights by attachment of his property or in the case of decree for specific performance of contract or for an injunction by his detention in the Civil prison or by attachment of his property or by both
[23] *Justice K.S.Puttaswamy*v. *Union of India* AIR 2017 SC 4161
[24] *Supra* note 17
[25] *Ibid*

preserve the integrity of family. However, it has since been misused to deny women's claim for maintenance or cruelty. The committee suggested the deletion of provisions related to restitution of conjugal rights, as it no longer serves the best interests of the family.[26]

III. EMERGENCE OF REMEDY OF RCR

The remedy of restitution of conjugal rights emerged in an extremely anti-women context in medieval Europe where the Roman Catholic Church had the power to physically restore to the husband, his wife who had escaped from their custody. Later, it was incorporated into the English law. Though neither the Hindu nor Muslim law recognised this concept, it was used by English lawyers who were practicing in the newly setup courts both in Presidency and Moffusil towns. Two important cases within the newly set up judicial system where this remedy was contested and awarded are *Moonshee Buzloor Ruheem* v. *Sumsoonnisa Begum*[27] and *Dadaji Bhikaji* v.*Rukhmabai.*[28] In the first case, the Privy Council, in 1876 applied the principle of restitution of conjugal rights to Mohammedan law and held that on authority as well as principle there is no doubt that a Muslim husband may institute a suit in the Civil Court of India for a declaration of his right to the possession of his wife and for sentence that she return to cohabitation.

In the second case, a single judge, Pinhey J., who had initially heard the case in 1885 ,the Judge found that it would be barbarous, cruel and revolting to compel a young lady to go to a man whom she dislikes, in order that he may cohabit with her against her will. He had refused to grant the husband the remedy based on the following two grounds: firstly that it can only be applied to situations where a couple has cohabited. Judge stated that "it is misnomer to call this case a suit for restitution of conjugal rights because the couple had never cohabited after marriage. It would be a suit for institution and not restitution of conjugal rights; Secondly, the remedy was transplanted from England and it has no foundation in Hindu law."[29] This historical judgment succeeded in drawing attention to the vexed question of the relationship between morality and law and in embedding the case within a broader legal humanitarian framework. The verdict made the case inseparable from women's cause. But within six months, on appeal, a division bench of the Bombay High Court comprising two senior most judges, Sargent C.J. and Sir Bayley J.,set it aside and ordered a fresh trial. In the fresh trial, Judge Charles Farran ruled in favour of DadaJi and

[26] *Ibid*
[27] *Supra* note 8
[28] *Dadaji Bhikaji* v. *Rukhmabai*(1886) 10 Bom 301
[29] *Dadaji Bhikaji* v. *Rukhmabai*(1885) ILR 9 Bom 529

even ordered Rukhmabai to pay for his legal costs since she had opposed his suit. Though the norm for refusal to comply with such decrees of the court is attachment of property, Judge Farran sought to enforce his decree by warning Rukhmabai with imprisonment of nearly six months. "In the moment of pride and glory for Indian women for centuries to come, Rukmabai declared that she would willingly undergo imprisonment rather than let a man she detested enforce conjugality. Fortunately for all concerned the matter was finally settled by payment of compensation by Rukhmabai to her husband. What was crucial for this debate is the fact that Rukmabai owned property and had a separate income from which she was in a position to pay her husband a compensation for her refusal to live with him. Only through payment of compensation could the dispute finally be settled."[30] This case directly led to a change in law requiring a minimum age of marriage for women. In England, and later in India it led to dropping of criminal consequences for refusing to comply with the court's decree on restitution. Since Rukhmabai's case the law on restitution of conjugal rights has been upheld by the Supreme Court. "This remedy is often viewed as anachronistic and has been at the center of several controversies regarding its constitutionality It has also surfaced in reference to husband authority and control over their wives who had refused to give up their jobs." This case is of historical significance.

Though initially only husbands availed of this remedy, later it was also used by deserted wives to restore their marriages. It has been incorporated into almost all matrimonial statutes. it has also been introduced into Muslim law through judge made laws.

IV. CONCEPT OF RCR

Restitution of Conjugal Rights is covered under Section 9 of Hindu Marriage Act,1955. "For Restitution following three conditions must be satisfied, the respondent has withdrawn from the society of the petitioner without any reasonable excuse; the court is satisfied about the truth of the statement made in such a petition; and there is no legal ground why the relief should not be granted. The second condition relates to proof. The third condition relates to bars as laid down in section 23, Hindu Marriage Act,1955. The first condition contains two elements, the withdrawal of the respondent, and the withdrawal of the respondent without any reasonable excuse."[31] These two elements of the first condition are matters of interpretation before the court of law.

[30] *Supra* note 10 at p.15
[31] *Supra* note 2 at p.185

The most important reason for seeking the remedy of restitution of conjugal rights is to prove withdrawal of one spouse from the society of the other. There are certain rights and obligations which arise as a consequence of the contract of marriage. The phrase 'withdrawal from society' has been taken to mean the refusal of one spouse to continue with matrimonial obligations. It is withdrawal not from the place but from a particular state of affairs i.e. conjugal obligations. There must be an act of separation coupled with the intention of separation. When the fact of separation co-exists with intention to separate then that constitutes withdrawal from one's society or desertion. Further 'withdrawal from society' may take place even when the parties are living under the same roof. When the husband compels the wife to leave the matrimonial home, it cannot be construed that the wife has withdrawn from the society of her husband.

"The defence available to the remedy of restitution is one reasonable excuse or reasonable cause. If the cause or excuse for withdrawal is reasonable, courts will not award a decree of restitution of conjugal rights to the petitioner. A 'reasonable excuse' may often seem to be under the ambit of subjectivity, however there has been a consistent opinion held by the courts, that the following constitutes a reasonable cause:

i. An act on the part of petitioner which can constitute a ground for relief to respondent for obtaining any other matrimonial relief
ii. A matrimonial misconduct that is grave but cannot be considered a ground for matrimonial relief
iii. An act, an omission, or conduct, which makes it impossible for the respondent to live with the petitioner.

An act which can be construed as a ground for divorce, judicial separation or nullity of marriage is complete defence to the respondent in a petition for restitution of conjugal rights. A reasonable cause or excuse has been considered to include behaviour such as husband's insistence that the wife live with his parents, wife's apprehension that it is unsafe to continue living with her husband, husband having another wife or bringing another woman into the house, false accusation of adultery immorality against the wife etc. In case the husband himself is responsible for the wife's desertion or in other words, if he is guilty of constructive desertion, he is not entitled to decree of restitution of conjugal rights. On the contrary, a wife who has been deserted is entitled to such a decree."[32]

[32]Flavia Agnes, *Marriage, Divorce, and Matrimonial Litigation*, Vol II (New Delhi:Oxford University Press,2011) p.23

Though both husband and wife are able to use this remedy, practically far more husbands file for this remedy as compared to wives. When a wife files for maintenance, as a retaliatory measure, husbands are advised to file a petition for restitution of conjugal rights. Very often this remedy is used as a legal ploy to defeat the wife's claim rather than genuine intention of reconciliation.

V. DIVORCE UNDER SECTION 13(1A) (II)[33] OF HINDU MARRIAGE ACT & RCR

In *PushpaKumari*v. *Parichhit Pandey*,[34] the wife had filed criminal cases against the husband and in-laws on grounds of cruelty and demand of dowry. In retaliation the husband filed for restitution of conjugal rights. The trial court passed a decree in his favour. While setting aside the decree awarded by the trial court the high court held "that in the present society, it is very difficult to force any person to live according to the desire of the other and therefore, the Section 9 of Hindu Marriage Act for restitution of conjugal rights is losing its force because even if the prayer for restitution of conjugal rights is allowed, this decree cannot be enforced against the desire of the wife who does not want to live with husband. The cases filed by the wife under Section 498(A) of IPC and the Dowry Prohibition Act were pending against the husband and in-laws. In these circumstances if the prayer for conjugal rights is allowed, it would amount to demolishing the cases filed by her. When this fact has come on record, prayer for restitution of conjugal rights cannot be allowed at all because there is always the danger that the wife may be put to further the trouble in some other form."[35]

"Restitution of conjugal rights is mere paper decree as it cannot be enforced. But it helps to secure ancillary relief such as maintenance, custody of children etc., in case the wife is not willing to file for divorce and wants to retain her marital tie or is hoping for a reconciliation with her husband."[36] While moving the court on this ground, one needs to be cautious that the

[33]Section 13(1A) in The Hindu Marriage Act, 1955
[(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground
(ii)that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

[34]*Pushpa Kumari* v. *Parichhit Pandey*,2005 MLR 551

[35]*Ibid*

[36]*Supra* note 32 at p.25

decree serves as a backdoor entry towards divorce on ground of irretrievable breakdown of marriage.[37]

In *Saroj Rani* v. *Sudarshan Kumar*,[38] the wife filed a petition for restitution of conjugal rights, on 28 March 1978 the husband appeared and a consent decree was passed in favour of the wife. After a gap of one year on 19 April 1979, the husband filed for divorce under Section 13(1A) on the ground that one year had passed since the passing of the decree and no actual cohabitation had taken place between the parties. The wife alleged that she tried to comply with the decree many times but husband did not allow her to cohabit with him. The trial court dismissed the husband's petition for divorce. In an appeal, the husband was granted a decree of divorce. The wife approached the Supreme Court for setting aside the High Court decree on the ground that the husband should not be allowed to take advantage of his own wrong. But the Supreme Court ruled that non-compliance with the decree of restitution of conjugal rights does not amount to taking advantage of his or her own wrong as stipulated under Section 23(1)(a) of Hindu Marriage Act. The court held that whatever be the reasons, the marriage had broken down irretrievably and parties would no longer live together as husband and wife and in such a situation it was better to close a chapter. If such conduct of the husband is intended to be treated as wrong, then it requires legislation to that effect. The court commented that it cannot rule out the possibility of a party obtaining a decree of restitution of conjugal rights and in not enforcing the same with the sole purpose of getting a divorce after lapse of statutory period, but such abuse can be prevented only by bringing necessary legislation to plug the loophole. It is certainly a matter which requires serious consideration of the Parliament. But as the law stands now, the court is helpless in the matter and can only give that relief as one naturally flowing from the compliance of statutory requirements.

"In the same ruling, the Apex Court also upheld the constitutional validity of this provision on the ground that it is a benevolent provision which would facilitate the reconciliation and save the marriage".[39]

But the more recent trend is a clear departure from the position adopted by the Supreme Court in *Saroj Rani* v. *Sudarshan Kumar Chadha*.[40] "Courts have refused to award a decree to the husband who is guilty of taking advantage of his own wrong. But if either of the parties, through their conduct prevent the decree from being executed, the aggrieved spouse

[37] *Ibid*
[38] *Saroj Rani* v.*SudarshanKumar*,AIR 1984 SC 1562
[39] Supra note 32 at p.26
[40] *Supra* note 38

would be entitled to decree of divorce on the ground of non-compliance of the decree of restitution of conjugal rights."[41] Therefore the decree which is meant to preserve the marriage ultimately turned out to be a decree which leads to the dissolution of marriage. Therefore the ultimate purpose of keeping section 9 on statutory books is defeated by the latest development in law relating to divorce, so the better process to delete this remedy from the statutory books as it has lost its main purpose.

VI. CONSTITUTION AND RCR RIGHT TO EQUALITY AND FREEDOM TO CARRY ON ANY PROFESSION *VIS-A-VIS* RCR

The Hindu Marriage Act, 1956 by virtue of section 24 and 25 has burdened the wife with the obligation that she must maintain the husband when the husband is unable to maintain himself under the notion of equality but the courts continued to undermine a woman's right to retain her job against husband wish under the ancient notion of patriarchy. "This concept was adopted into the modernized law and the courts granted the husband the privilege of determining the choice of matrimonial home. If the women are employed at a place away from the matrimonial home the husband could claim restitution of conjugal rights against the wife."[42]

For many years after Hindu Marriage Act, courts in a number of cases have held that Hindu marriage is a sacrament and it is a sacred duty of the wife to follow her husband and reside with him wherever he chooses to reside. In all these cases the women were working and supporting the family. The husbands had approached the court for restoring conjugality just to spite the wife. The courts upheld the husband's right and granted him a decree of the restitution of conjugal rights as referred below.

In *Ramprakash* v. *Savitri Devi,*[43] court held that according to Hindu law, marriage is a holy union for performance of marital duties with her husband where the husband chooses to set up a matrimonial home.

In *Tirath Kaur* v. *Kirpal Singh*[44] the wife pleaded that she was willing to carry on with the marriage but was not prepared to give up the job. But the Punjab High Court disallowed her plea and ruled in favour of the husband stating that the wife's refusal to give up the job

[41] *Supra* note 32 at p.27
[42] *Supra* note 10 p.24
[43] *Ramprakash*v. *Savitri Devi* AIR 1958 Punj 87
[44] *Tirath Kaur* v. *Kirpal Singh* AIR 1964 Punj 28

amounts to desertion. This would entitle the husband for a decree of restitution of conjugal rights.

The Madhya Pradesh High Court in *Gaya Prasad* v. *Bhagwat*[45], held that a wife's first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection.

The Punjab and Haryana High Court in *Surinder Kaur* v. *Gurdeep Singh*[46], held that the Hindu law imposes on the wife duty of attendance, obedience to and veneration for husband to live with him wherever he chooses to reside.

Similar issue came before the full bench of Punjab and Haryana High Court in the case of *Kailash Wati* v. *Ayodhia Prakash*.[47] The wife was employed prior to marriage, seven years after the marriage the husband has asked the wife to resign her job. On her refusal to do so he filed for restitution of conjugal rights. The wife stated that she was prepared to honour her matrimonial obligation but was not prepared to resign her job.The Full Bench of Punjab and Haryana High Court held that according to Hindu law, marriage is a holy Union for the performance of marital duties with her husband where he may choose to reside and to fulfill her duties in her husband's home. The court reaffirmed that the wife's refusal to resign her job amounts to withdrawal from the husband's society and granted the decree in favour of the husband.

Therefore asking the wife to leave her job and resume cohabitation under the sacramental concept of marriage is a violation of the right to carry on any profession under Article 19(1)(g) of the Constitution. Therefore Court is not able to adopt balancing approach between Fundamental Rights and marital obligations.

"While under the modern concept of equality the husbands have the right to be maintained by their wives, under HMA under the concept of sacramental marriage they could restrain them from gainful employment. The right was based on a plea that it was a sacred duty of the Hindu wife to reside under the care and protection of her husband, her lord and master. While the husband's plea is not surprising, the judicial affirmation of this plea under a modern statute is disturbing."[48]

It was around 1975 that the court began to recognise the woman's right to hold on to a job away from her husband's residence. There are many important judgments of this time which secured for women their right of holding a job away from their husband's residence.

[45] *Gaya Prasad* v. *Bhagwat* AIR 1966 MP 212
[46] *Surinder Kaur* v.*Gurdeep Singh* AIR 1973 P&H 134
[47] *Kailash Wati* v. *AyodhiaParkash* ILR (1977) 1 P&H 642 FB
[48] *Supra* note 10 at p.25

The Gujarat High Court, in the case of *Praveenben* v.*Sureshbhai*,[49] while denying the husband the relief, declared that in the modern outlook, the husband and wife are equally free to take up a job and retain it. Since there had been a mutual arrangement, it was not a case where it could be said that the wife had withdrawn from the society of the husband. In *N.R. Radha Krishna* v. *Dhanalakshmi*[50] Madras High Court held that under the modern law,the concept of wife's obedience to her husband and her duty to live under his roof under all circumstances does not apply.

The Delhi High Court in the leading case, *Swaraj Garg* v. *R.M.Garg*,[51] dissented from the full Bench decision in Kailash Wati and held that in the absence of a premarital agreement between the parties it cannot be said that the wife who had a permanent job with good income had to live at a place determined by the husband when the husband did not earn enough to maintain the family.

"Providing constitutional validity to the wife's right to hold onto the job, Deshpande J. ruled that an exclusive right to the husband to decide the matrimonial home would be violative of equality of sexes clause under Article 14 of the Constitution."[52]

In all the cases, the fact that the wives were better placed economically as compared to the husband and effectively managing the household expenditure and judges while delivering the judgment were influenced by these considerations and denied the husband's right to set up the matrimonial home.

VII. ARTICLE 21 AND RCR : RIGHT TO PRIVACY

The case of *T.Sareetha* v *VenkataSubbaiah*,[53] was the first to question the validity of the provision relating to restitution of conjugal rights under the protective umbrella of right to privacy. In this case Sareetha, a 16 year old high school girl was married to one Venkat in Tirupati. The petitioner contended that Sec 9 was "liable to be removed from the statute as it was in violation of articles 14, 19 and 21. The petitioner stated that this remedy is contrary to the freedoms of life, liberty and dignity."According to Justice Chowdary, "marital rights connote two formulations, first that marriage partners have right for each other's company and second, marital intercourse. He held that "enforcing this right would amount to transfer of the right of the individual over her body, to the state". He posited against the continued use

[49] *Praveenben*v.*Sureshbhai*AIR1975 Guj 69
[50] *N.R. Radha Krishna* v. *Dhanalakshmi* AIR 1975 Mad 331
[51] *Swaraj Garg* v *R.M.Garg* AIR 1978 Del 296
[52] *Supra* note 32 at p.25
[53] T.*Sareetha v Venkata Subbaiah* AIR 1983 AP 356

of the section to enforce unwilling sex over a partner, under the garb of tyranny of the law. The judgment highlights the fact that even the decision to have a child is an intimate decision that should be taken by the woman and not something she should be coerced into against her will. This provision is truly a reminder of the illegitimate colonial era. It lacks legal backing and is a blatant infringement of an individual's right over his/her body, thereby violating an individual's liberty under Article 21 of the Indian Constitution. Justice Subba Rao perceptively made this observation and extended the right to life to include individual's liberty as well."[54]

The Supreme Court in *Govind* v. *State of M.P*[55] held that right to privacy under Article 21 should "encompass the right to personal intimacies of home, family and marriage". The court reiterated that the right to privacy is available to every person irrespective of the marital status. Similarly, Justice Chowdary held that 'there could be no legitimate grounds for the withdrawal of this right to privacy, by state sanction'. These two judgments can be construed to advocate the protection of the right to privacy under the Constitution. The law as laid out in the Maneka Gandhi[56] case, ordained that "due process" connotes being right, just and fair and does not accept arbitrary action by certain individuals. Further, under Article 14 it was observed that 'a blind adherence to equality of treatment without a reference to equality of circumstances is neither just nor constitutional'. The court acknowledged that while section 9, HMA might exhibit formal equality, wherein there are no distinctions between the rights of husband and wife. "However, husband and wife from a social point of view are unequal and treating unequals equally is neither just nor fair." Since this makes the remedy oppressive for the wives, while benefiting the husbands. These cases mark the evolution of a different line of thought in family jurisprudence.

Right to liberty

The Saritha judgment can go a long way in benefiting working women, by protecting them from being subject to undue pressure to give up their careers or suffer threats of dissolution of marriage. This section was assumed to be a lifeline for deserted women who were unwilling to divorce their husbands. However, a possible amendment in Section 13 to introduce irretrievable breakdown of marriage as a logic for divorce would go a long way in solving this problem and the wife would no longer be forced to use the diverted route of section 9, for severing the marital ties. "Justice Chowdary through his other pronouncements on

[54]https://jcil.Isyndicate.com/wp-content/uploads/2016/08/ Restitution -of-conjuga rights-preserving-a-sacrment-or-creating-a-liability-Arushi-Nayar-pdf(last visited on 12 Jun 2022)
[55]*Govind*v. *State of M.*P AIR 1975 SC1378
[56]*Maneka Gandhi* v. *Union of India* AIR 1978 SC 597

subjects like "forced sex is a denial of joy" and his scathing critique, calling it barbarous and laws enforced indignity, has positively liberated women. The court would enforce its powers either through Civil Procedure Code Order 21, rules 32, 33 or by holding the other party in contempt."[57] This statement is a tacit admission of the existence of marital rape, which the law thus far doesn't recognize.

Right to bodily autonomy and dignity

In T. Sareetha[58] the Court observed that sexual cohabitation is an integral ingredient of Restitution of Conjugal Rights. Therefore, the Court determined Section 9 of the HMA and Order 21, Rule 33 and 34 of the Civil Procedure Code could serve to enforce marital intercourse on an unwilling person. These provisions thus transfer the decision to have or not have intercourse from the private individual to the State. Thus, a decree of Restitution of Conjugal Rights "offends the inviolability of the body and the mind" and the "integrity of a person", and it "invades the material privacy and domestic intimacies" that a person should have individual control over. Additionally, the Court also observed that these provisions diminish the value of consent by using the judicial process to coerce an individual to engage in sexual cohabitation. The Court acknowledged that this would have worse consequences for a woman as pregnancy could result from non-consensual intercourse. In this way, this Section encroaches on the individual's dignity, which is an integral part of Article 21 of the Constitution. The Court then gave the example of *Anna Saheb* v. *Tarabai*, where a decree of restitution was passed in favour of the husband even after the wife repeatedly expressed her dislike of him and reluctance to live with him. The cumulative effect of all these would be the misuse of state force to coerce a woman into forced sex and pregnancy. Since pregnancy alters the life of the woman significantly, her right to decide prevails over state interference. Based on these, the Court concluded that Section 9 constitutes a grave violation of Article 21 and that there can be no countervailing state interests that justify this invasion of privacy.

In this case the court held that Section 9 of the HMA cannot be viewed as just or fair because even though it is equal on paper, it is unequal in practice. This is because the requirements of equality under Article 14 of the Constitution are not satisfied as in our social reality, Section 9 is used predominantly by husbands and rarely by wives. The consequences of this remedy are disproportionately high on the wives due to social and physiological reasons. In summary, the Court ruled that the remedy of Restitution of Conjugal Rights is "partial," "one sided",

[57]Mayne's, Treatise on Hindu Law & Usage, 16th ed.(New Delhi: Bharat Law House,2013) p.93
[58]*T.Sareetha* v.*Venkata Subbaiah* AIR 1983 AP 356

and work as an "engine of oppression". Thus, Section 9 of the HMA is void as it offends both Article 14 and 21 of the Constitution.

Thus in conclusion the Andhra Pradesh High Court in *T. Sareetha* v.*Venkata Subbaiah*[59] held that "the right to privacy belongs to an individual and is not lost by marital affiliation". The court observed that the enforcement of section 9 against an individual forced her to have sexual relations with her spouse, thus bereaving her of control over her body. This, according to the court, was a severe aperture of the right to privacy as it transfers "the choice of whether or not to have marital intercourse to the State from the concerned individual".[60]

Latest in the series is the *K.S. Puttuswamy* v. *Unionof India,*[61] the Supreme Court held that individuals have a right to privacy which grants them complete sovereignty over their bodies. "Nine judges of the Supreme Court gave this landmark judgment and unanimously held that " right to privacy is protected as an intrinsic part of right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution."[62]The Court has thus adopted the egocentric definition of privacy as argued in the Sareetha case.

Narrow view after T. Sareetha

Regrettably, the Delhi High Court, in *Harvinder Kaur* v. *Harmander Singh Choudhry,*[63] returned back to the narrow definition of privacy. One year after the historic Sareetha judgment, the Delhi High Court re-examined this issue and held to the contrary. In this case the wife challenged a decree for restitution granted to her husband by the lower court. "The court, while dismissing the appeal, held that the section was constitutionally valid, stating that the dual objective of the section was 'restoring amity in marital life through a legally enforced rapprochement'. The court went on to add that introducing constitutional law in the sphere of marriage is like a bull in a china shop, and that Articles 14, 21 have no place in the privacy of the home. The Delhi court redefined the foundations of marital relationships, away from the protection of right to privacy. Further, the court considered sexual relations as a vital element of marriage, but not necessarily the *summumbonum*, or the sole motivation behind petitions of restitution. Thus, unlike Justice Chowdhary, the Delhi high court took a more narrow view of the provision of restitution."[64]

[59] *Ibid*
[60] *Ibid*
[61] *Supra* note 23
[62] https://www.scobserver.in/cases/Fundamentalright to privacy (last visited on 12 Jun 2022)
[63] *Harvinder Kaur* v. *Harmander Singh Choudhry* AIR 1984 Del 66
[64] *Supra* note 62 at p.9

Post these two diametrically different judgments, the Supreme Court in Saroj Rani's case[65], clarified its stance on this provision. The court construed that marriage, as a socially sanctioned practice and family as its essential structure, provided husband and wife inherent rights over each other's society. The Supreme Court expressed its motivation to protect these uncodified laws towards, the social function of preventing the breakup of the marriage, restoration of conjugal relations and to prevent the severing of the marital tie. Therefore, Justice Mukherjee was unequivocal in upholding the Delhi High Court judgement that section 9 was not in violation of Art 14 and 21 of the constitution.

The Court in Delhi High Court case[66] held that the leading idea of Section 9 is to preserve marriage. Section 9 is an endeavor to bring about reconciliation between the parties. The Court then moved on to discuss the concept of the breakdown of marriage as, if the decree for restitution is not obeyed for the space of one year and the parties continue to live separately it is undoubtedly the best evidence of the breakdown of marriage and with the passing of time the most reliable evidence that the marriage has finished.

The decree of restitution of conjugal rights serves a useful purpose because it gives the parties a cooling-off time of one year which is essential. The Court also observed that Section 13(1-A) is based on proceedings under Section 9. If Section 9 is unconstitutional, then Section 13(1-A)(ii) is also constitutionally void. Thus implying no decrees of restitution and no divorce under Section 13(1-A)(ii). The Court held that the abolition of Section 9 is to be done by the legislature and not the courts. As the ground for divorce under Section 13(1-A) is available to either party to a marriage, there is complete equality of sexes and equal protection of the laws. Hence, it is not violative of Article 14 of the Constitution. The Court even scorned the introduction of principles of constitutional law in the private matters of family. The Court held that to hold Section 9 unconstitutional without regard to Section 13(1-A) is to take too narrow a view. The Court held that though the remedy under Section 9 may be outmoded, it is not unconstitutional, thus, Section 9 is perfectly valid. There is express admission by the court that a remedy introduced with the concept of preservation of marriage has become outdated with time and should therefore be deleted from statutory books.

VIII. MARITAL RAPE & RCR

This judgement of T.Sareetha can be considered a landmark not only in the field of family law but also in criminal law, particularly the offence of marital rape. "After several years

[65] *Supra* note 38
[66] *Supra* note 63

of debate and activism, marital rape is still not recognised as a criminal offence in India. In fact, Section 375 of the Indian Penal Code expressly excludes it from the ambit of rape through its exception clause, which states that sexual intercourse by a man with his own wife is never to be considered rape as long as the wife is above 15 years of age.[67] The statute, thus, does not place any importance on the consent of the wife. Through the judgement of T. Sareetha, it can be seen that the doctrine of Restitution of Conjugal Rights can be misused to force sex on the respondent spouse, and in a largely patriarchal and male-dominated society, it disproportionately victimises women. Such a situation provides impunity to those men who enforce restitution of their conjugal rights, coerce their wives to cohabit with them, and further commit marital rape on them. "Justice Chowdhary's pronounced in his judgment that "forced sex like other forced things is denial of all joy. No positive act of sex can be forced upon an unwilling person because nothing can be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of law to a positive sex act. This statement it should be noted has been made in reference to a couple who are merely living apart and are not judicially separated. Judge's observation on forced sex is the indication of rape within marriage. It has a tremendous implications for women's movement, especially for activists who have been working on behalf of battered wives who are not only physically beaten but are subjected repeatedly to act of forced sex."[68]

"The patriarchal structure under which the rape law defines rape as forced intercourse with the woman other than his own wife. This has always been implied that in the marriage a husband cannot rape his own wife, that forced intercourse with his own wife is not rape. On the other hand according to the Judgement of T.Sareetha it is unconstitutional for a man to demand sex from his wife. By this judgement raping his own wife is even more heinous, more grossly violative of the Fundamental Rights in question"[69]

"The amended section 376B created a new category of marital intercourse called illicit intercourse meaning forcible intercourse by husband with his judicially separated wife without her consent with minimum punishment of imprisonment for two years and maximum punishment of seven years and fine"[70].

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[67] Exception 2 of section 375 IPC creates an exception to the offence of rape in cases of forced sexual intercourse by a man with his own wife if she is of 15 years of age or above.

[68] Vimal Balasubramanyan"Conjugal Rights v. Personal Liberty", Andhra High Court judgment *EPW*,July 10,1983,p.1263,https://www.jstor.org/stable/4372307

[69] *Ibid*

[70] Section 376B IPC. Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either

" Justice Chaudhary in the Sareetha case had also declared that restitution of conjugal rights is a barbarous and imported remedy, that it is arbitrary and does not serve any social good that even under British law from where it was originally imported it is now abolished. At the end however he has said that the Hindu concept of matrimonial law never recognised the Institution of restitution of conjugal rights although it fully upheld the duty of wife to surrender to her husband. This last corollary suggests that even while talking of the forced sex the judge perhaps does not really recognise the concept of rape within marriage."[71]

"One more point Justice Chaudhary had observed that forced sex is accompanied by forcible loss of precious right to decide when, if at all, her body should be allowed to be used to give birth to another human being. This seems to have implication in the context of sexual acts in which the woman is not allowed to use contraception either for religious reason or sheer male cussedness. The end result is the same loss of precious right to decide whether and when to have a baby."[72] Section 9 of Hindu Marriage Act,1955 was struck down for violating Article 21 based on the fact that forced sex violated personal freedom.

The Kerala High Court[73], "in a recent historical judgment, declared that marital rape, while not being a statutorily punishable offence on its own, can be considered as a form of cruelty and further viewed as a ground for the Court to grant a divorce to the aggrieved party. The facts in this case also involved a husband seeking to enforce restitution of conjugal rights on his wife, whom he had previously sexually abused and raped. This decision is a massive step in the direction of the criminalisation of marital rape and must be used as a building block in the argument against the concept of restitution of conjugal rights."[74] In Independent Thought v. Union of India[75], "the Supreme Court declared that sexual intercourse forced by a man on his minor wife would be recognised as a criminal offence. This has raised the age ceiling for the criminalisation of marital rape to women aged below 18 years. The court stated that exception 2 to section 375 IPC is read down as follows: Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."The same considerations can now apply to rape committed on adult wives as well. As held in the Puttaswamy judgment, privacy is a fundamental right, and bodily autonomy, being a vital part of privacy, must not be put in jeopardy through the institution of marriage.

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description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

[71] *Supra* note 68 at p.2

[72] *Ibid*

[73] https://www. livelaw.in(last visited on 12 Jun 2022)

[74] *Ibid*

[75] https://www.scobserver.in(last visited on 12 Jun 2022)

"The Delhi High Court on 11th May 2022 gave separate verdict on a batch of petitions challenging the marital rape exception under Section 375 of Indian Penal Code. Justice Rajiv Shakdher in his judgment has held that marital rape exception in favour of husband is violative of right to equality, right to life, right against discrimination and right to freedom of speech and expression."[76] However, the other judge, Justice Hari Shankar did not agree with Justice Rajiv Shakdher. Justice Shankar has held that marital rape exception is not violative of Constitution and is based on intelligible differentia.

"Justice Shakdher's verdict is sound as there can be no rational basis to differentiate between married and unmarried women. The IPC classifies the crime of rape on the basis of marital status of women, namely unmarried, married and married but separated. This qualification does not have any relation with the object of the statute, that is, to prevent and punish offence of rape. A woman does not lose her right to sexual autonomy upon her marriage. Rape is rape irrespective of the fact that it is perpetrated by husband on his wife."[77]

"The marital rape exception also violates the right to freedom of speech and expression. It violates the right of married women to say no to sexual intercourse. As correctly pointed out by the petitioner, conjugal rights end where the right to bodily integrity begins. A sexual intercourse between man and woman require consensus ad idem."[78]

Justice Shankar's verdict is based on argument that marital rape exception is aimed at preservation of marital institution, on which the entire Bedrock of society rests. His argument is trying to preserve the Institution of marriage at all (potentially harmful) cost? His argument comes in direct conflict with the right to privacy.

The case is pending before Supreme Court, but the Parliament should take active steps to resolve this issue of marital rape exception. It is high time to realise that right of women under Constitution can not be ignored on a assumption that non consensual sexual intercourse would strengthen the institution of marriage. A relationship must rest on trust and mutual respect and law should not legally disempower a married woman.

IX. CONCLUSION AND SUGGESTIONS

So from the long discussion it is clear that the question of constitutionality of restitution of conjugal rights has created a lot of confusion and ambiguity over its existence in the legal

[76]Hemendra Singh," No Means No: Marital Rape Exception in India", *EPW*, 28 May,2022 Vol 57, Issue No. 22
[77] *Ibid*
[78]*Ibid*

system. From a legal point of view it is constitutional whereas from the practical point of view it is still unconstitutional. The judiciary has given different answers to the same question which has created untold difficulties for the application of this doctrine of RCR. Therefore rights of the individuals should be given more importance rather than considering that marriages are to be preserved at any cost. Thus the tussle between the personal laws and the eternal fundamental rights is turning very ugly in nature.

The decision in T. Sareetha was one of the first judgments to view the Constitution as a transformative document. It took a stand for the bodily autonomy of women, which was inviolable even by marriage and her husband. It was made clear that a wife is not a subordinate party in a marriage and her consent and rights have equal value as that of her husband. Based on this emancipated and progressive logic, Section 9 of the HMA was declared liable to be struck down as unconstitutional. Further, when acknowledged as an enabler of marital rape, this Section becomes even more dangerous to the fundamental rights of married women across the country. While it has been overturned by subsequent judgements, thereby restoring the status of Restitution of Conjugal Rights, the T. Sareetha judgment remains a beacon of hope for the proponents of the belief that marriage must no longer serve as a license to enforce cohabitation and intercourse and that fundamental rights are paramount, even against deeply entrenched institutions like marriage.

The Supreme Court by permitting section 9, yet calling it outdated and not in tune with modern times, provided only a half -hearted step. Major progress in this field can be claimed only after two changes. First, from now the grounds of divorce include, 'irretrievable breakdown of marriage'. Second, courts should test family laws on the platform of fundamental constitutional rights. Remedy of restitution has failed to qualify the test of being at par with Fundamental Rights under the Constitution of India. The restitution section is unfit for a modern gender sensitive society and against the principles of natural law. It fails at the touchstone of justice and fairness. The remedy of RCR is frequently used by men to get divorce on easier terms, therefore there is a need to introduce irretrievable breakdown of marriage directly as a ground of divorce. While some people argue that this section aims at preserving the bond of marriage, the question is whether it is worth sacrificing our fundamental rights for a marriage. Fundamental Rights are very basic to our existence, they help us to lead a life of dignity while staying within the marriage.

With the growing need that the law should intervene in family matters and protect the rights of individuals, restitution of conjugal rights has been criticized across common law countries, leading to its abrogation in the UK, Australia, Ireland, and South Africa. It is time that India,

too, should delete restitution of conjugal rights, taking into consideration the gross breach of the right to privacy, equality and personal liberty. Further, the Court are considering that state force was a highly inappropriate way to preserve a marriage. Recently, in Ojaswa Pathak's case, petitioners challenged the validity of Section 9 and acknowledged that women are the worst affected by the Section and that the Restitution of Conjugal rights is an archaic and oppressive procedure that promotes the commodification of women.Restitution of Conjugal Rights may enforce intercourse on an unwilling party which is a grave violation of human dignity and is a misuse of legal procedure to coerce cohabitation. Individual bodily autonomy is paramount over invasive state interests and Section 9 of the HMA promotes no public good and is inherently oppressive and discriminatory.

In law the husband has the Right to demand RCR or to take support of the state to get sexual access to his wife who may not be willing to participate in sexual relations. Marriage guarantees to the man through RCR, access to his wife's body which is also the basis for creating legal heirs to property and lineage. Hindu law influenced by religious fundamentalist impose husband's right to sexual access to wife in demanding tone. In arranged marriages among Hindus, the consent of Individuals involved in marriage is discounted and considered entirely irrelevant. Recently Delhi High Court tried to criminalize marital rape, which is very essential to maintain equality in gender relations because in Hindu marriage sex and power is centralised in the hands of men in the family. It is the right time to delete the RCR provision which also promotes practically this theme of centralization of power in the hands of men.

Suggestions

i. The remedy of restitution which is facing a lot of opposition must be replaced by reconciliation. The compulsive force of restitution in which courts ask the spouse to cohabit with the other spouse is practically not welcomed by the litigating spouses, resulting in the ending of the relationship. Reconciliation is a mild, acceptable and amicable way in which both the spouses may cohabit and if not possible part away resorting to some alternate remedy like divorce by mutual consent without consuming most of their time in litigation.

ii. RCR is justified on statutory books for preservation of marriage but ultimately it turned out to be a remedy for dissolution of marriage. It serves only a indirect or via medium to dissolve the marriage. In order to get divorce on the ground of 13(1-A)(ii) of HMA there is need to get two decrees, first decree of RCR under Section 9 and then wait for a minimum period of one year and then get second decree under Section 13(1-A)(ii) of HMA. This results in multiplicity of suits and pendency in the

courts.Therefore it is better to have separate and direct ground of irretrievable breakdown of marriage as a remedy to seek divorce rather than invoking two decrees to get the one and the same result of divorce.

iii. RCR was introduced with the concept of preservation of marriage but the amendment of 1964 in the divorce law and further amendment in 1976 promoted the provision of RCR as a diverted route to get divorce. With time the decree of RCR has lost its sanctity and reduced as a subsidiary decree to get divorce.

iv. Therefore it is high time to evaluate and amend the Hindu Marriage Act,1955 and to take immediate steps to include the "irretrievable breakdown of marriage" as one of the grounds of dissolving the marriage between two parties.

v. Section 9 HMA should be repealed and in its place some useful provision which will serve the purpose of law should be introduced. The 71st Law Commission Report has recommended that "irretrievable breakdown of marriage" should be included as a separate ground for obtaining divorce under the Hindu laws. It emphasized the separation period of three years as a criterion of breakdown. On the basis of the report, the Marriage Laws (Amendment) Bill, 1981 was introduced in the Parliament but lapsed due to opposition from women organizations. Therefore irretrievable did not formally become law, but informally validated in a number of judicial decisions. Thus to avoid this confusing state of affairs, the Law Commission of India in its 217th Law Commission Report in March 2009 again recommended " irretrievable breakdown of marriage" as a ground of divorce. On the same grounds Marriage Laws (Amendment) Bill 2013 was introduced though passed by the RajyaSabha but could not be considered by the LokSabha and lapsed.

vi. Thus Section 9 originally introduced for preserving marriage has lost most of its force and reached a stage of being repealed. Therefore, by compulsive decree of Section 9, forcing people to remain in unhappy marriages will not serve any useful purpose. This will cause constant misery and grief which will undermine the institution of marriage.

vii. There is a need to either legislature should come in forefront to delete this provision from statutory books or the Supreme Court put its seal and declare it unconstitutional and struck it down.

viii. Decree Of RCR even if passed by the court cannot be executed personally and force a person to perform marital obligations. The question is when a decree is not capable of being enforced and serves its purpose then why should it be there in the statutory books. It has already become a Dead Letter which is required to be deleted.