



## RESTITUTION OF CONJUGAL RIGHTS: CONSTITUTIONAL PERSPECTIVE\*

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MARRIAGE GIVES rise to a very tender but complex interrelationship between the spouses from which a plethora of rights and obligations emanates. These rights and obligations cumulatively constitute 'conjugal rights' and can be termed as the essence of the marital union. According to Hindu philosophy, there are three objects of marriage: (1) *dharma* (justice) (2) *praja* (procreation) (3) *rati* (pleasure or sex). For success of married life there are two prerequisites. They are virtue and love. Here virtue means *dharma* or justice.

It is a general rule that each spouse is entitled to the society and comfort of the other and if any spouse, without any reasonable cause, leaves any spouse, the latter can move the court for a decree of restitution of conjugal rights. In Hindu, Christian and Parsi personal laws, the remedy of the restitution of conjugal rights is governed by the statutory provisions, whereas under Muslim law, this remedy has been imported from the British common law and applied by way of equity, justice and good conscience.

As restitution of conjugal rights is a part of the personal laws, the question arises, what will happen if personal laws violate fundamental rights? Whether personal laws could be excluded from the purview of article 13? *State of Bombay v. Narasu Appa Mali's*<sup>1</sup> case reveals that personal laws could not be excluded from the purview of article 13 and, therefore, in order to be a valid law, it has to pass the test of fundamental rights.<sup>2</sup>

This matrimonial remedy is available to both the spouses, but a suit for restitution by the wife is rare. A survey of case law under the head 'restitution of conjugal rights' reveals that even though the decree of restitution of conjugal rights has been asked for by the husband against

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\* Paper presented at the National Seminar on Personal Laws jointly organized by Indian Law Institute, Delhi and Dr. Ambedkar Government Law College, Pondicherry on 10-11 March 2002 at Pondicherry.

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1. AIR 1952 Bom. 84.

2. *T. Saritha v. Vengata Subbiah*, AIR 1983 AP 356. The Andhra Pradesh High Court accepted Hindu Marriage Act, 1955 very much law within the meaning of the Constitution.



his wife, but in almost all cases it was proved that either he was himself guilty of cruelty or brought the petition only to escape from the liability to pay maintenance.<sup>3</sup>

*Whether this matrimonial remedy violates right to privacy?*

Although the Constitution does not expressly declare the right to privacy as a fundamental right, the said right is an essential ingredient of personal liberty. The European Convention on Human Rights in 1953 specifically recognized this concept. This right is not absolute. Any right to privacy must encompass and protect the personal intimacies of home, family, marriage, motherhood, procreation and child rearing. In *T. Saritha Vengata Subbiah*,<sup>4</sup> section 9 of Hindu Marriage Act relating to restitution of conjugal rights was held as unconstitutional because this decree clearly snatches the privacy of wife by compelling her to live with her husband against her wishes. But in *Harvinder Kaur v. Harmander Singh*,<sup>5</sup> section 9 of Hindu Marriage Act was held as valid. This view was upheld in *Saroj Rani v. S.K. Chadha*.<sup>6</sup> The court held that in the privacy of home and married life neither article 21 nor article 14 has any place. Warren and Brandeis advocated that the law should provide both the criminal law and the private law remedy for the protection of right to privacy.<sup>7</sup> It may be mentioned in this context that this remedy has been abolished in England by section 20 of the Matrimonial Proceedings Act, 1970. However, in India, section 9 affords a remedy to the aggrieved wife against the husband deserting her without any reasonable cause. If the court passes a decree in her favour it can be executed as per the procedures contained in Civil Procedure Code. The decree of restitution of conjugal rights violates:

- (i) Freedom of association 19(1)(c).
- (ii) Freedom to reside and settle in any part of India 19(1)(e) and freedom to practice any profession 19(1)(g).

(i) *Infringement of freedom of association or union 19(1)(c):*

By the decree under section 9, a wife is compelled by the court to have association with her husband against her will and *vice versa*. In *Huhhram v. Misri Bai*<sup>8</sup>, the wife complained to the court that her father

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3. Ajaya K. Vishvesha, "Restitution of conjugal rights under Muslim law – A critical appraisal" *Indian Bar Review* Vol. 14 382(1987)

4. AIR 1983 AP 356.

5. AIR 1984 Del 66.

6. AIR 1984 SC 1562.

7. Samuel D. Warren and Louis D. Brandeis, "Right To Privacy" 4 *Harv L Rev* 193-220(1890).

8. AIR 1979 MP 144.



in law has an evil eye on her and her husband ill-treated her. Despite this, in response to the husband's claim for restitution decree, the court passed a decree in favour of the husband. If the father-in-law molests her after her association with her husband due to the decree, none else but the court decree shall be responsible for the mishap. In *Atma Ram v. Narbada Devi*,<sup>9</sup> though the husband clearly pleaded that he no longer wants to live with his wife but the decree of restitution of conjugal rights was passed in favour of the wife. It is the clearest example of forced union brought about by a restitution decree.

(ii) *Infringement of freedom to settle and to practice any profession 19(1)(e) & 19(1)(g)*:

In the present social setup when females are trying hard to get jobs for becoming economically and self dependent and also to lead a dignified life, mere refusal of the wife to resign her job at the instance of the husband is not a sufficient ground for granting a decree of restitution in favour of the husband. In *Swaraj Garg v. K.M. Garg*,<sup>10</sup> violation of article 19(1)(e) and (g) were not pleaded but the court refused the decree on social grounds.

Mentally and physically separated husband and wife cannot be united by a decree of restitution of conjugal rights. A horse can be brought to the water pond but cannot be compelled to drink it. Jurists felt that the constitutional provisions should not be allowed to govern the family affairs. In *Harvinder Kaur's* case,<sup>11</sup> it was said, "introduction of the constitutional law in the home is most inappropriate, it is like introducing a bull in a China shop". *Saroj Rani*<sup>12</sup> was a divorce on the basis of non-compliance of the decree of restitution of conjugal rights. Hence, the Supreme Court was neither bound to pass a judgment regarding the constitutionality of restitution of conjugal rights decree nor the matter could be examined and analyzed completely before the court. It is a decision *sub-silentio*, not fully argued.

To conclude, the author feels that the decree of restitution of conjugal rights is against the principles of natural law. It cannot be supported on the ground of justice and fairness. It cannot be supported on social or legal criteria. There is a big gulf between legal norms and social norms, which render a legal norm devoid of content.

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9. AIR 1980 Raj 35.

10. AIR 1978 Del 296.

11. AIR 1984 Del 66.

12. AIR 1984 SC 1562.