IS A RESTITUTION DECREE SEXPLOITATIVE? NEED FOR RELOOK?

Abstract

Marriage is the very foundation of a stable family and civilised society. However, while right to marry is a component of the Right to Life under the Constitution of India and also recognised under the Universal Declaration of Human Rights, nobody has a vested right to marriedhood, nor does anyone have a vested right to divorce. Thus there are laws the world over, to regulate the conditions which need to be complied with to enter into or solemnise a legal marriage, the rights and obligations of the parties while in the relationship as also escape routes in cases of real hardship to couples. Restitution of conjugal rights is one such matrimonial relief wherein the spouse can seek help of the court to realize his/her right to consortium of each other. In case one party to the marriage withdraws from the company of the other the later can resort to the court's intervention. This article seeks to analyze this matrimonial relief from the lens of natural justice and individual liberty. The courts have often voiced their skepticism about such a relief.

MATRIMONY ENTAILS certain rights and obligations, the most significant being the right or entitlement to consortium of each other. When one spouse withdraws or abandons the company of the other, the aggrieved spouse may seek court intervention by filing a petition for restitution of conjugal rights. This remedy has been adopted into Indian matrimonial system through the English Common law of the British Raj. It was applied in India by the Privy Council for the first time in 1866 in *Moonshee Buzloor* v. *Shamsunnissa Begum*[1] Such suits were considered as a species of suits for specific performance. It is significant to know that in this case as far back as 1860, the Principal Sudder Ameen of the 24 Pergunnahs, which was the trial court, dismissed the restitution suit. It observed:

"Neither by the Mohammedan law nor by natural justice was the appellant under such circumstances entitled to the aid of the courts to enable him to recover the possession of his wife's company"

On appeal, the Calcutta High Court confirmed the decision in 1863. It observed:

"We should be making the court the engine of grievous injustice if we gave the plaintiff free power and control over the person of the defendant by asking her to return to him"

1 [1867] 11, M.I.A. 551.

The Privy Council, however, reversed these orders and remanded the case to High Court for being tried on fresh evidence. In this case references were made to various authorities which clearly supported the jurisdiction of civil courts to try such suits.

In *Dadaji Bhikaji* v. *Rukmabai*[2] a restitution suit was held to be maintainable. The court of first instance, judge of Division Bench, refused the relief of restitution sought by husband stating that " it seems to me that it would be a barbarous, a cruel, a revolting thing to compel a young lady under the circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will"

On appeal however, Sargent, C J, reversed the other. It held "The Code of Civil Procedure (xiv of 1882)....far from treating the suit as discredited provides in express terms by section 260 for the enforcement of such decree by imprisonment or attachment of property or both".

In *Bai Jivi* v. *Narsing*[3] the court conceded it's jurisdiction to try restitution suit but was not oblivious" that such compulsion is repugnant to modern ideas. It is based on one sided texts thousands of years old hardly suited even in India to existing social conditions."

Thus even while courts did have jurisdiction to entertain and try restitution petitions, they seemed not to be very inclined about the desirability and propriety of the same

The legal position as it stands today in India is that all matrimonial law statutes provide for relief of restitution of conjugal rights. Thus, when a husband or wife withdraws from the society of the other without reasonable cause, the aggrieved party may file a petition for restitution of conjugal rights and the court on being satisfied of the truth of the statements made in the petition and that there is no legal ground why the restitution should not be granted, may pass a decree for restitution of conjugal rights accordingly. The burden of proving whether or not there is a reasonable ground for withdrawal from the society of the other is on the person withdrawing

The mode of execution of such decree is laid down in the Code of Civil Procedure (CPC) 1908. The court may in execution attach the property of the respondent and if within a year of such attachment the decree is not complied the attached property may be sold and out of the sale proceeds the court may award such compensation to the petitioner as it thinks fit. When the petitioner is the wife and not the husband, the court may make an order that in case of non compliance the respondent shall make such periodical payments to the petitioner as the court thinks reasonable.

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2 (1886) ILR 10 BOM 301.

3 AIR 1927 BOM 264.

It may be pointed out here that the sanction behind the decree was softened by an amendment in 1923 to the original Code of 1908. Prior to amendment the respondent could be arrested and put behind bars in execution of decree not obeyed. Now the only sanction is financial.

It is significant to note that the constitutional validity of section 9, is under challenge before the apex court. It was challenged way back in 1983 and 1984 also. In *T Sareetha* v. *T Venkatta Subbaiah*[4] the provision was termed as "uncivilised", "barbarous" " engine of oppression" and as being violative of articles 21, 19 and 14 of the Constitution.. Sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights, the court observed. The result is that the decree holder gets a right not only to the company of the other but also to have sexual intercourse with him/ her. As a natural corollary, according to the court, it also meant the surrender of the choice to have or not to allow one's body to be used as vehicle for another beings creation. Since such a decree is capable of being enforced, the court felt that it is to coerce through judicial process the unwilling party to have sex against the person's consent and free will, with the decree holder." Nothing could conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long rope of the law to a positive sex act", the court observed. A decree of restitution was held to be violative of article 21 of the Constitution which guarantees right to life and personal liberty since it is bound to include body's inviolability and integrity and intimacy of personal identity, including marital privacy; on the touchstone of article 14 which guarantees equal protection of law the remedy fails according to the court. Though in form it does not offend the classification test in as much as it makes no discrimination between husband and wife but "bare equality of treatment regardless of the inequalities of realities is neither justice nor homage to constitutional principles".

The only purpose served by such decree is that it provides a ground for divorce at a later stage but the price paid for this according to the court, very high viz, human dignity. In view of all the above, section 9 was termed as savage, barbarous, and uncivilised and declared null and void.

Shortly after this judgment the Delhi High Court not only upheld the validity of section 9 but also discussed it's advantages in *Harvinder Kaur* v. *Harmandar Singh*.[5] Justice Avadh Behari denounced the introduction of constitutional law in family law as "introducing a bull in a China shop". The court discussed the meaning and idea of

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4 AIR 1983AP 356.

5 AIR 1984 Del 66.

cohabitation and consortium and came to conclusion that restitution aims at cohabitation and consortium and not merely sexual intercourse and there is nothing barbarous or coercive about it." A disproportionate emphasis on sex, almost bordering on obsession has coloured the views of the learned judge"[6] the court observed

According to Delhi high court, section 9 is in a way an extension of provisions which aims at stabilizing marriage and encouraging reconciliation. It acts as an index of connubial felicity; it is a sort of litmus paper. If it is disobeyed it is an indiciation that parties have reached a stage of no return. In such case they get a ground for divorce. It cajoles and coaxes the withdrawing party to return to matrimonial home and in alternative facilitates divorce. It is a foothold and handhold for section 13(1A). It thus serves a useful purpose by giving a cooling off period. Parties live under a type of 'legal armistice'.

The debate on the issue in the light of the two contradicting judgments of the High Courts of AP and Delhi was set at rest very soon thereafter by the apex court in *Saroj Rani* v. *Sudershan Kumar*[7] wherein the court had occasion to express it's views on the matter. Approving the Delhi judgment the apex court held that the financial sanction by way of attachment of property provided for disobedience of the decree is only an inducement for the parties to live together in order to give them an opportunity to settle their differences. It held that the right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. It is inherent in the very institution of marriage itself. There are sufficient safeguards in section 9 to prevent it from being a tyranny. It held that decree of restitution serves a social purpose as an aid to the prevention of breakup of marriage. It cannot be viewed in the manner the learned judge of the AP high court has viewed and we are therefore unable to accept the position that it is violative of article 14 or 21 of the Constitution.

The issue of constitutionality of section 9 has again resurrected after 35 years. A petition has been filed before the Supreme Court by two students from Gujarat National School alleging that the law treats women as chattel and is violative of the right to privacy, individual autonomy and dignity of a person under article 21 of the Constitution; it is steeped in a patriarchal gender stereotype and is violative of article 15 discrimination on ground of, inter alia, gender. Though "facially neutral" but are in fact deeply discriminatory towards women. The direct and inevitable effect of the provision has to be seen in light of deeply unequal familial power structures that prevail within Indian society. Further, the remedy has its origins in feudal English law. The UK itself has abolished the same in 1970 (section 20 Matrimonial Proceedings

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6 Referring to justice Choudary of AP High Court.

7 AIR 1984 SC 1562/ (1984) 4 SCC 90.

Act, 1970), hence it is incongruous to retain it in our system. Also, it is coercive as it entails measures like attachment of property in case of willful disobedience of the decree. In a nutshell the validity of a law has to be tested according to changing times and hence needs reconsideration. The chief justice has referred the matter to a three judge bench which has sought response of the centre on the petition in section 9 of Hindu Marriage Act, similar provision under section 22 of Special Marriage Act and Rules 32 and 33 of order xxi CPC on execution of decree of restitution.

While the purpose behind the provision is to preserve and save the marriage tie, it cannot be denied that there is an element of judicial coercion when a person (respondent) is enjoined through a court process to join the petitioner after a bitterly contested court litigation and with financial sanction behind it in case of non compliance

As very aptly remarked by Justice G S Saraf in *Anita Jain* v. *Rajendra Jain*[8] "to live with a man (or woman) you hate is slavery but to be compelled to submit to his embrace is a misfortune too great even for slavery itself".

The test of inviolability of a marriage is not the legal thread that sustains it through a legal process but by an inherent emotional bondage. Even way back in 1860 and early 20th century, courts were skeptical about such relief and felt it to be cruel and revolting. Now over a century later, times and social conditions have undergone sea change and hence the need to have a relook all the more. This is not to undermine the significance of stability in marriage but to give a thought on how far the courts should use its authority in enjoining parties to unite. Strengthening counseling and mediation services without element of intimidation and coercion could play a very positive role provided there is even a slightest spark in the marriage. If it is completely dead no judicial process can make it a success. There is no point in flogging a dead horse. The only purpose it can serve is to give a circuitous route to obtaining a divorce. This only adds to workload of judiciary by needless litigation to build up a ground for divorce.

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8 AIR 2010 Raj 56.

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