



Restitution of Conjugal Rights: Is discrimination continuing against women?

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Abstract:

Amongst Hindus, marriage is a settled institution with a religious character attached to it. Man is the only half of his self. Therefore he is not fully born until he takes a wife and after marriage alone he becomes complete. The acceptance by the bridegroom of the bride, constituting her as his wife. That means bride is not a real party to the marriage, which is a transaction between the bridegroom and her guardian in which she is the subject of the gift. In this process consent or non consent of her is not taken into consideration at all. According to the Hindu concept giving of the gift to a suited person is a sacred duty put on the father and after performing of which the father gets great spiritual benefit. Here the question raised is about the wife. What about the wife? Is she considered as a chattel like the English people consider her? This is not an end but the discrimination starts here once she enters the life. Marriage is the existence of rights between spouses. These rights are called as conjugal rights. This paper sought to analysis, is this actual remedy for a women or a sign of discrimination? And also about the constitutional validity of this right.

Keywords: restitution, conjugal rights, marriage issues, constitutional validity of restitution of conjugal rights

Introduction:

Marriage constitutes the basis of social organization. Hindu law regards marriage as a sacrament, indissoluble and eternal. It is sacred that no party can dissolve it at will, particularly wife. This can be evident from the declaration of Manu that "neither by sale nor by desertion is wife released from the husband¹." Thus there was an element of inherent injustice on the wife, throughout her life. To tackle such inequalities among husband and wife and to protect the sacramental aspects of marriage, the Personal Laws enacted certain matrimonial remedies. One of such remedy is that of Restitution of Conjugal Right. This right finds its origin

in the Jewish Laws. British introduced this to us in the name of social reforms.

"Restitution" basically means "restoring to a party to its original place"², whereas "conjugal" means, "of relating to marriage or to married persons and their relationship"³. So the question which we ask ourselves is what right we are going to retribute? By doing so, are we violating Article 14 and Article 21 of the Constitution?

Personal Laws and Conjugal Rights:

Under Hindu marriage Act, 1955, section 9 speaks about this remedy. It runs like this "when either husband or the wife has, without reasonable excuse, withdrawn from the society of the other,



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 accordingly⁴.”

Hindu Law stressed on the wife's obedience to her husband, but it did not laid down any procedure for compelling her to return to her husband against her will⁵. It must be noted that such a concept existed in England in 19th century and was introduced in India in the case of Moonshed buzloo rhueen v. Shumsoon nissa begam⁶ where such compelling was considered as specific performance. This remedy is available to Christians under section 32 and 33 of the Indian Divorce Act, 1860, to parsis under section 36 of the Parsi Marriage and Divorce Act, 1936 and inter caste marriages will be governed by section 22 of Special Marriage Act, 1954.

Taking all the personal Laws into consideration we can lay down certain elements in common to prove. In that first which comes is Withdrawal from society. Making it more clear it means withdrawal from cohabitation. The next question that derives is what constitutes a reasonable excuse? Any matrimonial conduct which is grave and weighty will amount to a reasonable excuse. The court in various cases held that the following situations will amount to a reasonable excuse to act as a defense in this area;

1. A ground for relief in any matrimonial cause.
2. A matrimonial misconduct not amounting to a ground of a

matrimonial cause, if sufficiently weighty and grave.

3. Such an act, omission or conduct which makes it impossible for the petitioner to live with the respondent.

It must be noted that this concept is only a secondary one⁷. Primarily onus rests with the petitioner. Once the petitioner has proved his case, then only burden of proof will shift to the other party to prove the defense of reasonable excuse or cause. Once it fails, the court will give the decree for restitution of conjugal rights. Here it is interesting to note that disobedience to such a decree is willful as it is held under section 13 (1-A) (ii) of the Hindu marriage Act⁸, if the spouse fails to reconstitute after one year after such a decree, it can amount to a condition of divorce. And this section 13 (1-A)(ii) of Act leads to the problem of insincerity of the petitioner⁹ as it is misused to attain certain ulterior purposes other than reunion.

Another drawback of this remedy is that it is used as a defense for maintenance suit. In order to frustrate the wife's claim for maintenance the husband will file this petition and to eyewash the society, after the decree of restitution he will stay with the wife and leaves his wife afterwards. Then after a year he will file for divorce on the ground that there has been no restitution for a year. There are a lot number of cases to prove this point¹⁰.

Constitutionality of this Relief:

Constitutional validity of section 9 for the first time came up in the case of T. Sareetha V. Venkatasubbiah¹¹. In this case sareetha claimed that section 9 of the Act is liable to be struck down as violative of the fundamental rights in



part III of the Constitution of India, specifically Article 14 and 21. Justice Choudary held that section 9 is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. It denies the women her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. The woman loses her control over her most intimate decisions. Clearly therefore, the right to privacy guaranteed by Article 21 is flagrantly violated by a decree of restitution of conjugal right¹².

But Supreme Court upheld the validity of section 9 of Hindu Marriage Act, in the case of Saroj rani V.Sudarshan kumar chandh¹³, by stating that if the purpose of the decree for restitution of conjugal right in the said Act is understood in its proper perspective it is not violating Article 14 and 21 of the constitution. So for a proper understanding we have to go through Article 14 and 21 with a broader perspective.

What Article 14 laid down is that "the state shall not deny to any person equality before the law and equal protection of Law with in the territory of India"¹⁴. Here equality before Law is maintained in this section as it equally applicable to both the genders. But what about the rule, "like should be treated alike and not that unlike should be treated alike"¹⁵. When the court is pronouncing this kind of a decree the court is forcing the wife against her will. By doing this the consequences are unequal. The wife only is undergoing the changes like she have to bear a child against her wishes and this would affect her choice to determine when she wishes

to use her body for procreation. Whereas husband does not suffer any such consequence, so in this sense Is it not like unlike are treated equally?

Article 21 states that "No person shall be deprived of his life or personal liberty except according to the procedure established by Law"¹⁶. Though it is narrated in a negative language it confers on every person the right to life and personal liberty. By giving restitution we are forcing a woman to go against her will and deprived her choice. Rather than giving this kind of remedy we can make use of remedies such as judicial separation and divorce, which will give due respect to Article 21 of the constitution.

Conclusion:

The concept of restitution of conjugal right was borrowed from the British Law. However the British have abolished the provision from their Laws by The Matrimonial Proceedings Act of 1970. In such a situation it becomes difficult to appreciate why Indian Law are keen to adopt this rule which has undesirable social consequences and which is violative of the constitution!

References

- ¹.Manu ,IX .46.
- ² Oxford ADVANCED Learner's dictionary ,8th Edn ,Vol-2,pg 1304
- ³Shorter Oxford English dictionary ,3rd Edn ,Vol-1, pg 371
- ⁴.sec.9 ,The Hindu Marriage Act ,1955 ,Bare Act ed.1999,p6



- ⁵ Bai jiva v.Narsingh Lalbhai ,AIR 1927 Bom 264 at p.268
- ⁶ .(1867)11 Moo Ind App 551.
- ⁷ .Aditya swarup, constitutional validity of restitution of conjugal rights: scope and relevance, accessed from <http://works.bepress.com/adityaswarup/8>,(Last visited :July 12).
- ⁸ Sec.13 (1-A)(ii) ,The Hindu Marriage Act ,1955v,Bare Act ed .1999 ,p9
- ⁹ Mr.prashanth s.J ,Hindu women and Restitution of conjugal Rights :Do we need the Remedy?,accessed from <http://www.manupatrafast.com/article/s/popOpenArticle.aspx?>
- ¹⁰ Veena handa V. Avinash handa.AIR 1984 Del 444; Bitto V. Ram deo .AIR 1983 All 371.
- ¹¹ AIR 1983 AP 356
- ¹² Ibid .
- ¹³ AIR 1984 SC 1652.
- ¹⁴ Dr. J.N.Pandey ,The constitutional Law of India ,Ed 49 ;pg 77
- ¹⁵ Dr. V.N.Shukla –Constitution of India ,Ed.5th pg.27
- ¹⁶ .Ibid at 239