



RESTITUTION OF CONJUGAL RIGHTS: AN ANALYSIS

Sukhbir kaur , Assistant Professor, Department of Law, SSGPURC, Hoshiarpur

Marriage is social institution and is very basis of a civilized society and marriage is not merely the relationship between husband and wife. Stability of marriage is the sin qua non of every society because the peace in the society is actualized from the one and harmony arising out of commensurate response in the family. The stronger the marriage, the stronger is the society. Consequently, marriage and its perseverance are of vital importance to both the society as well as the state. Conjugal rights are the core of marital union. They originate, operated and are enjoyed within the institution of marriage and are recognized and endorsed by the law in the civilized world. The most important of such rights is the 'right to consortium' which is not creature of law but is inherent in the concept of marriage. It was held in, '*Saroj Rani Vs Sudershan Kumar Chadha*',¹ that in India, conjugal right i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. The term Conjugal rights may be viewed in its proper prospective by keeping in mind the dictionary meaning of the expression 'Conjugal'. Shorter Oxford English Dictionary² notes the meaning of conjugal as "of or pertaining to marriage or to husband and wife in their relation to each other". So, these are the rights which husband and wife have to each other's society and marital intercourse. It implies the corresponding duty of each spouse to cohabit together as a husband and a wife sharing a common place of living, a common domestic life generally called 'Matrimonial Home'. Mulla has describe it beautifully as, the essence of marriage is a sharing of common life, sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying in common things of the matter and of the spirit and from showering love and affection on one's offspring's. Living together is a symbol of such sharing in all its aspects. Living apart is symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage.³

Recognition of marital rights and duties in its logical sequences gives the claim to the parties to a marriage for the enforcement of these rights. This right is of marital claims of the respective spouses, is the basis of matrimonial remedies. Law does not wish to allow either spouse to act according to personal wishes and not full fill the marital obligation; therefore this remedy of restitution of conjugal rights is incorporated in all personal laws in India. According to **Derrett.**, restitution of conjugal right is intended to give the deserting spouse an opportunity of returning, reassuring his or her responsibility an making a fresh start⁴. The object of this remedy is to maintain the sanctity of marriage institution and also the healthy development of civilized society aiming at preserving the institution of marriage.

The main fundamental question arises that what constitute matrimonial home? Does the non acceptance of the imposed decision of one party lead to withdrawn from the society? Does the decree of restitution of conjugal rights achieve its purpose or defeat it? Unfortunately, the

¹ AIR1984SC1562

² Shorter Oxford Dictionary 3rd edition Vol.1p. 37, quoted in Saroj Rani vs Sudershan Kumar Chadha, AIR1984SC1562At 1568

³ Mulla, Hindu law %th Fdition Para 443 p. 567

⁴ JDM Derrett: A Critique of Modern Hindu Law



judiciary has not been clear, whenever the conjugal rights come into open conflict with. It always been alleged that women's right to equal opportunity in employment and education ignored by the judiciary. Instead of giving a rational judgment and guiding the parties to make adjustment in view of the social change, the judiciary has either evaded the issue or thrown its weight on the traditional view of the husband's authority not only to determine the location of matrimonial home but also to decide whether the wife should work or not. And under the constraints to depart from the old notions of consortium and cohabitation which emphasized that the cohabitation was only possible while living under the same roof unless the parties were living at separate places with mutual agreement or arrangement, many courts passed decree of restitution of conjugal rights against the wife.⁵ Thus, the authority of the husband was upheld even by the judiciary. But it is also true and it is very much reflected in the judicial tenor which is making attempts to depart from the traditional ethos and redefining the concepts of consortium and cohabitation to make way for the change in the concept of matrimonial home.⁶ Matrimonial Home and Restitution of Conjugal Rights restricted concept view of marital rights in wider perspective which can be performed even while living at different places provided the intention to cohabit continues. Under the provision of restitution of conjugal rights the court is enjoined to make every endeavor to bring about reconciliation between the parties, besides this the remedy has some practical utility value also. Firstly, the decree of restitution of conjugal rights enables the wife to claim maintenance as ancillary relief without filling a fresh suit⁷. And secondly, when all attempt to reconcile in spite of the decree of restitution of conjugal rights fails then it entitles either spouses to obtain, a decree of divorce in somewhat dignified way on the basis of non compliance with the decree of restitution for a period of one year or more⁸. Thus, this remedy gives to the parties a chance to reconcile, if nothing comes out of it then it leads to the dissolution of the marriage on the presumption that the marriage has irretrievably broken down. Therefore, the Law Commission has not recommended the abolition of the remedy of the restitution of conjugal rights either in its fifty ninth report or its seventy first report despite being aware of the fact it has been abolished in England.

But, lately the remedy of restitution of conjugal rights has come under a lot of criticism because it hardly serves the purpose of bringing back the spouse together rather it is being used as an easy way for the dissolution of marriage. As **Aggarwala** describes it as "the weakest of matrimonial remedy."⁹ It has been said to be outdated, unsuitable and practically unenforceable in the present day pattern of society¹⁰. It is also being suggested as a remedy which is not remedy in itself but serves as a stepping stone for some other remedy or convenience hardly deserves a place in the law book¹¹. B.P. Beri says that at the highest it is pious reminder for the discharge of the duty and one need not have recourse to a court of law and spend a lot of money and time and undergo trouble for the reminder of well know duty.¹²

⁵ Tirath Kaur Vs Kirpal Singh AIR 1964 Pub. 28, V. Pothuraja Vs Radha AIR 1965 AP 407, Gaya Parsad Vs Bhagwati AIR 1966 MP 214. ⁶ Harvinder Kaur Vs Harmander Singh AIR (1984) Delhi.66

⁶ Harvinder kaur vs Harmader Singh AIR 1984 Dehli.66

⁷ Sec. 25, Hindu Marriage act, 1955

⁸ Sec. 13(1A)(II) The Hindu Marriage Act, 1955, Sec. Special Marriage Act, 1954, By amendment in Parsi Marriage and Divorce Act, 1936 in sec. 32(a)

⁹ RK Agarwala, Matrimonial remedies Under Hindu Law 1974 P.15

¹⁰ SP Sharma, Restitution of Conjugal rights in V Bagga (ed) Studies in the Hindu Marriage Act

¹¹ RK Agarwala, Matrimonial Remedies under Hindu Law 1974 p(169)

¹² BP Beri, Marriage and Divorce in India (1982) p.184



As in *Shakila vs Gulam*¹³ **Vadya J.** observed that the restitution of conjugal rights is a relic of ancient times when slavery or quasi slavery was regarded as natural and this barbarous remedy should by sparingly awarded particularly after the constitution of India come into force, which guarantees personal liberty and equality of status and opportunity to men and women alike. But society had changed now joint-families are breaking into nuclear families and now husband and wife are working together, lack of communication as it used to be in older days is no more. As a result where man and woman happen to be educated and leave the spouse with calculated and final determination, this remedy seems to be quite useless. In *Babu Rao Vs Sushila*¹⁴ it was rightly observed that in matrimonial matters it is the attitude of mind and feelings that count and no decree of the parties to live together. In the fast changing society the concept of marriage is changed i.e. from the sacrament to the semblance of sacrament and contract. The modern approach to restitution in the words of **Venkataramiah J.** it has to be borne in mind that the decision in a suit of restitution of conjugal rights doesn't entirely depend upon the right of the husband. The court should also consider whether it would make it equitable for it to compel the wife to live with her husband. Our notion of law in that regard has to be altered in such a way as to bring them in conformity with modern social condition¹⁵. Thus, with the changing society, the concept of restitution of conjugal needs to be changed. In recent times, the husband can no longer expect that the forbearance, patience and complete servitude from his wife as dignity and self respect are the progressive features of the day¹⁶. It was for this reason that constitutional validity of the remedy of the restitution conjugal rights was challenged before the Andhra Pradesh High Court in **T. Sareetha Vs T. Venkatasubiah**¹⁷ It was held in this case that the remedy of restitution of conjugal rights provided by section 9 of the Hindu Marriage Act, 1955, is savage and barbarous remedy, violating the right to privacy and human dignity guaranteed under Article 21 of the Constitution. It neither promotes any legitimate public purpose based on any conception of the general good and sub serve any social good and there being arbitrary offends Articles 14 of the constitution which guarantees right to equality therefore, this is a ultravires of the constitution. In the opinion of **P. A. Chaudhary, J.**, this remedy is absolutely unreasonable, inhuman and nothing more than 'forced sex', 'coerced sex' and forcible marital intercourse. But **Avadha Behari Rohtagi J.** has strongly negative the judgment in T. Sareetha's case in *Harvinder Kaur Vs Harmander Singh*¹⁸ and held that sections 15 Raj Md. Vs Amina AIR 1976 Kant 202. 16 Kanna Vs Krishnaswami AIR 1972 Mad 247. 17 AIR (1983) AP 356. 18 AIR (1984) Delhi 66. Conclusion 123 of the Hindu Marriage act is not violative of the Article 14 and 21 of Constitution. He further evaluated the relevance of the restitution of conjugal rights as matrimonial remedy in the Hindu society and come to a conclusion that the time has not ripe enough to bury this legal device of providing a chance to the spouses to mend their ways through adjustment for the sake of amity and good relations between the spouses and a happy married life. It is no way means legally enforced sexual intercourse and on the contrary restrict itself to ensure the cohabitation and consortium for one year. This section ensures complete equality to the spouse does not violate the constitutional provision, because it sought to preserve the institution of marriage. The

¹³ AIR(1974)Bom.166

¹⁴ AIR(1964) MP 73

¹⁵ Rj Md. Vs. Amina, AIR1976Kant202

¹⁶ Kanna Vs. Krishnaswami AIR1972 Mad. 247

¹⁷ AIR (1983)AP 356

¹⁸ AIR(1984) Dehli 66



supreme Court conducted both the views in Smt. *Saroj Rani Vs Sudershan Kumar Chadha*¹⁹ where it preferred the view of **Mr. Justice Rohtagi** of Delhi High Court given in Harvinder Kaur's case and in this process Supreme Court reviewed the cases at length and relying on the correct connotation of the expression "Conjugal Right" given by Earl Jowitt in the dictionary of English law that conjugal rights are rights which husband and wife have to each other's society and marital intercourse²⁰.

The remedy has come before the different courts²¹ for their opinion time to time and lot of criticism was made because it has hardly been useful in bring the spouses together or in saving the broken marriage. Matrimonial Home and Restitution of Conjugal Rights It may be concluded that although the underlying object of this relief is to achieve harmony in matrimonial relationships and afford a chance to the parties to make endeavor to live happily and peacefully. Yes, in practice it has been found through the case laws that this remedy has failed to achieve the desired objective. This remedy in most of the cases has been taken merely a step-in aid for the dissolution of marriage. This way of getting divorces serves no purpose, rather is waste of time and money. Ours is developing society, social values have undergone a change in the attitudes and values of the people. Woman is equally participating in family's financial position by taking employment outside her home. As **Maine** rightly said that, the unit of ancient society was the family and of the modern society individual. In these circumstances, the marital relations have also undergone a change and the concept of marital rights and duties towards each other now stands on a different footing. The concept of marriage is also changed from sacrament to a mixture of sacrament as well as contract. The right of each spouse to the society of the other which has been considered as the basis of this remedy is no more only the right which the spouses have towards each other. It may humbly be suggested that law should redefine 'matrimonial home' in the changing context of woman's right to work and consequent socio-economic structure after society. It should clearly stipulate that the decisions regarding matrimonial home should be mutual and not the monopoly of one party as in the traditional culture. Non acceptance of the decision of the one party should not be treated as withdrawn from the society Conclusion 125 of the other or desertion, hence not made a ground either in case of restitution of conjugal rights or divorce and concept of consortium and cohabitation should be read in wider sense. **Dr. Paras Diwan** rightly pointed out that wife's refusal to resign from her job amounts to withdrawn from the society lies in the fact that much had been made out of the matrimonial home and husband's right to establish it and the wife obligation to live in it. If the expression 'Matrimonial Home' has to be used in our times, we have no escape but to accept Lord Denning's formulation of matrimonial home: It has to be establish by the mutual consent of the parities and the spouse who takes an unreasonable attitude will be considered to be, one who has deserted, not merely this, it is established by him. The parties would cohabit the way exigencies of their employment will permit and neither the husband nor the wife (a wife who has a better job may as well ask her husband to give up his job) has any right to ask the other to resign. As far as restitution of conjugal rights is concerned it is suggested that a remedial measure in the form of a reconciliation clause may be introduced, so that the courts should act not as a judge

¹⁹ AIR 1984 SC 1562. 20 Dictionary of English law 1959 (Ed.) P. 453 Quoted in Saroj Rani Vs Sudarhsan Kumar Chadha AIR SC (1984) 1562.

²⁰ Dictionary of English law 1959 (Ed.) P. 453 Quoted in Saroj Rani Vs Sudarhsan Kumar Chadha AIR SC (1984) 1562

²¹ Tirath Kaur Vs Kirpal Singh AIR 28 1964, Gaya Parsad Vs Bhagwati AIR 1966 MP 212, Smt. Kaiashwati Vs Ayodhiya Parkash 1977 HLR 175 P & H (FB). 124 (SG Pustak)



to find fault or guilt of the party but should attempt to bring to two parties together through the reconciliation proceeding which should be of the counseling nature which may help the parties to adjudge their marital obligations towards each other from a fresh angle. Even on the future of few reconciliation attempts such a union should be broken with maximum fairness and the only method apart from the mutual consent the principle of irretrievable breakdown of the marriage. Which was also recommended to be inserted by the 71st report of the Law commission in Hindu Marriage Act 1955 along with the existing grounds and principles of divorce. In this law commission has recommended that separation of three years with no hope of reconciliation should be considered as a proof of breakdown of marriage and hence a decree of divorce should be available on the ground of irretrievable breakdown of the marriage. No doubt marriage is pivotal institution of society and keeping in mind the peculiar condition of the changing society especially in the status of women, marriage is still treated as semblance of sacrament and contract and divorce is still not considered good for the woman. Therefore, the remedy of restitution of conjugal rights accompanied with the conciliation provision and the introduction of irretrievable breakdown of marriage as a ground of divorce would serve the purpose in the present position because otherwise the institution of marriage which is vital for the existence and functioning of social life in society will be taken as convenience of the man. So, we need to have equality between man and woman without power on one side or obedience on the other. It should be the goal which is desirable to be achieved. Therefore, such type of family law is required which not only helps in maintaining the sanctity of institution of marriage and family stability but at the same time also accords equal value and opportunity to the husband and wife.