

WORKING WIVES AND RESTITUTION OF CONJUGAL RIGHTS UNDER HINDU MARRIAGE ACT: SOME GLIMPSES FROM JUDICIAL DECISIONS

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Abstract

Marriage gives some necessary duties and rights to both the spouses almost under all the matrimonial laws. Its main implication is that the parties should live together. Under Hindu law when marriage was treated as sacrament the responsibility of spouses for living together was more. Under Hindu Marriage Act a due consideration has also been given to the togetherness of the spouses and if either of the spouses withdraws herself or himself from the society of other without any reasonable cause then the aggrieved party has the right to file the petition in the matrimonial court for the restitution of conjugal rights. At this juncture, when the Constitution of India provides equality to every one under Article 14 and grant personal liberty under Article 21, it becomes difficult for the courts to compel person to live in the company of other if he or she is not willing for the same. Moreover, some time the profession or the job of one spouse create situations which may give rise the demand of restitution of conjugal rights from the other. In this state of affairs, the court preferably has to save the marital relations between the couples and hence, while deciding such petition the Court always consider the reasonability of the party who is alleged to have been deserted and which may differ from case to case. In this backdrop an attempt has been made in this paper to analyse the judicial approach while deciding a petition regarding restitution of conjugal rights under Section 9 of Hindu Marriage Act especially when the wife is working away from the society of the husband.

Key words:Conjugal, Court, Desertion, Hindu, Husband, Marriage, Society, Spouses, Wife

Introduction

Marriage imposes an obligation upon both the spouses to cohabit with each other. It is a necessary implication of marriage that the parties will live together. The main theme of marriage under the old Hindu law was that the husband and the wife should be entitled to the company and society of each other.¹ Under the ancient Hindu Law the foremost duty of the wife was to honour and serve the husband. She had always to stay with him and had a right to residence in the house. On the other hand, the duty of the husband was to maintain his wife and parents. Manu declared that one must maintain one's aged parents, a virtuous wife and a minor son even by doing a hundred bad deeds.² In this way under ancient Hindu Law it was the duty of the husband to provide residence and maintenance for the wife, and the wife was bound to stay with the husband. Where one of the spouses refuses the access of the other the question of restitution of conjugal rights arise. Though the shastric texts did not specifically mention the remedy of restitution, but in case of failure of anybody to perform his marital duties, the other spouse was entitled to enforce his or her rights in the Court of law.³ Not only was the husband bound to maintain the wife, but he was called upon to cohabit with the wife and was supposed to incur the sin of embryo murder, if he refused to do so without any good cause. On the other hand, the husband had a right to consortium i.e. the wife was also not to refuse herself to the husband and if she does so, her delinquency was to be proclaimed in the village and she was to be driven from the house.⁴

¹. Mohammad A. Qureshi, *Marriage and Matrimonial Remedies; A Uniform Civil Code for India* 81 (Concept Publishing Company Delhi,1978)

². Pundurang Vaman Kane, *History of Dharmasastra* 568 (Bhandarkar Oriental Research Institute, Poona, Vol.II, Part-I, 2nd Edition,1974)

³. *Id.* at p.570

⁴. *Id.* at p.571

The remedy of conjugal rights was well recognized by the British Indian courts. In *Hursookha Vs. Poorun*⁵ the court granted the remedy of restitution. In *Binda Vs. Kausilya*⁶ the court said that the texts of Hindu law relating to conjugal cohabitation and imposing restriction upon the liberty of the wife, and placing her under the control of her husband, are not merely moral precepts, but rules of law. As the Shastric law was silent on many points, the British courts, therefore, assumed the authority and power to use discretion as when to award the remedy and when to refuse it. The decisions delivered by the courts during the British period show the courts refusing the restitution in situations, where the husband was suffering from an incurable and contagious or loathsome disease,⁷ adoption of another religion,⁸ keeping of a low caste Concubine,⁹ on extreme disparity of age with wife where marriage was not yet consummated¹⁰ and for his present adultery.¹¹

The Law Commission of India in its seventy first report observed that the essence of marriage is a sharing of common life, a sharing of all the happiness that life had to offer and also all the misery that has to be faces in life. Living together is a symbol of such sharing, whereas, living apart is a symbol indicating the negation of such sharing. In this context the conjugal rights accrue on each spouse the moment they entered into the marital tie.

Objectives of Research:

1. To study the rationale behind the incorporation of Section 9 in the Hindu Marriage Act, 1955
2. To analyse the constitutional validity of Section 9
3. To explore the judicial stand in deciding the petition under section 9 of HMA especially when the wife is working
4. To concludes the study with some suggestions based on the field of research

Research Questions:

1. Whether the Constitution of India, can be applied to test the legality of a petition to be filed under Section 9 of the HMA, 1955?
2. Whether the section 9 of the HMA violates the Fundamental rights guaranteed under Article 14 and 21 of the Constitution of India?
3. What is the opinion of the courts regarding the conjugal rights of husband especially when wife is working away from the company of the husband?

Research Methodology

This paper is an outcome of a doctrinal research based on the literature available in the shape of books, journal, Articles, cases, research website etc. However, the study was conducted in keeping mind the objectives mentioned above.

Limitations of Study

The paper is descriptive and based on secondary data and hence its reliability is subject to the available literature in this regard. Considering the limitations of time the paper, has also been confined to the discussion and the research questions in the mind of the researcher.

Restitution of Conjugal Rights under HMA

The principle of shastric law as declared by Manu that neither by sale nor by desertion a wife could be released from her husband¹² was applicable only to the Hindu women and not to the men. Thus, under Hindu personal law there was an element of inherent injustice towards wife. To cop up such types of inequalities and also to protect the sacramental aspect of Hindu Marriage, the Hindu Marriage Act, a codified version of the shastric law was enacted by the Parliament in 1955 expressly provides the provisions for restitution of Conjugal rights. After the enactment of this statute, if any of the spouses neglect the other in conjugal relations the later can approach the

⁵ . (1867) Rep. H.C.J. N.W.P.(Agra 1867).

⁶ . (1892) 13 All., 126).

⁷ . *Bai Premkunwar Vs. Bhika* (1868), 5 Bom. H.C.R. (A.C.)209

⁸ . *Paige Vs. Sheonarain* (1886)8 All., 78

⁹ . *Dular Kaur Vs. Dwarkanath* (1907), Cal.971

¹⁰ . *Gurmukh Singh Vs. Mst. Harbans*, A.I.R. 1928, Lahore 902

¹¹ . *Binda Vs. Kausilya* (1892)13 All., 126

¹² . Manu, IX, 46.

court of law for restitution of the same.¹³ The Marriage laws (Amendment) Act, 1976 on the recommendations of the Law Commission¹⁴ amended this provision of Law by repealing sub-section 2 and added an explanation to sub-section 1.¹⁵ By virtue of this explanation a duty has been imposed upon a person who withdraws himself or herself from the society of the other, to prove that there was some reasonable excuse for such withdrawal. It has cleared a lot of confusion regarding interpretation of this section based on meaning of reasonable excuse for the withdrawal of a spouse from the society of the other, and also that who has to bear the burden of proving the withdrawal as reasonable or unreasonable. The restitution of conjugal rights as provided under Section 9 of the Hindu Marriage Act, 1955 is the only positive relief in the legislation which aims to affirm and preserve the marriage. Its object is to restore the missing links. It provides a fresh opportunity to the parties to make another attempt to live together with love and respect. However, it is discretionary in nature. It is not a mandatory remedy. The words "...may decree restitution of conjugal rights" used in section 9 have given discretion to the Courts while deciding a petition regarding restitution. It is neither 'shall' nor 'will', but 'may' which is permissive and not mandatory. It is the obligation of the courts that the discretion must be used objectively and without prejudice.

Conditions for Restitution:

Section 9 of the Hindu Marriage Act, 1955 has laid down four conditions for decreeing the grant of restitution of conjugal rights. These are;

- (i) The respondent has withdrawn from the society of the petitioner.
- (ii) The withdrawal by the respondent is without a reasonable excuse.
- (iii) The Court is satisfied that the statements made in the petition are true.
- (iv) There is no legal ground for refusing to grant application.

Constitutional Validity

During the time of introducing the provision of restitution of conjugal rights in the Special Marriage Act and Hindu Marriage Act, there were heated debates in the parliament for and against this concept. The constitutional validity of restitution of conjugal rights was challenged in the Andhra Pradesh High Court, in which the petitioner claimed that this remedy is violative of the fundamental rights given in the Constitution specifically Article 14 and 21 and is therefore, liable to be struck down¹⁶. Justice Choudary held that section 9 is barbarous and savage which violates the right to privacy and the right to live with dignity given under Article 21¹⁷. Thereafter, Delhi High Court in *Harvinder Kaur v. Harmander Singh*¹⁸, held that Section 9 is not unconstitutional since the aim of this section is to preserve the marriage. Ultimately, the Supreme Court in *Rani v. Sudarshan*¹⁹ set aside the controversy arose by the two contradictory decisions of two different High Courts. The Apex Court in its landmark decision upheld the constitutional validity of section 9 of the Hindu Marriage Act. The Court observed that the object of this section is to bring together the estranged parties so that they can live together. In the opinion of Court, the privacy of home and married life had nothing to do with Article 14 and 21 of the Indian Constitution.

Judicial Approach

Lawful wedlock among two persons imposes an obligation on both the spouses to cohabit with each other and to live with each other. Hindus are no exception to this rule. The expression "withdrawal from the society" means cessation of cohabitation, to bring to end consortium. The cessation of cohabitation should be the voluntary act of

¹³ . The Hindu Marriage Act, 1955; Section 9. It provides "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".

¹⁴ . Law Commission of India, 59th Report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954 (1974).

¹⁵ . Explanation added to Sub-Section (1) of Section 9 of HMA speaks as "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"

¹⁶ . *Sareetha v. T. Venkatasubbaiah*, AIR 1983 AP 356

¹⁷ . *Ibid*

¹⁸ . AIR 1984 Delhi 66

¹⁹ . 1984 AIR 1562

the respondent. For establishing withdrawal from the society, it is not necessary to establish all elements of desertion. What is needed to be established in a petition of restitution of conjugal rights is a total repudiation of cohabitation. However, when one spouse withdraws himself or herself from the society of the other spouse, it is withdrawal from the totality of conjugal relationship, such as refusal to live together, refusal to have marital intercourse, and refusal to give company and comfort.²⁰ Desertion by one spouse of the other would amount to withdrawal from the society of the other.²¹

In a petition for restitution of conjugal rights it is not required to show that the parties were cohabiting earlier. Where spouses have not cohabited at any time after the marriage, a petition for restitution of conjugal rights would lie if the intention not to cohabit is established.²² On the other hand, when a spouse refuses to cohabit with the other that is enough, it is not necessary to show that consummation of marriage has taken place. It is no defence to a petition for restitution of conjugal rights that the respondent whether or not like the petitioner or does not want to live with him or her or that he or she is a poor person who cannot afford his or her spouse or that he or she is not a proper person to be a life companion.²³

In the context of section 9 an important question is whether taking up of a job by a wife at a place other than where her husband resides amount to desertion or her withdrawal from his society for the purpose of job is under a reasonable cause. This question first came up before the Punjab and Haryana High Court in *Tirath kaur Vs. Kartar Singh*.²⁴ This was a husband's petition for restitution of conjugal rights. His contentions were that his wife had left the matrimonial home to a distant place and taken up a job there and, despite his repeated requests to resign her job and re-join him in the matrimonial home, she had not cared to do so. The parties were married in 1953 and the muklawa ceremony took place in 1954. The wife's case was substantially established on the evidences which revealed that in 1958 her husband being in a bad financial position requested her to take up some training so as to enable her to take up a job. Since her husband was neither willing nor in a position to bear the cost of her training, she left for her father's house where she took training in tailoring and succeeded in obtaining a diploma in 1959. Thereafter she got a job at a place which was at some distance from her husband's house. Initially both the parties were agreed to this job. Her husband used to visit her and stay her place frequently and she also used to go to her matrimonial home during holidays and vacations, whenever she got an opportunity to do so. The wife contended that she used to send some portion of her salary regularly to her husband and her father-in-law. During all this period and till a short while ago before the filing of the petition, cohabitation continued between the parties. The wife alleged that her husband's demand for money continuously increased, which she was not in a position to meet and, therefore, the husband quarrelled with her and demanded that she should resign her job, which she refused to do. It was established that conjugal intercourse continued a short while ago before the presentation of the petition and that the wife used to send money to the husband and the father-in-law. The wife in her letters to the husband, in her pleadings and in her oral deposition maintained; "I want to marriage to continue, that the petitioner may come to me occasionally and I may visit him occasionally. But I am not prepared to give up my job at any cost". Though the wife used the word 'occasionally' in her letter to the husband, even then it was clear from her oral deposition and tenor of the evidence that what she meant was that whenever it would be possible she would go to live with her husband and her husband, too, could do the same. This was also a fact that Tirath Kaur took up the job after six years of married life and such was made for the financial contingency of the husband.

The Court in this case held that where a job requires a wife to live away from her husband and she refuses to resign, it cannot be said that she has not deserted him or has not withdrawn from his society without reasonable cause. Referring to the duties of a wife under Hindu law as stated by Mulla, the court observed; In Mulla's Hindu law, it has been stated that a wife's first duty is to submit herself obediently to his authority, and to remain under his roof and protection. She is not, therefore, entitled to separate residence or maintenance, unless she proves that,

²⁰ . Paras Diwan, *Law of Marriage and Divorce* 334 (Universal Law Publishing Co.Pvt. Ltd. 4th Edition 2002)

²¹ . *Ibid*.

²² . *Venugopal Vs. Laxmi*, AIR 1936 Mad. 288.

²³ . *Amma Saheb Vs. Tarabai*, AIR 1970 MP 36

²⁴ . AIR 1964 Punjab .28

by reason of his misconduct or by his refusal to maintain her in his own place of residence or other justifying cause, she is compelled to live apart from him. The counsel for the wife argued that in the present day pattern of society, it is not possible to fit the old notion of a Hindu wife being an appendage to the household of the husband, and that it is open now-a-days for either spouse to employ his or her time in gainful employment, and if the wife, owing to the exigencies of service, cannot stay for all the time with the husband, it should not be held that she was withdrawn from his society. The court, however, refused to accede to the submission and held; It is not possible to accede to the contention..... that the husband in the present case should content himself by visiting his wife whenever he wishes to live with her or cohabit with her or by her coming to live with him occasionally. There can be no bar to such an arrangement being made by mutual consent and concurrence of the parties as the court observed .

In *Gaya Prasad Vs. Bhagwati*²⁵ wherein the wife also averred that on account of adverse financial circumstances of the husband she had to take up the job of a *gram sevika* with his permission to carve out a decent living. Later on, the husband demanded that she should give up her job and join him. The trial court after hearing the petition held that the wife's employment because of economic compulsions cannot amount to unreasonable withdrawal. However, on appeal the Madras High Court reversed the order. It held that merely on the ground that the husband has small income and the wife if she is allowed to serve at a place away from a marital home can substantially augment the family income, cannot be held to be a sufficient reason to deny the wife's society to the husband. Nothing in the Hindu law warrants the adoption of such a course.

The Madras High Court in *N.R. Radhakrishnan Vs. N. Dhanalakshmi*²⁶ took a different view that a wife living separate from the husband by taking up a job somewhere else owing to financial exigencies or by an implied or mutual arrangement arrived at by her and her husband, cannot be said to have withdrawn unreasonably from her husband's society. The petitioner and the respondent in this case were gainfully employed before marriage, the husband as a driver in the State Transport Undertaking at Madras and wife as a School Mistress at Madras in a school conducted by the Madras Corporation. Sometime after the marriage, the husband got himself transferred to Pondicherry and then to Krishanagiri. This seems that after the marriage some trivial misunderstanding developed between the parties. While at Krishanagiri the husband wanted the wife to resign her job and join him there but she refused to do so. Her contentions were that her husband treated her with cruelty soon after the marriage, and that he got himself transferred to tease and spite on her. Like other cases the income of Husband here was also very low. It was Rs 200 per month only. Maharajan, J., while disposing of the petition suggested that the sensible course for the parties to follow was, "each may visit to other in his or her place at weekends, and come away after a day's stay at the place of his or her avocation".

Similar observations and suggestions were passed by the Gujarat High Court in *Praveenaben Vs. Sureshbhai*²⁷ wherein the wife took the job after the marriage with the full consent of the husband. The parties were posted at different places. For the cohabitation husband sometimes visited the wife's place and vice versa. Ultimately the husband changed his mind, wanted his wife to resign the job and join him, and on her refusal to do so, filed the petition for restitution of conjugal rights. It was established from the facts of the case that the wife took up the job at a place away from the husband's place of residence with the consent of the husband.

In *Mirchumal Vs. Devi Bai*,²⁸ both the parties were in employment and posted at different places at the time of the marriage. During holidays and vacations the wife used to visit and live with her husband. This way, their life continued for about four years when the wife resigned her job and joined her husband. After about a year the wife again took up a job at a place away from her husband's home. For about six months the wife did not join her husband and consequently, he filed a petition for restitution of conjugal rights. In her pleadings and oral deposition before the court, the wife made the similar statements to that of the Tirath Kaur that she was prepared to go and reside

²⁵ . AIR 1966 MP 212

²⁶ . AIR. 1975 Mad.331

²⁷ . AIR 1975 Guj. 69

²⁸ . AIR 1977 Raj 113

with her husband during vacations, and holidays and the husband too was free to do the same but at any cost she could not resigned from the job.

The learned District Judge in this case dealt with an important question whether the respondent withdrew from the society of the appellant without reasonable excuse? In this connection, the learned District Judge dealt with the question whether respondent's taking of a job at a place away from her husband's home was unjust and without reasonable cause, and can this be treated as leaving the society of her husband without reasonable excuse within the meaning of Section 9 of the Act. The learned District Judge answered this question in the negative. He observed,--

“The society has much advanced and now education is imparted equally to both males and females. The pattern of society has changed altogether. The wife cannot be prevented from taking up employment and cannot be forced to reside at the same place where her husband is living or serving. If she is compelled to give up her employment, and without doing so, she cannot reside with her husband at the place where he is serving, then it would mean inequality before law and serious infringement of her fundamental rights as enshrined in our Constitution. In the instant case, the non-petitioner is prepared to come and reside with her husband during vacation or during holidays which she might set. Similarly, she is prepared to welcome her husband whenever he finds time and opportunity to go and reside with her. I am, therefore, of this view that in the circumstances mentioned above, it cannot be said that the non-petitioner has left the society of her husband without just cause”.

Aggrieved by the decision of the District Court, the husband filed an appeal before the High Court which was dismissed by the Court and it was held by the High Court that the decision of Learned District judge was right in the circumstances of the case.

In *Vibha shrivastava Vs. Dinesh kumar*²⁹ the wife's refusal to resign her job and live with her husband who was living in a different place was found to be justifiable and the husband's petition for divorce on ground of cruelty was dismissed. Similar decision was given by Bombay High Court in *AB Bakre Vs. BS Bakre*.³⁰ The Rajasthan High Court also expressly emphasized the concept of complete equality of the spouses in this regard. The wife's insistence on her continuing with her employment and refusing to leave her job was held not to constitute cruelty so as to entitle the husband to matrimonial relief.³¹ Such decisions of Courts can be considered as a shift from traditional Indian thought to a modern thought which develop with the concept of gender equality. Now the judges are interpreting the law to provide better justice to women in the new context of the socio-economic conditions.

While deciding a petition under section 9 of the Hindu Marriage Act, Courts exercise their discretion very reasonably and according to the circumstances of the case. Decision of different high Courts reveal that it differs from case to case and court can neither compel any party to go for cohabitation with other nor allow the other to throw the one out of the marital tie who has reasonably separated for some time from the society of the latter. In *Baburao Vs. Sushila*³² the Madhya Pradesh High Court made certain suggestions as to how the discretion should be considered as a whole. The Court said that restitution should be allowed when it is seen that the petitioner deserves it, and it will not be unreasonable to do so, in the circumstances of the case. The Court also said that the restitution should not be granted if there is no hope for the parties to live together happily. The Court observed that in marital matters it is attitude of the mind and the feelings that count, and no decree of the court can force the parties to live together.

Conclusion and Suggestions

The remedy of restitution of conjugal rights is open to both the spouses. If any of the party refuses to cohabit the other, latter can approach to the court under section 9 of Hindu Marriage Act, 1955. However, it has been generally observed that the number of cases as instituted by wife in this respect is low as compared to the cases filed by the husband. One reason can be the influence of Shastric law over the Hindu society as Shastras do not speak of the

²⁹ . AIR. 1991. MP 346

³⁰ . AIR 1991 Bom.164

³¹ . *R Prakash Vs. Sneha Lata*, AIR 2001 Raj.269

³² . AIR 1960, M.P. 73

women's right to restitution.³³ It appears that notions of sound public policy and natural justice coupled with the influence of English Common Law which already recognized the remedy for both the spouses, actually led the early courts to introduce and apply the remedy of restitution in Hindu Law to both the spouses alike. The other reason may be the intention of husband to avoid the maintenance petition if any filed by wife, where the husband has made it impossible for the wife to live with him. So, the petitions for restitution are sometimes presented with malice intention either to defeat the maintenance claim of the wife, or to pave the way for divorce.³⁴ In such cases the restitution petition is generally used for no other purpose but to create a deadlock. In this context, it is submitted here, that the provision of restitution of conjugal rights incorporated in Hindu Marriages Act, 1955 is only a positive relief granted under the legislation. However, the courts while dealing with petition under Section 9 very consciously go through the contents and facts of the cases which may differ from case to case. Modern concepts of equality of sexes, marital rape and employment of a person are given due considerations by the courts. Over and above a due consideration is given to save the marital relations and healthy attempts are made for saving the marriage which can change the mind set up and feelings of the parties.

It is suggested here that when one party approaches to court for seeking the society of other, the court should explore the situation to reconcile the parties. It would serve the intent and purpose of section 23(2) of the Hindu Marriage Act, which provides that the Courts should make every endeavour to bring about reconciliation between the parties involved in matrimonial dispute. Hence, before proceeding to grant any relief under this Act, the Courts are duty bound in first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties. When a marriage is plagued with quarrels and fights, and when the times get arduous for partners to stay with each other, staying away from each other for a while may help. But when this 'for a while' does not end, and continuous indefinitely, this doesn't help the marriage in any way, rather distances the couple. So, if it is beyond the realm of imagination for them to remain together at that point it's better that they take separate as opposed to being isolated. Besides, the working women should not be compelled to leave the job merely to render their conjugal duties. It is the need of time that in the male dominated society like India the women should be made economically independent. While deciding a petition under Section 9 of HMA, 1955 one side the court's duty is to make every endeavour to make patch up between the parties for saving the marriage, on the other hand court has to ensure that there must not be any infringement of the fundamental rights of any of the party particularly guaranteed under Article 21 of the Constitution.

³³ . Myne says, "Agreement enabling a wife to avoid a marriage are forbidden by Hindu law and contrary to public policy and can be no answer to a suit for restitution of conjugal rights by the husband against the wife".

³⁴ . Supra Note 1 at p.85