

**ONLINE OPEN ACCESS PEER-REVIEWED LAW**  
**JOURNAL**

**ISSN: 2582-7952**



VOLUME 1: ISSUE IV

Email: [support@lexbonafide.com](mailto:support@lexbonafide.com)

Website: [www.lexbonafide.com](http://www.lexbonafide.com)

### **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of Lex Bona Fide – The Law Journal. The Editorial Team of Lex Bona Fide holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of Lex Bona Fide. Though all efforts are made to ensure the accuracy and correctness of the information published, Lex Bona Fide. shall not be responsible for any errors caused due to oversight or otherwise.

## **EDITORIAL TEAM**

### ***EDITOR IN CHIEF***

*Name – Mr. Neeraj Kumar Gupta*  
Asst. Professor Institute of Law, Nirma University  
LL.B., LL.M  
Email - [editorinchief@lexbonafide.com](mailto:editorinchief@lexbonafide.com)

### ***SENIOR EDITOR***

*Name – Mr. Vikas Guru*  
Chartered Accountant(CA)//Founder & Editor of Income Tax  
Judgement Fortnightly Journal  
Email – [vikasguruca@gmail.com](mailto:vikasguruca@gmail.com)

### ***SENIOR EDITOR***

*Name – Ms. Pankhuri Agrawal*  
Ph.D Scholar(NALSAR), LL.B., LL.M (NLSIU)  
Email - [pankhuri11agrawal@gmail.com](mailto:pankhuri11agrawal@gmail.com)

### ***SENIOR EDITOR***

*Name – Mr. Franz D. Kaps*  
Associate at DLA Pipers | Arbitration | Frankfurt, Germany  
Email – [franz.kaps@dlapiper.com](mailto:franz.kaps@dlapiper.com)

### ***SENIOR EDITOR***

*Name – Mr. Wasim Beg*  
Partner at L&L Law Offices and Ex-additional Advocate  
General (J&K)  
Email – [wbeg@luthra.com](mailto:wbeg@luthra.com)

### ***SENIOR EDITOR***

*Name – Mr. Swarnendu Chatterjee*  
Advocate on Record, Supreme Court of India and Partner at  
L&L Partners.  
Email – [chatterjeeaor@swarnendu.co](mailto:chatterjeeaor@swarnendu.co)

**SENIOR EDITOR**

*Name – Prof. Dr. Adam Dubin*  
*Director & Professor of Law at Universidad Pontificia*  
*Comillas, Madrid, Spain*  
Email – [adubin@icade.comillas.edu](mailto:adubin@icade.comillas.edu)

**SENIOR EDITOR**

*Name – Mr. Vatsal M. Parikh*  
*Practicing Advocate Gujarat HC ||LL.B., LL.M*  
Email – [vatsalparikh93@gmail.com](mailto:vatsalparikh93@gmail.com)

**SENIOR EDITOR**

*Name – Ms. Parita Goyal*  
*Arbitration & Cross Border Dispute Resolution | B.A. LL.B. ,*  
*LL.M (Queen Mary University, London)*  
Email – [paritaagoyal@gmail.com](mailto:paritaagoyal@gmail.com)

**SENIOR EDITOR**

*Name – Mr. Spandan Saxena*  
*Associate at Indus Law | BBA LL.B*  
Email – [spandan.saxena96@gmail.com](mailto:spandan.saxena96@gmail.com)

**EDITOR**

*Name – Ms. Bhavya Sharma*  
*B.Com. LL.B.(Hons.), Institute of Law, Nirma University*  
Email - [bhavyasharma0396@gmail.com](mailto:bhavyasharma0396@gmail.com)

## ***ABOUT US***

LEX BONA FIDE - LAW JOURNAL is an open access, peer- reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

**LEX BONA FIDE: LAW JOURNAL**

# **WITHHOLDING CONSENT TO RESTITUTION OF CONJUGAL RIGHTS: A DETRIMENTAL AND ARCHAIC LEGAL TRANSPLANT FROM RUKHMABAI'S CASE TO OJASWA PATHAK CASE**

**By- Anshika Sharma  
(Asian Law College, Noida)**

## **ABSTRACT:-**

*“We do not create marriage from scratch. Instead, in the elegant language of the marriage ceremony, we ‘enter into the holy estate of matrimony.’*

*Marriage and family are considered the strongest pillars of Indian Society. Marriage is regarded as a religious institution that is important for the growth of society. Family is defined as a social group of persons united by the ties of persons, united by the ties of marriage, interacting and communicating with each other in their respective social roles.*

*Marriage as an institution gives birth to a relationship of two partners: Husband and Wife alongside various rights, duties and obligations. These rights further constitute the ‘Conjugal Rights’ for a marital union which in a basic sense means “Right to stay together”.*

*It is widely accepted that husband and wife should live together, provide comfort and support to each other during their marital union. But if any of them leaves the other without giving a reasonable justification or sufficient cause for the same, the aggrieved spouse can knock the doors of the court to seek justice under the concept of “Restitution of Conjugal Rights”, under the Hindu Marriage Act 1955.*

*This article is a shot to critically analyze the thought of Restitution of conjugal rights, a marital remedy accessible for the Hindus within the Hindu marriage Act of 1955. The author also will analyze the cases determined by the apex court regarding the problem of conjugal rights. The author can elucidate upon a similar context by discussing the objective, scope and therefore the extent of applicability of Section nine of the Hindu Marriage Act, 1955.*

## **KEYWORDS:-**

*Marriage, Conjugal Rights, Hindu law, Hindu marriage act, Restitution of Conjugal Rights, rights and obligations, Section nine, husband, wife, reasonable cause.*

## **INTRODUCTION:-**

The thought of marriage is to determine a relationship between husband and wife. As per Hindu Law, the marriage could be a sacred tie and the last of ten sacraments that may never be broken. Also, it's a relationship that's established from birth to birth. According to smritikars, even death cannot break this relationship. Also, it's not solely thought about as sacred however it's additionally a holy union. The main objective of a wedding is to change a woman and a man to perform their spiritual duties. Together with this, they even have to generate offspring. As per ancient writings, a girl is taken into account 1/2 of her husband and therefore completes him. Whereas a man is additionally thought-about incomplete without a woman. Every Hindu

whether or not they are male or female should marry. Also, an individual couldn't stay a perpetual student and where he didn't want for an ascetic life. However, he was enjoyed or engrained within the shastra to marry. Thus wedding is taken into account nearly as good as required additional therefore within the case of a female.

**Marriage is a samskaras and therefore is a religious ceremony in nature. There are 3 characteristics of the religious ceremony nature of marriage.**

1. It is a never-ending union whereby it's valid in all the life to come. It is thought about as a permanent union wherever if it's tied once it cannot be untied.
2. Also, it's a holy union wherever it's essential to perform spiritual ceremonies.

Now that Hindu marriage is taken into account as a religious ceremony, there's not a demand or consent of any of the parties. Thus, even though the person is of unsound mind or minor, {the marriage is taken into account as a sound and valid marriage. Although beneath the contract law, the contract of someone with an unsound mind or contract of a minor is taken into account as void. Moreover, section twelve lays down that once one's consent isn't obtained the marriage is taken into account void. Thus, it shows that despite the very fact that a party is proving the absence of a willing mind, the wedding is valid and legal. The modern nature of marriage is written agreement. Thus, it receives the ideals of equality and liberty. Also, nowadays it's been established thanks to the west that for marriage to be effective, there should an agreement of voluntarily entering into it by each the parties.

***Thus, to sum up, the Hindu marriage has not remained a contract and neither has it remained a religious ceremony. However, it is aforesaid it's a semblance of each.***

The legal structure in India has continuously had a very paternal perspective towards women's personal lives. Beneath the garb of protective families, the bodies and personalities of girls are compromised and desecrated. Whereas a number of these directly hit the vulnerabilities of girls and their lives, others do the identical in an exceedingly rather roundabout manner. This development is mirrored within the legal provisions of restitution of conjugal rights beneath the Hindu marriage Act, 1955 and Special marriage Act, 1954.

The provisions of restitution of conjugal rights are contained in sections nine and twenty-two of the Hindu Marriage Act, 1955 and Special marriage Act, 1954 respectively. Broadly, it provides the aggrieved party, either the husband or the wife, remedy to use for restitution of conjugal rights if either of the party has withdrawn from his or her society. The court, on being glad about the reality of the allegations and that there's no alternative legal ground barring such remedy, might order the opposite party the corporate of the aggrieved party. The enforcement mechanism for this decree is contained in order twenty-one, rule thirty-two of the Code of Civil Procedure that provides for attachment of property, detention jail civil prison, or both if the opposite party fails to go with the decree. Further, beneath section thirteen of the Hindu Marriage Act, 1955, if there's no restitution within one year of the passing of the decree, it becomes a ripe ground for divorce. It will be assessed from a blank reading of those provisions that they inspire a legal breach into the quality of matrimonial privacy.

**SECTION 9 OF THE HINDU MARRIAGE ACT:-**

Restitution of Conjugal Rights, “*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 with 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.*”<sup>[1]</sup>

When a better half is guilty of staying away without any reason or a justifiable cause and if the suit of restitution of legal right succeed then the couple would be needed to stay along. Therefore it may also be inferred that section nine is the wedding saving clause or section. This remedy was earlier applied in England and soon enforced by the Privy Council in India, for the primary time in a very famous case named **Moonshee Bazloor v. Shamsoonaisa Begum**[2]. However, this married remedy of restitution of legal right has been removed in England way back in 1970.

These legal provisions found an area within the written account during the colonial times once girls were thought to be the 'chattel' of the husband with no legal temperament of their own. The law regarding the restitution of legal right was abolished within the United Kingdom in 1970 following the report of the Scarman Commission in 1969 on the unusualness of such a provision. However, it's remained intact in the Republic of India despite being challenged vehemently quite once. The primary challenge to the current detrimental law came from **Rukhmabai**[3], a physicist, who refused to shack up with a person she was married to in her childhood.

Justice Pinhley dominated that English law wouldn't be applicable during this case as a result of the wedding wasn't solemnized between willing adults and Hindu law doesn't have any precedent to support such an action. The case aroused interest from all the quarters of national life. Despite the extreme pressure, she declared that she would rather attend jail than forcibly suffer her husband. To the nationalists like Bal Gangadhar Tilak, this was the proper case of Hinduism being in peril owing to the influence of English education. The case was opened for trial, however, it had been finally closed when an appeal to Queen of England overruled the appeal and set Rukhmabai free. However, this case operated more like an exception than a legal precedent.

### **CONSTITUTIONAL VALIDITY OF SECTION 9:- INFRINGEMENT OF RIGHT TO PRIVACY:**

It is to be noted that there arises a competition that restitution of legal right violates the Right to privacy of the wife. The Supreme Court in its judgement of **Kharak Singh vs. State of UP**[4] has held right to privacy "is a necessary ingredient of private liberty". In **Gobind v. State of M.P.**[5] again the court had to encounter the problem raised within the case of Kharak Singh. During this case, the honourable Supreme Court concluded that the right to privacy -among alternative rights is enclosed in the right to liberty.

The most important challenge to the current law came from a Telugu-Tamil film actor, **T. Sareetha**. During this case,[6] the court control that this provision, finding its roots within the medieval religion European law, offends the right to privacy and bodily integrity enshrined underneath Article twenty-one of the constitution. The court noted that it additionally deprives the lady of her generative sovereignty, "In the method of constructing such a fateful selection on once where and how if in the least she ought to beget, bear deliver and rear a child, the wife according to her human dignity ought to never be excluded, conception and delivery of a baby involves the foremost intimate use of her body."

It was additionally noted that whereas this provision facially appearance neutral and doesn't offend the classification take a look at underneath Article fourteen because it does not discriminate between a husband and mate however it's to be unbroken in mind that "bare equality of treatment despite the difference of realities was neither justice nor deference to the constitutional principles."

In the case of **Harvinder Kaur v. Harmander Singh Choudhary**[7], the judge noted that sex was the only refrain of the previous judgment whereas he believed that sex is merely one in each of the elements of habitation, not the summum bonum. He, therefore, believed that it to be

a misconception to carry that the restitution of legal right well-grooved “the starkest sort of governmental invasion” of “marital privacy”. It was the command to not be offending by Articles fourteen and twenty-one of the Constitution.

This view was followed by the Supreme Court within the case of **Saroj Rani v. Sudarshan Kumar**[8], where the court aforesaid that the decree for restitution of conjugal rights offers the husband and wife a chance to settle up the matter amicably. It allegedly serves a social purpose as an aid to the hindrance of the break-up of the wedding. The court considers the governmental intrusion into the bedroom of their matrimonial house rather casual.

### **VIOLATION OF FREEDOM OF ASSOCIATION UNDER RESTITUTION OF CONJUGAL RIGHTS:-**

In **Huhhram vs. Misri Bai**[9], the court passed the restitution against the need of the wife. During this case, although the wife had clearly expressed that she wouldn't want to live together with her husband, still the court went ahead and gave the judgement in favour of the husband. The alternative issue happened in **Atma Ram. V. Narbada Dev**[10], in which the judgement was passed in favour of the wife.

### **RECENT ANALYSIS:-**

The issue of restitution has surfaced recently owing to a petition filed by the students of a National Law University in Gujarat to strike it off the written account. The **petition**[11] terms such law-mandated restitution as a ‘coercive act’ that violates the sexual and decisional autonomy and right to privacy and dignity bonded by Article twenty-one of the constitution. It conjointly highlights however the operation of the supply is deeply inequitable within the context of the unequal power structures.

A three-judge bench comprising judge Ranjan Gogoi and Justices Deepak Gupta and Sanjiv Khanna issued notice to the Centre on the petition that aforesaid that these laws treat ladies as "chattel" and are offensive of fundamental rights as well as the right to privacy.

Ojaswa Pathak and Mayank Gupta, students of Gujarat National Law University at Gandhinagar, had challenged the validity of section nine of the Hindu Marriage Act (HMA), Section twenty-two of the Special Marriage Act (SMA) and certain provisions of the Code of Civil Procedure (CPC). They empower courts to pass a decree of restitution of conjugal rights to an unloved couple. The plea observed the nine-judge verdict that command privacy mutually of the fundamental rights and assailed the legal provisions of the HMA and therefore the SMA, saying that they force largely unwilling ladies to shack up with their alienated husbands.

'Courts in India have understood 'Conjugal rights' to possess 2 key ingredients: cohabitation and sexual intercourse. 'Under the legal theme in India, a spouse is entitled to a decree directional his other to shack up and participate in sexual intercourse. He or she is additionally entitled to coercive measures form of type of attachment of property just in case the spouses willfully disobey the decree of restitution,' the plea aforesaid. The legal framework is "facially neutral" and places a "disproportionate burden on women", the plea aforesaid, adding that it's "based on social structure English law that regarded a girl as 'chattel' of his husband".

It said: 'The remedy of restitution of legal right wasn't recognized by any of the private law systems of India. the same has its origins in feudalistic English Law, that at that point considered a married woman to be the personal property of the husband'. 'The united kingdom itself has abolished the remedy of restitution of conjugal rights in 1970.' It is steeped during a

patriarchal gender stereotype and is offensive of Article 15(1) (prohibition of discrimination on the ground of gender etc) of the Constitution, the plea aforesaid. The provisions were additionally offensive of the privacy rights, individual autonomy and dignity of people secure below Article twenty-one (protection of life and personal liberty) of the Constitution, it said.

'The provisions for restitution of legal right are facially neutral in the maximum amount as they permit each the husband and therefore the wife to move court. However, in effect, they're deeply discriminatory towards ladies. The direct and inevitable impact of the availability needs to be seen in lightweight of the deeply unequal familial power structures that prevail among Indian society,' aforesaid the petition.

Asserting that the right to cohabit was an intimate personal alternative, the plea aforesaid that the availability requiring an individual to cohabit with another against their will are offensive of the Right to Privacy of an individual. The plea was aforesaid that the validity of law needs to be tested consistent with the dynamical times. It had additionally sought after reconsideration of the 1984 apex court verdict by which it had put aside the Andhra Pradesh High Court's call quashing section nine of the Hindu Marriage Act.

### **CONCLUSION:-**

**In a country where divorce continues to be thought-about a social false belief or taboo within the twenty-first century, for several people that are unable to support themselves or trust their families, this remedy encroaches upon their ability of separation without a divorce. This section grants the court the authority to force people to cohabit with their partners, against their will and volition, which in several cases will cause to be a threat to their safety, security and even life.**

## REFERENCES

- [1] The Hindu Marriage Act 1955 (Section 9)
- [2] *Moonshee Bazloor v. Shamsoonaissa Begum* PC 1867
- [3] *Dadaji Bhikaji vs. Rukhmabai* (1885) ILR 9 Bom 529
- [4] *Kharak Singh v. State of UP*, AIR 1963 SC 1295; (1964) 1 SCR 332.
- [5] *Gobind v. the State of M.P.*, (1975) 2 SCC 148; AIR 1975 SC 1378.
- [6] *T. Sareetha Vengata Subbiah v. State*, AIR 1983 AP 356.
- [7] *Harvinder Kaur vs Harmander Singh Choudhry* AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187
- [8] *Smt. Saroj Rani vs. Sudarshan Kumar Chadha* 1984 AIR 1562, 1985 SCR (1) 303
- [9] *Huhhram vs. Misri Bai*, AIR 1979 MP 144
- [10] *Atma Ram. v. Narbada Dev*, AIR 1980 RAJ 35
- [11] *Ojaswa Pathak Case*

