THE FUTILITY OF THE PROVISION OF RESTITUTION OF CONJUGAL RIGHTS (AS UNDER HINDU MARRIAGE ACT, 1955) IN THE PRESENT SCENARIO

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INTRODUCTION

Restitution of Conjugal Rights is a remedy, which basically means restoration or reinstatement of one's marital rights or privileges (like, comfort and consortium of one another[214]) which the marriage or the marital bond entitles him to. There is a uniform provision regarding Restitution of Conjugal Rights in all of the personal laws. Section 9 of the Hindu Marriage Act, 1955 makes this remedy available to the Hindus. The section states that:

When either the husband or wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being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 a petition and that there is no legal ground why the application shouldn't be granted, may decree restitution of conjugal rights accordingly.

[Explanation- 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excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.][215]

Thus, there are 4 necessary conditions laid down in this sub-section:

- The respondent has withdrawn from the society of the petitioner.
- The withdrawal by the respondent party is without a reasonable excuse
- The court is satisfied that the statements made in the petition are true.
- There is no legal ground for refusing to grant application

This section has been amended by the Marriage Laws (Amendment) Act, 1976 on the recommendations of the Law Commission[216]. The Amendment has repealed sub section (2) and

[214] Ela Dasu v. Ela Lachamma, (1990) 2 HLR 249 (Ori)
[215] Inserted by Act 68 of 1976, section 3.
[216] Law Commission of India, 59th Report 52-55, 108

added an Explanation to sub-section (1) which has cleared a lot of confusion regarding interpretation of this section[217].

EXECUTION OF THE DECREE:

In India, the **Code of Civil Procedure (Order 21, Rules 32 and 33)** has retained the attachment of property. Thus, this remedy is backed by a financial coercion. Thus, if the decree is disobeyed then the court has the power to attach the property of the judgement-debtor. The court also has the authority to sell the attached property if the decree remains not obeyed for 6 months. It has the authority even to exercise discretion in enforcing the financial sanction by attachment of property or ordering to pay certain sum in instalments or make periodic payments. Hence, even though the court is bound to issue a decree of restitution of conjugal rights, it is not bound to enforce it through the financial sanction.

Though it is the only positive relief under the Hindu Marriage Act, 1955 aiming at preserving and affirming marriage but with changing times, the concept of marriage has suffered distinctive changes and several negatives are propping up of this remedy. This puts a question mark to its validity and viability in the present scenario.

EVOLUTION OF THIS REMEDY

EVOLUTION OF RESTITUTION OF CONJUGAL RIGHTS IN ENGLAND:

The remedy of restitution of conjugal rights was not recognised by any of the personal laws in India. It came, only with the British Raj. It is remarkable that this was the only matrimonial remedy which was made available by the British rulers of India to all the Indian communities under general law. In England it came from the Jewish law.

Like any other anachronistic remedy, the restitution of conjugal rights dates back to feudal England, where marriage was primarily a property deal, and the wife and the children were part of man's possessions as other chattels. The remedy finds its origin the ecclesiastical courts of England. Before 1813, the sanction of such a decree was excommunication. Later on, 6 years imprisonment was substituted by the English Parliament. Hence, a decree could be executed by

[217] The confusion was on two issues: (i)what is meant by reasonable excuse for the withdrawal of a spouse from the society of the other; and (ii)who has to bear the burden of proving the withdrawal as reasonable as unreasonable.

arresting the wife. It is remarkable that many other anachronistic common law actions were gradually abolished but they survived in English matrimonial law.

This remedy was retained in the capitalist England, though some of its stings contrary to the concept of equality of sexes were picked out. The decree could no longer be executed by the arrest of the respondent but it could be by the attachment of the property. Later on this mode of execution of decree was also abolished. The non-compliance of the decree amounted to constructive desertion, thus becoming a ground for divorce. The modern English law has fortified wife's position by making adequate financial provisions for her. The British Law Commission[218] presided by Mr. Justice Scarman in its report on 09-07-1969 recommended abolition of this remedy in English law which lead to S.20 of the 'Matrimonial Proceedings and Property Act, 1970' which abolished the right to claim restitution of conjugal rights in English Courts.

RESTITUTION OF CONJUGAL RIGHTS AS A BORROWED CONCEPT IN INDIA:

As mentioned earlier, the remedy of restitution of conjugal rights was not recognised by the Hindu law, i.e, by the *Dharmashastras* and the *Vedas*. The Vedas recognised the necessity for a son relieves his father from hell called "*Puth*" resulted in the desire for a male offspring for the continuance of the family and for the performance of funeral rites and offerings. Consequently, the sacredness of marriage was recognised. The texts of Hindu law also recognised the principle "let mutual fidelity continue till death". Hindu law enjoined upon the spouses to have society of each other. While, the old Hindu law stressed on the wife's implicit obedience to her husband, it did not lay down any procedure for compelling her to return to her husband against her will. It became necessary to find some remedies and procedures so as to see that the marriage is intact and would not be disturbed by petty quarrels between the spouses.

The procedure of Restitution of Conjugal Rights was introduced in our country by the British rulers in India at least from the time of the decision in ***Monshee Buzloor v. Shumsoonissa Begum***[219] considering such actions as a species of suits for specific performance. This case clearly marks the advent of such relief and the current law in India. This remedy was subsequently done away with

[218] 23rd Law Commission of England
[219] *Monshee Buzloor,* (1867) ii, Moo IA 551

in England, but such remedies did not bind the Indian courts wherein the procedure had become statutorily recognised. After independence this remedy found place in the Hindu Marriage Act, 1955[220]. When the provision in the **Special Marriage Bill** and **Hindu Marriage and Divorce Bill** was being debated in parliament, many members voiced their opinion against it. **J.B. Kriplani** said: "*This provision is physically undesirable, morally unwanted and aesthetically disgusting.*.". **Mr. Khardekar** had opposed the remedy, saying, "*to say the least this particular cause is uncouth, barbarous and vulgar. That the government should be abettors in a form of legalized rape is something very shocking…*"[221]. Sir **J.Hannen** in ***Russell v. Russell***[222] also vehemently opposed the remedy saying, "I have not once known a restitution petition to be genuine, that these were merely a convenient device either to enforce a money demand or to obtain divorce."[223] Some scholars[224] have even expressed the view that the remedy should be abolished. The viability of such opinions would be further examined.

ANALYSIS OF THE INSIGNIFICANCE OF THE REMEDY IN THE PRESENT SCENARIO

Restitution of Conjugal Rights is a remedy basic aim of which is to give a "cooling-off period which is not only desirable, but essential"[225] to the spouses before breaking off their relationship abruptly. This remedy though set up for an extremely noble cause and result in mind doesn't lead to the desired outcome mostly. It was set up to preserve the very sacramental bond of marital relationship and to protect it from mere whims of the spouses or from petty wear and tear of marriage. It is to see that an aggrieved spouse is not deprived of all the marital pleasures just because of some unreasonable cause of his spouse. It is to see that the parties are able to find a way back to each other and sort out their differences. Marriage has been a union of two families apart from a union of two persons. It is an emotional, sacramental and sublime bond to which high

[220] PARAS DIWAN, LAW OF MARRIAGE AND DIVORCE (3rd ed. 1999).
[221] Parliamentary Debates on Special Marriage Bill (10th December,1954)
[222] Russell, (1897) AC 395.
[223] Ibid at 455.
[224] Raj Kumari Agarawala, *Restitution of Conjugal Rights: A Plea for the Abolition of the Remedy*, J.I.L.I. 256,1970; Paras Dewan, *Modern Hindu Law, 166*(1985); Jaspal Singh, *Law of Marriage and Divorce in India*, 84,(1983), Kaul,J.l and Dhingra,I.C. *Hindu Women and Restitution of Conjugal rights: A plea for the Abolition of the remedy*, Women and the: Problems and Perspectives(Deep and Deep Publications ,1996).
[225] S.K. SHARMA, PRIVACY LAW: A COMPARITIVE STUDY (1994)

amount of importance is attached since olden times. Hence, it has been considered to be the duty of the judiciary to see that marriage doesn't cease to exist because of any whimsical or petty reasons and the institution of marriage is preserved.

But, as time has passed by, the very foundation on which the strength of the marital bond rested has suffered a change. The concept of joint families is crumbling and we are switching to nuclear families instead. Several legislations such as the Marriage Laws (Amendment) Act, 1976 have changed the entire conception of marriage in Hindu Law. It has increased the contractual nature of marriage by leaps and bounds, leaving the sacramental character just on the outline. Moreover, this remedy suffers with several loopholes which are adding to its detrimental effect. This has put a question mark as to its efficacy. Its constitutional validity has also been questioned. All of this makes the futility of the provision apparent. The individual reasons for declaring this provision preposterous in the present scenario is being discussed in detail as follows:

- **CONSTITUTIONAL VALIDITY OF THE PROVISION**:

T Sareetha v. Venkata Subbaiah[226]:

The question of constitutional validity of section 9 of Hindu Marriage Act, 1955, for the first time arose in this case. It was held that the remedy of restitution of conjugal rights is violation of **Articles 14, 19 and 21** of the **Constitution of India**. Justice **Choudhary** of the A.P High Court termed the remedy as "*savage", "uncivilised", "barbarous", "engine of oppression*". He said that the remedy was tiled towards the husband and through this decree the husband gets a right, not only to the company of the wife but also to have sexual intercourse with her. Hence, he termed this remedy as the grossest form of violation of human liberty and cessation of human choice. Here, the court observed that a person gets access to "*one's body to be used as a vehicle for procreation of another human-being*"[227]. Therefore, the A.P. High Court observed that it is a "*savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution, hence void*". Sexual cohabitation is enforced through this remedy against an individual's choice violating article 19 which talks about freedom of expression. As to being violative of Article 14 of the Constitution, i.e, right to equality, the court held that though it

[226] *T. Sareetha*, AIR 1983 AP 356
[227] *Ibid* at 365.

does not make any discrimination between husband and wife, but "*bare equality of treatment regardless of inequalities of realities is neither justice nor homage to the constitution principle*"[228].

Harvinder Kaur v. Harmandar Singh[229]:

The Delhi High Court upheld the constitutionality of Section 9, soon after the T Sareetha case. Justice **A.B. Rohtagi** held, "*it is to take the grossest view of the remedy to say that it subjects a person by the long arm of the law to a positive sex act*"[230]. It was observed, that this remedy is equally available to both the spouses and purports to preserve marriage, rebuild a broken home and re-establish the "*two-in-one*" relation between the estranged spouses. According to Justice Avadh Behari, the restitution decree acts as an index of connubial felicity. It is sort of a litmus paper. If the decree remains disobeyed for a period of one year, it shows that the relationship has reached a stage of no-return and becomes a ground for divorce. It offers a cooling off period to the estranged spouses. Hence it doesn't enforce any sexual act in any way. Therefore, it doesn't violate any provision of the constitution.

Saroj Rani v. Sudarshan Kumar Chadha[231]:

The Supreme Court upheld the decision of the Delhi High Court. In this case, it was observed that:

"*The right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself…There are sufficient safeguards in section 9 to prevent it from being a tyranny.*"[232]

It was remarked, "*It serves a social purpose and as an aid to prevent the break-up of marriage*"[233]. It was observed that the remedy gives the husband and the wife an opportunity to amicably resolve their differences and live together. It serves a social purpose and as an aid to restore the marital tie. It was submitted that no spouse could obtain the decree merely by filing a petition. If the court sees that the withdrawing spouse had a reasonable excuse for his/her withdrawal, then the decree

[228] *Ibid* at 368.
[229] *Harvinder Kaur*, AIR 1984 Del. 66
[230] *Ibid.*, para 15
[231] *Saroj Rani*, AIR 1984 SC 1562.
[232] *Saroj Rani*, (1984) 4 SCC 90, para 14.
[233] *Ibid* at 1568-1569.

is refused. The provision of "*reasonable excuse*", for withdrawal is "built in safeguard" against the misuse of section 9. Thus, this section is not violative of any constitutional provision.

THE FLAWS IN HARVINDER KAUR CASE[234] AND SAROJ RANI CASE[235]:

As discussed earlier, it has been observed in both the cases of Harvinder Kaur and that of Saroj Rani that there is no violation of any constitutional provision. It was held in the case of Harvinder Kaur v. Harmandar that as the remedy was available to both the spouses, it was not violative of Article 14, i.e, the fundamental right to equality, enshrined in the Indian Constitution. But, the equality provided in the Indian Constitution is not only that of equality in law, but also of equality in reality[236]. Equality does not mean physical equality between husband and wife, but it means equality of thought, action and self-realisation which, is sadly not provided in this remedy because, practically, this remedy is highly biased towards the husbands and provides a powerful tool to them. Moreover, it is anachronistic for educated women to be forced by State power to go and live in a place, where from they have withdrawn.

Then, it had also been provided in the Harvinder Kaur case that "*it is to take the grossest view of the remedy to say that it subjects a person by the long arm of the law to a positive sex act*". It had also been implied that the **Justice Choudhary** in the T Sareetha case by iterating about enforcement of sexual cohabitation, has ignored every other aspect of marriage and of the decree. These views were, again, upheld by the Supreme Court in the Saroj Rani case. But, what Justice Choudhary wanted to outline was that marital cohabitation will inevitably lead to a sexual cohabitation and this would be one of the grossest violations of human rights. He never denied the existence of other components and consequences of the remedy. He focussed on this aspect, because this was the root cause of its unconstitutionality and wanted to press on the point that enforced sexual cohabitation is an inevitable consequence of this remedy.

To understand the constitutionality of a provision it should be juxtaposed with its inevitable consequences[237]. Sexual activity is enforced irrespective of a person's will and it leads to

[234] Harvinder Kaur v. Harmandar Singh, AIR 1984 Del. 66
[235] Saroj Rani v. Sudarshan Kumar, AIR 1984 SC 1562
[236] Matd. Works v. The Asst. Collector
[237] State of Bombay v. Bombay Education Society, AIR 1954 SC 561 ; R.C.Cooper v. Union of India, AIR 1970 SC 564.

surrendering of her choice, in making "one's body a vehicle for procreation of another human being", as rightly stated in the T. Sareetha[238] case. Such forced sex is mental torture to her, degrading to her dignity and monstrous to her spirit. Forced marital and sexual cohabitation are seen to be gross violations of right when held in light of the ruling of the Supreme Court in the cases of ***Kharag Singh v. State of Uttar Pradesh***[239] and ***Govind v. Madhya Pradesh***[240] which pronounced that the right under Art. 21 extends to the privacy and personal autonomy of the person; forced marital and sexual cohabitation ergo is a violation of this right.

Then again, in India, the majority of households are male-dominated. The real liberalisation of women hasn't seeped into the ground reality as yet. In such a social backdrop, it is but obvious that the remedy of restitution of conjugal rights would be a right which would be inclined towards the men and would provide an impetus to the patriarchal hegemony. This, makes this remedy work against the right of Equality as enshrined in Article 14. This also backs the assertion of "enforced sexual cohabitation", which violates Article 21 of the Indian Constitution.

Autonomy in personal matters and an unfettered discretion in the use of one's body is the cornerstone of human dignity. Such enunciation has been made in Courts of Law all over the world. Such right is one that is most fundamental to human existence and cannot be waived[241].41 As an individual loses the discretion to choose or allow one's body to be used for a particular purpose, this becomes violative of Article 19 which preserves the Right of Expression of an Individual.

The safeguards stated in the Saroj Rani case (that of reasonable cause) doesn't help in mending the unconstitutionality of this remedy because the wilful cohabitation is not brought about making enforced sexual cohabitation inevitable.

It has also been contended by supporters of this remedy that the sanction is merely financial and involves no forcible enforcement as such. Hence, it cannot be said that it enforces a sexual cohabitation. But, in my opinion, a sanction is a sanction and its motive is to enforce the particular

[238] T. Sareetha v. Venkata Subbaiah, AIR 1983 AP 356
[239] *Kharag Singh*, AIR 1963 SC 1295: (1964) 1 SCR 332
[240] *Govind*, AIR 1975 SC 1378, 1385.
[241] Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180: the Supreme Court here held that a fundamental right guaranteed to a person cannot be waived; nor can an estoppel prevent the operation of such right.

decree. As the remedy inevitably purports to bring about an enforced sexual cohabitation, it cannot be said that there was no motive of such a consequence.

Therefore, this remedy ends up violating the constitutional provisions of Article 14, 19 and 21. The safeguards do not help in anyway, in preventing the "tyranny". This is how the judgements in the cases of Harvinder Kaur v. Harmandar and Saroj Rani v. Sudarshan Kumar are flawed.

- **REMEDY HAVING BEEN ABOLISHED IN ENGLAND:**

The remedy of Restitution of Conjugal Rights is a borrowed concept from England. It was introduced through the British Raj. It has taken to all the developments in the concept which were there in the English law. But, the remedy had been abolished in England under **Section 20 of the Matrimonial Proceedings Act, 1970**. The **23rd Law Commission of England** proposed this abolition under its report, "Proposal for the abolition of the matrimonial remedy of Restitution of Conjugal Rights". The various arguments that they cited, in support of their plea for abolition, under their report, roughly, were:

- Restitution proceedings are a platform through which the spouse can show his willingness and endeavour to resume the married life. But, this can be demonstrated through various, more appropriate, procedures and approaches. If the aggrieved spouse fails to make effective use of them, and these approaches fail to bring out the effective result, it is unlikely that legal proceedings would be of greater help.
- In so far as, disobedience of restitution proceedings for a particular period are effective in bringing about desertion as a ground for divorce, this can be effected more appropriately even without the decree of restitution of conjugal rights by obtaining an order of divorce independently, on the ground of desertion. (There is not much difference, in the desertion after the decree and normal desertion. The difference in the time period of the respective desertion is negligible).
- If the real purpose of the restitution proceedings is financial assistance in any case, then the proper remedy for this would be section 22 of the Matrimonial Clauses Act,1965 (Maintenance).

- In most of the cases, no steps are taken after the petition for restitution is filed. It is mostly because, the applicants realise the futility of such proceedings and the fact that a decree is not going to bring their partner back.
- A court directing individuals to live together is hardly an effective measure of attempting to effect reconciliation.
- The order has no teeth and brings law to disrepute, it is suspected that few, if any, decrees are obeyed and the futility of the decree is well illustrated by Nanda v. Nanda P. 351, where a wife, having obtained a restitution decree, went to the husband's flat, and the court was prepared to grant an injunction to restrain her from molesting him and entering the premises.
- The very fact that the remedy of restitution of conjugal rights is so rarely used indicates that the remedy is not an effective one.

Several reasons as to the retention of this remedy were also stated in its report, by the Law Commission. On comparison, the demerits or the arguments in favour of the abolition of the remedy outweighed the positives or reasons for its retention.

All of the reasons stated in the report match and fit into the Indian scenario in a perfect manner. The problems outlined in the report completely comply to the present deplorable situation of the remedy in India. Hence, the remedy should be done away with in the similar lines.

Professor Derrett's Opinions and the Changed Social Scenario Favouring the Abolition:

The remedy of restitution of Conjugal Rights had been abolished in England, around 1969. India chose to continue with it. No mention of the abolition of this remedy was found in the 59th or the 71st Law Commission Report of India[242]. This was very germane, considering the social scenario of those times. **Professor Derrett** stated that, "*the practical utility of the remedy is very little in the contemporary England, but in India where the spouses separate at times due to the misunderstanding, failure of mutual communication due to the intrigues of relatives, the remedy of restitution is still of considerable value…*"[243]

[242] Law Commission of India, Fifty-ninth Report (1974)
[243] J.D.M. Derrett, A CRITIQUE OF MODERN HINDU LAW 292(1970)

Justice Avadh Behari in ***Harvinder Kaur v. Harmandar Singh*** submitted that, "the opinion of Derrett is more realistic and the Hindu society is not mature enough to do away with the remedy and its abolition would be like throwing the baby with the bath water"[244]. It is a known fact, that England's social aspect has been decades ahead of India's. In this situation, it is not rational to strike about the changes brought in the England legal scenario, in the Indian laws. So, these views are extremely acceptable considering the era in which they were made.

But, the very assertions of Professor Derrett and Justice Avadh Behari have lost their sheen with time. India has advanced by leaps and bounds from its 1969 social scenario. Back then, the Hindu society was not mature enough for this change. Marriage was a family affair, involving religious and emotional sentiments, pretty much based on sacraments. It was brought about through the intervention and association of relatives. So, a relationship being disturbed by the intrigues of relatives was a common affair. But, society has evolved tremendously, so has the nature of marriage (primarily, after Marriage laws Amendment Act, 1976 which made marriage mostly contractual). Marriage has transformed from being a family affair to a private affair. It is not being denied here, that marriages do not get affected by the interference of relatives today. But, the number has reduced. Also, the negatives of the remedy are outweighing this positive aspect that it aims to bring about, tremendously. So, it is unrealistic to keep this futile remedy.

The view of Prof Derett, by and large represents the popular feelings of Hindu spouses but with the changed social scenario of the Hindu Community, rapid growth of nuclear families, spreading of education and consciousness of their rights, the remedy of restitution of conjugal rights finds no significance, as such. It is for this reason that, Dr. R.K. Agrawal and S.P. Sharma plead for the ouster of the remedy from the Act as according to them it has become outdated and hardly deserve a place in law. It has become "fossilized and redundant" and should be abolished from the Indian law.

- **FALLACY IN THE ENFORCEMENT OF THE RESTITUTION DECREE:**

The remedy of Restitution of Conjugal Rights is backed by a financial sanction. When a person fails to comply with a decree of restitution the Court has a power to enforce the decree under

[244] *Harvinder Kaur*, AIR 1984 Del 66, 74

Order 21 Rule 32 of Civil Procedure Code, 1908. Under Rule 32(1)[245], if the party wilfully does not comply with the decree, then the Court can attach the property of the decree- holder. Under Rule 32 (3)[246], the Court has the power to sell the attached property if the decree has not been complied with by the decree holder for six months. The difficulty arises if the judgement–debtor has no actual property in possession. In India, we find that in most cases that the wives' do not have actual possession over any property. In such cases, if a restitution decree is not complied with, then the court needs to ascertain the share of the wife in the property of her husband, when it is not divided and arrive at her share in the property, but this is extremely cumbersome. Difficulty also arises if the husband is a property-less person. The decree is not backed by the sanction in such cases. It is irrational to think that coercing a person financially would drive him into the bond emotionally. The aim of this remedy is the cohabitation of the spouses, but when the property is attached and sold, it will lead to acerbity between the spouses, will dilute their relationship and will make the purpose of the remedy frustrated.

- **FUTILITY OF THE INTERFERENCE OF COURT:**

Marriage is an emotional bond. Making a withdrawing spouse resume cohabitation with the aggrieved spouse doesn't bring about the emotional connection. The stress or the wear and tear of marriage cannot be sorted by a decree which dictates that the parties have to cohabit. It has been rightly said, in the report given by the Law Commission which proposed to abolish this remedy in England, "A court directing individuals to live together is hardly an effective measure of attempting to effect reconciliation"[247].

The will of the aggrieved spouse is not given attention in this remedy. Hence, even if the decree is successful in bringing about cohabitation, it cannot bring about the affection and love that a relationship requires. This can only increase the bitterness and unrest in the relationship and makes

[245] CODE CIV. PROC. § 32(1):"Where the party against whom a decree of restitution of conjugal rights has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree of restitution of conjugal rights by the attachment of the property…"
[246] CODE CIV. PROC. § 32(3):"Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment –debtor has not obeyed the decree and such decree holder has applied to have the property attached property sold, such property may be sold; and out of the proceeds the Court may award the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment –debtor on his application."
[247] 23rd Law Commission of England's report, *Proposal for the Abolition of the Remedy of Restitution of Conjugal Rights*(1969).

the withdrawing spouse's attitude stiffer, frustrating the very purpose of this remedy. Moreover, there are various other ways and techniques of reconciliation. If a spouse is truly interested in bringing about resumption of cohabitation, he can opt for those procedures, rather than a decree which shall facilitate only the physical presence of the other spouse, and not her emotional presence in the relationship.

- **ULTERIOR MOTIVES OF THE PETITIONER IN RESTITUTION CASES:**

One of the most fundamental problems with the remedy is the insincerity of the petitioner. The remedy is blatantly misused to achieve ulterior purposes other than reconciliation. There are two ulterior motives for this:

(i) Passport to divorce:

Section 13(1-A)(ii) of the Hindu Marriage Act, 1955 says that if a restitution decree has not been complied with for a period of one year the parties can file for divorce. Generally, in restitution proceedings, after getting the decree the "aggrieved spouse" does not comply with the decree willingly and after the statutory period of one year, files for divorce under **S. 13 (1-A)(ii)** on the ground of non-compliance with the decree. There are many cases to corroborate this point[248]. One such case is, ***Malkiat Singh v. Shinderpal Kaur***[249] in which the court found out the insincerity of the petitioner who deliberately kept the decree unsatisfied to obtain divorce and refused to grant divorce on this premise. In fact, Justice Rohtagi in Harvinder Kaur v Harmander Singh[250] recognised that "the legislature has created restitution of conjugal rights as an additional ground for divorce".[251]

(ii) Defence for maintenance suits:

[248] Jaswider Kaur v. Kulwant singh ,AIR 1980 P&H 220; Santosh Kumari v. Mohan Lal ,AIR 1980 P&H 325;*KS* Latitamma v. NS Hirianniah, AIR 1983 Kar 63; Saroj Rani v. Sudarshan Kumar, AIR 1984 SC 1562; Harvinder Kaur v. Haminder Singh ,AIR 1984 Del 66; Banti Devi v. Moti Ram, AIR 1990 HP 35; Murlidahr Rao v. Vasantah Rao, AIR 1984 AP 54; T. Sareeta v. Venkata Subbaiah, AIR 1983 AP 356.
[249] *Malkiat Singh*, AIR 2003 P. & H. 283
[250] *Harvinder Kaur*, AIR 1984 Del 66.
[251] *Ibid*. at para 74

There have been umpteen cases in which the husbands filed petitions for the restitution of conjugal rights just to counterblast the applications of their wives for maintenance under section 125 of CrPC. Some of them being, ***Darshan Ram v. Maya Bai***[252]***, Gurdeep Singh v. Ranjit Kaur***[253]***, Charan Sigh v. Jaya Wati***[254]***, Rajendra Prasad v. State of U.P***[255]***. In Veena Handa v Avinash Handa***[256], the husband in order to frustrate his wife's claim for maintenance sold all his property and distributed all his property to his relatives and claimed that he did not own any property in land. After the decree of restitution was passed, he filed for divorce, after a year, on the ground that there has been no restitution for a year. When the trail court granted the relief, he immediately married another girl, notwithstanding the wife's appeal against the divorce decree in the higher Courts. Similarly, in ***Bitto v Ram Deo***[257] the husband falsely accused his wife of being unchaste to frustrate her claim of maintenance when she had filed for restitution.

This shows how restitution petitions are blatantly misused for ulterior purposes other than reconciliation. Moreover, restitution petitions are filed in the District Court, these cases go unreported, thus making it difficult to get an estimation of the actual number of petitioners who have been misusing the remedy. If we were to take into account these cases then we would get the true picture of how the remedy is being blatantly misused.

- **THE CHANGES BROUGHT ABOUT BY MARRIAGE LAWS (AMENDMENT) ACT, 1976:**

In the olden times, marriage was purely sacramental. Large emphasis was laid on its indissoluble character, rituals and religious ceremonies. As the time evolved, the sacramental character gradually started diminishing and the contractual character increased tremendously. With the advent of the Hindu Marriage Act, 1955, marriage no longer had the religious sanctity and was greatly contractual in its character. The Act by providing several matrimonial remedies such as divorce and nullity of marriage eroded its sacramental character.

[252] *Darshan Ram*, (1966) 2 HLR 88 (P&H)
[253] *Gurdeep Singh*, (1966) 1 HLR 191 (P&H)
[254] *Charan Singh*, (1966) 1 HLR 454 (All)
[255] *Rajendra Prasad*, (1991)2 HLR 621 (All)
[256] *Veena Handa*, AIR 1984 Del 444
[257] *Bitto*, AIR 1983 All 371.

The changes further brought about by the Marriage Laws (Amendment) Act, 1976 are revolutionary in nature.

- Divorce was further liberalised. Section 13-B was introduced which provided for Divorce by mutual consent.
- The period required to elapse before a decree of Restitution of Conjugal Rights or Judicial Separation, which has not been able to bring about reconciliation, could become a ground for divorce was reduced from 2 years to 1 year.
- Desertion, which was earlier a ground for Judicial Separation, was made a ground for Divorce as well.

This Act brought about a tremendous change in the entire conception of marriage over time and made it primarily contractual. With the entire concept of "Divorce by mutual consent", it is clear that the court no longer hinders the breaking off of a marriage if the parties are too estranged to reconcile. As Restitution of Conjugal Rights was primarily based on the sacramental character of marriage, with its degradation, the remedy's foundation has shaken up. This has had some impact (if not large), on the restitution proceedings and the number of cases under restitution of conjugal rights has diminished by a large extent as is seen statistically. This shows how redundant the provision is.

CONCLUSION AND SUGGESTIONS

Restitution of Conjugal Rights is a concept, which had great significance at the time, when it had evolved. But, with the changing times and changing social scenario it has lost its significance. Though this remedy is based on a noble cause, its consequences are far more detrimental and fail to bring about the desired effect in most of the cases, statistically. The instances of its misuse are increasing rapidly and its redundancy too. Despite the Supreme Court ruling, it is observed that the provision does violate the constitutional provisions of Article 14,19 and 21.

Such a provision which is incompatible with changing times, is detrimental and obsolete, should be done away with and novel ideas for reconciliation which are effective in its execution as suggested, should be brought about. By suggesting that the remedy should be done away with, it

is nowhere being suggested that the noble cause behind it should be no longer sought. A member of the Indian Parliament once suggested that the remedy of restitution of conjugal rights might be substituted by reconciliation. I would like to build upon this suggestion and state that a Reconciliation Body should be formed which could prove to be helpful and effective for the spouses to a certain extent, without diluting their relationship in any manner.

A **Reconciliation Body** can be formed by the Judiciary, consisting of qualified professionals (such as Psychologists or any other person suitable for the purpose). This body can make an earnest effort in reconciling the spouses and reviving the lost love and affection between them. Such a body can try to mend the differences and sort out the problems existing between them. The Reconciliation process can take place through the discretion of court, during the divorce proceedings. If the Court feels that there is a scope for rehabilitation of marriage, then it can order the Reconciliation Body to take over the matter and strike a compromise between the spouses, failing which the Court shall grant them divorce.

Such Reconciliation Bodies should be instituted at all levels and only the cases, wherein the marriage has not broken down irretrievably and there is a scope for reconciliation, should be referred to them. R.K. Agarwala has given out a somewhat similar system in her article "*Restitution of Conjugal Rights: A Plea for the Abolition of the Remedy*".

Therefore, in brief, redundancy of the provision of restitution has become apparent due to the rapid social change, the change in the nature of marriage after the Marriage Laws (Amendment) Act, 1976 and other legislations, the ineffectiveness of the consequences of this remedy, lingering of the bickering in the marital home due to this provision which seeks to achieve a healthy cohabitation, insincerity of the petitioner who has ulterior motives in most of the cases, incapacity of the judiciary in making a difference to an emotional bond and its unconstitutionality.