CHAPTER VIII
RESTITUTION OF CONJUGAL RIGHTS IN SOCIO-LEGAL PERSPECTIVE

I INTRODUCTION

As laws governing marriage relationship form a very important branch of legislation, a number of legislations have been passed to regulate marital relations. These enactments have provided for a number of matrimonial reliefs and remedies.

The matrimonial remedies of divorce, Judicial separation and restitution of conjugal rights are distinctive in character and have been devised with a set purpose. After a decree of divorce, there is total dissolution of marital ties. In judicial separation, there is suspension of marital relationship and Restitution of Conjugal Rights aims at reconciliation of the spouses. So, different remedies are meant for different purposes. A number of legal and social implications ensue from matrimonial remedies. Sometimes, the implications are such nature, which could not have been contemplated innocent spouses. If a decree for restitution of conjugal rights is granted, it is the general assumption that the parties will resume cohabitation. The decree for restitution of conjugal rights cannot be executed by compelling respondent to cohabit with the petitioner. Order 21, Rule 32 of the C.P.C. provides the mode for execution, by attachment of the property of the respondent. However, judicial trends under Supra Chapters V and VII indicates that instead of reconciliation, the remedy is being misused for other ulterior purposes. The remedy has grave legal and social implications in actual practice. The implications of the
remedy are different under different personal laws. The implications are of two types:

1. Legal Implications
2. Social Implications.

The study of these implications is desirable to judge the efficacy of the remedy.

II LEGAL IMPLICATIONS OF THE REMEDY

The decree for restitution of conjugal rights gives rise to legal questions which are of complicated nature. The implications of the remedy are as under:

(A) Implication under Hindu Law

Though, the remedy is available to both the spouses, yet it is generally resorted to by the husband. The wife still suffer from many disabilities. Thus, the legal implications of the remedy are against the interests of the wife. The legal implications of the remedy are as under:

(i) The problem relating to the locus of 'Matrimonial Home' is still complicated. The concept has been discussed in detail in Supra Chapter V. The spouses are supposed to cohabit in the matrimonial home. But a wife is gainfully employed, she may be posted away from 'Matrimonial Home'. The husband may ask the wife to resign the job. If she refuses to resign, the husband may seek restitution of conjugal rights on the ground that she has withdrawn from the society without a reasonable cause. Some High Courts
are adhering to the traditional concept and outlook that a Hindu wife is supposed to remain under the roof and protection of her husband. The Punjab and Haryana, Madhya Pradesh and Andhra Pradesh High Courts granted remedy for restitution when the wife refused to resign the job. The remedy was granted without looking into the financial position of the spouses and other exigencies of the family. Taking of such a narrow view has adversely affected the position of wife. The wife has ceased to be an appendage of her husband in modern times. The wife is placed in a difficult situation after decree of the court.

Now two options are open for her. Either to resign and submit herself obediently to her husband or be prepared for divorce. In both the situations, she is the sufferer and victim of circumstances. Though some High Court have also given liberal interpretation of the terms 'cohabitation' and 'Matrimonial Home' and do not recognize the sole right of the husband to determine the locus of Matrimonial home, yet the whole situation is still confusing and working against the interest of wife.

(ii) There is correlation between sections 9 and 13(1-A) (ii) of the Hindu Marriage Act. Section 13(1-A) incorporates the breakdown grounds of marriage. If there is no resumption of cohabitation between the parties for a period of one year or more after the passing of a decree for restitution of conjugal rights, either spouse is


entitled to seek divorce under Section 131A(ii). Mere non-compliance of the decree does not mean 'wrong' with in the meaning of Section 23(1)(a). The decision of Supreme Court in Dharmendra v. Usha\(^4\), has removed the confusion to a greater extent. According to the discernible trend, a spouse must be guilty of positive misconduct for denial of remedy.

The new judicial trend is against the interest of the wife. If a husband is the judgment debtor he may not comply the decree, if he is decree holder, wife may to prevented to resume cohabitation. After expire of one year or more, he becomes entitled to seek divorce. A wife going to court with genuine hope of resuming conjugal cohabitation can't anticipate that she is preparing ground for her divorce. There is a long list of such cases the details references are given in Supra Chapter V. The petitions by husbands are generally not bonafide and are filed to path for divorce. Surprisingly, the courts while pretending to promote stability of marriage through this decree advocates that it is passage or passport to divorce. Thus, the remedy for restitution is being misused for the covert and sinister object of getting rid of the spouse, divorce against whom is not otherwise possible. This is a grave legal implication.

(iii) A Hindu wife is entitled to seek separate residence and maintenance under section 18(2) of the Hindu Adoption and Maintenance Act, 1956. However, one of the ground justifying her separate living must exist. However, the judicial trends under Supra Chapter V clearly indicates that petitions by husband are generally filed to defeat

\(^4\) AIR 1977, SC2219.
the maintenance claim of wife. A husband may not bother for his wife when she is living separately and may not provide any maintenances. But as and when she applies for maintenance or actually obtains order for maintenance, a petition for restitution of conjugal rights is filed by husband. These is a long list of such cases. If the decree for restitution of conjugal rights is passed in favor of the husband, the wife is dis-entitled to claim maintenance from him. After passing of decree, wife can be easily harassed by the husband. If a wife is already claiming maintenance from her husband, the maintenance orders can be got set aside by her husband after obtaining the decree for restitution of conjugal rights. Thus, the decree is used to deny the subsistence allowance to the wife and to pave path for divorce. Supra chapter v illustrates reference of cases.

(iv) The decree for restitution may create marital deadlock also if the husband is decree holder he can easily prevent the wife from complying it, if he is judgment debtor he may not comply it. A matrimonial decree is not an ordinary property decree whose execution is only concern of decree holder, who may pursue its execution or leave it alone. The decree, though personal, affects family which in turn affects the stability of society at large. But a husband can easily sit on the decree. Generally the wife is not on sound footings, and is hesitant to approach the court to seek divorce due to social sigma attached to a divorcee. Thus, through the manipulation of the husband a marital deadlock may be created. It is a grave implication of the remedy which mars the future of a wife.
(v) If the decree for restitution is not obeyed, the aggrieved party can procure a maintenance order from the court under Section 25 of the Hindu Marriage Act without starting a fresh maintenance suit. The provisions is applicable both to the both spouses, but it is apparent that in the Indian set up a husband would hardly need financial help from the wife. This legal implication is beneficial for the wife.

(vi) As discussed in Supra Chapter VII, the remedy works against the interest of a wife and it is violative of Right to Equality, Right to Privacy and dignity and Right to fundamental Freedoms guaranteed under the Constitution.

(B) Implications Under Muslim Law

Marriage under Muslim Law is a civil contract and a dissoluble union. A husband has unilateral and absolute powers of divorce. He can exercises this power against his wife even without assigning an reason for the same. The Islamic religious philosophy does not permit the use of this right without prudence.

The Prophet has said:

"Of all the permitted things divorce is the most hated by Allah'"

Dr. Galwash deduces:

"Marriage being regarded as a civil contract and as such not indissoluble, the Islamic Law naturally recognizes the
right in both the parties, to dissolve the contract under certain given circumstances. Divorce, then, is a natural corollary to the conception of marriage as a contract.

"It is clear then, that Islamic law discourages divorce in principle, and permits it only when it has become altogether impossible for the parties to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes."

Dr. Galwash further asserts that "Divorce is permissible in Islam only in case of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by Talaq or by Khul". Dealing with divorce, The Holy Quran says,

"And women have rights similar to those against them in a just manner..."

Yusuf Ali, in his commentary on the Holy Quran says:

"While the sanctity of marriage is the essential basis of family life, the incompatibility of individuals and the weaknesses of human nature require certain outlets and safeguards, if that sanctity is not to be made into a fetish at the expense of human life."

Thus, the Holy Quran does not recognize the absolute right of the husband to divorce his wife. The right is equally recognized for the wife also. The divorce is to be granted when public interest demands the formal ending of a marriage which remains marriage in name only. Sir John Salmond laid down this principle in a few New Zealand decisions:

"In general it is not in the interest of parties or in the interest of the public that a man and woman should remain bound to gather as husband and wife in law when for a lengthy period they have ceased to be such in fact".6

Thus, the sunna of the Prophet of Islam and the Holy Quran in clear terms state that resort to divorce may be taken in cases of urgency or when the parties can't pull on together. But neither in sunna of the prophet of Islam nor in the Holy Quran we find a statement which requires forced union which is inherent in the concept of restitution of conjugal rights. Thus, the remedy is against the socio-religious philosophy of Islam.

The remedy for restitution of conjugal rights can't be implied if the nature of Muslim marriage and the Islamic religious philosophy are kept in mind. The decree which involves the intervention of state in personal affairs in negated through out the Muslim Jurisprudence.

The judicial trends also indicate that not a single suit has been instituted by a Muslim wife to seek this remedy.

6. Ibid. p. 77.
Thus, in actual practice, the remedy is meant only for the husband to harass the wife. As the remedy is being used by the husband only, the implications are naturally against the interests of wife. The legal implications are as under.

(i) If the husband does not want to divorce his wife he may create a dead lock after obtaining decree for restitution of conjugal right. He can easily prevent the wife from complying the decree by refusing cohabitation. Thus, a limping marriage may continue but it will impair the legal rights of the wife to claim maintenance because under Muslim law if a wife refuses cohabitation, she is liable to forfeit her claim for maintenance. If she goes to the court to claim maintenance, the husband will confront her with restitution decree and the court refuses to help her.

(ii) If after the decree of the court, the wife refuses cohabitation, she would have no claim to her deferred dower also. Thus, her legal right to maintenance and dower stands forfeited in case of her refusal to comply the decree of the court. Thus, the wife is put in a situation in which she has to choose either to remain united with a husband whom she does not consider worthy of her association, or be prepared to forfeit her legal rights right to dower debt and maintenance.

(iii) Though the remedy is available to both spouses, yet it is being used only by husband. Thus, it is violative of Art. 14 of the Constitution. As discussed in supra Chapter vii, the remedy is also violative of Arts. 19, 21 and 23 of the Constitution.
(C) Implication Under Christian Law

The judicial trends in supra chapter vi indicates the frivolous nature of petitions by husband. Only in Sarah Abraham v. Pyali Abraham, the decree was passed against the wife. The wife has been able to plead valid defences in answer to petition for restitution. Further, only in Saldanha v. Saldanha, the decree in favour of wife was passed by the court.

(i) Thus, the judicial trend indicates that the remedy is being misused by the husbands and the relief is granted only in exceptional cases. Thus the remedy is violative of Articles 14 and 21 of the Constitution.

(ii) Further, under the Indian Divorce Act, 1969, non-compliance of the decree, it never matures into a ground for divorce. Thus, a limping marriage may continue creating a marital deadlock. When the marriage has broken down completely, there is no use of retaining the marital ties. It does not serve any useful purpose and is against the interests of the parties and the society. A husband can sit easily on the decree to harass the wife. Thus, many years of young age may be wasted in unnecessary litigation. This is the most obnoxious implication of the remedy under Christian law.

7. AIR 1959 Ker. 75.
8. AIR 1930 Bom. 105.
(D) Implications Under Parsi Law

The remedy under section 36 of the Parsi Marriage and Divorce Act, 1936, has proved to be a dead letter of law. There is not a single reported case under the existing Act. The following are the legal implications of the remedy.

(i) As the remedy has not been used in a single case under the present Act, the Parsis are well convinced about the inefficacy of the remedy. A remedy without use becomes defunct and unworthy of retaining in any act or statute book by indirect implication of law.

(ii) Section 32A was inserted in the Parsi Marriage and Divorce Act, 1936, by the Parsis Marriage and Divorce (Amendment) Act, 1988. The non compliance of the decree for a period of one year or more will entitle either of the spouse to sue for divorce under clause (ii) of this section. There is every possibility of useful of this provisions to prepare ground for divorce. Thus, the provision has grave legal implications.

II SOCIAL IMPLICATIONS OF THE REMEDY

The decree for Restitution of conjugal rights has social implications also. The social implications are discussed as under:

(A) Implication Under Hindu Law

Though there is equality before law, but the Hindu wife still suffer, from many disabilities. The majority of the
women are not on sound footings and are ignorant of their rights. The Hindu wife is always put in a disadvantageous position whether she is the decree holder or judgment debtor. The judicial trends in Supra Chapter V reveals that the petitions by wife are genuine where as the petition by husband are generally not bonafide. It has been observed that while deciding the cases relating to family law, the ethos and culture of the family relations are ignored. It is the wife who has to leave her parents to join the husband who continues to live with his kith and kin even after marriage. Hence, it is the wife alone who has to seek acceptance in ‘Matrimonial Home’. This factor is to kept in mind while deciding cases relating to restitution. There may be some differences in mutual adjustments and the Hindu Joint family has also its own contribution in this regard. Divorce ends misery but brings miseries.

The wife is put to great hardships after divorce. No woman wants to bear the badge of a divorcee. It is very difficult to find a suitable match for a divorcee. The misuse of the remedy by husband for purpose of divorce, renders the wife homeless and shelterless.

If she complies the decree, there is no certainty that she would be able get love and affection from her husband. As pointed out in T. Sareetha v. Venketa Subbiah case, that she may be subjected to sexual intercourse against her wishes. If she does not comply the decree, she must be ready to be divorced. Her position is not better than a slave who has to lead a miserable life.

There is no provision enabling her to continue to stay in the matrimonial home. All girls do not have parents or parents willing to accommodate or support them after divorce. Sometimes, the attitude of family members is so hostile that the helpless girl is forced either to tolerate everything and live like a servant or go to street. There is hardly any other place where she can seek sanctuary. This fact is also to be taken into consideration by court so that the misuse of the remedy may be prevented to some extents. Thus, the decree has grave social implications for wife.

(B) Implication Under Muslim Law

Muslim males enjoys two important matrimonial rights which are not available to their wives. The Sharia Law has conferred absolute powers of divorce on them. The judicial legislation confers them the right to sue for restitution of conjugal rights.

The decree of the court has social implications against wife's interest. She is likely to become a victim of social censure. The members of the community may abhor her because she is held guilty in the eyes of the people. Thus, she is put in an absurd position affecting her social status she has no option but to cohabit with the man whom she does not like for one reason or the other. If she does not comply the decree, her husband may divorce her. Thus, divorce is the indirect implication of the remedy.

Opinion generates law and law in turn generates opinion. Once the decree for restitution of conjugal rights is passed against a wife an opinion is formed against her which labels
her with matrimonial guilt. Even in the family of her parents, she is likely to be treated as an undesirable person. Thus, she is put in a chaotic condition. She feels totally depressed, dejected and alienated in the society. There can't be a slavery worse than the compulsive cohabitation. The weapon of divorce can be used by the husband to compel the wife to lead a disgraceful life. This Talaq technique has reached a corrupt crescendo of circumvention. Justice Khalid made a poignant pronouncement in Haneefa's case:

"Before parting with this case, I feel it my duty to alert public opinion towards a painful aspect that this case reveals. A division bench of this court, the highest court for this state, has clearly indicated the extent of the unbridled power of a Muslim husband to divorce his wife."

"Should Muslim wives suffer this tyranny far all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their suffering? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed."

Thus, after decree of the court, she may submit herself to her husband to lead a disgraceful and miserable life. A divorcee has no financial security for her future maintenance. A bench (Khalid and Janaki Amma JJ.) observed with deep feeling in Kunhi Moyin's case.

10. AIR 1972 KL 512 at 514.
"The Indian society is peculiar in its nature, in its treatment of women. A divorcee carries with her many disqualifications. A girl in her teens divorced by her husband, can thereafter expect only a man in his mid fifties as husband or will have to remain unmarried through out her life, while a husband who had divorced his wife, can get a girl sweet seventeen, the next day. It will not be far from truth to say that in case of marriage and divorce, the society continues to be a man's society. Our is a peculiar society, where women suffer manifold disabilities while man have always an upper hand".

"These is no use saying that equal opportunities have been provided for women in all walk of life. We can say with confidence that the evil of divorce and consequent miseries of divorced women are a reality. One daily witness the sorry spectacle of young girls in teens with children astride their waist waiting in the corridors of courts claiming maintenance from their husbands only for their children, and not for themselves since they are divorced. This provision, therefore is a highly salutary one and is meant to alleviate the sufferings of such women and to cause a little deterrent to erring and callous husbands. In this process, if a few husbands who had divorced their wives long ago, have to suffer, it cannot be helped." 11

Thus, due to grave social implications, a wife may be forced to resume cohabitation with her husband. The Muslim law, consistent with Islamic religious philosophy, does not

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11. AIR 1976 KL.T 87 at p. 92-93.
compel the spouses to lead a miserable life when their marriage has proved a failure but grants them right to separate.12

Law can't be understood in isolation to human nature. Therefore, if a wife has fought unsuccessful legal battle with her husband, she would not like to cohabit with a person with whom she was engaged in litigation. However, due to compelling social reason she may be forced to resume cohabitation. We can't expect that peace and harmony can be resorted by such cohabitation. In majority of cases, the husband seeking remedy fro the court, has more than one wife. The suit is generally filed to thwart a claim for dower or maintenance.

Thus, through the decree of the court, a Muslim wife is robbed of her socio-legal rights in her community. In Anis Begum case, Suilaman C.J. rightly stated:

"There is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally.13

The implications of the decree must be kept in consideration before granting the relief by the courts. The true spirit of Quran must find its sway in courts decision. It has been rightly stated:

"Muslim can come to terms with contemporary world only, if they go straight back to Quran and renew their faith and

13. AIR 1933 All. 634 at 640.
belief by seeking direct inspiration and guidance from it". 14

(C) Implication Under Christian Law

The remedy is generally used by the husband to harass the wife or to defeat maintenance claims. Only in Saldanha v. Saldanha 15, the decree is passed in favour of wife in complete disregard of social facts. The decree can be achieve any objective because the husband cannot be enjoined to give conjugal love and affection to his wife, which is an essential element for a happy married life. It is difficult to reconcile that the husband, who has married a second wife within a fortnight of having solemnized first marriage with the respondent, will give respect, recognition and love to his first wife just by the decree of the court. The decree will only result in the continuation of a de-jure marriage which is all fact non existent. The judicial trend in Supra Chapter VI reveals that the remedy has not been frequently used by the spouses. If a decree is passed against a wife, she has to suffer humiliation at the hands of his husband. A limping marriage may continue for a number of years. The remedy has grave social implications against wife.

(D) Implication Under Parsi Law

The enlightened Parsi community has realised the futility of the remedy, thus, it has not been resorted to in a single case under the existing Act. The relationship between law and social facts cannot be overlooked. Parsi Panchayat of Bombay

15. Supra Note 8.
and other organisations of Parsi Community render great service by educating the members of their community on matters of socio-moral importance. The remedy is only fossilized and redundant under Parsi Law.

Thus, the remedy has grave legal and social implications. Instead of reconciliations, it can be misused for other purposes. The implications are contrary to the interests of wife. A layman is unable to understand the anticipated implication of the remedy. It has been rightly pointed out by RajKumari Aggrawal:

"Restitution of conjugal rights as a remedy shall be useful or not, in our society as anywhere else. The value of the remedy in any society, barring the caveman's is anyway doubtful. Truth is that this is the most tricky and defective remedy that operates on extremely slippery premises. Though harmless in appearance, it is capable of causing serious trouble and torture. A slight wrong diagnosis and administration in a wrong case, it can become the deadliest of legal medicines, though under most of the modern legal systems much of its venom has been eliminated by forbidding forcible execution of a restitution decree." 16

In such situation the legislature should give thought whether to retain it or not which is harmless in appearance but having grave socio-legal implications.

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