**CASE ANALYSIS. OF SMT. SAROJ RANI VS SUDARSHAN KUMAR CHADHA**

**AIR 1984 SC 1562**

Hindu marriage Act 1955- section 9- Constitution of India- Article 13, 14, and 21- laws inconsistent with or in derogation of the fundamental rights, right to equality, right to life and personal liberty. Section 9 of the Hindu Marriage Act deals with 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 When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being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 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.

**Impact on Indian Society**

**Introduction**

Marriage under all matrimonial laws is union imposing upon each of the spouse’s certain marital duties and gives to each of them certain legal rights. The necessary implication of marriage is that parties will live together. Each spouse is entitled to comfort consortium of the other. So after the solemnization of the marriage if either of the spouses without reasonable excuse withdraws himself or herself from the society of the other then the aggrieved party has a legal right to file a petition in the matrimonial court for restitution of conjugal rights. The court after hearing the petition of the aggrieved spouse, on being satisfied that there is no legal ground why the application shall be refused and on being satisfied with the truth of the statements made in the petition may pass a decree of restitution of conjugal rights.

A decree of restitution of conjugal rights implies that the guilty party is ordered to live with the aggrieved party. Restitution of conjugal rights is the only remedy which could be used by the deserted spouse against the other. A husband or wife can file a petition for restoration of their rights to cohabiting with the other spouse. But the execution of the decree of restitution of conjugal rights is very difficult. The court though is competent to pass a decree of restitution of conjugal rights, but it is powerless to have its specific performance by any law. The non-compliance of the issued decree results to constructive destruction on the part of the erring spouse.

At present as per the provisions available under the Indian personal laws, the aggrieved party moves a petition for a decree of divorce after one year from the date of the passing of the decree and the competent court can pass a decree of divorce in favour of the aggrieved party. The decree of restitution of conjugal rights can be enforced by the attachment of property, and if the party complained against still does not comply, the Court may also punish him or her for contempt of court. But under no circumstances, the court can force the erring spouse to consummate marriage. Decree of restitution of conjugal rights could be passed in case of valid marriages only.

In modern India, the remedy is available to Hindus under **Section 9** of the **Hindu Marriage Act, 1955,**to Muslims under general law, to Christians under**Section 32** and **33** of the **Indian Divorce Act, 1869**, to Parsis under **Section 36** of the **Parsi Marriage and Divorce Act, 1936** and to persons married according to the provisions of the **Special Marriage Act**, **Section 22** of the**Special Marriage Act, 1954.**

**ORIGIN**

The principle of restitution of conjugal rights has been borrowed into Indian laws from English law.[[1]](#footnote-1) In English law, wife and husband were treated as a single entity and therefore a wife could not sue her husband or vice versa.[[2]](#footnote-2) The remedy for restitution for conjugal rights owes its origin to the Ecclesiastical Courts of the West. Such courts by decree of restitution of conjugal rights compelled the recalcitrant spouse to discharge the due obligation towards the complaining spouse. Later in England, the remedy was recognized by the various Matrimonial Causes Acts passed from time to time.[[3]](#footnote-3)

From England, these rights passed on to her various colonies onto which her Anglo-Saxon jurisprudence was grafted and India was no exception in this regard. The provision was never a part of Hindu, Sikh, Muslim or Parsi Law, but the British imported it into India, through judicial pronouncements.

Thus in the absence of any statutory law, the Indian courts passed decrees for restitution of conjugal rights for all religious communities.

**FACTS OF THE CASE**

*Smt. Saroj Rani v/s Sudarshan Kumar Chadha was decided on 8th August 1984. It is considered landmark because it challenged the constitutional validity of Section 9 of the Hindu Marriage Act, 1955 wherein the two-judge bench of the Honourable Supreme Court of India upheld the validity of Restitution of Conjugal Rights enshrined under the Act.*

Petition was filed by the wife for a restitution of conjugal rights under Section 9 of the Hindu Marriage Act,1955. Her husband consenting to the passing of a decree for the same was passed. After a period of 1-year husband filed a petition under Section 13 of the Hindu Marriage Act,1955 against the appellant for divorce on the ground that though one year had elapsed from the date of passing the decree for restitution of conjugal rights as no actual cohabitation had taken place between the parties.

While the period of cohabitation wife was taken to the house of the husband by her parents one month after the decree and that the husband kept her in the house for two days and then she was again turned out. Considering this District Court as the decree for restitution of conjugal rights was passed by the consent of the parties, the husband was not entitled to a decree for divorce. The appeal was filed by Respondent to High Court for decree of divorce. On appeal, case came before Division Bench of High Court that a that a consent decree could not be termed to be a collusive, decree so as to  disentitle    the  petitioner to a decree for restitution of conjugal rights,  and that  in view  of the language of  Section 23 if the Court had tried to make conciliation between  the parties  and conciliation had been ordered, the  husband was  not disentitled  to get a decree. The appeal was allowed, and the husband was granted a decree of divorce. The appeal for the same is here.

**Issues before the Hon’ble court:**

1. Husband whether entitled to a decree of divorce or not?

2. Constitutionality of Section 9 of Hindu Marriage Act, 1955.

**Appellant’s Contentions:**

* Other Party could not take advantage of his ‘wrong’ because of having refused cohabitation in the execution of the decree. (Main contention)
* It was submitted that the respondent/husband had with the intention of ultimately having divorce allowed the wife a decree for the restitution of conjugal rights knowing fully well that this decree he would not honour and thereby he misled the wife and the Court and thereafter refused to cohabitate with the wife and now, it was submitted, cannot be allowed to take advantage of his ‘wrong’.
* Assail the factual finding of the Trial Court that there was no cohabitation after the decree for restitution of conjugal rights
* The decree for restitution of conjugal rights was in a sense collusive decree
* Challenged the constitutionality of Section 9 0f Hindu Marriage Act, 1955 relying on the case of Sareetha v. Venkata  Subbaiah, A.I.R.1983[[4]](#footnote-4)  Andhra Pradesh, which was Overruled by this court.

**Respondent’s Contentions:**

1. Restitution of Conjugal rights is constitutional under Smt. Harvinder Kaur v. Harmandir Singh Choudhry, A.I.R.1984[[5]](#footnote-5) Delhi, Approved by the court.

**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”. (Explanation: Where a question arises whether there has been a reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from society.)

The restitution of conjugal rights is often regarded as a matrimonial remedy. The remedy of restitution of conjugal rights is a positive remedy that requires both parties to the marriage to live together and cohabit.

The texts of Hindu Law recognized the principle, “*let mutual fidelity continue until death”.* Hindu Law enjoined on the spouses to have the 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.

The concept was introduced in India in the case of *Moonshee Buzloor*v*. Shumsoonissa Begum[[6]](#footnote-6)*, where such actions were regarded as considerations for specific performance. The Privy Council laid down that it was available to the Muslims in*Kateeram Dokanee v. Mst. Gendhenee[[7]](#footnote-7)*, so on the basis of this decision it was held that such a suit was permissible for the Hindus as well as mutatis mutandis. This was followed in *Jogendronundini Dossee*v.*Hurry Doss Ghose,[[8]](#footnote-8) Brindabun*v.*Chundra[[9]](#footnote-9)*, *Binda*v*. Kaunsila[[10]](#footnote-10)*and *Dadaji Bhikaji v. Rukmabai[[11]](#footnote-11)*. Then onwards relief in the nature of Conjugal rights was available to the Hindus in civil courts. After the passing of the Hindu Marriage Act, 1955, Section 9 gives a statutory sanction to a proceeding for restitution of conjugal rights.

This section in the Hindu Marriage Act is a reproduction of the sections 32 and 33 of the Indian Divorce Act.[[12]](#footnote-12) It is to be noted that similar provisions as to restitution of conjugal rights exist in other personal laws as well. Muslim equates this concept with securing to the other spouse the enjoyment of his or her legal rights.[[13]](#footnote-13) Earlier, it was also attached to the specific performance of the contract of marriage. In *Abdul Kadir*v.*Salima*, the Allahabad High Court decided that the concept of restitution must be decided on the principles of Muslim Law and not on the basis on justice, equity and good conscience. The laws relating to Christians[[14]](#footnote-14) and Parsis[[15]](#footnote-15)also deal with the concept of Restitution of Conjugal rights.

To sum up, under all personal law, the requirements of the provision of restitution of conjugal rights are the following:

* Withdrawal by the respondent from the society of the petitioner.
* The withdrawal is without any reasonable cause or excuse or lawful ground.
* There should be no other legal ground for refusal of the relief.
* The court should be satisfied with the truth of the statement made in the petition**.**

**Constitutional Validity of Section 9**

The constitutional validity of the provision for restitution of conjugal rights has time and again been questioned and challenged. The earliest being in 1983 before the Andhra Pradesh High Court in *T. Sareetha*v.*T. Venkatasubbaiah[[16]](#footnote-16)*where the Hon’ble High Court held that the impugned section was unconstitutional. The Delhi High Court in *Harvinder Kaur v Harminder* *Singh[[17]](#footnote-17)*though had non-conforming views. Ultimately Supreme Court in *Saroj Rani v. Sudharshan[[18]](#footnote-18)*gave a judgment which was in line with the Delhi High Court views and upheld the constitutional validity of Section 9 of the Hindu Marriage Act, 1955 and over-ruled the decision given in *T. Sareetha* v. *T. Venkatasubbaiah*.

It may be said that the two cases *T. Sareetha* v. *T. Venkatasubbaiah* and *Saroj Rani* v. *Sudharshan* are unambiguously the most important cases in the Indian spectrum of stare decisis dealing with the remedy of ‘restitution of conjugal rights’. The importance of such cases must, likewise, not be undermined. Sareetha and Saroj Rani bring out the core arguments offered on either side to the issue of restitution of conjugal rights. The major grounds for challenge to the constitutionality of S.9 of the Act are as in violation of Articles 14 and 21 of the Indian Constitution. Even though Sareetha has been the first case where the Constitutionality of S.9 of the Act has been challenged, it is pertinent to point out the observations of Lord Herschell in *Russell v Russell[[19]](#footnote-19)* where he noted the barbarity of such remedy of forced cohabitation between couple. Such observation is the touchstone against which all arguments in favor of the unconstitutionality of S.9 may be placed.

**Right To Equality And Restitution of Conjugal Rights**

Indian society is often regarded as one with widespread discrimination based on gender. More often than not, there have been instances where women have been subdued to violence and injustice because of their gender. It is to be noted that there is an inequality in the Indian society with regard to conjugal rights because “a suit for restitution by the wife is rare in the Indian Society”. This fact has been affirmed by Gupte who was quoted by the Court in *T. Sareetha* v. *T. Venkata Subbaiah*. It is only the educational, economic and social factors which have made the life of women deplorable in our Country. In our social reality, this matrimonial remedy of restitution of conjugal rights if found used almost exclusively by the husband and rarely resorted to by the wife.

According to Article 14, *“The state shall not deny to any person equality before the law or the equal protection of laws within the territory of India”[[20]](#footnote-20)*

The guiding principle is that all persons and things similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.[[21]](#footnote-21) All equals must be treated equally amongst themselves and unequal’s unequally.[[22]](#footnote-22) It must be realized that Gupte’s quote was concerning the old Hindu law and the provisions of the Hindu Marriage Act, 1955 and other personals do not have any provision of inequality existent in them. By amending act 44 of 1964, “either party to a marriage” is allowed to present a petition on the grounds given in Section 9 and Section 13(a).

The concept of gender discrimination has not been incorporated in the Hindu Marriage Act and all are treated as equals under this section. It is opined by the author that there is no classification of sexes in Section 9 and all equals have been treated equally in this area. There is complete equality of sexes hare and equal protection of the laws. Section 9 cannot be struck down as violative of Article 14 of the Constitution. The object of the restitution decree is to bring about cohabitation between the estranged parties. So that they can live together in the matrimonial home in. That is the primary purpose of Section 9 of the H.M.A. Cohabitation has been defined in these words: Cohabitation does not necessarily depend upon whether there is sexual intercourse between the husband and the wife. ‘Cohabitation’ means living together as husband and wife.

The Decision in ***T. Sareetha* v. *Venkatasubbaiah* Case:**

The question of constitutional validity of **S.9 f**or the first time came up in came up in the case of ***T Sareeta v Venkatasubbiah*** where the husband had himself asked the Court to pass a decree of restitution of conjugal rights and after completion of a year he filed a petition for divorce on the ground that the decree has not been complied to. The wife challenged the constitutional validity of **S.9** of the Act. Justice Chaudhary of the Andhra Pradesh High Court held **S. 9** to be “savage and barbarous remedy violating the right to privacy and human dignity guaranteed by **Article 21** of the Constitution, hence void”.

Chaudhary J. stated that **section 9** imposes *“sexual cohabitation between unwilling, opposite sexual partners.”* He called it “forced sex”, “coerced sex” and “forcible marital intercourse”. He went on to hold that the state interference in personal rights destroyed the “sexual autonomy” and “reproductive autonomy” of the individual. A wife who is keeping away from her husband, because of a permanent or temporary arrangement, cannot be forced, without violating her right to privacy, to bear a child by her husband.

A large number of English and American decisions have been cited in support of this view. This decision is the first of its kind to take this view. The decree for restitution does nothing of the kind. Under **section 9** of the **Hindu Marriage Act**, 1955, the Court has the power to make a decree of restitution of conjugal rights which is the remedy available to enforce the return of a spouse who has withdrawn from cohabitation. The decree, if granted, orders the respondent to return within a period of one year to the aggrieved party. This period is specified in **section 13(l-A)(ii)** of the Act. This remedy is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation.

**The Right to Life and Restitution of Conjugal Rights**

The Right to Life of a person is regarded as the most important aspect of a person’s fundamental rights. It is stated in the Constitution as follows[[23]](#footnote-23) “No person shall be deprived of his life or personal liberty except according to the procedure established by law”. **Article 21**, though couched in the negative language, confers on every person the fundamental right to life and personal liberty. These rights have been given a paramount position by the Supreme Court[[24]](#footnote-24). It is argued that**Section 9** of the **Hindu Marriage Act,** 1955 that provides for the restitution of conjugal rights, violates the right to privacy of an individual. Section 9 denied the spouse his/her free choice whether, when and how her/his body was to become the vehicle for the peroration of another human being.

A decree for restitution of conjugal rights deprived, according to the learned Judge in Sareetha’s case a woman of control over her choice as and when and by whom the various parts of her body should be allowed to be sensed. Our Constitution embraces the right to privacy and human dignity and any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and childbearing. It is to be noted that the restitution of conjugal rights, unlike specific performance, is only wilful in nature and the courts must treat it only as an inducement in times to come. The institution of marriage has been inherent in the Indian Society and all must be done to protect it. Furthermore, if a spouse does not wish to stay with his/her partner then he may make use of remedies such as judicial separation and divorce. Leaving a partner without a reasonable excuse cannot be justified[[25]](#footnote-25). This is against the concepts of justice, equity and good conscience which are the basis for laws made in our Country. Thus it must be observed that**Section 9** of the **Hindu Marriage Act** is not violative of **Article 21** of the Indian Constitution.

**Findings of Court**

* From the facts on record, it appeared to the court that there was no collusion between The wife petitioned against the husband on certain allegations, the husband denied these allegations. He stated that he was willing to take the wife back. A decree on that basis was passed.
* Before the Division Bench of behalf of the appellant-wife, counsel did not assail the factual finding of the Trial Court that there was no cohabitation after the decree for restitution of conjugal rights nor did counsel press the ground of defence namely that the appellant could not take advantage of his ‘wrong’ because of having refused cohabitation in execution of the decree.
* There is, however, no whisper of these allegations as provided under Appellant’s Contention no.2  in the pleading. As usual, on this being pointed out, the counsel prayed that he should be given an opportunity of amending his pleadings and, the parties, with the usual plea, should not suffer for the mistake of the lawyers.
* On Respondent’s contention no.2 : Firstly there was no pleading, secondly this ground was not urged before any of the courts below which is a question of fact, thirdly the facts pleaded and the allegations made by the wife in the trial court and before the Division Bench were contrary to the facts now sought to be urged in support of her appeal.
* There are sufficient safeguards in Section 9 to prevent it from being a tyranny. The importance of the concept of conjugal rights can be viewed in the light of Law Commission-71st Report on the Hindu Marriage Act, 1955- “Irretrievable Breakdown of Marriage as a Ground of Divorce”.
* This is so as an inducement by the court in appropriate case when the court has decreed restitution for conjugal rights and that the court can only decree if there is no just reason for not passing decree for restitution  of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of the marriage. It cannot be viewed in the manner the learned single judge of Andhra Pradesh High Court has viewed it and we are therefore unable to accept the position that Section 9 of the said Act is violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective   and if the method of its execution in cases of disobedience is kept in view.
* The Section 9 of the Hindu Marriage Act, 1955 is constitutional.
* Even after the final decree of divorce, the husband would continue to pay maintenance to the wife until she remarries and would maintain the one living daughter of the marriage. Wife would be entitled to such maintenance only until she remarries and the daughter Menka to her maintenance until she is married. Respondent would pay costs of this appeal to appellant assessed at Rs. 1500.
* Appeal dismissed.

**The Decision in** *Saroj Rani V. Sudarshan Kumar*

In this case, the wife petitioned for restitution of conjugal rights. She was married in 1975 and had given birth to two daughters during her brief married life. She was turned out of her matrimonial house in 1977 and subsequently filed a petition to which she was granted interim maintenance by the Court. The husband later filed a consent memo for the passing of the decree and the decree of restitution of conjugal rights was accordingly passed in favor of the wife. One year later, the husband applied for divorce under **Section 13** **(1-A)** of the **Hindu Marriage Act, 1955** on the ground that he and his wife had lived separately during the one year period.

The question of cohabitation arose wherein the spouses stayed together for a period of two days after the decree was passed. It was submitted that the ground for divorce was unjustified and the husband was getting away with his ‘wrongs’. This argument was based on the principles of natural law, i.e. justice, equity and good conscience. It was further argued that the concerned section, that is **Section 9** of the **Hindu Marriage Act** violated **Articles 14** and **21** of the Indian Constitution. The Hon’ble Court under Justice Sabyasachi Mukhatji observed:

“We are unable to accept the position that Section 9 of the Hindu Marriage Act is violative of **Art. 14** and **21** of the Indian **Constitution**. Hindu Marriage is a sacrament and the object of section 9 is to offer an inducement for the husband and wife to live together in harmony. If such differences may arise as in this case, it may be a valid ground for divorce after a period of one year. Hence **Section 9**’s validity is upheld.”

Thus the Court granted the divorce but at the same time understanding the situation of the wife and daughters, ordered the husband to pay prescribed maintenance to the wife until she remarries. The Hon’ble Court has thus considered the interests of both parties and maintained harmony in this area.

**CONCLUSION**

In 1983, [the Andhra Pradesh High Court](https://indiankanoon.org/doc/1987982/%27) struck down section 9 of the Hindu Marriage Act, which provided for the restitution of conjugal rights, as unconstitutional. Justice Choudary held that compelling a person to live with his/her spouse violated the right to privacy in the Indian Constitution. The fundamental issue at the heart of this debate has been whether the right to privacy extends to the home and marital relationships.

However, taking into consideration the fact that marital rape is not an offence in India, compelling a woman to live with her husband takes away her right to choose whether or not to have sexual intercourse, as her husband can forcibly have sexual intercourse with her without legal sanction. Thus, even if section 9 of the Hindu Marriage Act does not make sexual intercourse compulsory, compelling a woman to stay with her husband in the matrimonial home puts her at risk of marital rape, depriving her of autonomy over her own body and thus violates her right to privacy.

With the gradual understanding that the law needs to intervene in family matters and protect the rights of individuals, restitution of conjugal rights has been criticized across common law jurisdictions, leading to its abolition in the UK, Australia, Ireland and South Africa. It is time that India, too, abolishes restitution of conjugal rights, taking into consideration the blatant breach of the right to privacy it represents.

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**BRIEF ABOUT THE AUTHOR**

Shruti Awati is a 2nd year LLM student at ILS Law College, Pune. She has participated in various seminars and events. She was a part of the organising team for Surana and Surana moot court competition at Symbiosis Law School, Pune. She is very keen in legal research and drafting, and looks forward to developing them better in future. she has worked for 6 months in district court in Pune under an advocate, she has also interned in Legasis Pvt. Ltd. under an IPR team for 3 months, she was a part of one month internship program in Abhay Nevagi and associates and she has an experience of interning in High court of Chhattisgarh under a very experienced and renowned lawyer. Further, she has also completed B2 level of certification in French Language from alliance francaise de poona.

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