

SYNOPSIS

The Petitioners (Public Interest Litigants) are students of the Gujarat National Law University, Gandhinagar. This Petition challenges the validity of Section 9 of the Hindu Marriage Act, 1955, Section 22 of the Special Marriage Act, 1954 and Order 21, Rules 32 and 33 of the Code of Civil Procedure, 1908. The provisions provide the statutory scheme for the Restitution of Conjugal Rights.

The Black's Law Dictionary defines 'Conjugal Rights' to mean:

"The rights and privileges arising from marriage relationship, including the mutual relationship of companionship, support and sexual relations."

Courts in India have understood 'Conjugal rights' to have two key ingredients:

- i. Cohabitation
- ii. Sexual intercourse

Under the legal scheme in India, a spouse is entitled to a decree directing his other spouse to cohabit and take part in sexual intercourse. He/she is also entitled to coercive measures in the form of attachment of property in case the spouses wilfully disobey the decree of restitution.

The Petitioners submit that the legislative package providing for the Restitution of Conjugal Rights is unconstitutional on the following grounds:

- i. The legal framework is facially neutral. It however places a disproportionate burden on women and is therefore violative of Articles 14 and 15(1) of the Constitution.

- ii. The legal framework is based on feudal English law which regarded a Woman as chattel of his wife. It is steeped in a patriarchal gender stereotype and is violative of Article 15(1) of the Constitution.
- iii. The legal framework is violative of the rights to privacy, individual autonomy and dignity of individuals (both men and women) which are guaranteed under Article 21 of the Constitution.

The remedy of restitution of conjugal rights was not recognized by any of the personal law systems of India. The same has its origins in feudal English Law, which at that time considered a wife to be the chattel of the husband. The United Kingdom itself has abolished the remedy of restitution of conjugal rights in 1970.

It is pertinent to note that these provisions were struck down as unconstitutional by the Andhra Pradesh High Court in *T Sareetha v. T. Venkata Subbiah*, AIR 1983 AP 356. The constitutionality of these provisions was upheld by the Delhi High Court in *Smt. Harvinder Kaur v. Harmander Singh Choudhry*, A.I.R. 1984 DEL 66. Ultimately, this Hon'ble Court approved the decision of the Delhi High Court by its Judgment in *Saroj Rani v Sudarshan Kumar Chadha*, (1984) 4 SCC 90.

The Court in *Saroj Rani* (supra) held:

14. *In India it may be borne in mind that conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. See in this connection Mulla's Hindu Law — Fifteenth Edn., p. 567, para 443. 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 — Seventy-first Report on the Hindu Marriage Act, 1955 — “Irretrievable Breakdown of Marriage as a Ground of Divorce”, para 6.5 where it is stated thus:

“Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage — „breakdown’ — and if it continues for a fairly long period, it would indicate destruction of the essence of marriage — „irretrievable breakdown’.

The Court went on to hold:

“16. It serves a social purpose as an aid to the prevention of break-up of 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.

Submissions With Regard to Privacy, Autonomy and Dignity

It is clear that the court in Saroj Rani considered the scheme for restitution of conjugal rights -as *an aid to the prevention of break-up of marriage*”. It is

however submitted that the personal autonomy and dignity that are guaranteed under the Constitution cannot be sacrificed at the altar of family life. This Court in *KS Puttaswamy and Anr v Union of India and Anr*, (2017) 10 SCC 1. This Court therein has held:

“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.”

Subsequently, the Court in *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1 observed:

“...Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person’s nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.”

This was reiterated by the Court in *Joseph Shine v Union of India*, (2018) 2 SCC 189 wherein it held that:

“The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as

private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.”

In light of the above, the Petitioners submit that the Constitution guarantees to every individual the right to be left alone – even within the framework of a family. Any provision which forces an individual to have sexual relations or even cohabit a home without her will is violative of the right to privacy, individual autonomy and dignity that are guaranteed by the Constitution.

No Compelling State Interest

It is pertinent to note that in recent years traditional family values have changed. This was recognized by this Court in *Joseph Shine (supra)*. This Court in *Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1* has held that *-a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid.”*

The Petitioners submit that society is changing into one where the private interest of sexual autonomy, dignity and happiness of an individual is put before concerns like societal morality or family life. Thus, there exists no compelling interest for the state to interfere in matters related to conjugal rights. Such an argument was rejected by the Court in *Joseph Shine (supra)*.

Submissions With Regard to Facial Neutrality

This Court has long recognized that in judging the validity of legislation, the Court must have regard to its real, direct and inevitable effect and not on its

outward form. [*Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co., Ltd.*, [1954] S.C.R. 674, *Express Newspaper (P) Ltd. & Ors. v. Union of India* [1962] 3 SCR 842, *R.C. Cooper v. Union of India* [1973] 3 SCR 530]

Recently, the Court in *Navtej Singh Johar (supra)* has recognized the concept of indirect discrimination, noting that “*facially neutral action by the State may have a disproportionate impact upon a particular class*”.

The Petitioners submit that the provisions for restitution of conjugal rights are facially neutral in as much as they allow both the husband and the wife to move court. However, the direct and inevitable effect of the provision has to be seen in light of the deeply unequal familial power structures that prevail within Indian society. The Andhra Pradesh High Court in *T Sareetha (Supra)* had observed as follows:

“Bare equality of treatment regardless of the inequality of realities is neither justice nor homage to the constitutional principle... the question is how this remedy works in life terms. In our social reality, this matrimonial remedy is found used almost exclusively by the husband and is rarely resorted to by the wife. A passage in Gupte's Hindu law in British India page 929 (second edition) attests to this fact... the reason for this mainly lies in the fact of the differences between the man and the woman. By enforcing a decree for restitution of conjugal rights the life pattern of the wife is likely to be altered irretrievable whereas the husbands can remain almost as it was before this is so because it is the wife who has to beget and bear a child. This practical but the inevitable consequence of the enforcement of this remedy cripples the wife's future plans of life and prevents her from using that self-destructive remedy... The pledge of equal protection of laws is thus inherently incapable of being fulfilled by this

matrimonial remedy in our Hindu society. As a result this remedy words in practice only as an engine of oppression to be operated by the husband for the benefit of the husband against the wife.”

The Petitioners submit that the consequences of a decree of restitution cause extreme hardship to a woman – who has to return to her marital homes and responsibilities, than it does to a man. As has been noted by the Andhra Pradesh High Court, the remedy is an *-engine of oppression to be operated by the husband for the benefit of the husband against the wife.”*

In light of the above, the Petitioners submit that the legislative package providing for the restitution of conjugal rights violates Articles 14, 15(1) and 21 of the Constitution. It intrudes into an individual's private life, without there being any compelling state interest for the same. The same is thus liable to be struck down as unconstitutional.

LIST OF DATES AND EVENTS

21.09.1885	A single judge of the Bombay High Court delivered his Judgment in <i>Dadaji Bhikaji vs Rukhmabai, ILR (1885) 9 Bom 529</i> . The observations of the Ld. Single Judge are reproduced below: <i>“The parties to the present suit went through the religious ceremony of marriage eleven years ago when the defendant was a child of eleven years of age. They have never cohabited. And now that the defendant is a woman of twenty-two, the plaintiff asks the Court to compel her to go to his house, that he may complete his contract with her by consummating the</i>
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marriage, The defendant, being now of full age, objects to going to live with the plaintiff, objects to allowing him to consummate the marriage, objects to ratifying and completing the contract entered into on her behalf by her guardians while she was yet of tender age. It seems to me that it would be a barbarous, a cruel, a revolting thing to do to compel a young lady under those circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will; and I am of opinion that neither the law nor the practice of our Courts either justified my making such an order, or even justifies the plaintiff in maintaining the present suit.

I have looked through the reported decisions of the Courts in England and of the Court's in India; but I cannot find one that covers the ground covered by the facts of this case. There is not an instance, that I know of, in which a Court has compelled a woman, who has gone through the religious ceremony of marriage with a man, to allow that man to consummate the marriage against her will. It may, of course, be said that in England marriages are generally celebrated between persons of mature age, who usually consummate the marriage on the same day, and that, therefore, one must not expect to find a case on all fours with this among the English cases. But, then, on the other hand it must be remembered that the practice of allowing suits for the restitution of conjugal rights (and that is what is asked for in the plaint) originated in England under peculiar circumstances, and was transplanted from England into

India. It has no foundation in Hindu law-the religious law of the parties to the suit. Under the Hindu law such a suit would not be cognizable by a Civil- Court. For many years after I came to India such suits were not allowed. It is only of late years the practice of allowing such suits has been introduced into this country from England; (I think only since the amalgamation of the old Supreme and Sadar Courts in the present High Courts has brought English lawyers more into contact with the mufassal).

This being so, I think I am not bound to carry the practice further than I find support for in the English authorities, especially when the granting of the relief prayed would produce consequences revolting not only to civilized persons, but even to untutored human beings possessed of ordinary delicacy of feeling. The practice of allowing those suits in England has become much discredited, and has been rendered almost inoperative by the legislation of the past year. See Stat. 47 & 48 Vic, cap. 68, Section 2. It is, in my opinion, matter for regret that it was ever introduced into this country. "As, however, it has been introduced into this country," I am bound to follow it so far as it has received the sanction of this Court or of the Privy Council. I find, however, neither precedent nor authority for granting the relief asked for in this suit, and I am certainly not disposed to make a precedent, or to extend the practice of the Court in respect of suits of this nature beyond the point for which I find authority.

	The Judgment was overturned in Appeal by the Division Bench.
24.07.1969	The UK Law Commission recommended that the remedy of Restitution of Conjugal Rights be abolished.
1970	The provision for Restitution of Conjugal Rights was abolished in England under Section 20 of the Matrimonial Proceedings Act, 1970.
01.07.1983	<p>The Hon'ble Andhra Pradesh High Court in the case of <i>T Sareetha v. T Venkata Subbaiah</i>, AIR 1983 AP 356, struck down Section 9 of the Hindu Marriage Act as null and void. The Ld. Single Judge therein held:</p> <p><i>17. A combined reading of the above substantive and procedural provisions relating to the grant of relief of restitution of conjugal rights by court makes it clear that the decree for restitution of conjugal rights contemplated to be granted under section 9 of the Act is intended by the statutory law to be enforced in species under Order 21 Rule 32 and 33 by applying financial sanctions against the disobeying party. In other words, sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights, it follows, therefore, that a decree for restitution of conjugal rights passed by a civil court extends not only to the grant of relief to the decree-holder to the company of the other spouse but also embraces the right to have marital intercourse with the other party. The consequences of the enforcement of such a decree are firstly to transfer the choice to have or not to have material intercourse to</i></p>

	<p><i>the State from the concerned individual and secondly, to surrender the choice of the individual to allow or not to allow one's body to be used as a vehicle for another human being's creation to the State.</i></p> <p>Ultimately, the Court struck down the validity of the provisions holding that <i>-remedy of restitution of conjugal rights provided for by that Section is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by article 21 of our Constitution.</i></p>
15.11.1983	<p>The Hon'ble Delhi High Court upheld the Constitutional validity of Section 9 of the Hindu Marriage Act in the case of <i>Harvinder Kaur v. Harmander Singh Choudhary, AIR 1984 Del 66.</i></p>
08.08.1984	<p>The Hon'ble Supreme Court in the matter concerning <i>Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90</i>, agreed with the Delhi High Court and upheld the Constitution validity of Section 9 of the Hindu Marriage Act.</p>
June, 2015	<p>The Ministry of Women and Child Development had instituted a committee to look into the status of women and children in India. The report of the committee recommends the deletion of the provisions for restitution of conjugal rights, stating that they should not be continued as a matrimonial remedy. The report states</p> <p><i>"7.20 The objective of Section 9 was to preserve the</i></p>

	<p><i>institution of marriage but is now being misused. The practice of filing a suit for restitution of conjugal rights every time a wife for maintenance or files a complaint of cruelty continues, thereby defeating her claim. Further restitution of conjugal rights is against human rights of a person as no can be or should be forced to live with another person.”</i></p>
<p>August, 2018</p>	<p>Subsequently, the Law Commission of India has published a consultation paper on the reform of family law. The Commission observes: <i>“In the current context when a number of women are as educated as men are and are contributing to their family income, the provision of restitution of conjugal rights should not be permitted to take away these hard-earned freedoms.”</i> It goes on to endorse the report of Report of the High Level Committee on the Status of India, observing:</p> <p><i>“2.62. The Report by High Level Committee on Status of Women, Ministry of Women and Child Development in 2015 had also recommended that restitution of conjugal rights had no relevance in independent India and the existing matrimonial laws already protects conjugal relations, as denial of consummation is recognised as ground for divorce. The report, under the leadership of Pam Rajput highlighted the fact that this provision was only being used to defeat maintenance claims filed by wives and served little purpose otherwise. The</i></p>

	<i>Commission echoes the recommendation of the Committee in this regard and suggests the deletion of section 9 from the Act, 1955, section 22 of the SMA,1954, and section 32 of Indian Divorce Act, 1869.”</i>
18.02.2019	This Writ Petition is filed seeking a declaration that Section 9 of the Hindu Marriage Act, 1955, Section 22 of the Special Marriage Act, 1954 and Order 21, Rules 32 and 33 of the Code of Civil Procedure, 1908 are unconstitutional.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL WRIT JURISDICTION
(Under Article 32 of the Constitution)
WRIT PETITION (CIVIL) No. OF 2019
[PUBLIC INTEREST LITIGATION]

IN THE MATTER OF:

1. Ojaswa Pathak

2. Mayank Gupta

...Petitioners

AND

Union of India,

Through Secretary,

Ministry of Law and Justice

4th Floor, A-Wing,

Shastri Bhawan New Delhi-110 001. Respondents

**A WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA
PRAYING INTER ALIA, FOR A WRIT, ORDER, DIRECTION OR
DECLARATION THAT SECTION 9 OF THE HINDU MARRIAGE ACT, 1955
AND SECTION 22 OF THE SPECIAL MARRIAGE ACT AND ORDER 21
RULE 32 AND 33 OF THE CODE OF CIVIL PROCEDURE, ARE VIOLATIVE
OF FUNDAMENTAL RIGHTS AND HENCE UNCONSTITUTIONAL**

TO,

HON'BLE THE CHIEF JUSTICE OF INDIA

AND HIS HON'BLE COMPANION JUSTICES

OF THE SUPREME COURT OF INDIA

THE PETITION OF THE HUMBLE

PETITIONERS ABOVE NAMED

MOST RESPECTFULLY SUBMITTED AS UNDER:

1. The Petitioners respectfully seek to invoke the extraordinary jurisdiction of this Court under Article 32 of the Constitution of India and crave inter-alia for issuance of an appropriate Writ, order and/or direction for declaring Section 9 of the Hindu Marriage Act, 1955,

Section 22 of the Special Marriage Act, 1954 and Order 21 Rule 32 and 33 of the Code of Civil Procedure, as unconstitutional.

2. The Petitioner No. 1 Ojaswa Pathak, is a third year law student pursuing BBA LLB from Gujarat National Law University, Gandhinagar. His residential address is _____ His phone number is _____. His email id is _____. His AADHAR number is _____

Petitioner No.2, Mayank Gupta is a third year law student pursuing B.Com LLB from Gujarat National Law University, Gandhinagar. His residential address is _____. His phone number is _____. His email id is _____. His AADHAR number is _____

3. The Petitioners have locus standi to file this petition as they are concerned and public spirited citizens of India. As law students, they have read about and observed the misuse of the prima-facie illegal provisions relating to the Restitution of Conjugal Rights. The same is violative of the autonomy and dignity of the individual citizens. Hence, they have been constrained to file this Petition challenging the vires of the said provisions.
4. The Petitioners are filing this Petition purely in public interest and have no personal interest in the outcome of the matter. There is neither civil, criminal nor revenue litigation, involving the Petitioner herein which has or could have a legal nexus with the issues involved in the present Public Interest Litigation. The Petitioners have filed separate affidavits stating that they have no personal

gain, private motive or oblique reason for filing this Public Interest Litigation.

5. The Petitioners has not filed any similar Writ Petition either in this Hon'ble Court or any other High Court. The Petitioner herein has not approached any of the Respondents/authority for the reliefs sought in the present Writ Petition. The Petitioners have been constrained to approach this Hon'ble Court without taking recourse to the remedy available under Article 226 of the Constitution because the High Courts are barred to decide upon the constitutionality of the said provisions by virtue of the decision of this Court in *Saroj Rani v. Sudarshan Kumar*, (1984) 4 SCC 90.
6. The sole Respondent is the Union Ministry of Law and Justice, Government of India.
7. The relevant facts relevant to this Writ Petition are as follows:
 - i. A single judge of the Bombay High Court delivered his Judgment in *Dadaji Bhikaji vs Rukhmabai*, ILR (1885) 9 Bom 529. The Ld. Single Judge therein observed that the remedy of restitution of conjugal rights was unknown to Hindu Law and had been transplanted from England into India. This decision was later overturned in appeal. However, Rukhmabai refused to follow the decree, stating that she would rather go to jail. The matter was ultimately settled outside Court. Rukhmabai is stated to have become India's first female doctor.

ii. The Parliament debated the Hindu Code Bill in April-May, 1955. A number of members opposed the provision for restitution of Conjugal Rights, calling it —crude, uncouth, barbarous and vulgar. In response, the then Minister of Law Mr. H.V. Pataskar admitted that the provision was harsh. He however pointed out that under the procedural law of the country, the decree for restitution could not be forcibly executed. Thus there was no fear of a brutal get-together of unwilling spouses. He further explained that such a decree could help some unfortunate women because Rule 33, Order XXI of the Civil procedure Code had a special provision with respect to the enforcement of such a decree against the husband. A husband who disobeys a restitution decree can be ordered to pay to the wife some periodic payments fixed by the court. Therefore, a wife could subsist in spite of the fact that the husband was not living with her. He requested the members to consider this aspect of the remedy and insisted upon the propriety and usefulness of retaining it.

iii. The UK Law Commission recommended that the remedy of Restitution of Conjugal Rights be abolished on 24.07.1969. The Commission, chaired by Leslie Scarman noted that *“a court order directing adults to live together is hardly an appropriate method of attempting to effect a reconciliation.”* The Commission also noted that *“in so far as restitution proceedings are used to demonstrate a spouse's endeavour*

to save the marriage by showing his or her willingness to resume married life together, this can be demonstrated equally early by other more appropriate approaches. If these fail to bring about desired result, it is unlikely that bringing legal proceedings will have greater effect. “

The provision was subsequently abolished in England under Section 20 of the Matrimonial Proceedings Act, 1970. A copy of the Report of the Law Commission, ‘Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights’ dated 24.07.1969 is attached herewith and marked as **Annexure P1. [Pages to]**

- iv. The Hon’ble Andhra Pradesh High Court in the case of T Sareetha v. T Venkata Subbaiah, AIR 1983 AP 356, struck down Section 9 of the Hindu Marriage Act as null and void. A copy of the Judgment of the Andhra Pradesh High Court in T Sareetha v. T Venkata Subbaiah reported as AIR 1983 AP 356 dated 01.07.1983 is attached herewith as **Annexure P2. [Pages to]**
- v. The Hon’ble Delhi High Court upheld the Constitutional validity of Section 9 of the Hindu Marriage Act in the case of Harvinder Kaur v. Harmander Singh Choudhary, AIR 1984 Del 66.
- vi. The Hon’ble Supreme Court in the matter concerning Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90,

agreed with the Delhi High Court and upheld the Constitution validity of Section 9 of the Hindu Marriage Act.

- vii. A single judge of the Punjab and Haryana High Court doubted the validity of the provisions regarding restitution of conjugal rights in *Maya Devi v Kailash Chander*, (2014) 5 RCR (Civil) 968. The observations of the Court are as below:

“I have my own doubts that decree of restitution of conjugal rights thus enforced offends the inviolability of the body and the mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of such a person, which will be dealt with in appropriate proceedings.” A copy of the Judgment of the Ld. Single Judge of the Punjab and Haryana High Court dated 17.12.2013 in *Maya Devi v Kailash Chander*, (2014) 5 RCR (Civil) 968 is attached herewith and marked as **Annexure**

P3. [Pages to]

8. In the light of the foregoing facts, the Petitioners are constrained to invoke the jurisdiction of this Hon'ble Court, inter alia, on the following amongst other grounds which are taken without prejudice to each other:

GROUND

- A. Because the remedy of Restitution of Conjugal Rights is borrowed from feudal English Law, which at that time considered a wife to be the chattel of the husband. Thus, if the wife withdrew from the society of the husband, she could be compelled to join the husband. The provisions are steeped in

stereotypes of women and their role in a marriage. It is submitted that Article 15 prohibits the State from discriminating on grounds only of sex. The scheme of ‘restitution of conjugal rights’ though facially neutral, is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15. [*Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, *Joseph Shine (supra)*]

B. Because this Hon’ble Court has recognized that in judging the validity of legislation, the Court must have regard to its real, direct and inevitable effect and not on its outward form. [*Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co., Ltd.*, [1954] S.C.R. 674, *Express Newspaper (P) Ltd. & Ors. v. Union of India* [1962] 3 SCR 842, *R.C. Cooper v. Union of India* [1973] 3 SCR 530].

The Andhra Pradesh High Court in *T Sareetha* has correctly observed that *...by enforcing a decree for restitution of conjugal rights the life pattern of the wife is likely to be altered irretrievable whereas the husband's can remain almost as it was before this is so because it is the wife who has to beget and bear a child. This practical but the inevitable consequence of the enforcement of this remedy cripples the wife's future plans of life and prevents her from using that self-destructive remedy.*

The same goes to show that the provisions for restitution of conjugal rights are facially neutral in as much as they allow both the husband and the wife to move court. However, in effect, they are deeply discriminatory towards women. The Petitioners humbly submit that the direct and inevitable effect of the provision has to be seen in light of the deeply unequal familial power structures that prevail within Indian society. This Court in *Joseph Shine (supra)*, has observed:

A provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. In its operation, law “permeates and is inseparable from everyday living and knowing, and it plays an important role in shaping (legal) consciousness.” A contextual reading of the law shows that it influences social practices, and makes “asymmetries of power seem, if not invisible, natural and benign”

C. Because provisions requiring a person to even cohabit with another against their will are violative of the Right to Privacy of an individual. This Court in *KS Puttaswamy and Anr v Union of India and Anr, (2017) 10 SCC 1* has observed :

Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop.

D. Because this Court in *Navtej Singh Johar (supra)* and *Joseph Shine (supra)* has recognized “*sexual choices as an essential attribute of autonomy, intimately connected to the self-respect of the individual.*” Speaking in the context of Section 497, this Court in *Joseph Shine (supra)*, has held :

“Section 497 seeks the preservation of a construct of marriage in which female fidelity is enforced by the letter of the law and by the coercive authority of the state. Such a conception goes against the spirit of the rights-based jurisprudence of this Court, which seeks to protect the dignity of an individual and her “intimate personal choices”. It cannot be held that these rights cease to exist once the woman enters into a marriage.”

It is humbly submitted that the right to cohabit or take part in sexual intercourse with another is an intimate personal choice. These continue to exist in each individual – man or woman even after marriage. The scheme for restitution of conjugal rights is violative of the same in as much as it allows a man/woman to take coercive measures (in the form of attachment of property) against his/her spouse who is unwilling to have a conjugal relationship.

E. Because the Ministry of Women and Child Development had instituted a committee to look into the status of women and children in India. The report of the committee recommends the deletion of the provisions for restitution of conjugal rights, stating that they should not be continued as a matrimonial remedy. The report states|

“7.20 The objective of Section 9 was to preserve the institution of marriage but is now being misused. The practice of filing a suit for

restitution of conjugal rights every time a wife for maintenance or files a complaint of cruelty continues, thereby defeating her claim. Further restitution of conjugal rights is against human rights of a person as no can be or should be forced to live with another person.”

F. Because the Law Commission of India has published a consultation paper on the reform of family law. The Commission observes: *“In the current context when a number of women are as educated as men are and are contributing to their family income, the provision of restitution of conjugal rights should not be permitted to take away these hard-earned freedoms.”* It goes on to endorse the report of Report of the High Level Committee on the Status of India, observing:

“2.62. The Report by High Level Committee on Status of Women, Ministry of Women and Child Development in 2015 had also recommended that restitution of conjugal rights had no relevance in independent India and the existing matrimonial laws already protects conjugal relations, as denial of consummation is recognised as ground for divorce. The report, under the leadership of Pam Rajput highlighted the fact that this provision was only being used to defeat maintenance claims filed by wives and served little purpose otherwise. The Commission echoes the recommendation of the Committee in this regard and suggests the deletion of section 9 from the Act, 1955, section 22 of the SMA, 1954, and section 32 of Indian Divorce Act, 1869.”

G. Because one of the objects for including Section 9 in the Hindu Marriage Act seems to be that a wife can claim periodic payments from her

husband who is unwilling to comply with a decree of conjugal rights. It is submitted that this justification no longer holds good in light of the provision for maintenance under S.125 of the Code of Criminal Procedure. It is submitted that the validity of a law has to be tested according to the changing times. This Court in *Anuj Garg (surpra)*, has held

“Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in constitutional rights analysis would not be out of place. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid.”

It is submitted that the only purpose that the scheme of restitution of conjugal rights serves is that of forced cohabitation of unwilling spouses under a decree of law. In view of subsequent legislative changes, the reasoning that it allows for the payment of periodic payment to the wife no longer holds good. The law is liable to be struck down on that ground.

9. The Petitioners have not filed a similar petition before this Hon'ble Court or any other court on the same grounds.

10. That Annexures produced along with this Writ Petition are true and correct copies of their respective originals.

11. The Petitioners crave leave of this Hon'ble Court to add to, alter, amend and/or modify any of the grounds aforesaid.
12. The issues raised in the Petitioners are ones of Constitutional importance and the Petitioners have no other equally efficacious remedy available to them other than to file the instant Writ Petition under Article 32 of the Constitution of India for the protection of their fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution of India.
13. The Petitioners state that the present petition is being filed bonafide and in the interests of justice.

PRAYER

18. In light of the foregoing facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be graciously pleased to:
 - a. Issue an appropriate writ, order or direction striking down Section 9 of the Hindu Marriage Act, 1955 for being violative of the fundamental rights guaranteed under the Constitution;
 - b. Issue an appropriate writ, order or direction striking down Section 22 of the Special Marriage Act, 1954 for being violative of the fundamental rights guaranteed under the Constitution;
 - c. Issue an appropriate writ, order or direction striking down Order 21 Rule 32 and 33 of the Code of Civil Procedure, 1908 to the extent they concern with the Restitution of Conjugal Rights for being violative of the fundamental rights guaranteed under the Constitution

d. Issue such other appropriate writ, order or directions as this Hon'ble Court may deem just and proper to issue in the circumstances of the case.

AND FOR THIS ACT OF KINDNESS PETITIONER, AS IN DUTY BOUND, SHALL EVER PRAY.

DRAWN BY:

FILED BY

PRANJAL KISHORE

MP VINOD

Filed On :

Advocate on Record

for the Petitioner

APPENDIX

Relevant Provisions of the Hindu Marriage Act, 1955, Special Marriage Act, 1954 and Code of Civil Procedure, 1908

Section 9 of the Hindu Marriage Act/Section 22 of the Special 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 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.

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.

Provisions of the Civil Procedure Code

Order 21, Rule 32- Decree for specific performance for restitution of conjugal rights, or for an injunction— (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, 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 for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunctions been passed is a corporation, the decree may be enforced by the

attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(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 the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or here, at the end of [six months] from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration : A, a person of little substance, effects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately

compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from a in the execution-proceedings.

Rule 33- Discretion of Court in executing decrees for restitution of conjugal rights— (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree against a husband for the restitution of conjugal rights or at any time afterwards, may order that the decree shall be executed in the manner provided in this rule.

(2) Where the Court has made an order under sub-rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again review the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

