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Privacy and Personal Liberty within Marriage: A Socio-Legal Study of Matrimonial Relationships in India

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Abstract

The notions of privacy and personal liberty have undergone significant transformation within Indian constitutional jurisprudence, yet their application within matrimonial relationships continues to present complex socio-legal challenges. This research paper examines the intersection of individual autonomy and marital obligations, analysing how the right to privacy—recognized as a fundamental right under Article 21 in Justice K.S. Puttaswamy (Retd.) v. Union of India—operates within the intimate sphere of marriage. It explores the tension between traditional notions of marital unity and evolving constitutional values that prioritize dignity, bodily integrity, and decisional autonomy.

The study critically evaluates legal provisions and judicial approaches relating to issues such as marital rape, reproductive choices, surveillance within marriage, and the right to sexual autonomy. Landmark judgments, including Joseph Shine v. Union of India, which decriminalized adultery, and Suchita Srivastava v. Chandigarh Administration, are analysed to demonstrate the judiciary's gradual recognition of individual rights within marital relationships. At the same time, the paper highlights the persistence of patriarchal norms, legal ambiguities, and gaps in statutory protections—particularly in the context of the absence of explicit criminalization of marital rape in India.

Adopting a socio-legal approach, the research integrates doctrinal analysis with an examination of societal attitudes and cultural practices that influence the enforcement of privacy and liberty rights within marriage. It argues that while constitutional jurisprudence has progressively expanded the scope of privacy and personal liberty, their realization in matrimonial contexts remains uneven and contested. The paper concludes by advocating for a more rights-centric legal framework that harmonizes matrimonial law with constitutional principles, ensuring that marriage does not become a space where fundamental rights are diminished but rather one where dignity, equality, and autonomy are fully protected.

Keywords: *Right to Privacy, Personal Liberty, Matrimonial Law, Article 21, Marital Autonomy, Gender Justice, Reproductive Rights, Constitutional Law, Puttaswamy, India.*

Conjugal rights under family law

Even if the “right to privacy” isn't specifically called out as one of the essential rights in the Indian constitution, it is nonetheless considered to be a component of personal liberty. The “European Convention on Human Rights”, which was held in 1953, makes a point of expressly recognising this idea. This right is not an unqualified one. Our bodies, our feelings, our thoughts, our possessions, and anything else that is an integral part of who we are are all protected by our “right to privacy”.

In 1983, the *Andhra Pradesh HC*¹ declared that Sec. 9 of the HMA, which provided for the “restitution of conjugal rights”, was in violation of the state's constitutional provisions and therefore null and void. The bench held, “forced a person to live with his/her spouse violated the ‘right to privacy’ in the Indian Constitution.” This judgment was later overruled by Delhi HC in the case of “*Harmander Kaur v. Harvinder Singh Choudhry*”,² and the SC later upheld the verdict of the Delhi HC in the case of “*Saroj Rani v. Sudarshan Kumar Chadha*.”³ The most important question that “has been at the centre of this discussion is whether or not the ‘right to privacy’ extends to the sphere of the home and the marital relationship.”

In “*Gobind v State of MP*”⁴, the SC held, “the “right to privacy” protects ‘the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.’ This definition seems to treat the home as a private space where the law could not interfere.”

In “*K.S. Puttuswamy v Union of India*”⁵, the SC held, “individuals have a “right to privacy” which grants them complete autonomy over their body.”

The Andhra Pradesh HC⁶ had noted, “the enforcement of a decree of Sec. 9 compels a person to have sexual intercourse with her spouse, thus depriving her of control over her own body”, but Delhi HC opposing this view noted, “the impugned Sec. aimed at ‘consortium’ and not at ‘cohabitation’. ‘Consortium’ has been defined as ‘companionship, love, affection, comfort, mutual services, sexual intercourse’.” The Delhi HC noted, “sexual relations are not the ultimate goal of a marriage and that “restitution of conjugal rights” aims only at compelling the parties to a marriage to live in the same household and does not compel them to have sexual intercourse.”

¹ T.Sareetha v Venkata Subbaiah AIR 1983 AP 356

² AIR 1984 Delhi 66

³ 1984 AIR 1562

⁴ AIR 1975 SC 1378

⁵ AIR 2017 SC 4161

⁶ Supra note. 13

A woman's ability to conceive children is limited when she lives with her husband. Therefore, even if Sec. 9 of the HMA does not mandate that “partners engage in sexual activity, forcing a woman to stay with her husband in the matrimonial home puts her at risk of marital rape, deprives her of autonomy over her own body, and therefore violates her right to privacy. This is the case even if Sec. 9 of the HMA does not mandate that partners engage in sexual activity.”

In “*Joseph Shine v. Union of India*”,⁷ the SC noted, “the “right to privacy” depends on the exercise of autonomy by individuals. If an individual is disabled from exercising his/her the “right to privacy” then the court must take steps to ensure that the person’s right is realised in its fullest sense.” The Court noted, “an individual’s right to privacy cannot be infringed by regarding familial structures as private space.”

After these judgments were handed down, a petition was presented to the SC in which the constitutional legitimacy of “Sec. 9 of the HMA and Sec. 22 of the SMA” were questioned.⁸ The petitioner argued, “granting a decree for restitution of conjugal right is a "coercive act" on the part of the state because it forces a spouse to live with another spouse against his or her will. This argument was made in response to the state's decision to grant a petition for restitution of conjugal right. In addition, the conduct is illegal since it violates an individual's right to sexual autonomy, as well as their ‘right to privacy’ and the right to live a decent life, all of which are guaranteed by Article 21 of the Constitution.”

The petitioner contended, “despite the fact that these Sections provide a right to both the husband and the wife to approach the court, however, these Sections are discriminatory against women, and women are treated as 'chattel' by these laws. This argument was made in light of the fact that these Sections provide a right to both the husband and the wife to approach the court.”

Customary practice prevalent in Indian society denotes that the wife stays with the husband post-marriage. The husband has the right to require his wife to live with him, and the corresponding duty of the wife to live with her husband. However, this cannot always be the case, and under such circumstances, conjugal rights accrue. George A. Lundberg defined marriage as a set of rules and regulations, which define the rights, duties and privileges of the husband and wife with respect to each other.⁹

Upon such withdrawal from the society of the husband, without any reasonable cause, the husband can file a petition for restitution of conjugal rights. Where the court is satisfied with the statements made and there is no other legal bar to such decree, the petition may be granted.

⁷ AIR 2018 SC 4898

⁸ <https://www.thehindu.com/news/national/sc-terms-important-pleas-seeking-striking-down-of-provisions-on-conjugal-rights/article35210962.ece>

⁹ George Andrew Lundberg, *Sociology* 133 (Harper and Brothers, New York, 1958).

The concept of restitution of conjugal rights was introduced in India in the case of **Moonshee Buzloor Ruheem v. Shumsoonissa Begum**,¹⁰ where such actions were regarded as considerations for specific performance.

In the relevant part of the judgment, it was held that-

“If there be cruelty to a degree rendering it unsafe for the wife to return to her husband’s dominion, the Court will refuse to send her back to his House; so also, if there be a gross failure by the Husband of the performance of obligations which the marriage contract imposes on him for the benefit of the wife, it affords sufficient ground for refusing him relief in such a suit.”¹¹

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**¹² where the Hon’ble High Court held that the impugned section was unconstitutional. Ultimately Supreme Court in **Saroj Rani v. Sudharshan**¹³ gave a judgment which was upheld the constitutional validity of the Section 9 of the Hindu Marriage Act, 1955 and over-ruled the decision given in T. Sareetha v. T. Venkatasubbaiah.

In the case of **Hamidunnessa Biwi v. Zohiruddin Sheikh**¹⁴, in a suit by husband for restitution of conjugal rights, the wife relied on a prenuptial agreement, executed by the guardians of the husband, then a minor, and also by the husband, stating that the husband would always live at his mother-in-law’s house and the wife would never be required to leave her parental home or reside somewhere else; the court refused to uphold the agreement. To put this into perspective, we can clarify that this was in consonance with Muslim law that allows for marriage contracts ‘nikah-nama’, wherein guardians can enter into such valid contracts on behalf of a spouse who is minor at the time of marriage. However, such clauses will not hold, for being in violation of public policy. It is also in violation of the mutual rights and obligation that arise upon marriage between the spouses.

Krishan Iyer v Ballamal¹⁵ dealt with the question, whether an agreement between husband and wife to live apart from each other is valid or not said: Even apart from the Hindu Law the agreement, we think, must be regarded as opposed to public policy and therefore not enforceable. It may well be deemed to be forbidden by the Hindu Law.

Later on, a liberal approach was taken by the Allahabad High Court in the case of **Shanti Nigam v. R. C. Nigam**¹⁶. The relevant part of the judgment held that “women can no longer be confined to the house. In the view of altered social

¹⁰ (16.02.1867 – PRIVY COUNCIL): MANU/PR/0018/1867 or (1867) 11 MIA 551

¹¹ *ibid*

¹² AIR 1983 AP. 356

¹³ AIR. 1984 SC 1562

¹⁴ (1890) 17 Cal 670

¹⁵ (1911) 34 Mad 398.

¹⁶ 1971 A. L. J. 67; AIR 1971 All. 567

conditions, both husband and wife may think it necessary to work and contribute equally to the family chest..... It is one thing for a wife to say that she will not go to her husband and will not cohabit with him nor will she allow him to come to her. It is different if she says that it is necessary for the upkeep of the family that she should also work and she would go to her husband whenever it is possible for her to do so, and the husband could also come to her at his own convenience..... In such a situation it cannot be said that she has withdrawn herself from the society of her husband.”

A decree of restitution of conjugal rights¹⁷ 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 cohabit 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 favor 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.

The provisions for restitution of conjugal rights are identical in Section 22 the Special Marriage Act, 1954 and Section 9 of the Hindu Marriage Act, 1955. It is as follows:

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.¹⁸

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.

¹⁷The 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.

¹⁸ Smt. Saroj Rani vs Sudarshan Kumar Chadha(1984): Section 9 of Hindu Marriage Act is constitutional.

The conceptualization of the provision for restitution of conjugal rights under Muslim law by Tayabji is as follows:

“Where either the husband or wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage, the court may decree”.

These provisions come into play when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other. What does ‘withdrawal from society’ mean?

In *Sushila Bai v. Prem Narayan*¹⁹, the husband deserted his wife and thereafter was totally unresponsive towards her. This behavior was held sufficient to show that he had withdrawn from the society of his wife, and therefore the wife’s petition for restitution of conjugal rights was allowed. The defence to this principle lies in the concept of a ‘reasonable excuse’. If the respondent has withdrawn from the society of his spouse for a valid reason, it is a complete defence to a restitution petition.

To proceed with establishing the area wherein the conjugal rights accrue, it is essential to draw a boundary on such area. ‘Withdrawal from society’ does not necessarily have to mean complete desertion or living separately. It can also mean-

- Withdrawal from sexual intercourse,
- Non-cooperation in the performance of marital obligations,
- Intention to abandon indefinitely
- Cessation of cohabitation by voluntary act of the Respondent-wife

Marital Rape and Right to Privacy

Furthermore, another argument by the opponents is that marital relationship is entailed in the murky waters of private sphere wherein law cannot pervade. The argument has also been endorsed by the judiciary, though not directly with respect to Marital Rape, but certainly in cases related Restitution of Conjugal Rights (RCR). It is important to understand as to why RCR gets a mention here. The Hindu Marriage Act, 1955, under section 9, allows Courts to compel spouses to live together and resume conjugal relationship if they are staying separately without any reasonable excuse.²⁰ Resumption of conjugal relations also takes away the freedom of indulging in sexual relationship from the individual and grants it to the Court or the State. Much akin to this, in the case for Marital Rape, the question is that whether the State can compel a woman to have sexual intercourse with her husband even against her consent. In a nutshell, the questions regarding constitutionality that arises with respect to RCR are the same as in marital rape and therefore, a parallel can be drawn as to how courts have treated the question of privacy and autonomy in case of the former. The Andhra Pradesh

¹⁹ AIR 1964 MP 225

²⁰ The Hindu Marriage Act, 1955 (Act No 25 of 1955), s 9

High Court in the *T.Sareetha v. T.Venkatasubbaih*²¹ held that section 9 of the Hindu Marriage Act, 1956 is unconstitutional in nature since it strikes down the sexual autonomy of a woman. Substantiating its argument, the court held that forcing an act of sexual intercourse upon an unwilling person, no matter what the relationship is between the persons involved, is a humiliation not just to the dignity of an individual but also demeaning to the human spirit. It was further opined by the court that a decree for RCR offends the inviolability of the body and the mind along with offending the marital privacy of an individual. Focusing on marital privacy, the court referring *Tom Gaiety* said that the definition of right to privacy “is bound to include body’s inviolability and integrity and intimacy of personal identity including marital privacy.”²² Thus, the court focused on both autonomy as well as marital privacy of an individual while interpreting and upholding the right to privacy in cases of RCR. However, the Delhi High Court, in *Harvinder Kaur v. Harmander Singh Choudhary*²³, took a view to the contrary and upheld the constitutionality of the provision, in order to protect the institution of marriage and thereby ignoring the fact that when a woman is forced to resume conjugal relations with her husband, there is a very high possibility that she can be forced into an act of sexual intercourse without her consent and with no legal recourse available to her. Further, the court said that since marital relationships lie in the private sphere, it was reluctant to go deeper into it since it would strike at the very nature of spousal relationship and open up the gates for ‘unlimited litigation.’ Further, the court also held that it will be inappropriate to introduce Constitutional law in homes as it is akin to introducing a bull in a China shop. The matter also came up for consideration in the Supreme Court in the case of *Saroja Rani v. Sudarshan Kumar Chada*²⁴ whereby the court agreed with the Delhi High Court judgment and upheld the constitutionality of section 9 of the Hindu Marriage Act, 1956. It is contended that the Delhi High Court and the Supreme Court have been erred in their judgments. Even if we agree to their line of arguments that the courts or the legislature cannot pervade into the private sphere of marriage, then why is it that a provision like section 498A under the IPC has been added to protect a married woman from cruelty in marriage? Why has the act called Protection of Women from Domestic Violence Act, 2005 been brought in by the legislature? And, was marital privacy not pervaded when the Dowry Prohibition Act, 1961 was enacted? These are the questions which the judiciary and the opponents of criminalizing Marital Rape also need to ponder upon. The court which is supposed to be the ‘guardian and protector of Fundamental Rights’ swayed away from its duty when it upheld the constitutionality of section 9 of the Hindu Marriage Act, 1955 as it violates articles 14 and 21 of the Constitution. The aforesaid opinions of the Supreme Court and the High Court of Delhi are also

²¹ AIR 1983 AP 356.

²² Id.

²³ AIR 1984 Delhi 66

²⁴ AIR 1984 SC 1562.

not in consonance with the recent opinion of the Supreme Court in the case of *K.S. Puttaswamy v. Union of India*²⁵, also popularly known as the ‘Right to Privacy’ judgment. The judgment held that the privacy and autonomy of an individual is a fundamental right enshrined under article 21 of the Constitution. Therefore, it is time for us as a society to move away from the argument of marital privacy and focus on the arguments related to right to equality, autonomy and choice of a woman. This argument ensures that a woman is seen as person with an individual personality of her own rather than being symbolized as a wife. This is where the *T. Sareetha* judgment erred in its approach whereby it held that section 9 wasn’t in sync with ‘marital privacy’ rather than focusing on the autonomy of the woman. This left enough room for its judgment to be overturned later in the *Harvinder Kaur and Saroja Rani* judgments. On the point of marital privacy consistently raised by the proponents of the exception clause, Chandrachud J., writing the majority opinion, he pointed that there is a need to move to individual autonomy from Marital Privacy. The bench stated “privacy allows each human being to be left in a core which is inviolable.”, and reiterated the observation of the Apex Court in *Gobind v. State of Madhya Pradesh*²⁶, where the bench held that the central concern of any limited government under a constitution should be individual autonomy with explicit guarantees. It was held that individual privacy of a human being is not only one of the most important facets of human life but also provides dignity to a human being, and that the liberty to exercise personal choice is imbibed in the idea of privacy. The majority opinion also addressed the fact that privacy includes Bodily Privacy an inalienable right that prevents others from violating someone’s body, and also Decisional Privacy which signifies the ability to make life decisions including sexual and reproductive decisions. Nariman J. in a separate opinion, concurring with the majority, held that the Right to Privacy includes the Privacy of Choice which includes the right to make choices that are integral to a person’s life. It is pertinent to mention the ruling of the Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan Mardikar*²⁷ wherein it was held by Ahmadi C.J. that even if a woman accepts ‘dark sides of her life’, she is entitled to her privacy which no one can pervade according to his whims and fancies. In *Suchitra Srivastava v. Chandigarh Administration*²⁸ where Balakrishnan C.J. held that the right of a woman to procreate or not and to make reproductive choices is part of her fundamental right to personal liberty enshrined under the Constitution. Most importantly, it was held that a woman shouldn’t be restricted to make her right to reproductive choice such as the right to refuse participation in sexual intercourse or her insistence on contraception. The court further stated that the aforementioned right included the right to choose the kind of birth control she

²⁵ 2017 10 SCC 1

²⁶ (1975) 2 SCC 148.

²⁷ (1991) 1 SCC 57

²⁸ (2009) 9 SCC 1.

wants and her prerogative of motherhood. It is evident that the Apex Court has given primacy to individual privacy and autonomy of a person in unequivocal terms and not marital privacy. In light of the above rulings of the Supreme Court, it is clear that the right to bodily integrity is a natural corollary to the right to privacy which every woman possesses. Therefore, the marital rape, which violates the bodily integrity, autonomy, privacy and dignity of every married woman, and the exception clause to article 375 permitting it, are ultra vires article 21 of the Constitution. In recent years, the Delhi High Court and the Supreme Court have heard a slew of petitions against Marital Rape but the attitude of the judiciary has not been benign towards the cause of married women. It is pertinent to note that since 2017, the Delhi High Court has been hearing a series of petitions filed by the RIT Foundation along with All India Democratic Women's Association (AIDWA), challenging the constitutionality of section 375 of the IPC. It has been argued that the law discriminates against married women who are sexually assaulted by their husbands.²⁹ However, the Government has responded by saying that criminalizing marital rape would destabilize the institution of marriage and that it will become an easy tool in the hands of wives to harass their husbands.³⁰ Further, the Government also has also argued that if sexual acts between a husband and his wife is termed as marital rape, then the sole authority as to what constitutes marital rape will rest with the wife. The Government has also raised questions regarding the nature of evidence which will be relied upon before the Court in such procedures as "there can be no lasting evidence in case of sexual acts between a man and his own wife." However, the Division Bench comprising of Justices Gita Mittal and C. Hari Shankar, made an oral observation that both husband and wife had the right to refuse sexual relations. The Bench quoted that, "Marriage does not mean that the woman is all time ready, willing and consenting for establishing physical relations. The man will have to prove that she was a consenting party." Further, even the Delhi Government argued and submitted that marital rape cannot be made a penal offence via a separate provision as it was already a crime under section 498A of the IPC, which pertains to cruelty by the husband against his wife.³¹ Also in the year 2019, a Public Interest Litigation (PIL) was filed in the Supreme Court requesting the bench to direct the Central Government to frame a law for making Marital Rape, a ground for divorce.³² The division bench comprising of Bobde J.

²⁹ Meera Emmanuel, "Marital Rape Case: Marriage does not mean all time Consent for Sexual Relations, Delhi HC", BarandBench, July 18, 2018, available at: <https://www.barandbench.com/news/delhi-hc-marital-rape-marriage-consent> (last visited June 12, 2021).

³⁰ RIT Foundation v. Union of India, W.P. (C) No. 284/2015

³¹ IANS, "Delhi Government Opposes Criminalization of Marital Rape in HC, Says It is 'already an offence'", Firstpost, January 18, 2018, available at: <https://www.firstpost.com/india/delhi-government-opposes-criminalisation-of-marital-rape-in-hc-says-it-is-already-an-offence-4309411.html> (last visited on June 13, 2021).

³² IANS, "SC Refuses to Entertain PIL Seeking Law Against Marital Rape", Outlook, July 1, 2019, available at: <https://www.outlookindia.com/newscroll/sc-refuses-to-entertain-pil-seeking-law-against-marital-rape/1565608> (last visited on June 10, 2021)

and Gavai J. directed the petitioner to approach the High Court of Delhi. Consequently, the petitioner approached the Delhi High Court seeking that it gives directions to the Legislature to introduce a law on marital rape. However, the petition was dismissed by a division bench of Patel J. and Shankar J. stating that the court did not have the power under article 226 of the Constitution to frame laws on its own.³³ Thus, while the Apex Court and various High Courts across the country have ruled in favour of bodily integrity, privacy and autonomy of women, they have fallen short of action when there has been a question of criminalization of marital rape. The legislators have also consistently held the view that criminalization would destabilize the institute of marriage, ignoring that nothing is left to stabilize in marriage post an incident of forced sexual intercourse or forced sexual assault by a man on his wife. These views are also influenced by societal responses to such acts which are coloured with ignorance, stigma, taboo etc.

4.3. Virginitly Test

Virginitly test refers to check the chastity of a woman to ascertain whether she has ever engaged in sexual act or not. In Surjit Singh Thind vs Kanwaljit Kaur³⁴ the issue before Punjab-Haryana High Court was whether court can pass an order for virginitly test of a woman in divorce petition. The High Court by rejecting the contention of husband stated that in present case virginitly of women is not an issue and the petition has been filed by the wife on the ground of impotency of her husband and there are many other ways to prove the impotency of husband. Proof of virginitly of wife would not lead to the conclusion that the marriage has been consummated. The court refused from granting an order for virginitly test and held that directing a woman to go for medical examination for getting her virginitly tested is against the right to privacy and personal dignity enshrined under Article 21 of the Indian Constitution.

4.4. Evidentiary Issues in Adultery and Paternity

Adultery as a ground for divorce and the plea for the DNA test on the child

For a matrimonial offence that usually takes place secretly, an in absence of the other spouse sometimes randomly and at other times in a planned manner, to bring in the direct proof is virtually next to impossible. With the advancement in scientific technologies a person having strong reasons to believe in the infidelity of the spouse leading to, in his perception fathering somebody else's child would normally be a nightmarish trauma that can now be authenticated puror by conforming it. In the past the courts have always adopted a protectionist attitude towards ordering or subjecting a party to the DNA test for fear of what they term as "bastardising" an innocent child. Therefore, unless and until the husband

³³ Anuja Kapur v. Union of India W.P. (C) 7256/2019

³⁴ AIR 2003 P H 353

convince the court of non access to the wife at the time of possible conception of the child, the court would not order the child to undergo a DNA test. If he fails to convince non access, the court would apply presumption of paternity under section 112 of Indian Evidence Act.

In a case before the Madras High Court (*Muniappan v. Ponni*³⁵) the husband, a contraction labourer at Bangalore, filed a petition praying for a decree of divorce under section 13 (i-a); 13 (1)(i) and (1) (i-b). Pending this petition he also filed an application under section 112 of the Indian Evidence Act, praying to the court to direct the blood test to be conducted upon the second son of the wife to find out its biological father as he suspected his paternity. The wife was residing at her parents place in Madepalli village all along and as he was working at Bangalore he had not visited her at the time of possible conception of the child, or any time near it as such he suspected that the wife was having an affair with another person and was continuing the same. The wife disputed the claims of the husband and contended that it is a settled position that DNA tests cannot be ordered as routine in all the cases; as she was a married woman, the presumption of paternity cannot be disputed an order of DNA test would amount to a violation of her rights of privacy and that the husband's sole objective in disputing the paternity of the child was to tarnish her image. The husband on the other hand contended, firstly, that in exceptional cases and his was one such exceptional case, a DNA test can be ordered and secondly as per the requirements of section 112 of the Indian Evidence Act, he had established non-access and made out a prima facie case.

The high court observed that a well settled principle in this connection is that a matrimonial court has the power to order a person to undergo a medical test and passing such an order by the court would not be in violation of the right to personal liberty under article 21 of the Constitution, but the court should exercise such power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the court's order the respondent refuses to submit himself/herself to medical examination, the court will be entitled to draw an adverse inference against him/her. It quoted some important earlier judicial pronouncement (*Kamti Devi v. Poshi Ram*³⁶) wherein it was held that conclusiveness of the presumption under section 112 of the Indian Evidence Act cannot be rebutted by the DNA test and proof of non-access to each other is the only way to rebut that presumption.

The apex court in the past (*Gautam Kundu v. State of West Bengal*³⁷) had issued specific directions in this connection that were as follows:

1. That courts in India cannot order blood tests as a matter of course;
2. Wherever applications are made for such prayers in order to have roving inquiry, the prayer for having blood tests cannot be entertained;

³⁵ 2011 MLR 524 Mad

³⁶ (2001) 5 SCC 311, 2002 MLR 28

³⁷ 1993 MLR 34: (1993) 3 SCC 418

3. There must be strong prima facie case in that the husband must establish non access in order to dispel the presumption arising under section 112 of the Indian Evidence Act;
4. the court must carefully examine as to what would be the consequences of ordering blood test, whether it will have the effect of branding a child as a bastard and the mother an unchaste woman; and
5. No one can be compelled to give sample of blood for analysis.

In the present case the court held that the husband here was successful in proving prima facie case of non access and that there was no harm in ordering of the DNA test and the same would not be violative of the constitutional rights of privacy guaranteed to the wife as an individual.

Though the pronouncement was appropriate in the light of the facts and circumstances of the case, but otherwise, the hesitation of the courts in ordering for a DNA test for fear of it having an adverse impact on the child, appears to be misplaced. Societal imposition of stigma and its adverse impact on the child is now an outdated concept. Present times recognize the right of a child to know who his real father is with the help of a DNA test and the same is being entertained by the courts in India. The child's first and intimate interaction is with the parents and what is perhaps of utmost importance for the child is their undiluted love and affection. Where the father suspects the paternity of the child, and he has strong reasons to believe it but they are short of non access, it would be in the best interests of the child to have a conclusive determination of who his father is.

4.5. Whether a Party to a Divorce Proceeding can be Compelled to a Medical Examination

In married life the competency of married couple to fulfill their marital obligation plays crucial role. If any party to the marriage is not capable to fulfill his/her matrimonial obligation then it would be very difficult to live a happy married life. The law permits a party to the marriage to approach the court for getting a decree of divorce or for getting an order for nullity of marriage on the various grounds, for example, insanity, impotency, venereal disease etc. In such cases the burden of prove of incapacity of party lies on the person who files a case. To prove it, he can give evidence and at the same time he can also request the court for medical examination. When a person can be ordered to get them self examined, it is most debating question because this issue is related with the privacy and dignity.

In *Sharda vs Dharmpal*³⁸, the issue was whether a party to a divorce proceeding can be compelled to go for a medical examination. In this case right to privacy of married couple was judged by the court in different angle. In this case husband filed a petition for divorce under section 12(1)(b) and 13(1)(iii) of the Hindu

³⁸ AIR 2003 SC 3450

Marriage Act, 1955 against his wife.³⁹ He also filed an application for medical examination of his wife by stating that his wife is mentally unfit and not able to fulfill her matrimonial obligations. The issue before the Supreme Court was when and how a person can be asked for medical examination in case filed for divorce on the ground of physical incapacity and up-to which extent a married person has right to privacy. The court stated that in matrimonial cases where the petition has been filed for granting a decree of divorce on the ground of any physical incapacity, such as impotency, schizophrenia etc, in such cases it would be very difficult to reach on any conclusion without the medical examination of a party. In such case a person can opposed medical examination on the ground of right to privacy. If his plea is accepted then it will become very difficult for court to decide a case. In such cases it is necessary to make a harmonious construction of statutory provisions. The court affirmed that right to privacy guaranteed under Article 21 is not an absolute right and it is subject to some restriction. There is a need to make a balance between two conflicting interest, otherwise some statutory rights may become futile. The court by clarifying the position on above issues stated that in matrimonial cases the court has power to pass an order for medical examination of party and such orders are not in contravention of Article 21 of the Indian Constitution. However before passing such order there should be sufficient material before the court and the applicant must have prima facie case in his favour. After considering all above factors if the court passes an order for medical examination the person who has been asked to undergo a medical examination refused from submitting himself for medical examination then the court may draw adverse opinion against such persons.

4.6. Woman's Right to Make Reproductive Choices

Reproductive choices refers to choice of women to bear or not to bear child. In *Suchita Srivastava & Anr vs. Chandigarh Administration* (2009), a different issue came before the court for consideration. It was about the right of a victim to retain her pregnancy and termination of pregnancy of a woman without her consent. The court held that a woman's pregnancy could not be terminated without her willingness. In the cases of termination of pregnancy of a woman her consent matters because being a member of human family she has right to be treated as human and she is equally entitle to all human rights.⁴⁰ The court by recognizing the right of women to make reproductive choices stated that she can take such decisions which affect her body and this right is available to her due to Article 21 of Indian Constitution which guaranteed right to life and personal liberty which includes right to privacy also. No other persons can compel her for procreation of child because under right to privacy she has right to take decision for procreating child. It is possible only when the statute permits. So to make

³⁹ Section 12(1)(b) deal with and section 13(1) (iii) of Hindu Marriage Act 1956 deal with voidable marriage and divorce respectively

⁴⁰ Ms. Pooja Jaiswal. (2010). Women Rights vis-à-vis Human Rights, Dehradun Law Review, 2(1), Page 67

decision to have or not to have child, is discretion of woman. Because she is the best judge of her and she has liberty to do so due to Article 21 of Indian Constitution. Sexual Autonomy In India the right to sexual autonomy came up before the Andhra Pradesh High Court for consideration in *T. Sareetha v. T. Venkata Subbaiah*.⁴¹ In this case the constitutionality of section 9 of Hindu Marriage Act, 1955, which provides for restitution of conjugal rights was challenged on the ground that it violates the fundamental rights guaranteed under Article 21 of Indian Constitution. The court by stating that section 9 of Hindu Marriage Act is unconstitutional on the ground of violation of right to life and personal liberty held that the remedy of restitution of conjugal rights provided for by section 9 is savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. A wife cannot be compelled to live with a person against her will and section 9 compels a woman to live with a person against her will which is against the dignity and personal liberty of a woman. A woman has right of personal autonomy. The court further stated that the decree of restitution of conjugal right violets the right to privacy of an individuals. It also restricts a woman from exercising control over her body and choices. But the Dehli High Court in the case of *Harvinder Kaur v. Harmander Singh*⁴² has given different opinion on section 9 of Hindu Marriage Act and not followed the decision of Andhra Pradesh High Court and upheld the constitutionality of section 9. The constitutionality of section 9 was again challenged in Supreme Court in the case of *Saroj Rani v. Sudarshan Kumar Chandha*⁴³ in which the Supreme Court which has upheld the constitutionality of section 9 and held that it does not violets the right to privacy. The right to bodily integrity and the reproductive choice of any woman have been the recognized by the courts.⁴⁴ Recently a petition has been filed in Supreme Court challenging the constitutionality of section 9 of Hindu Marriage Act 1955 and section 22 of Special Marriage Act 1954, which provides for restitution of conjugal rights, on the ground of violation of fundamental right granted guaranteed under Article 21 of the Indian Constitution. Terming the court- mandated restitution of conjugal rights as a “coercive act” on the part of the State, the petitioner contented that in United Kingdom the provision relating to restitution of conjugal rights has been abolished in 1970 and the notion that woman is chattel of her husband is not acceptable. Section 9 of Hindu Marriage Act violets the sexual and decisional autonomy, right of privacy and dignity covered under Article 21 of the Indian Constitution.

⁴¹ AIR 1983 AP 356

⁴² AIR 1984 Delhi 66

⁴³ AIR 1984 SC 1562

⁴⁴ *State of Maharashtra v. Madhukar Narayan Mardikar* AIR 1991 SC 207

4.7. Marital privacy in other aspects

Evidence plays a crucial role in administration of justice whether it is a criminal case or a civil suit. To prove or disprove a fact, evidence is offered by the litigating parties in support of their allegations/demands which facilitates a judge to deliver the judgement based on the evidence tendered and the facts and circumstances of the case. Standard of proof required in the civil and criminal proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that findings recorded in one procedure may be treated as final or binding in the other as both the cases have to be decided on the basis of the evidence adduced therein. Evidence can be in many forms depending on the context in which it is used. It may refer to legally admissible testimony or testimony given by a witness in the court. A witness can testify based on any event he has seen or any communication he has heard or been a part of. However, there are some communications or matters where courts cannot force the individual to disclose the details of such communication/matter. These communications are known as privileged communications. A privilege is a legal rule that protects communications within certain relationships from compelled disclosure in a court proceeding. As for instance when two individuals enter into a legally recognized relationship, all communication that takes place between them is protected. These communications are such that they may not be used as evidence in a court of law against the persons communicating due to the specific nature of their relationship.

4.8. Privacy Under Statutory Laws of India: An Assessment

The fact that individuals in India are concerned about their "Right to Privacy" is evidence that Indian legal thought acknowledges this right, and that it has been codified into law. Additionally, the existence of privacy in India is evidence that individuals in India are concerned about their "Right to Privacy." In addition, the fact that people in India have the right to privacy reveals that this right has been defined by Indian Legal Thought. The following is a list of laws that, either directly or indirectly, deal with one or two aspects of the "Right to Privacy" in India.

(1) Privacy And Insult on The Modesty of Women

The IPC, 1860 The IPC, 1860 has not expressly dealt with the protection of "Right to Privacy". In spite of that fact, certain provisions of the code can be mentioned which either expressly or impliedly deal with the protection of privacy. In this respect the Sec. runs as follows:

"Word, gesture, or act with the intent to insult the modesty of a woman is a violation of Sec. 509 of the Criminal Code. In order to infringe on a woman's privacy or to insult her modesty by uttering a demeaning remark, making a sound or gesture, or exhibiting an object, one must have the intent that such word or

sound should be heard by such woman, or that such gesture or object will be seen by such woman, or intruding upon her private space”⁴⁵.

This has been amended by the Criminal Laws (Amendment) Act, 2013 and few changes have been made -the words “shall be punished with simple imprisonment for a term which may extend to three years, and also with fine” have been substituted instead of the original words. Therefore, the strictness of Sec. in the matters of punishment has been increased in the recent period⁴⁶.

Since ancient times, India's customary laws have protected the "Right to Privacy." Classical and mediaeval sources highlight this privilege. Section 509 of the IPC acknowledges the long-standing Right to Personal Secrecy. IPC Section 509 guarantees a woman's "Right to Privacy" and modesty. Article Section prohibits violating a woman's right to modesty. Invasion of a woman's private is an assault on her modesty. This Section protects a woman's privacy, but only if an invasion offends her modesty. Protecting the "Right to Privacy" in Indian criminal law is a positive move. Criminal Laws (Amendment) Act, 2013 increased punishments for this Crime. In view of the new social backdrop, the Criminal Laws (Amendment) Act, 2013 tightened penalties for invading a woman's privacy. Other parts of the IPC also guarantee the "Right to Privacy" The Criminal Laws (Amendment) Act of 2013 added all these protections. Legislators have recognised the growing importance of privacy in modern society and inserted new safeguards to the IPC to ensure its enforcement. Before that, we had Section 509. Sections 354A, 354B, 354C, and 354D deserve special attention.

Sec. 354A defines Sexual harassment and provides punishment for the said offence. Though it has dealt with sexual harassment of women as a crime and has not expressly spoken about the violation of Privacy as a crime, but it should be remembered that, sexual harassment of a woman does not only injure her physically, but mentally also. Sexual harassment is such a crime with a woman, which takes away her right to live with human dignity, right to reputation, “Right to Privacy” and many other important human rights along with it⁴⁷.

Sec. 354B provides that, the commission of assault or use of criminal force to any woman with intent to disrobe her or to compel her to be naked should be considered as a crime and the Sec. prescribes punishment thereof. Disrobing a woman in public is not only a type of harassment on her, but it also amounts to her insultation in public along with the outrage of her modesty. Moreover, it takes away various human rights of the said woman, like to Right to Reputation, Right to Live with Human Dignity and the “Right to Privacy”.

⁴⁵ Vol.8,no.3 Ardener, Shirley G. “Sexual Insult and Female Militancy” pg. 422–40 (1973)*JSTOR*, <https://doi.org/10.2307/2800319> (Last Accessed 1st Aug 2022)

⁴⁶ Vol.154,no.3Solove, Daniel J. “A Taxonomy of Privacy.” *University of Pennsylvania Law Review*,Pg. 477–564 (2006)*JSTOR*, <https://doi.org/10.2307/40041279>. (Last Accessed 1st Aug. 2022)

⁴⁷ Vol.52,no.1Asikainen, Susanna. “Women out of Place: The Women Who Challenged Jesus.” *Neotestamentica*, pg.179–94 (2018)*JSTOR*, <https://www.jstor.org/stable/26499217> (Last Accessed 2 Aug. 2022)

Sec. 354C is another important Sec. of IPC inserted by the Criminal Laws (Amendment) Act, 2013, wherein a good attempt has been taken for the protection of “Right to Privacy” of a woman in India. It is a serious attack on the “Right to Privacy” of a woman, because performing sexual activities or using lavatory are purely private acts, wherein no observation by any perpetrator, is expected. Watching women, in such a situation is serious violation of her Privacy and human dignity, which can never be overlooked. Moreover, the Sec. has expressly used the terms, like “private act”, “privacy” etc., which denote the intention of the legislature to protect “Right to Privacy” through this Sec. under criminal law.

Sec. 354D deals with the offence of Stalking committed against a woman and prescribe punishment thereof. Stalking means, a hunt for game carried on by following it stealthily or waiting in ambush. The Sec. declares any stalking committed by a man on a woman as an offence, wherein the man follows the woman, attempts to establish personal interaction with her inspite of her disinterest in the matter or monitors the electronic communication used by the woman. Stalking on women also violates various human rights of women, like the Right to Reputation, Right to live with Human Dignity and “Right to Privacy”. Watching a woman in ambush or secretly, monitoring of her private electronic communication or following her or attempting to establish personal interaction with her, without her consent or inspite of her disinterest, would surely amount to violation of “Right to Privacy” of the said woman. Therefore, it is understood that, the IPC and the Criminal Laws (Amendment) Act, 2013 have taken good initiatives for the protection of “Right to Privacy” under Criminal Law. Though the term ‘Privacy’ is not used expressly everywhere, but the initiatives are no doubt praise-worthy⁴⁸.

(2) Privacy Of Divorce Proceedings: The Divorce Act, 1869

It is found that, of all judicial proceedings, the dirtiest linen is washed in public and the greatest amount of mudslinging is to be found in matrimonial proceedings. In order to preserve Privacy in such cases and to minimize embarrassment of all concerned, all matrimonial laws contain a provision for proceedings to be conducted in camera, i.e. behind the closed doors, where members of the public are not allowed. Therefore, Sec. 53 of the Divorce Act, 1869 lays down that, if the court thinks fit, any proceedings under the Divorce Act may be conducted wholly or in part, behind closed doors.

This provision has been incorporated for protection of Privacy of the matrimonial life of the parties to the divorce proceedings, which becomes open to all in front of the Court, which means, Court proceedings should be kept private, where any

⁴⁸Vol.47,no.1Asrani-Dann, Sheetal. “THE RIGHT TO PRIVACY IN THE ERA OF SMART GOVERNANCE: CONCERNS RAISED BY THE INTRODUCTION OF BIOMETRIC-ENABLED NATIONAL ID CARDS IN INDIA.” *Journal of the Indian Law Institute*,pg. 53–94(2005),JSTOR, <http://www.jstor.org/stable/43951951>. (Last Accessed 1st Aug. 2022)

intrusion by any outsider as well as the publication of the said proceedings are prohibited. In this sense, this legal provision is a good initiative for protection of Privacy in Matrimonial Proceedings in India⁴⁹.

(3) Privacy And Medical Termination of Pregnancy: The Medical Termination of Pregnancy Act, 1971

Under Sec. 7(1)(c) of the Medical Termination of Pregnancy Act, 1971, the State Governments are empowered to make regulations prohibiting the disclosure, except to such persons and for such purposes as may be specified in such regulations, of any information regarding the particulars of a woman having undergone termination of any pregnancy under the Act. “Any person who wilfully contravenes or wilfully fails to comply with any such regulations shall be liable to be punished with fine which may extend to one thousand rupees. It is evident that, these special provisions have been enacted to essentially safeguard the special interests of Women & children in extraordinary circumstances”⁵⁰. Therefore, Sec. 7(1)(c) of the Act has been incorporated for protection of Privacy of woman who have terminated their pregnancy under the Act. According to the Act, pregnancy termination is permitted only on medical ground. Again, termination of pregnancy is a private matter of the woman doing so and she may not be interested to disclose matters relating to it in public. Moreover, a number of rape victims and other young girls are subjected to termination of pregnancy under the Act. Identification of those women and girls as well as the publication of information about them may hamper the future of those girls and women by damaging their reputation. Due to this reason, it is utmost important to maintain the Privacy and secrecy of those medical termination of pregnancy⁵¹.

⁴⁹Vol.105,no.8Siegel, Reva B. “‘The Rule of Love’: Wife Beating as Prerogative and Privacy.” *The Yale Law Journal*, pg. 2117–207(1996) *JSTOR*, <https://doi.org/10.2307/797286>. (Last Accessed 1st Aug. 2022)

⁵⁰https://www.iitk.ac.in/wc/data/Majlis_Legal-rights-of-women.pdf

⁵¹https://www.worldbank.org/content/dam/Worldbank/document/Gender/Voice_and_agency_LOWRES.pdf

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