ANDHRA PRADESH HIGH COURT

T. Sareetha

Vs.

T. Venkata Subbaiah

Civil Revn. Petn. No. 2069 of 1981

(P.A. Choudary, J.)

01.07.1983

ORDER

P.A. Choudary, J.

1. This Civil Revision Petition its filed by Sareetha, a well-known film actress of the South Indian screen, against an order passed by the learned Subordinate Judge, Cuddapah, overruling her objection raised to the enter taining of an application filed, by one Venkata Subbaiah, under Section 9 of the Hindu Marriage Act (hereinafter referred to as 'the Act') for restitution of conjugal rights with her.

2. Sareetha while studying in a high school and then hardly aged about sixteen-years and staying with her parents at Madras, was alleged to have been given in marriage to the said Venkata Subbaiah, at Tirupathi on 13-12-1975. Almost immediately thereafter, they were separated from each other and have been continuosly living apart from each other for these five-years and, more. Venkata Subbaiah had, therefore, flied under Section 9 of the Act O.P. No. 1 of 1981 on the file of the Sub-Court, Cuddapah, for restitution of conjugal rights with Sareetha. Sareetha had taken a preliminary objection to the jurisdiction of the Cuddapah Sub-Court to the entertaining of that application. The contention of Sareetha was that the petition filed by Venkata Subbaiah itself showed lack of jurisdiction on the part of Cuddapah court to try the petition and, that the Sub-Court, Cuddapah ought to have declined jurisdiction. The basis for this objection was an allegation contained in the husband's petition "that the marriage took place at Tirupathi and that the petitioner and respondent last resided together at Madras". Sareetha relied upon this statement of Venkata Subbaiah to say that the Cuddapah Court had no jurisdiction to entertain the petition of Venkata Subbaiah. It was this preliminary objection taken by Sareetha that had been overruled by the Cuddapah Sub-Court, leading Sareetha to the filing of this Civil Revision Petition.

3. Venkata Subbaiah hails from Cuddapah where he owns a house and agricultural lands Venkata Subbaiah stated in his petition for restitution of conjugal rights that after his marriage with Sareetha at Tirupathi in December, 1975, he and Sareetha went to Cuddapah and lived there together for six months and that thereafter they went to Madras and stayed at Madras with the parents of Sareetha for some time. According to Venkata Subbaiah, their stay at Cuddapah for six

months was immediately after their marriage at Tirupathi and that was the place where they last resided together within the meaning of the Act. The subsequent stay at 'Madras, according to Venkata Subbaiah, should not be regarded as the place where they last resided together. On the other hand, Sareetha contended that as she and Venkata Subbaiah had, on the statement of Venkata Subbaiah himself, last lived together at Madras the Cuddapah Court would have no jurisdiction to try the application of Venkata Subbaiah.

4. By the date of her marriage, Sareetha was studying in high school and was living with her parents at Madras. Venkata Subbaiah hails from Cuddapah. The petition of Venkata Subbaiah disclosed that after their marriage at Tirupathi they lived at Cuddapah for six months and that thereafter they went to the parents of Sareetha at Madras and lived there for some time. There can be no doubt that Madras was their last place of living together, because thereafter they parted company with each other. Those were the days when Sareetha was attempting to gain access to the South Indian cinefield, of which she is today one of the most talented top actresses. According to Venkata Subbaiah's allegations, these attempts of Sareetha led to misunderstanding between him and Sareetha on the one hand and also between him and the parents of Sareetha on the other, and forced Venkata Subbaiah to return to Cuddapah leaving Sareetha at Madras. Theretafter Venkata Subbaiah and Sareetha never met each other.

5. Now, the plea of Sareetha objecting to the jurisdiction of Cuddapah Court raised two questions. Firstly, did the parties live at Cuddapah immediately after their marriage? Secondly, if they did, did the Madras residence supersede the Cuddapah residence? Sareetha in her petition did not specifically deny the allegation made by Venkata Subbaiah that after marriage they had lived at Cuddapah. All that she had stated in her petition was :

> "The respondent admitted in para 3 of his petition that the marriage took place at Tirupathi and the petitioner and respondent last resided together at Madras. Hence the main petition does not lie in this court for the reason that the cause of action is arising outside the territorial jurisdiction of this Court. As per Section 19 of the Hindu Marriage Act 1955 the court at Tirupathi where the marriage took place or at Madras where the petitioner and respondent last resided together alone have jurisdiction to try this petition. Hence the petition is liable to be dismissed for want of jurisdiction."

The learned Subordinate Judge construed the above pleadings of Sareetha as not amounting to a specific denial of Venkata Subbaiah's allegation that the husband and wife lived at Cuddapah for six months immediately after their marriage at Tirupathi and before going to Madras. The learned Subordinate Judge found the pleadings of Sareetha to mean to say that the Madras residence amounted in law to have superseded the Cuddapah residence. The learned Subordinate Judge found, as a fact, that the Cuddapah residence was not denied by Sareetha. He accordingly examined the second question and found that the Madras stay was not sufficient to displace the Cuddapah residence. In the result, he found that the Cuddapah Court had jurisdiction to try the application filed by Venkata Subbaiah.

6. In this C.R.P. these findings are assailed by Sareetha.
7. As already noted, Venkata Subbaiah had specifically pleaded that they had lived together at Cuddaph immediately after their marriage. Sareetha failed to specifically deny this averment

made by Venkata Subbaiah. I therefore think that the learned Subordinate Judge was right in holding, believing Venkata Subbaiah, that the parties lived at the house of Venkata Subbaiah at Cuddapah. Even otherwise, it would not be easy to believe that a newly married couple, as the parties are alleged to be, first went to the parents of the wife at Madras without going to the husband's place at Cuddapah. Certainly, this is not common among the agricultural communities who are more firmly bound tied to their place of residence and agriculture. Further, the very plea of Sareetha that Madras was the place where they last resided together amounts to an admission on her part that there was at least one another place where they resided together prior to their residing at Madras. That place of residence could only be Cuddapah. For all these reasons, I hold that Venkata Subbaiah and Sareetha lived at Cuddapah for some time immediately after their marriage as alleged by Venkata Subbaiah.

8. But the next question whether Cuddapah or Madras should be counted as the place where the parties had last lived together for the purpose of Section 19 of the Act still requires to be considered and answered. For its answer this question depends upon the meaning to be given to the statutory provision of Section 19 of the Act. We should therefore read Section 19 of the Act.

9. Section 19: "Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction –

> (i) the marriage was solemnized, or
> (ii) the respondent, at the time of the presentation of the petition, resides, or
> (iii) the parties to the marriage last resided together, or
> (iv) the petitioner is residing at the time of presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which the Act extends, or has not been heard of as being alive for a period, of seven years or more by those persons who would naturally have heard of him if he was alive."

Of its four Clauses of Section 19 of the Act, we are concerned, in this case, with its Clause (iii) which speaks of a place where the parties to the marriage last resided together. The words "parties to the marriage" in that clause present no difficulty and they obviously refer to the wife and husband. It is the use of the word "resided" that causes a degree of uncertainty in the ascertainment of the meaning of this clause. The word is not defined by the Act. In its dictionary sense of the word, "to reside" means, "to dwell permanently or for a length of time." (See Webster's dictionary). Temporary place of residence or a casual place of stay is thus excluded from being called a residence. Further, in the third clause of Section 19 of the Act, the "residence" spoken of is the joint residence. Combinedly read, the third clause of Section 19 refers to a place where the husband and wife lived together permanently or at least for sufficiently long period of time. Such a place can only be a place of permanent dwelling taken up by the husband and wife jointly for their matrimonial purposes. That place must be one to which the parties are bound by the solemn ties of their matrimony. That can only be the place chosen by them jointly as suitable for fulfilling their matrimonial vows of Dharma, Artha, Kama and Moksha. In other words the third clause of Section 19 of the Act refers to the matrimonial home of the parties to the marriage.

10. The secular description given by Ridley J., to the place of residence of a person as "the place

where he eats, drinks and sleeps" indicates the connection of the place to the carrying on of the activities by the resident. (See *Stokeon-Trent Borough Council v. Cheshire Country Council*[1]*).* In a matrimonial matter, Lord Merriman said (in *Lowry v. Lowry*[2]*).*

> "..... I suppose the words "last ordinarily resided together as man and wife in England" could be paraphrased by saying that the matrimonial home at which the parties last cohabited was in England."

These ordinarily accepted descriptions of the word 'reside' in matrimonial cases, would have the effect of excluding the places where the husband and the wife stayed temporarily on short sojourns pursuing temporary purposes such as seeking pleasure or visiting a friend or a temple or attending a function from the category of residence. The places where the wife and husband stop to eat or drink or stay for the night during such short sojourns could never be taken to have been intended by Section 19 (iii) of the Act to be called "the place they last resided together." Such places do not reverberate with the sounds of marriage destiny. Giving such a meaning to the words "last resided together" in Section 19 (iii) of the Act would make that clause disfunctional. Stay in Elliot's one-night cheap hotels could not have been intended by the Act to be treated as the place of last residence of the husband and wife. In particular, in the case of those who have a place of permanent dwelling, a matrimonial home can only refer to their permanent dwelling place. But where the parties to a marriage have no permanent place of dwelling to start with and move from place to place, like the wandering Gypsies, it would legally be difficult to choose one place more than another place as their place if permanent residence. In such a case acting out of necessity created by the Statute, we may have to ascribe even to a temporary place of stay the exalted status of the last place of residence. In such a case, we way have to call a stay even in a one-night cheap hotel as the last place of their residence, because there are no competing claims made by other place. More depends on the particular facts of each case and less on the meaning of the words. Fixation of the place where the parties last resided together thus requires the courts to take an over-all view of the particular facts in a particular case. But luckily, for this case there is no need to go into those refined niceties. Here Venkata Subbaiah had a permanent house at Cuddapah where he eats, drinks and sleeps, carrying on his agricultural operations. Presumably, his ancestors lived, there and worked there. With the mother-earth there, he forged sacred bonds of intimacy. It is that place to which Venkata Subbaiah and Sareetha went immediately after their marriage at Tirupathi and lived for six months. That was the place chosen by them for fulfilling their matrimonial vows. They thus made Cuddapah their matrimonial home. Thus, within the meaning of clause (iii) of Section 19 of the Act, it is Cuddapah alone that can be called their matrimonial home and their place of residence in this case. Such a residence cannot be displaced by their Madras residence. The nature and duration of their stay at Madras was temporary and casual and had no enduring claims to make that place a place of residence. There they

[1](1913) 3 KB 699, 704, 705
[2](1952) 2 All England Reporter 61

were visiting the father and mother of Sareetha, but without breaking their bands of association with Cuddapah. Such a temporary or casual residence at Madras occasioned by the customary necessity of visiting relatives, cannot displace the place of their permanent dwelling at Cuddapah. It follows that Venkata Subbaiah and Sareetha last resided together at Cuddapah and Cuddapah court has jurisdiction to entertain the application filed by Venkata Subbaiah for restitution of conjugal rights under Section 19 (iii) of the Act.

11. The petitioner's learned counsel cited several decisions of the various High Courts and also of the Supreme Court. It does not appear to me to be necessary to refer to these cases in detail, because I find that in those cases the judgments merely turned upon the facts of each case. The answer to a question where the wife and husband last resided together must, in the nature of things, depend upon on the particular facts of each case.

12. In R. Barnet London Borough Council (1981) 2 WLE 86, the Divisional Court ruled that the expression, "ordinary residence" embodied a number of factors such as time, intention, and continuity, each of which might carry a different weight according to the context in which, and the purpose for which the expression was used in a particular statute.

13. In the varying circumstances of a concrete case, no general principle of law can decide what relative weight should be given to these various factors of time, intention and continuity. The question, therefore, whether the wife and husband last resided together in a particular place, can only be decided, on the particular evaluation of these changing and differing factors and not by following any mechanical rule of thumb. The various decisions cited by the learned counsel cannot, therefore, be taken as laying down any proposition of law. They can only be taken at best as laying down propositions of good sense.

14. In *Qualcast Wolverhampton Ltd. v. Hayness*[3] Lord Denning chided the County Court for treating the decisions of the House of Lords on the question whether the employer was guilty of negligence or not in particular cases as laying down any proposition of law binding upon a County Court.

15. In that case, an experienced moulder who injured, himself in the course of his employment sued his employer for negligence. Although the County Court found as a fact that the moulder was not wearing protective spats that were made available by the employer and which would have prevented the injury, held thinking that it was bound by the authoritative decisions of the superior courts that the employer was guilty of negligence, for their failure to administer warning to the experienced moulder. The House of Lords reversed that judgment holding that the question what did reasonable care demand of the employers in that particular case was not a question of law but a question of fact on which no decision of the superior courts can act as a precedential authority. Lord Denning observed in that case:

> "The question that did arise was this: What did reasonable care demand of the

[3](1959) AC 743

> employers in this particular case? That is not a question of law at all but a question of fact. To solve it the tribunal of fact - be it judge or jury - can take into account any, proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway Code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken, but it would be a mistake to elevate them into propositions of law.
>
> .....
>
> I can well see how it came about that the county court judge made this mistake. He was

> presented with a number of cases in which judges of the High Court had given reasons for coming to their conclusions of fact. And those reasons seemed to him to be so expressed as to be rulings in point of law; whereas they were in truth nothing more than propositions of good sense. This is not the first time this sort of thing has happened. Take accidents on the road, I remember well that in several cases Scrutton L. J. said that "if a person rides in the dark he must "ride at such a pace that he can pull up within the limits of "his vision" *(Baker v. E. Longhurst and Sons Ltd*[4]*.* That was treated as a proposition of law until the Court of Appeal firmly ruled that it was not (*Tidy v. Battman*[5]*. Morris v. Luton Corporation*[6] - So also with accidents in factories. I myself once said that an employer must, by his foreman, "do his best to "keep (the men) up to the mark" *(Clifford v. Charies H. Challen and Son Ltd*[7]*.)* Someone shortly afterwards sought to treat me as having laid down a new proposition of law, but the Court of Appeal, I am glad to say, corrected the error *(Woods v. Durable Suites Ltd8.).* Such cases all serve to bear out the warning which has been given in this House before. . . . . .". We sought "to beware of allowing tests or guides which have been suggested" by the court in one set of circumstances, or in one class of "cases, to be applied to other surroundings" and thus by degrees to turn that which is at bottom a question of fact into a proposition of law. That is what happened in the cases under the Workmen's Compensation Act, and it led to a wagon load of "cases"; see *Harris v. Associated Portland Cement Manufacturers Ltd*[9]*.* by Lord Atkin. Let not the same thing happen to the common law, lest we be crushed under the weight of our own reports."

The question which is the place where the husband and wife last resided together is, in my opinion, not being capable of being treated as a question of law, I consider the matter from an overall view of the facts.

16. In this case, the finding of fact is that the parties had lived for six months at Cuddapah immediately after their marriage at Tirupathi. The place of the permanent residence of Venkata Subbaiah is Cuddapah. Venkata Subbaiah has agricultural lands there. Presumably he conducts agricultural operations from there which would require his constant presence and attention. Unless Sareetha succeeds in showing that she never lived with Venkata Subbaiah at Cuddapah the claim of Cuddapah to be the place of last residence in this case, cannot be rejected. It is true that Sareetha say, that she never lived with Venkata Subbaiah at Cuddapah, but this point was never made good by her. She never argued this point before the court below nor is that plea proved to its satisfaction.

[4](1933) 2 KB 461, 468 [6](1946) KB 114) [8](1953) 1 WLR 857
[5](1934) 1 KB 319 [7](1951) 1 KB 495 [9](1939) AC 71

The question whether she lived with Venkata Subbaiah at Cuddapah or not, is a pure question of fact. The finding of the lower court on such a question of fact cannot be disturbed by a revisional court. I am thus left with no option except to accept that finding. Accepting the finding of the court below that Sareetha and Venkata Subbaiah lived together at Cuddapah for about a period of six months after their marriage at Tirupathi, I hold that Cuddapah was the place where the parties had last resided together and the Madras residence is ineffectual to displace that Cuddapah residence and that accordingly the court of the Subordinate Judge. Cuddapah, has jurisdiction to

try the petition filed by Venkata Subbaiah for restitution of conjugal rights.
PART II.

17. This leads me to the consideration of the other half of this case which raises an important constitutional question. Sareetha in her petition dated 31-8-1981 of which notice from this court had been duly given to and served upon the Attorney General of India, New Delhi, raised for the first time a question of constitutional validity of Section 9 of the Hindu Marriage Act. Through that petition, Sareetha claimed that Section 9 of the Act, "is liable to be struck down as violative of the fundamental rights in Part. III of the Constitution of India, more particularly articles 14, 19 and 21 inasmuch as the statutory relief under the said provision, namely, restitution of conjugal rights offends the guarantee to life, personal liberty and human dignity and decency." As the above contention of Sareetha involves the question of constitutional validity of Section 9 of the Act, authorising grant of curial relief of restitution of conjugal rights to a Hindu suitor, I read Section 9 of the Act in full and the relevant parts of its allied procedural provisions contained in Order 21 Rules 32 and 33 of the Civil Procedure Code.
Section 9 : 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 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."
> Order 21 Rule 32 of Civil Procedure Code. 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).....
> (3) Where any attachment under subrule (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 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 where, at the end of (six months) from the date of the attachment, on application to have the property sold has been made, or if made has been

refused, the attachment shall cease.

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 payment.

(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 revive 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."

A combined reading of the above substantive and procedural provisions relating to the grant of relief of destitution 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 Rules 32 and 33 by applying financial sanctions against the disobeying party. Additionally always a Court can enforce its decree through its contempt powers. The Judicial Committee of the Privy Council in *Moonshed Buzloo Rhueem v. Shumsoon Nissa Begum*[10], held that a suit for restitution of conjugal rights filed by a Muslim husband was rightly filed as a suit for specific performance. It is on the same lines that Order 21 Rule 32 of the Civil Procedure Code speaks of a decree granted for restitution of conjugal rights as a decree of specific performance of restitution of conjugal rights. Conjugal rights connote two ideas. (a) "the right which husband and wife have to each other's society" and (b) "marital intercourse." (see The Dictionary of English Law by Earl Jowitt P. 453.) In *Wily v. Wily*[11] "an offer by the husband to live under the same roof with his wife, each party being free from molestation by the other was held not an offer of matrimonial cohabitation," (see N.R. Raghavachariar's Hindu Law, 7th Edn. Vol. II P. 980. Gupte's Hindu Law of Marriage P. 181 and Derrett's Introduction to Modern Hindu Law Para 308). 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

[10](1867) 11 Moo Ind App 551

[11](1918) P. 1

consequences of the enforcement of such a decree are firstly to transfer the choice to have or not to have marital intercourse to 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. Relief of restitution of conjugal rights fraught with such

serious consequences to the concerned, individual were granted under Section 9 of the Act enables the decree holder through application of financial sanctions provided by Order 21 Rules 32 and 33 of Civil Procedure Code to have sexual cohabitation with an unwilling party. Earlier such a decree could have been enforced against an unwilling party even by imprisonment in a civil prison. Now, compliance of the unwilling party to such a decree is sought to he procured by applying financial sanctions by attachment and sale of the property of the recalcitrant party. But the purpose of a decree for restitution of conjugal rights in the past as it is in the present remains the same which is to coerce through judicial process the unwilling party to have sex against that person's consent and freewill with the decree-holder. There can be no doubt that a 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. The uninhibited tragedy involved in granting a decree for restitution of conjugal rights is well illustrated by *Anna Saheb v. Tara Bai*[12], In that case, a Division Bench of the Madhya Pradesh High Court decreed the husband's suit for restitution of conjugal rights observing "but if the husband is not guilty of misconduct, a petition cannot be dismissed merely because the wife does not like her husband or does not want to live with him....." What could have happened to Tarabai thereafter may well be left to the reader's imagination. According to law, Tarabai could be forced to have sex with Anna Saheb against her will.

18. It cannot be denied that among the few points that distinguish human existence from that of animals, sexual autonomy an individual enjoys to choose his or her partner to a sexual act, is of primary importance. Sexual expression is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation of the opposite sexes. No relationship between man and woman is more rested on mutual consent and freewill and is more intimately and personally forged than sexual relationship. The famous legal definition of marriage given by Lord Penzace in *Hyde v. Hyde*[13] *(Divorce Court),* as a voluntary union between man and woman only highlights this aspect of free association. The ennobling quality of sex of which Havelock Ellis wrote in his Studies on the Psychology of Sex ensues out of this freedom of choice. He wrote that "the man experiences the highest unfolding of his creative powers not through asceticism but through sexual happiness." Bertrand Russell who ought to know, declared that :

> "I have sought love, first, because it brings ecstasy-ecstasy so great that I would often have sacrificed all the rest of life for a few hours of this joy." Forced sex, like all forced things, is a denial of all joy. Yet in conceivable cases, sex may statutorily be denied and even forbidden by law between specified groups of persons. But no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and

[12] AIR 1970 Mad Pra 36

[13] (1866) LR IP and D 130

> monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act. The restitution of conjugal rights by force of arms can be more and can

> be no less than what late Sri Sri, the greatest of the Modern Telugu poets, described in his poem "Kavitha" as "Rakshasa Rathi". The act of sex requires primarily the participation of mind. The researches of the modern psychology had put to rest the Cartesian dichotomy that has separated body and mind since the 17th Century. The researches of Dr. George Solomon of University of California led him to conclude that "mind and body are inseparable" and that "the brain influences all sorts of physiological processes that were once thought not to be centrally regulated." Sex act therefore, can never be treated, as a mere act of body that can be ordered to obey by the State. The coercive act of the State compelling sexual cohabitation therefore, must be regarded as a great constraint and torture imposed on the mind of the unwilling party. The life of a man or woman which the sovereign can commandeer through the coercive power of the State for performing an unwilling act of sexual cohabitation cannot but be regarded as that of a human beast drained of all spirituality. In *Russel v. Russel*[14] Lord Herschell long-ago noted the barbarity of this judicial remedy. He observed, "I think the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call barbarous."

19. There is even graver implications for the wife. An act of coerced sex is no less potent than an act of consensual sex in producing pRegulation ncy and procreating offspring. The only difference lies in the fact that the latter is with her consent while the former is without her consent. In the process of making such a fateful choice as to when, where and how if at all she should beget, bear, deliver and rear a child, the wife consistent with her human dignity, should never be excluded. Conception and delivery of a child involves the most intimate use of her body. The marvel of creation takes place inside her body and the child that would be born is of her own flesh and blood. In a matter which is so intimately concerns her body and which is so vital for her life, a decree of restitution of conjugal rights totally excludes her.

20. The origin of this remedy for restitution of conjugal rights is not to be found in the British common law. It is the medieval Ecclesiastical Law of England which knows no matrimonial remedy of desertion that provided for this remedy which the Ecclesiastical courts and later ordinary courts enforced. But the British Law Commission, presided over by Mr. Justice Scarman, (as he then was) recommended recently on 9-7-1969 the abolition of this uncivilized remedy of restitution of conjugal rights. Accepting that recommendation of the British Law Commission, the British Parliament through Section 20 of the Matrimonial Proceedings and Property Act, 1970 abolished the right to claim restitution of conjugal rights in the English Courts. Section 20 of that Act reads thus:

> "No person shall after the commencement of this Act be entitled to petition the High Court or any county Court for restitution of conjugal rights."

But our ancient Hindu system of matrimonial law never recognized this institution of

[14](1897) AC 395

conjugal rights although it fully upheld the duty of the wife to surrender to her husband. In other words the ancient Hindu Law treated the duty of the Hindu wife to abide by her husband only as

an imperfect obligation incapable of being enforced against her will. It left the choice entirely to the free will of the wife. In *Bai Jiva v. Narsingh Lalbhai*[15], a Division Bench of the Bombay High Court judicially noticed this fact in the following words :

> "Hindu law itself, even while it lays down the duty of the wife of implicit obedience and return to her husband, has laid down no such sanction or procedure, as compulsion by the courts to force her to return against her will."

21. This could have been only because of its realisation that in a matter so intimately concerned the wife or the husband the parties are better left alone without State interference. What could happen to the fate of a person in the position of Tara Bai (the respondent in the abovementioned Madhya Pradesh Appeal) who was forced to go back to her husband even after declaration of dislike and abhorrence towards her husband could have been well considered by the ancient Hindu Law. With the British occupation of this country, the whole legal position was drastically altered. The British Indian courts, wrongly equating the Ecclesiastical rule of this matrimonial remedy with equity, good conscience and justice, thoughtlessly imported that rule into our country and blindly enforced it among the Hindus and the Muslims. Thus, the origin of this uncivilised remedy in our ancient country, is only recent and is wholly illegitimate. Section 9 of the Act had merely aped the British and mechanically reenacted that legal provision of the British Ecclesiastical origin. The plain question that arises is whether our Parliament now functioning under the constitutional constraints of the fundamental rights conceived and enacted for the preservation of human dignity and promotion of personal liberty, can legally impose sexual cohabitation between unwilling, opposite sexual partners even if it be during the matrimony of the parties.

22. The Hindu Marriage Act was enacted by our Parliament in the year 1955 and the legislative competence of the Parliament to enact Section 9 of the Act under Item 5 of the List III of the VII Schedule to the Constitution is undoubted. But the question is whether that provision runs foul of Part III of the Constitution. The petitioner attacks Section 9 of the Act on the ground that granting of restitution of conjugal rights violates the petitioner's rights guaranteed under Articles 14, 19 and 21 of Part III of our Constitution. Let us, therefore, first examine the content of Article 21. Article 21 of the Constitution guarantees right to life and personal liberty against the State action. Formulated in simple negative terms, its range of operation positively forbidding the State from depriving any person of his life or personal liberty except according to the procedure established by law is of far-reaching dimensions and of overwhelming constitutional significance. Article 21 prevents the State from treating the human life as that of any other animal. It is now well established by the decisions of the Supreme Court that the word 'life' occurring in the above Article 21 has spiritual significance as the word 'life' occurring in the famous 5th and 14th Amendments to the American Constitution does. In those constitutional provisions of the American Constitution, the 'life' its interpreted by Mr. Justice Field in his dissenting judgment in *Munn v. Illinois*[16], to mean and signify

[15](ILR (1927) 51 Bom 329 at p. 339

[16](1877) 24 L Ed p. 17

more than a person's right to lead animal or vegetative existence'. Field J., said in the above Munn's case "By the term 'life' as here used something more is meant than mere animal

existence". The contrast drawn by Field J., emphasizing the difference between existence of a free willing human and that of an unfree animal was accepted by our Supreme Court first in *Kharak Singh v. State of U. P*[17]. and next in *Govind v. State of M. P*[18]. transforming Article 21 of our Constitution into a Charter for Civilization. In *Kharak Singh v. State of U. P.,* (supra) Rajagopala Ayyangar J., for the majority and Subba Ran, J., for the concurring miniority accepted the above meaning and significance given to the word 'life' by Field J., in Munn's case. It must however to be noted that while Rajagopala Ayyangar, J., stressed the word 'life' by observing that "the expression 'life' used in that article cannot be confined only to the taking away of life, that is, causing death." Subbarao J., in the same case gave greater importance to the words, "personal liberty", occurring in Article 21 of the Constitution. But both held that Article 21 of our Constitution to be the source for the protection of our personal liberty and life in the elevated sense. Subbarao J., perceptively observed that right to privacy forms a part of the guaranteed right of personal liberty in Article 21 of the Constitution. In a scientific age, psychological fears and restraints generated by the use of scientific methods, he feared, may constitute even greater denial of personal liberty than mere crude physical restraints of a bygone age.

23. In a later decision of the Supreme Court in *Govind v. State of M. P.,* (supra) Mathew J., taking the lead given by the minority judgment of Subbarao J., in the above mentioned Kharak Singh's case AIR 1963 Supreme Court 1295 and adverting to the American legal and philosophical literature on right to privacy and to the American cases reported, in *Griswold v. Connecticut*[19]*,* and *Jane Roe v. Henry Wade*[20]*,* ruled that Article 21 of our Constitution embraces the right to privacy and human dignity : The centrepiece of the judgment in Govind's case AIR 1975 Supreme Court 1378 is to hold that right to privacy is part of Article 21 of our Constitution and to stress its constitutional importance and to call for its protection. The learned Judge then examined the content of the right to privacy and observed that "any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing." The learned Judge stressed the primordial importance of the right to privacy for" human happiness and directed the courts not to reject the privacy-dignity claims brought before them except where the countervailing State interests are shown to have overweighing importance. He observed that "there can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realised as Brandies J., said in his dissent in *Olmstead v. United States' of America*[21]*,* the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore, they must be deemed to have conferred upon the individual as against the Government a sphere where he should be left alone." The learned Judge also stated "there can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior." Govind's case (supra) thus firmly laid it down that Article 21 protects the right to privacy and promotes the

[17](1964) 1 SCR 332 [19](1965) 14 L Ed 2d 510 [21](1927-277 US 438, 471)
[18](1975) 3 SCR 946 : (1975) 2 SCC 148 [20](1973) 35 L Ed 2d p. 147

individual dignity mentioned in the preamble to our Constitution. Govind's case also lays it down that the courts should protect and uphold those important constitutional rights except where the claims of those rights for protection are required to be subordinated to superior State interests.

24. However, it must be admitted that the concept of right to privacy does not lend itself to easy

logical definition. This is so partly because as Tom Gaiety said in his article "Redefining Privacy." (12 Harv. Civ. Rts. - Civ. Lib. Rev. p. 233,) the concept was thrown up in great haste from a miscellany of legal rock and stone and partly because of the inherent difficulties in defining such an elusive concept. The difficulty arises out of the fact that this concept is not unitary concept but is multidimensionl susceptible more for enumeration than definition. But it can be confidently asserted that any plausible definition of right to privacy is bound to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body's inviolability and integrity and intimacy of personal identity, including marital privacy. A few representative samples would bear this out. Gaiety defined privacy as "an autonomy or control over the intimacies of personal identity." Richard B. Panker in his "A Definition of Privacy", quoted in "Philosophy and Public Affairs" (1975 Vol. 4 No. 4 P. 295-314 wrote :

> ".....privacy is control over when and by whom the various parts of us can be sensed by others. By "sensed" is meant simply seen, heard, touched, smelled or tasted."

Gary L. Bostwick, writing in California Law Review, Vol. 64 P.1447 suggests that "privacy" is divisible into three components, (a) repose, (b) sanctuary and (c) intimate decisions. Of these three components, he holds, that the last one is an eminently more dynamic privacy concept as compared to repose and sanctuary (P. 1466). Prof. Tribe in his American Constitutional Law. P. 921 stressed another fundamental facet of the right to privacy problem. He wrote *inter alia*,

> "Of all decisions a person makes about his or her body, the most profound and intimate relates to two sets of questions: first, whether, when, and how, one's body is to become the vehicle for an other human being's creation." ':

25. Applying these definitional aids to our discussion, it cannot but be admitted that a decree for restitution of conjugal rights constitutes the grossest from of violation of an individual's right to privacy. Applying Prof. Tribe's definition of right to privacy, it must be said, that the decree for restitution of conjugal rights denies the woman her free choice it whether, when and how her body is to become the vehicle for the procreation of another human being. Applying Parker's defintion, it must be said that a decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed. Applying the tests of Gaiety and Bostwick, it must be said, that the woman loses her control over her most intimate decisions. Clearly, therefore, the right to privacy guaranteed by Article 21 of our Constitution is flagrantly violated by a decree of restitution of conjugal rights.

26. A few decided American cases have also taken the same view of the constitutional right to privacy in that country.

27. The observations of Justice Mc Reynolds in *Meyer v. Nebraska*[22], highlight certain facets of this right to privacy. There the learned Judge observed :

> "Without doubt, it denotes not merely freedom from bodily restraint but also the right of any individual to contract, to engage in any of the common occupations of life, to acquire

useful knowledge to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men..... ....The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."In *Griswold v. Connecticut*[23], Mr. Justice Douglas, while invalidating a Connecticut Statute which made the use of contraceptives a criminal offence, wrote for the court that "this law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.....", implying that the right to privacy encompasses within itself intimate relationships such as those between husband and wife about the use of contraceptives. Of course, the question from where this right to privacy should be derived gave rise to different answers in that case. Mr. Justice Douglas in *Griswold v. Connecticut*[24], has found penumbral areas of specific guarantees in the Bill of Rights as providing the basis for this right of privacy. But Mr. Justice Goldberg wrote, in that case highlighting in the process the theoretical confusions in the situation that the right of marital privacy falls within the category right to privacy. Griswold's case is an authority for the proposition that the reproductive choice to beget and bear a child does not belong to the State and that belongs to an individual. In *Jane Roe v. Henry Wade*[25], Mr. Justice Blackmun for the court observed that the earlier decisions of the American Supreme Court held that "only personal rights that can be deemed "fundamental" or implicit in the concept of ordered liberty"..... are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage..... procreation, contraception, family relationships, and child rearing and education....."

"Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make up. If the right of privacy means anything, it is the right of the INDIVIDUAL, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

This is a clear recognition of the legal position that right to privacy belongs to a person as an individual and is not lost by marital association. In *Planned Parenthood of Missouri v. Danforth*[26],) the court reiterated the position taken by the American Supreme Court in *Eisenstadt v. Barid ((1972) 405 US 438)* (supra) that the

[22](1923) 67 L Ed 1042 [24](1965-14 L Ed 2d 510) [26](1976-49 L Ed 2d 788
[23](1965) 14 L Ed 2d 510 [25](1973) 35 L Ed 2d 147

right to privacy belongs to each one of the married couple separately and is not lost by reason of their marriage. The Court observed, invalidating a statutory condition, that the husband's consent is necessary for termination of pRegulation ncy, "we cannot hold that the State has constitutional authority to give a spouse unilaterally the ability to prohibit a wife from terminating her pRegulation ncy." The Court further observed that "inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pRegulation ncy, as

between the two, the balance weighs in her favour." Earlier in *Skinner v. Oklahoma*[27], the American Supreme Court characterised the right to reproduce as one of the basic civil rights of man. In the same case Justice Jakson spoke of the State interference with reproductive decisions as involving dignity and personality. See also the decisions in *Loving v. Virginia*[28], and *Zablocki v. Redhall*[29],

28. The above cases of the American Supreme Court clearly establish the proposition that the reproductive choice is fundamental to an individual's right to privacy. They uphold the individual's reproductive autonomy against the State intrusion and forbid the State from usurping that right without overwhelming social justification. That this right belongs even to a married woman is clear from Justice Brennan's opinion quoted above. A wife who is keeping away from her husband, because of permanent or even temporary estrangement cannot be forced, without violating her right to privacy to bear a child by her husband. During a time when she is probably contemplating an action for divorce, the use and enforcement of Section 9 of the Act against the estranged wife can irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. During a moment's duration the entire life-style would be altered and would even be destroyed without her consent. If that situation made possible by this matrimonial remedy is not to be a violation of individual dignity and right to privacy guaranteed by our Constitution and more particularly Article 21, it is not conceivable what else could be a violation of Article 21 of our Constitution.

29. Examining the validity of Section 9 of the Act in the light of the above discussion, it should be held, that a court decree enforcing restitution of conjugal right constitutes the starkest form of governmental invasion of personal identity and individual's zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being. Clearly the victim loses its autonomy of control over intimacies of personal identity. Above all, the decree for restitution of conjugal rights makes the unwilling victim's body a soulless and a joyless vehicle for bringing into existence another human being. In other words, regulation ncy would be foisted on her by the State and against her will. There can therefore be little doubt that such a law violates the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution. It is of constitutional significance to note that the ancient Hindu society and its culture never approved such a forcible marital intercourse. Our ancient law-givers refused to recognize any State interests in forcing unwilling sexual cohabitation between the husband and wife although they held the duty of the wife to surrender to the husband almost absolute. Recently, the British Law Commission headed by Mr. Justice Scarman also found no superior State interests implicated in retaining this remedy on the British

[27](1941-86 L Ed 1655)
[28](1967-18 L Ed 2d 1010)
[29](1978) 54 L Ed 2d 618

Statute, Book. It is wholly without any social purpose. State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony. Neither State coercion can soften the ruffled feelings nor clear the misunderstandings between the parties. Force can only beget force as action can only produce counter-action. The only usefulness in obtaining a decree for restitution of conjugal rights consists in providing evidence for subsequent action for divorce. But this usefulness of the remedy which can be obtained only at enormous expense to human dignity cannot be counted as outweighing the interests in upholding the right

to privacy. It is only after considering the various factors that the Scarman Commission recommended for the abolition of this matrimonial remedy in England and the British Parliament enacted a law abolishing it. It is therefore, legitimate to conclude that there are no overwhelming State interests that would justify the sacrificing of the individual's precious constitutional right to privacy.

30. Duncan Derrett in his "Modern Hindu Law" para 306 however, while approving the abolition of this remedy in England advocated for somewhat strange reasons the continuance of this remedy in India. He wrote that "..... The practical utility of the remedy is little in contemporary England". He however says, that :

> "In India, where spouses separate at times due to misunderstandings, failure of mutual communication, or the intrigues of relatives, the remedy of restitution is still of considerable value, especially when coupled with the eight under Section 491 of the Criminal Procedure Code to recover (under certain circumstances) custody of a minor bride, and in the light of the rule that where restitution has been ordered a decree for separate maintenance cannot, without proof of new facts, issue in favor of the respondent."

With respect, I am unable to agree with this recommendation. Firstly, Derrett did not examine the matter from the Constitutional point of view of right to privacy guaranteed by Article 21 of the Constitution. Restitution of conjugal rights is an instance of punishing a criminal without a victim. Secondly, his remedy of restitution of conjugal rights is hot only excessive but is also inapproprivate. As Telugu proverb says, it is like setting fire to a house to burn it so as to catch a rat. Use of Police force is not the appropriate way to bring about reconciliation between the estranged wife and husband. The observations of Justice Blackmun in the above Planned Parenthood's case, (1976-49 L Ed 2d 788) are worthy of note in this connection. He observed :

> "But it is difficult to believe that the goal of fostring mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the State in protecting the mutuality of decisions vital to the marriage relationship."

I therefore hold that there are no overwhelming State interests to justify the subordination of the valuable right to privacy to any State interests.

31. On the basis of my findings that Section 9 of the Hindu Marriage Act providing for the remedy of restitution of conjugal rights violates the right to privacy guaranteed by Article 21 of the Constitution, I will have to hold that Section 9 of the Hindu Marriage Act is constitutionally void. Any statutory provision that abridges any of the rights guaranteed by Part III of the Constitution will have to be declared void in terms of Article 13 of the Constitution. But the earlier decisions of the Supreme Court, particularly the earliest in Gopalan's case AIR 1950 Supreme Court 27, had narrowly interpreted the language of Article 21 of the Constitution as

merely requiring a statutory procedure to be provided or established. If the validity of Section 9 of the Act were to be considered on that basis, I would have been left no option except to uphold its validity.

32. The protection to life and personal liberty contained in Article 21 of our Constitution is confined by Gopalan's interpretation only to the executive action taken without the backing of a supporting statutory law providing for procedure. In other words, the efficacy of that article as a fundamental right is almost denuded, because taking of life or personal liberty according to the procedure established by a legislative enactment is rendered by that interpretation constitutionally unobjectionable under that article. Thus interpreted, Article 21 offers no protection against legislative action. The cook of Bishop of Rochester could still be boiled to death, because the Parliament ordained that. Given that meaning, Article 21 would have been left with no constitutional mission to subserve, because a constitutional limitation imposed in the form of a fundamental is needed not against an executive action but only against the arbitrary exercise of legislative power. Under our system of jurisprudence, where the executive would be ineffective to deprive any person of his life or personal liberty except under the authority of legislative sanction even in the absence of a fundamental right, a fundamental right which mainly operates against an executive action would be purposeless. Yet, this is clearly the interpretation of Article 21 that commended itself to Gopalan's case AIR 1950 Supreme Court 27. Added to that, is the rule laid down by Gopalan's case to the effect that each fundamental right in Part III of the Constitution is a constitutional island to itself. According to this interpretation. the State action, in order to be valid, need not pass the test of cumulative prohibition contained in the relevant, fundamental rights.

33. In both these aspects the rule in Gopalan's case was found to be unsatisfactory almost from its inception. These rules are therefore, considerably modified by the later decisions of the Supreme Court in such as those rendered in the Banks Nationalisation case, AIR 1970 Supreme Court 564 and Maneka Gandhi's case, AIR 1978 Supreme Court 597. In *Sunil Batra v. Delhi Administration*[30]*,)* while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J., said :

> "that though our Constitution did not have a "due process" clause as in the American Constitution, the same consequence ensued after the decisions in the Bank Nationalisation Case and Maneka Gandhi case. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."

In the same case Desai J., observed that :

[30] AIR 1978 SC 1675

> "The word 'law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi's case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary, it would be violative of Article 14." The above quotations are taken from *Mithu v. State of Punjab*[31]*,* which

referred to those observations with approval.'

34. In *Mithu v. State of Punjab* (supra) the Supreme Court went even farthest where it struck down Section 303 Indian Penal Code on the ground that that Section violated not only Article 14 but even Article 21. The Supreme Court while approvingly referring to the above quotations observed in Mithu's case that : '

> "these decisions have expanded, the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it : that it is for the legislature to provide the punishment and for the courts to impose it." ''

Explaining the scope of expansion which Article 21 has undergone by reason of Bank Nationalisation case AIR 1970 Supreme Court 564 and Maneka Gandhi's case AIR 1978 Supreme Court 597 the Supreme Court in Mithu's case AIR 1983 Supreme Court 473 declared :

> "if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21."

In Mithu's case the Supreme Court implied that imposition of death sentence even under Section 302 Indian Penal Code would have been held in Bachan Singh's case AIR 1980 Supreme Court 898 invalid and *ultra vires* of the protection guaranteed by Article 21 if the Parliament had not provided for alternative sentences of life imprisonment and death sentence but provided for only a mandatory death sentence. A mandatory death sentence would then have been shot down by the civilized jurisprudence of Article 21. Now savagery of a death sentence is more an attribute of substantive law. In Mithu's case AIR 1983 Supreme Court 473, Chinnappa Reddi, J., ascribed the whole of his concurrence to Article 21. The reasoning of our Supreme Court in Mithu's case comes very close to the reasoning adopted by the American Supreme Court in cases like *Lambert v. California*[32] *decided,* upon the basis of substantive due process clause. In *Lambert v. California* (supra) the American Supreme Court invalidating a State criminal law held that :

> "where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process."

After Mithu's case, it is not easy to assert that Article 21 is confined any longer to procedural protection only. Procedure and substance of law now comingle and overlap each other, to such a degree rendering that a finding of any law that can competently

[31] AIR 1983 SC 473

[32](1957) 2 L ED 2D 228

establish a valid procedure for the enforcement of a savage punishment impossible.

35. In an imperfect world, where the clash of competing interests is the only certainty, where issues are therefore inherently complex, where Judges are fallible, and where man-made institutions have limits, solutions to problems will inevitably be less than optimum. (see - Preface to Chase and Ducat's "Constitutional Interpretation" (Second Edition). In its search to recognize

the true boundaries between the individual and the community, constitutional theory should therefore be open-ended without its categories being permanently closed. (see Paul A. Freund "On Law and Justice" page 163.)

> "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," to "mechanical answer". The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further (cut) a channel for what is to come." *Irvine v. California*[33] (dissenting opinion). The matter was well put in *Rochin v. California*[34]."

(Justice Harlan, in, *Poe v. Ullman*[35],).

The constitutional doctrine of privacy is not only life giving but also is lifesaving. It gives spiritual meaning to life which Sankara described as emanation of Brahman and saves such a life from "inhuman and degrading treatment" of forcible sexual cohabitation. (Article 5 of the Universal Declaration of Human Rights.) (see also The Right To Be Let Alone" by K.K. Mathew, (1979) 4 SCC P. 1 (Journal Section) and also "Torture And The Right To Human Dignity". by Paras Diwan, (1981) 4 SCC P. 31 (Journal Section)). Nothing much that is reasonable, in my opinion, can be urged in support of this barbarous remedy that forces sex at least upon one of the unwilling parties.

36. Following the reasoning adopted in the above Mithu's case, Section 9 of the Hindu Marriage Act, should be declared as unconstitutional, for the reason that the 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.

37. The Constitutional validity of Section 9 of the Act when examined on the touch-stone of equal protection of laws also leads to a conclusion of its invalidity. This is so because of two reasons. Firstly, Section 9 of the Act does not satisfy the traditional classification test. Secondly, it fails to pass the test of minimum rationality required of any State Law.

38. Of course Section 9 of the Act does not in form offend the classification test. It makes no discrimination between a husband and wife. On the other hand, by making the remedy of restitution of conjugal rights equally available both to wife and husband, it apparently satisfies the equality test. But the requirements of equal protection of laws contained in Article 14 of the Constitution are not met with that apparent though majestic equality at

[33](1953) 347 US 128, 147 : 98 Led. 561, 578 : 74 S Ct 381
[34](1951) 342 US 165, 170, 171 : 96 Led. 183, 188, 189 : 72 S Ct. 205 : 25 ALR 2d 1396
[35](1961) 6 L ed 2d p. 989 at 1020

which Anatole France mocked. Our Supreme Court declared that :

> "Bare equality of treatment regardless of the inequality of realities is neither justice nor homage to the constitutional principle."

(see *M. Match Works v. Asst. Collector*[36]*).*

> 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 Brilish India' page 929, (second edition) attests to this fact. The learned author recorded that although "the rights and duties which marriage creates may be enforced by either spouse against the other and not exclusively by the husband against the wife; a suit for restitution by the wife is rare."

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 irretrievably 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. Thus the use of remedy of restitution of conjugal rights in reality becomes partial and one-sided and available only to the husband. 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 works in practice only as an engine of oppression to be operated by the, husband for the benefit of the husband against the wife. By treating the wife and the husband who are inherently unequal as equals. Section 9 of the Act offends the rule of equal protection of laws. For that reason the formal equality that Section 9 of the Act ensures cannot be accepted as constitutional. Section 9 of the Act should therefore be struck down as violative of Article 14 of the Constitution.

39. Section 9 of the Act has also to be examined for its constitutional validity from the point of view of the test of minimum rationality. The American Constitutional writers and court decisions on the equality clause of the American 14th Amendment recognize the inadequacies of the mere classification theory of minimum rationality not merely as an additional test to the above theory of classification but even as basic to the whole of the 14th Amendment. Writing for a Division Bench of this court in *A. Laxmana Murthy v. State*[37]*,* I expressed our view of inadequacies of the theory of classification in these words :

> "Hitler's classification of all Jews into a separate category for purposes of butchering them and Nazalites' classification of all landlords into a separate category for purposes of exterminating them cannot, therefore, be faulted on this theory of equal protection clause".

Our Supreme Court had accepted the theory of minimum rationality in *E.P. Royappa v. Tamil Nadu*[38]*,* in the following words :

[36] AIR 1974 SC 497 AT 503

[37] AIR 1980 And Prad 293 at 298

[38](1974) 2 SCR 348, at p. 386

> "From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and

> is therefore violative of Article 14." ..... They require that State action must be based on valent relevant principles applicable alike in all similarly situate And it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality."

But our Supreme Court called the test as test of arbitrariness and followed it in the subsequent decisions in Maneka Gandhi case (1978) 2 SCR 621 and the International Airport case (1979) 3 SCR 1014, and *Ajay Hasia v. Khalid Mujib*[39], and *Air India v. Nergesh*[40] The theory of minimum rationality test which is heavily criticised by Seervai in his latest Constitutional Law, 3rd Edition page 272 is described by Prof. Tribe as requiring all legislation to have "a legislative public purpose or set of purposes based on some conception of general good." (see his American Constitutional Law, page 995.) Examined from this point of view, it is clear that whether or not Section 9 of the Hindu Marriage Act suffers from the vice of over-classification as suggested in the preceding paragraph it promotes no legitimate public purpose based on any conception of the general good. It has already been shown that Section 9 of the Act does not subserve any social good. Section 9 must therefore be held to be arbitrary and void as offending Article 14 of the Constitution.

40. In the view I have taken of the constitutional validity of Section 9 of the Hindu Marriage Act, I declare that Section 9 is null and void. As a corollary to that declaration, I hold that O.P. No. 1 of 1981 on the file of Subordinate Judge, Cuddapah, filed by Venkata Subbaiah for the relief of restitution of conjugal rights with Sareetha is legally incompetent. Accordingly, I prohibit the Court of the subordinate Judge, Cuddapah from trying O.P. No. 1/81.

41. The Civil Revision Petition is allowed, but without costs.
Revision allowed.

[39] AIR 1981 SC 487
[40] AIR 1981 SC 1829