Delhi High Court
Harvinder Kaur vs Harmander Singh Choudhry on 15 November, 1983
Equivalent citations: AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187
Author: A B Rohatgi
Bench: A Rohatgi
JUDGMENT Avadh Behari Rohatgi, J.

(1) This appeal raises'an issue of great importance to the well-being of the nation, as it goes to the very root of the marriage relationship. The husband petitioned for restitution of conjugal rights. The wife opposed. The Additional District Judge granted a decree of restitution of conjugal rights to the husband. From that decreethe wife appeals to this Court.

(2) 0N appeal counsel for the wife. attacked' the constitutional validity of section 9 of the Hindu Marriage Act. I issued 'notice to attorney-general. He appeared and argued' the case. This part of the judgment deals with the constitutional question. The rest is concerned with the facts of the case.

(3) In the forefront of his arguments, counsel referred me to T. Sareetha v. T. Venkata Subbaiah, . In that case P. A. Chaudhary J. held that section 9- of the Hindu Marriage Act, 1955, (the Act) offends Articles 14 and 21 of the Constitution and therefore declared it null and; void. It was a simple case in which the husband had filed an application against the wife for restitution of conjugal rights under section 9 of the Act. The wife raised an objection to the jurisdiction of the court. The subordinate judge held that Cuddapah Court had jurisdiction to try the petition. The wife went. in revision to the High Court. Chaudhary J., in agreement with; the subordinate judge, held that Cuddapah Court had jurisdiction to try the petition.

(4) But the case is not important On this point.the Chief point decided was about the constitutional validity of section 9 of the Act. The learned judge held that the remedy of restitution of conjugal rights was "barbarous', "uncivilised" and "an engine of oppression". The main reason for holding that section 9 offended Article 21 of the Constitution was that a decree for restitution of conjugal rights was an order "to coerce through: judicial process, the unwilling party to have sex against that person's consent and freewill with the decree-holder". This, he held., was "degrading to human dignity and monstrous to human spirit". The learned judge took the view that the British Indian courts "thoughtlessly imported that rule into our country and blindly enforced it among the Hindus and the Muims. The origin of this uncivilized remedy in our ancient country is only recent and is wholly illegitimate. Section 9 had merely aped the British and mechanically re-enacted that legal provision of the British ecclesiastical origin." Restitution of Conjugal Rights.

(5) In my opinion this view is based on a misconception of the true nature of the remedy of restitution of conjugal rights. Section 9 reads as under :

"RESTITUTION of conjugal rights. When either the husband or the wife has, without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not

be granted, may decree restitution of conjugal rights accordingly.

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

(6) Chaudhary J. thought that section 9 imposes "sexual cohabitation between unwilling, opposite sexual partners." He called it "forced sex", "coerced sex" and "forcible marital intercourse". He went on to hold that tile state interference destroyed the "sexual autonomy" and "reproductive autonomy" of the individual. "A wife who is keeping away from her husband, because of permanent or temporary arrangement, cannot be forced, without violating her right to privacy, to bear a child by her husband" he said. A large number of English and American decisions have been cited in support of this view.

(7) This decision is the first of its kind to take this view. I respectfully dissent. The decree for restitution does nothing of the kind. Under section 9 the court has power to make a decree of restitution of conjugal rights which is the remedy available to enforce the return of a spouse who has withdrawn from cohabitation. The decree, if granted, orders the respondent to return within a period of one year to the aggrieved party. This period is specified in section 13(1-A)(ii) of the Act. "This remedy is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation". As Tolstoy says in his Law and Practice of Divorce (6th Edition) p. 99 : "THE court cannot enforce sexual intercourse, but only cohabitation, and restitution of conjugal rights can not be ordered where the respondent refuses sexual intercourse but continues to cohabit with the petitioner."

(See Jackson v. Jackson (1924) Probate 19 (2).

In Halsbliry's Laws of England (3rd Edition) Volume 12 page 284 it is said : (cohabitation) aces not necessarily mean serial intercourse, which the court cannot enforce, so that refusal of sexual intercourse by itself does not constitute refusal to cohabit."

In support of this proposition the high authority of Lord Stowell in Forster v. Forster, (1790) I Hag. Con. 144 (3): Orme (, v. Orme, (1924) 2 Addf 382-162 E.R. 335 (4); and Rowev. Rowe, (1865) 34 L.J.P. M&A 111 (5) have been cited.

(8) One thing is clear from Lord Stowell's decision in Forster v. Forster and Halsbury's statement of law that the Court does not and cannot enforce sexual intercourse. I accept it as true that sexual relations constitute almost important attribute of the conception of marriage. But it is also true that they do not constitute its whole content, nor can the remaining aspects of the A matrimonial consortium be said to be of wholly unsubstantial or trivial character. Marriage has been described in these words : "resides the procreation and education of children, marriage has for its object the mutual society,, help and comfort, that the one ought to have of the other both in prosperity and adversity. Marriage is the most solemn engagement which one human being can contract with another. It is contract formed with a view not only to the benefit of the parties themselves, but to the

benefit of third parties; to the benefit of their common offspring, and to the moral order of civilised society." (Shelford on Marriage and Divorce (184.1), p. 3 quoted in Weatherley v. Wentherley, (1946) 2 All E. R. I (II) (6). Cohabitation : Its meaning.

(9) The object of the restitution decree is to bring about cohabitation between the estranged parties. So that they can live together in the matrimonial home in amity. That is the primary purpose. Cohabitation has been defined in these words : Cohabitation does not necessary depend upon whether there is sexual intercourse between the husband and the wife. 'Cohabitation' means living together as husband and wife; and as I endeavored to point out in Evans v. Evans, (1948) I K.B. 175 (7), cohabitation consists in the husband acting .as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering house-wifely duties to the husband and the husband chershing and supporting his wife as a husband should. Of course sexual intercourse usually takes place between parties of moderate age if they are cohabiting, and if there is sexual intercourse it is very, strong evidence- in fact it may be conclusive evidence that they are cohabiting; but it does not follow that because they do not have sexual intercourse they are not 'cohabiting'. Cohabiting, as I have said, means the husband and wife living together as husband and wife. (Thomas v. Thomas, (1948) 2 K.B, 294 (8), per Lord Goddard CJ. at p. 297.] "THE cohabitation of two people as husband and wife means that they are living together as husband and wife, the wife rendering wifely services io her husband; the husband rendering husband like service to his wife. They must live together not merely as two people living in one house, but as husband and wife."

(Wheatley v. Wheatley, 1950) I K.B. 39 (9) per Lord Goddar CJ. at p. 43.] This is the true office of a restitution decree. Not that it compels sexual intercourse by "force of arms", as Chaudhary J. thought. Where either the husband or the wife has withdrawn from the society of the other party without just cause, the court orders the withdrawing party to return to the conjugal fold. So that the consortium is not broken. Consortium; Its meaning:

(10) Consortium means "companionship, love, affection, comfort, mutual services, sexual intercourse. All these belong to the married state. Taken together they make up consortium." Consortium has been defined as "a partnership or association; but in the matrimonial sense it implies much more than these rather cold words surest. It involves a sharing of two lives, a sharing of joys and sorrows of each party, of their successes and disappointments. In its' fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse all those elements which, when combind. justify the old common law dictum that a man and his wife are one person" Crabtree v. Crabtree, (No. 2) (1964) Australian Law Reports 820 (10), per Selby J. at p. 821.] Refusal of Sexual Intercourse.

(11) From the definitions of cohabitation and consortium It appears that sexual intercourse is one of the elements that goes to make up the marriage. But it is not the summum bonum. Sex is the refrain of T. Sareetha's case. As if marriage consists of nothing else except sex. Chaudhary, J.'s over-emphasis on sex is the fundamental fallacy in his reasoning. He seems to suggest that restitution decree has only one purpose, that is, to compel the unwilling wife to "have sex with the husband". This view was discarded long ago. As early as 1924 Sir Henry Duke President in Jackson v. Jackson (supra) at pages 23, 24 said : "WANT on refusal of one or other of the parties to a

marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the tics of marriage, but it does not produce either separation or living apart..... ... .Reflection upon the manifold duties of the married state must, I think, convince any reasonable mind that this refusal of itself by one of the parties, while the parties remain living together and discharging the other duties of the married state, cannot be said to amount to desertion. It is not abandonment; it is not living apart. It it is a refusal of a duty it docs not purport to conclude the matrimonial relationship."

(12) The remedy of restitution aims at cohabitation and consortium and not merely at sexual intercourse. To say that restitution decree "subject a person by the long arm of the to a positive sex act" is to take the grossest view of the marriage institution. The restitution decree does not enforce sexual intercourse. This can be proved by a simple illustration. A husband and a wife are living under the same roof. But the wife does A not allow the husband sexual intercourse with her because she thinks that it is a horrid and beastly thing. Will the court pass a restitution decree ? The answer is 'No'. Since they are living together as one household, as one unit and not as two, the law cannot go further and compel them to have sexual intercourse. The court has neither the means nor the capacity to enforce its decree in the marriage bed. It is most undesirable, save where we are clearly enjoined by statute so to do, to seek to discover or reveal the secret intimacies of the marriage bed. If a question arises whether the marriage has been consummated, no doubt this may be necessary. It is not, I think, right that we should do so in a case such as the present. All that the court in a husband's petition under section 9 does is to seek to enquire whether there is a "reasonable excuse" for the withdrawal by the wife from the society of the husband. It is a fallacy to think that the restitution of conjugal rights constitutes "the starkest form of governmental invasion" of "marital privacy", as Chaudhary J. seems to think. The burden of proving reasonable excuse lies on the wife. A spouse is entitled to the other's society and if the law enforces this conjugal duty there is nothing wrong.

(13) The leading idea of section 9, to my mind, is to preserve the marriage. The outstanding fact is that the husband and wife are living apart and leading their own separate lives. The court seeks to enquire into this separation. The inquiry into the affairs of the matrimonial life is to be confined to this one fact "Is there a just cause for the respondent to live apart and separate from the petitioning spouse?" Further delving into their matrimonial life is not necessary. If there is no rupture of marital relations and the parties are living together in the ordinary way of man and wife there is no need to resort to section 9 of the Act. Section 9 is a means of saving the marriage. It can be that the erring spouse comes on the right path and a broken home is rebuilt. Section 9 in a sense is an extension of sub-sections (2) and (3) of section 23 of the Act which encourage reconciliation by the court. The court is enjoined to make every endeavor to bring about a reconciliation between the parties. A Section 9 is a concrete illustration of this. What the court seeks to do is to enquire into the causes which have led to the rupture of the marital relations and a refusal to share the matrimonial life. If there is no reasonable excuse for living apart the court orders the withdrawing party to live together. It is the policy of the Act that the parties should live together. Living apart is the very antithesis of living together as society is the antithesis of separation. The policy of the Act is to assist in the maintenance of marriages other than those reduced to a mere shell. Where there is a complete cessation of cohabitation and the parties are living apart section 9 can properly be invoked. This state of affairs is normally brought about by one spouse leaving the matrimonial home, so that they

are no longer living under the same roof. They are living in a state of separation. They are living as two units rather than one. Two separate households are created. So they are treated as living apart unless they are living with each other in the same matrimonial home.

(14) A difficult situation arises. The matrimonial relationship has been terminated though marriage is subsisting. The marriage is in name only and not in substance. In law and not in fact. The policy underlying the legislation is that it is not conducive to the public interest that men and women should remain bound together in permanence by the bonds of marriage the duties of which have long ceased to be observed by either party and the purposes of which have irremediably failed. Such a condition of marriage in law which is no marriage in fact leads only to immorality and unhappiness. Germ of the Breakdown theory :

(15) The germ of the breakdown theory is to be found in a New Zealand case reported in 1921. Salmond J. in a passage which has now become classic enunciated the breakdown principle in these words :

"THE legislature must, I think be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated. and its further continuance is in general not merely useless but mischievous" (Lodder v. Lodder, (1921) New Zealand Law Reports 876 (II), at p. 877 quoted in Seventy-First Report of Law Commission of India, p. Ii, 12).

The marriage has ceased to be a real union in the true sense because the spouses are withdrawn from each other. They ale living apart. There is no cohabitation. Living apart and cohabitation are mutually exclusive opposites.

Where do we go from here ? The marriage is on the rock's. If the rift between husband and wife is no more than the ordinary wear and tear of married life there should be no great difficulty in the parties coming together and living as ordinary husband and wife. A restitution decree should be able to achieve this in some cases if not all. But if the differences are deep-seated and there is no resumption of cohabitation in spite of the decree of restitution the only course open to the legislature is to end the marriage because it cannot be mended. This is done by dissolving it by a decree of divorce. If the decree of restitution is not obeyed for the space of one year and the parties continue to live separately it is undoubtedly the best evidence of breakdown of marriage, and the passing of time, most reliable evidence that the marriage is finished. Section 13(1-A) is a legislative recognition of this principle which was conceited by Salmond J. as early as 1921 in Lodder v. Lodder (supra). Concept of Breakdown in Section 13(1-A.) (16) Section 13(1-A)(ii) says that if the withdrawing spouse is disobedient to the decree of restitution of conjugal rights and the husband and wife continue to live separately as before, each of them is entitled to a dissolution of marriage which has been a marriage in name only but in fact an empty legal shell. This law is based on the

theory of irretrievable breakdown of marriage. They Indian legislature introduced this theory, although in part only, as early as 1964 when it inserted sub-section (1-A) by the Amending Act 44 of 1964 in the parent Act. In England this theory found favor with the Parliament in the Divorce Law Reforms Act 1969. In the Matrimonial Act of 1973 the provision based on breakdown theory has been reenacted. The Law Commission of India has recommended its adoption in its Seventy-First Report of 1978. But a foresighted legislature thought as early as 1964 that the decree of restitution of conjugal rights will serve a useful purpose because it will give to the parties a cooling-off time of one year which was not only desirable but essential. If the marriage cannot be saved even after passing the decree of restitution it must be dissolved. A factual separation gives, an easily justiciable indication of breakdown. "Living apart" by itself spells breakdown. The breakdown is so patent.

(17) The decree of restitution of conjugal rights acts as an index of connubial felicity. It is a sort of litmus paper. It shows a change of heart if the restitution decree is obeyed. If the decree is disobeyed it is an indicia that the parties have reached a stage of no return. The Act's professed object is to facilitate reconciliation in matrimonial cases., This it does by asking the withdrawing spouse to return to the matrimonial home and gives one year's time to do so. If the restitution decree is not obeyed the court dissolves the marriage on proof of non-compliance of the restitution decree.

(18) There is no warrant in authority extending over 150 years in England from where we have borrowed this matrimonial remedy, nor any in India before or after the passing of the Act, for assigning to this remedy of conjugal rights the meaning given by Chaudhary J. He has interpreted section 9 in a sense clearly inconsistent with the law a.s expounded in England and India in a stream of authorities. As long ago as 1866 the Privy Council in Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, Ii M.I.A. 551(12) applied to this country the English remedy of restitution. In Indian legislature in 1955 codified this remedy.

(19) The dictum of Chaudhary J. that the restitution decree enforces "sexual cohabitation with an unwilling parley" and "constitutes the grossest form. of violation of individual's right to privacy" and "offends the in inevitability 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" is the high water mark of his judicial pronouncement. With respect to the learned judge cannot agree that this is what the restitution decree does. The cases referred to by him do not prove his proposition. Jackson v. Jackson 1924. P. 19 which was approved .by the House of Lords in Weatherley v. Weatherley, 1947 (1) All E.R. 563(13) clearly shows that the object of the restitution decree is' not to enforce sexual intercourse as the learned judge thought. The .court simply cannot enforce it. In the nature of thinks it is an impossible task. Breakdown theory in section 13(iii):

(20) The theory of irretrievable breakdown is also the basis of sub-section (iii) of section 13. That sub-section says :' "(III) That in a suit under section 18 of the Hindu Adoptions and Maintenance. Act, 1956, or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (or under the corresponding section 488 of the Code of Criminal Procedure, 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards."

This sub-section was inserted by Act No. 68 of 1976.

This provision is akin to the provision of section 13(1-A)(i) which provides a ground for divorce on the basis of non-resumption of cohabitation for a period of one year or more after the decree for judicial separation. That ground is available to both, the husband and the wife, because the decree of judicial separation can be passed in favor of the husband also under section 10 of the Act. But the provision in section 13(iii) is made only in favor of the wife who has been' awarded maintenance 'against the husband either under section 18 of the Hindu Adoptions and Maintenance Act, 1956. or section 125 of the Code of Criminal Proceedure, 1973, or section 4'88 of the Code of Criminal Procedure, 1898. This is another indicia of the breakdown of the marriage because living apart and an award of maintenance are strong indications that marriage has broken down beyond repair and there is no hope of the wife ever returning to cohabitation with the husband.

(21) More and more the legislature is moving towards the breakdown theory. But it has not completely broken away with the guilt theory which has dominated the law of divorce for 150 years. Section 13(1-A) is based on the breakdown theory. Section 9 is based on fault theory. After having found fault with the withdrawing spouse and after giving her time of one year for reparation, the legislature proceeds to dissolve the marriage because it has utterly broken down. The truth is that the legislature has not accepted the breakdown theory in its modern form as has been accepted in England and has now been, recommended for adoption in India by the Law. Commission in its Seventy-First Report of 1978. In England parliament has decreed : "If the marriage has broken down irretrievably, let there be a divorce." It- carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent. No longer are there long contested divorce suits. Nearly every case goes uncontested. The parties come to an agreement, if they can, on the things that matter so much to them.

(22) This is in consonance wth the modern trend not to insist on the maintenance of a union which has utterly broken down after several years of continuous separation; it may fairly be surmised that the matrimonial life is beyond repair. The only alternative is the legal dissolution of marriage and not a restoration of the marriage bond. It has now been sufficiently realised at all hands that the maintenance of-the fiction of' a marriage by a .legal tie will only drive one or the other or both spouses to sexual and other relations with outsiders clandestinely or under a social stigma rather than openly. Such a marriage serves no purpose except that it increases adudltery, fornication and personal bitterness. (Friedman-Law in A Changing Society, 2nd Ed. (1959) p. 233).

(23) The truth is that the faulty theory has utterly failed and has provided no solution to marriages which are on the rocks In the guilt theory "judges and lawyers are sometimes reduced to the role of scavengers. The layers have to look for and expose, and the judges are confronted with, the worst obscenities within a married life" (71st Report p. 14). In the breakdown theory judges certify the death of marriage and lawyers attest this fact. The breakdown theory is a recognition of the defects and demerits of guilt theory. The remedy of restitution of conjugal rights provided by section 9 of the Act is based on the assumption that the spouses have a reciprocal right to the society, company or companionship of each other. If the assumption proves wrong, divorce is the only "escape route out of a difficult situation." Origin of the Remedy (24) The remedy had its origin in ecclesiastical law

of England. In the ecclesiastical Courts before 1813 the sanction for enforcing restitution of conjugal rights was excommunication. In that year 6 months imprisonment was substituted by the English Parliament. In 1884 payments took the place of imprisonment, but at the same time failure to comply was, by section 5 of the Act of 1884, deemed to be a desertion. The Matrimonial Causes Act, 1965 altered the law. Disobedience to a decree of restitution enable the petitioning spouse (1) to obtain a decree of judicial separation; (2) obtain an order for permanent alimony or periodical payments or, if the husband is a petitioner, a settlement of the wires property.

In 1970 restitution was abolished. In India the Code- of Civil Procedure (0-21 Rules 32 and 33) has abolished imprisonment but has retained attachment of property. 'But Rule 33 confers a, discretion on the court to refuse execution by attachment and to order periodical payments to be made by the judgment-debtor to the decree-holder. So in the end there is only a financial sanction behind the restitution decree. Even if the Court is bound to make a decree, for restitution in a fit case it is no longer bound to enforce it as before by imprisonment or attachment.

(25) There may be cases where though the parties are living under the same roof yet the marriage has completely broken down. In these days of housing shortage the spouses may be compelled to live under the same roof though they have no love for each other. The practical test applied in cases where the parties are still living under the same roof is usually whether one party continues to provide matrimonial services for the other, and whether there is sharing of domestic life. If there is family or communal life there is evidence of resumption of cohabitation. If there is estrangement including a refusal to have sexual intercourse this may be evidence of consortium having come to an end. Whether cohabitation or marital relationship has or has not been resumed is a question of fact and degree to be determined according to commonsense principles. Some acts may be eloquent enough to serve as an indication of resumption of cohabitation and some of utter breakdown. The Test of Resumption of Cohabitation (26) It is true that there is a general outcry against this remedy in modern times. It .has been variously described as "archaic", "primitive" or "a rehearsal before the main drama of divorce". But in the scheme of the Act the restitution decree is a stepping stone to the more serious step of divorce, lt is a passage or passport to divorce. The Indian legislature believes that there should not be a sudden break of the marriage tic. It believes in reconciliation. It believes that cooling-off period is not only desirable but essential. This is why it allows husband and wife time to come together to the conjugal fold. In the case of restitution decree it orders the withdrawing spouse to return to cohabitation. In the case of judicial separation it sees whether there has been resumption of cohabitation within a period of one year or not. Because in a decree for judicial separation it ceases to be obligatory for the parties to cohabit. But the underlying principle is the same. Section 9 is a provision designed to encourage reconciliation. The Act's professed object is to facilitate reconciliation in matrimonial causes. "Living apart by itself spells breakdown". That this is the theory of the Indian legislature is clear from section 13(iii) of the Act. That sub-section provides for divorce by the wife on the ground that she is living apart and that since the passing of the order of maintenance in her favor there has been no resumption of cohabitation between the parties for one year or- upwards. Whether it is judicial separation or restitution or a maintenance order the legislature employs one single test: Has there been resumption of cohabitation between the parties (hiring the space of one year? If not the answer is dissolution of marriage.

(27) In short cohabitation is the highest common factor in the material provisions. It is the essence of married life. Take away cohabitations and you take the bottom out of marriage. Resumption of cohabitation means restitution of conjugal rights. Non-resumption means the death of marriage. This is the legislative policy. This court neither approves nor condemns any legislative policy.

According to the Indian legislature the marriage has not to be ended atonce. The breakdown of marriage does not take place in one day. It is a process in which the spouses drift apart. First there is apathy, then indifference, and then positive aversion. The consortium of husband' and wife, the kind of association which is only possible between husband and wife, ultimately comes loan end.

Divorce Structure (28) The divorce structure contemplated in section 13(1-A). is based on section 9 'proceedings. I section 9 is unconstitutional as Chaudhary J. has held, it must necessarily follow that section 13(1-A)(ii) is also constitutionally void. By a single stroke the learned judge has demolished this essential part of the divorce structure. Not only has he held section 9 to be bad he has also, though indirectly, held that henceforth there 'will be no decree of restitution and no divorce under section 13(1-A)(ii). The function of the counts Is to interpret and apply the law as enacted by the legislature, "Courts are concerned only with power to enact statutes, not with their wisdom". [Stone J- in U.S. v. Butler 297 U.S. 1 (1936)] (14). A Plea for Abolition (29) I am aware that there is a body of opinion which favors the abolition of this remedy. The main argument of the abolitionists is that you can take the horse to water but you cannot make it drink. The withdrawing spouse cannot be compelled to cohabit even though a decree is passed a.gairist him or her. Some academic have strongly argued for its abolition. (See Article on Restitution of Conjugal Rights under Hindu Law : A Plea for the abolition of the remedy, by R. K. Aggarwal, 1970 Journal of the Indian Law Institute page 257). But that is to be done by the legislature and not by the courts. Others have argued for an improvement upon sections 9 and 13(I-A). It has been suggested that after the passing of the decree of restitution and passing of a prescribed period of time within which cohabitation may be resumed, there should be an automatic distillation of marriage if .there is no return by the withdrawing spouse to cohabitation. It is suggested that there should be no aped for fresh divorce proceedings. (See Civil Marriage Law; Perspective and Prospects Indian Law Institute Publication of 1978).

(30) Professor Dtaican Derrett has argued turn retention of the remedy. He says :

"THE practical utility of the remedy is little in contemporary England, but 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 [Introduction to Modem Hindu Law (1963) p. 197].

The Law Commission, in their Fifty-ninth Report have- not recommended its abolition. Nor in their Seventy-First Report of 1978. The Commission was aware that it had been abolished in England under section 20 of the Matrimonial Proceedings Act 1970.

(See Foot Note 7 at page 55 of the 59th Report).

(31) A recent writer has suggested that "the' opinion of Derrett is more realistic and that the Hindu society is not mature enough to do away with the remedy. Its abolition would be like throwing away the baby with the bath-water." [R. C. Nagpal .Modern Hindu Law (1983) edition page 110]. I agree with the view of Derrett.

(32) Section 9 is the only positive relief under the Act aiming at the preservation of the marriage. The mental make up of the Anglo-Saxons is different from ours. The truth is that if it is requisite that our marriage laws should conform to a logical coherence, that is a matter which the legislature-must declare and provide. Time has come to recognise that matrimonial offences are in many cases merely symptomatic of the breakdown of the marriage and that there should also be a provision for divorce in cases where, quite apart from the commission of such offences, the marriage has broken down completely. Courts should be relieved of the difficult task of assigning" where fault lay, an issue in matrimony oft-times too subtle for the average man to determine. (Raydea on Divorce Vol. I (14th edition) (1983) p. 311]. But the remedy lies .with the legislature. On this part of the case my conclusion is this Dicta of emment judges, notably Lord Stowell, are all against the view that restitution decree cornels the wife "to have sex" with an "unwilling party". No case has ever said anything of the sort. None of the cases relied upon says anything of the sort. Section 9 and Article 14 :

(33) There remains the second argument that section 9 offends Article 14 of the Constitution which, found favor with A the learned judge. He held that in the remedy of restitution there is inequality because "a suit for restitution by the wife is tare. A passage in Gupte's 'Hindu Law in British India' p. 99, 2nd Edition attests to this fact." I have consulted Gupte's book. It is an old book of 1947 with a supplement of 1955. At p. 929 (not p. 99 as the learned judge says) the author says : "A suit for restitution by the wife is rare". This was true before the Hindu Marriage Act was enacted in 1955. Gupte was referring to old Hindu law and not to the Act because the Act had not been passed by then. Previously under the Act the decree-holder alone was entitled to sue for divorce. By the Amending Act 44 of 1964 "either party to a marriage" is allowed to present a petition on the ground given in section 13(1-A) .Even the party found guilty in restitution proceedings is entitled to petition for divorce under section 13(1-A)(ii). -The theory that one cannot take advantage of one's wrong has not been adhered to in the Hindu Marriage Act." (71st Report p. 16). There is complete equality of the sexes here and equal protection of the laws. I do not see how section 9 can be struck down as voltaic of' Article 14 of the Constitution. Constitutional Law and Faintly Law (34) One general observation must be made. Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14- have anyplace. In a sensitive sphere which is atonce most intimate and delicate the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond. That the restitution remedy was abolished in England in 1970 by Section 20 of the Matrimonial Proceedings and Properties Act 1970. on the recommendation of the Law Commission headed by Justice Scarmann is no ground to hold that it is unconstitutional in the Indian set-up.

(35) In the home the consideration that really obtains is that natural love and affection which

[Balfour v. Balfour (1919) 2 K.B. 571 (15)].

(36) This illustrates that the house of everyone is to him his castle and fortress. The spouses can claim a kind of sacred protection behind the door of the family home which, generally speaking, the civil authority may not penetrate. The introduction of constitutional Jaw into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in ; relationship which should be obviously as far as possible protected from. possibilities of that kind. The "domestic community" does not rest on contracts sealed with seals and sealing wax. Nor on constitutional law. It rests on that kind of moral cement which unites and produces "two-in-oneship".

(37) The learned judge has quoted men of letter like Have lock Ellis and Bertrand Russell. It is well known that Bertrand Russell had iconolastic. views on marriage and morals. For in stance he advocated that "aulery in itself should not, to my mind, be a ground for divorce. unless people are restrained I inhibitions or strong moral scruples, it is very unlikely that they will go through life without occasionally having strong- impulses to adultery. But such impulses do not by any means necessarily imply that the marriage no longer serves, its' purpose [Marriage and Morals (1967) p. 116]. The Indian legislature has not followed Russell's views in this or in other respects The fact is that the law of the land cannot be coextensive with the law of. morals, nor can the civil consequences of marriage be identical with its religious consequences.

(38) The learned judge has called restitution a "barbarous remedy". He has quoted Lord Herschell in Russell v. Russell, (1897) A.C. 395 (16). But Lor Herschell was, not saying this. What he was saying at pp. 455-56 was that reasonable excuse was not confined only to the grounds of divorce. It can as well be "something short of legal cruelty" which might constitute a reasonable excuse for refusing restitution. This is precisely what happened in India as the history of the Act would show. Section 9(2) as originally enacted provided that "Nothing a hall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce." This created considerable diffculty. The Law Commission in its Fifty-Ninth Report recommended its deletion. It is now possible for the- party to plead a reasonable excuse which may not necessarily be a ground either for judicial separation or nullity or divorce. So the Act was amended and by Act No. 68 of 1976 section 9(2) was delete This brought the law in conformity with the opinion of Lord Herschell. It will, thereore, appear that Lord .Herschell's expression "barbarous" was used in a different context. One single sentence from his judgment docs not empower the court to strike down lection 9 on the ground that it is "barbarous". The Deference of the Attorney General (39) The learned Attorney General criticised the judgment in Sareetha on. a variety of grounds. In the first place he said that marriage, according to' Hindu Law, is a samsara or a .sacrament and a holy union for the performance of religious duties, divorce dissolution of marriage are concepts which were ..uoene.to 'Hindu Law before the statute stepped in to modify the.. itradi. tional' law. He referred to Sawarjya Lakshnmi v. Dr. G.G. pad Rao and 'Devuloalli wara Sastri v. Polavarapu. (19.11) I.L.R. 34. Mad. 422'(18).

(40) Secondly he submitted that the social implications of the judgment were far reaching an if the view taken in Sareetha is allowed to prevail it will undermine the foundations of our social

organisation. The consequences of the judgment, he argued, are so grave as to destroy the very foundation of conjugal life. He pointed out that the Press praised the judgment but the praise was based on an insufficient understanding of our law. He entered a vigorous protest against the opinion that a mere commerce between the sexes is itself marriage. One great defect of Andhra judgment, it appears to me, is that it regards marriage as a legalised means of sexual self-satisfaction and not primarily as a partnership for life. Marriage does not exist solely for sexual congress. The reciprocal duties and obligations of the husband and wife under the Hindu Law will be found exhaustively discussed by Mahmood .1. in Binda v. Kauslia, 2nd 13 All. 126(20). Samsara is not sex. Nor sex be 31 and end-all of marrige. Marriage is not-the mere gratification of animal appetite. Nor a sheer self-indulgence into the lusts of the flesh. It creates mutual rights and obligations as all contracts do, and beyond that it confers a status.

(41) A marriage is not every casual commerce. A mere ..casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute .marriage. But when two parties agree to have that commerce for the procreation and bringing up of the children, and for such lasting cohabitation that would be a marriage in the sight of God and man. Cohabitation continues to the end of life. It is not mere temporary or casual commerce, but a contract of a permanent nature, in the intention of the parties. Marriage is a contract of the greatest importance in civil institutions, and it is charged with a vast variety of rights and obligations. Right.of property are attached to it. The essence of matrimony, is consent. (Linda v. Belisario (1795) 1 Hag. Con. 216(21) per Sir William Scott at pp 30 232.] (42) MARRIAGE- is the very foundation of' civil -.acieiy. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.. .It is an institution in. the maintenance of which the public is deeply interested, for it is the foundation of the family and of society without which there would be neither civilisation nor progress. (Meganatha v. Smt. Susheela. Air 1957 Mad. (426) (22)]. Whether it is English law or the Indian Act marriage is a voluntary union for life of one man and one woman to the exclusion of all others. [Hyde.v. Hyde. (1866) L.R. 1 P and D 130(23). 133 per Lord Penzance-].

(43) Thirdly, he argued, that marriage. being voluntary and consensual in character the court will compel the parties to live together again if they are living apart without any sufficient reason. If there is withdrawal or "subtraction", as Blackstone called it, and one party lives separate from the other without: any sufficient reason, they will be compelled to come together again. This is what the parties had themselves contracted. Cohabitation is an essential term of the contract, the very soul of marriage. If the court enforces the Contract there is nothing wrong. The parties had voluntarily stipulated this .at the time of entering into the marriage bond. In a sense there is no compulsion now because restitution decree is a stepping stone to divorce. In 1875 in Gatha Ram Mistree v. Mohita Kochia Atteah, 14 Beng. L. R. 29& (24) Mark by J. expressed the opinion that -.a decree for restitution is a mere declaration of rights. It was argued in 1886 before the Bombay High Court that a suit for restitution is a discredited rsmedy. But the argument was rejected. [See Dadaji Bhikaji v. Rukambai, (1886) I.L.R. 10 Born. .(301) (25)].

(44) Fourthly the said that section 0 is based upon reason and not brute force. The husband cannot shut up the wife in one room or take her by force. There may be good grounds for refusing to the husband the assistance of-the Court in a restitution exercise of its discretion may justly ietase a

decree-for restitution proceeding. There may be cases in which the court in he tion of conjugal rights. [Bai Jivi v. Nar Singh Lalbhai, (1877) R 51 Born. 429(26)]. It has repeatedly been held that the court will not compel the wife; to summit to the embraces of the- husband if it finds that it is iniquitous to 30 so. When court's intervention is asked for it may be refused if it is not just and equitable in the circumstances of the. case If the petitioner insincere and his petition is not bona fide the court will refuse restitution. The courts are in the matter of granting restitution decree governed by principles of equity. justice, and food conscience. (Kondal v. Ranganavaki Air 1924 Mad. 49) (27).

(45) Fifthly, attorney general argued, that the constitutional lity of section 9 has to be adjudged "by the generlity of cases it covers, and not by the freaks and exceptions it martyrs". That a few freak instances of hardship may arise on either side cannot be a ground to invalidate t^e legislation. This, he said, was established by the Supren,e Court decisions in R. S. Joshi v. Ajit Mills, per Krishna ^yei J. and Tamil Nadu Education Dcptt. v. State of Tamil Nadu^ Air 1980 Sc 279 (383) (29).

(46) Sixthly, he argued that section 9 is constitutionally valid. Applying" the standard that law has to be just, fair and reasonable as enunciated in Menka Gandhi, , section. 9, hs said tries to bring the parties together. Whether to grant a restitution decreewould be just, fair and reasonable in the facts and circumstances of a given case is left to the court to be decided in its judicial discretion. What better guarantee can the law afford for the "inviolability of t^e body and mind" of the wife ar.d her "marital privacy" so-call- ed. The matrimonial home must be reserved. Section 9 is a provision turn reconciliation In the tiue spirit of the Act. It is in the interests of the State that family life should be maintained, and that homes should not be broken up by the dissolution of the marriage of parents. Even ?J the absence of children, it i" m the interest of the State that if possible the marriage tie shc^dd remain stable and be maintained, ll'at in the vast number, of cases there is no reconciliation i^ not a ground for striking down the law. We must bear in mind all classes of cases. Taking consortium in the widest serse of the companionship of the wife it is in public interest that th^ marital life must be restored un- less one spouse has adopted a courr.s of conduct calculated to break the spirit of the sufferer, or a course of conduct which is a kind of tyranny to the other spouse.

(47) The wisdom of the legislation the courts cannot question, It is the duly of the judges to give effect, as best as they can, to the laws as Parliament ends them. whatever be their private opinions or in some cases their religious beliefs. In mv opinion the criticism of ?hs attorney general invalid. The judgment in Sareetha is based on a misconception of the (rue and of marriage. A disproportionate emphasis onsex. almost A bordering on obsession, has conjured the \ie\v of the learned judge. This is the crux of the issue. With the greatest respect to the learned judge I entirely disagree with him and with those who share his views.

(48) The Act combines the old mid the new. It is both traditional and modern in its outlook. Marriage is a civil contract and a religious ceremony. The essential features of the Act are these : equality of sexes, consent, religious rites and ceremonies, cohabitation and ideal of partners in life, monogamy, divorce, financial provisions, a statutory right to maintenance, and reconciliation. The two things, the multiplicity of divorces and the emancipated status of women, have gone necessarily hand in hand. The one could not have happened without the other : .both may be said to have raced helter skelter and sides by side.

(49) Constitution remedy may appear to be a survival of the concept 'of marital unity. Today it may appear outdated be- cause law is fast changing in response to the changing needs and ideals of society. But we have to see it with Hindu eyes of 1955. Section 9 is representative of a wise conservatism: of the law, as divorce was the produce of liberalism. It is the province of the judge to expound the law only and not to speculate upon what is best, in his opinion, for the advantage of the community. The judges are bound by the law. They are not authorised to establish as law everything which they may think for the public good, and prohibit everything which they think otherwise (Continental Tyre and Rubber Co. v. Daimler Co. (1915) I K.B. 893(31), 912 per Lord Reading).

(50) On marriage husband and wife became for many purposes one person in law, a doctrine of common l'aw of great antiquity. The every being of the woman was suspended during marriage or at least was incorporated and consolidated in- H to that of her husband. (Blackstone) In the words of a late Xix century lawyer. "The Creator took from Adam a rib and made it Eve; the common Inw of England endeavored to A reverse the process, to replace the rib and remerge the per- sonalities." (A Century of Family Law Graveson & Crane p. 2). This community of interest between husband and wife is reflected in section 120 of the Indian Evidence Act. In many fields this doctrine was abolished in England, when the women's epoch began. The shackles of servitude fell from the limbs of married women.

(51) In the scheme of the Act the restitution decree is the high road to divorce. There is only a waiting period of one year before the marriage is dissolved. There is no quarrelling. There is lull. Spouses live during the period under a type of legal armistice, or the non-compliance of the restitution decree the court pronounces divorce at the end of ons year. D So heat has been taken out of divorce. There is a great merit.

(52) Section 9 aims at "tw-in-onership", to us^ a happy phrase. Under the Act it serves a double purpose. It first E finds the fault and where it lies. Secondly it leads to the dissolution of the marriage, if there is no resumption of cohabitation. The legislative acts on the principle: "Where love can- not be, there can be left of wedlock nothing but the empty husk" (John Mikon). Section 9 combines the fault theory and the breakdown theory in one go. Summary and Conclusiol (53) In Forsfer v. Forster (1790) Hag. Con. 144 Loi " Stowell said 'that "the duty of matrimonial intercourse canrii be compelled by the court, though matrimonial cohabitation may." In Orme v. Orme (1824) 2 Add 382 it was said: "THE Eclesiasti'c Court can only interfere, in Ike v, of restitution, where matrimonial cohabitation suspended. The single duty which it can enforce by its decree in a suit of this nature is that A married parties 'living together'. It cannot at- tempt to enforce any in super-addition to this. Hence it is incompetent to the wife to sue the husband, or the husband the. wife, for 'restitution of conjugal right's, pending cohabitation."

Nearly two hundred years ago. Lord Stowell said: "The Court can decree cohabitation; it cannot decree sexual inter- course." (Forester v. ForsterJ. "The parties can cohabit, without there being sexual intercourse between them; although as a rule there is such intercourse if the parties are competent or of an age when sexual intercourse is likely to take place, but there may be cohabitation without sexual intercourse." (Evans v. Evans (1948) I K.B. 175, 180 per Lord Goddard D (J). Quoting Jowitt's Dictionary the learned 'judge thought that "Marital intercourse" is synonymous with sexual

intercourse. This is a misunderstanding of a legal phrase. It means consortium. It means fellowship. It means common lot. The Indian legislature was following Lord Stowell and not -Bertland Russell.

(54) Lord Stowell (Sir William Scott) was a distinguished judge (1945-1836). His knowledge of matrimonial law was unrivalled. His judgments on matrimonial and maritime law are classic. We have to go to his decisions in order to under- stand the precise connotation and significance of this remedy of restitution. This is necessary because Indian law has adopted this remedy from English law. This is why I have traced the history of this remedy in English law from its ecclesiastical origin.

(55) .MARRIAGE is defined in the Encyclopedia Brittannica, 11th ed. vol. 17, p. 753 as "a physical, legal and moral union ii between man and woman in complete community of life for the establishment of a family." The physical union takes the first place. The procreation of children is an essential element. On it depends the creation of the family. On the family depends the welfare of the nation. "Marriage is rooted in the family rather than the family in the marriage." (Westermark).

(56) There is nothing wrong if the law enforces cohabitation, i.e. living together. It does not and cannot enforce sexual intercourse. That the Court enforces sexual 'intercourse is a mistaken notion. What is wrong if he court passed the decree of restitution in the husband's suit in Anne Saheb v. Tarabai, which the learned judge described as an "inhibited tregedy"? This is pure rhetoric. "Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is a wrong thing." It is the international breach of one of the ties of marriage. Tarabai was given an opportunity to attempt reconciliation and resume cohabitation. If she then refuses, she certainly make use of her statutory right under Section 13(IA)(ii). That is all.

(57) The spouse guilty of willful defusal of sexual intercourse does his or her painter a serious and perhaps a cruel wrong. Whether willful refusals of sexual relations will amount to desertion , do not decide. In certain circumstances it will amount to cruelty. In Sheldon v. Sheldon, (1966) 2 All E.R. 257(33)(CA) the Cote of Appeal held that a husband's persistent refusal of sexual intercourse without explanation over a long period of time which had caused grave injury to wife's health amounted to cruelty and justified the wife in leaving the matrimonial home.

(58) In marriage sex business is not hurried and beastly. It is a biological necessity. It is fundamental to the marriage institution in the accepted and understood sense. The restitution decree is essentially an attempted reconciliation.

(59) If reconciliation fails the question of maintenance will at once arise. If there is no living together maintenance will Ii have to be fixed for living apart. A maintenance obligation has a different practical significance in a country such as Sweden, where most married women are employed and there are extensive welfare progammes, than, for example, in India.

(60) Restitution decree is a peg on which to hang a divorce. It is a foothold and handhold for section 13(1 A). "Un availability of divorce leads to immorality". So the legislature is crea,ting a number of grounds for divorce. What is bad in it? Restitution of conjugal rights has to be seen in the wider perspective of Act taken as a whole. To declare section 9 unconstitutional without having regard to

section 13(1-A) is to take too narrow a view.

Sections 9, 13(1-A) and 13(iii) envisage the same pattern of living husband and wife living together, husband behaving as husband and the wife behaving as a wife, doing housewifely duties. Cohabitation is the common denominator of these provisions. This is their warp and woof. Section 9 tries to bring them together. Sections 13(1-A) and (iii) dissolve -the union when there has been no resumption of cohabitation for the space of one year and upwards.

(61) The amendment of Section 13(1-A) in 1964 is a legislative recognition of the principle that in the interest of society if there has been a breakdown of the marriage there is no purpose in keeping the parties tied down to each other. (Madhukar Bhaskar Sheorev v. Saral Madhukar Sheodev. per Nain J.). This silo- section incorporates the breakdown theory.

(62) What is this breakdown theory? Breakdown of "marriage may be defined as "such failure in the matrimonial relationship that no reasonable probability remains of the spouses again living together as husband and wife for mutual comport and support." It means what cannot be mended should be ended. When marriage breaks down it is wrong to thing in terms of quality party and innocent party. 'Divorce is not though hitherto that has been the dominant notion -"a reward for marital virtue on the one side and a penalty for marital deligency, on the other." but "a defect for both, a failure of his marital 'two-in-one ship' in which both the members, however unequal their responsibility, arc inevitably involved together." (Mortner Committee of England 1964). This theory replaces all the fault grounds of divorce and recommends irretrievable breakdown as the sole ground of divorce. The Divorce Reforms Act 1969 in .England made the irretrievable breakdown of "MARRIAGE as the sole ground for divorce, and judicial separation. The English Act introduced a most fundamental change is the divorce policy of Parliament. The Divorce Reforms Act, 1969, has been repealed, and the same provisions were reenacted in the Matrimonial Causes Act, 1973. It is a part of a movement to remove the notion of guilty or fault as a necessary basis for a decree of divorce. The is a drastic reform of divorce law because it eliminates fault or guilt as the basis of divorce. "In this object" says Rayden. the English Act "has very largely succeeded: it has also resulted in a massive increase in the number of divorces'. [Rayden on Divorce, (1983) 14th cd. p. 13].

(63) It is increasingly felt that a theory based on fault. guilt, or offence, has the effect of deepening marital wound and renders the possibility of reconciliation increasingly more difficult. Even if both parties are innocent they may not be able to click. Even the most fervent and sincere hope of oni spouse that there will be a reconciliation cannot create : possibility of reconciliation where the other spouse is unreconciliable. Whatever may be the cause of breakdown, if there is withdrawal from the matrimonial obligation with the Men of destroying the matrimonial consortium, as well as physical separation, there is clear proof that the marriage is at an end.

(64) Mere physical separation can never constitute livid apart, even. if long continued. There must also be demon trated, on the part of one or both spouses, a mental attitude averse to cohabitation. "A husband and wife are living together not only when they are residing together in the sa. house, but also when they are living in different places, even they are separated by the high seas, provided the consortium has not been determined." [R v. Cremer (1919) I Kb 564 (569) (35)].

(65) There are, broadly speaking, two grounds: the 'fault followers' and the 'breakdown believers'. Fault theory is more and more losing ground to the breakdown theory. The Indian Act is a curious mixture of (1) the fault theory, (2) the breakdown theory and (3) mutual consent theory. It is a piece of mosaic work. In 1976 the Indian Legislature introduced divorce by mutual consent by enacting section 138. In 1964 the Legislature enacted section 13(1-A) permitting either part to the decree of restitution of conjugal rights or Judicial separation to claim divorce on the expiry of two years (reduced to one year in 1976) of the passing of the decree. This provision is an "undeclared adherence to the breakdown theory". (R.K. Aggarwal Reform of Matrimonial Law p. 96 in Studies in the Hindu Marriage 'and the Special Marriage Acts published by the Indian Law Institute). Divorce by mutual' consent is in truth an extension of the breakdown theory. It will be unrealistic and inhuman to order maintenance of a union in which the parties have agreed to cut asunder the nuptial tie. Section 9 serves a useful purpose because in a society like ours it gives a cooling-off period. Prof. Derrett sees practical utility in this remedy. Mr. K.C. Srivastava of Lucknow University also takes the same view. (See his paper on the Hindu Marriage Act p. 102 in the Studies of I.L.T.). .So section 9 is not without its advocates.

(66) According to the Law Commission of England the objectives of a good divorce law are: (1) to buttress, rather than undermine the stability of marriage and (ii) when, regretably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humilitation." Field of Choice (Commd. 3123 Para 15) Section 9 seeks to achieve the first objective. It aims at the stability of marriage. It is a fundamental principle in matrimonial law that one spouse is entitled to the society and comfort of the other, and where one abandoned the other without just cause, the old Ecclesiastical Courts, upon the petition of the other, would grant a decree for the restitution of conjugal rights. The court is enforcing the matrimonial cohabitation. Though the duty of matrimonial intercourse cannot be compelled by the court, matrimonial cohabitation may. [Forster v. Forster (supra)].

(67) The second objective is achieved by section 13(1-A)(ii). A disobeyed decree of restitution will enable either party to seek divorce. This is the introduction of the breakdown theory in the Act. Section 13(1A)(ii) is founded on section 9. It presupposes a restitution decree under section 9. That decree is passed against the guilt party. But both parties can petition for divorce. The Legislature is looking at. the state of the divorce market. If it finds that. there is more demand for divorce than it can meet it adds newer and newer grounds of divorce. And the list becomes longer and longer. The Law Commission of India in its 71st Report of 1978 has recommended the irretrievable breakdown of marriage as an additional-ground of divorce. The trend towards greater freedom appears to assert itself increasingly. From 1955 to 1976 there has been a remarkable liberalisation of divorce law in India.

(68) What is surprising is that everyone denounces the remedy of restitution but welcomes the ground of divorce based on it in section 13(1-A)(ii). The latter provision is praised as a wholesome provision. Because it introduced the breakdown theory in Indian law for the first time a theory which is most favored today in the countries of the West Recently there has been a strong plea for the abolition of the restitution remedy. This movement drew its inspiration from the Matrimonial Proceedings and Property Act 1970 which by section 20 abolished 'the right to claim restitution of

conjugal rights in England.

(69) What is often forgotten by the abolitionists is that sections 9 and 13(1-A) are of a piece. You cannot abolish section 9 without abolishing section 13(1-A)(ii). So the good will be thrown away with the bad. What has to be remembered is that it is not given to the judges to rewrite the statute. It is for the legislature to amend and abrogate the law. As long as it does not-change the law we must learn to live with it.

(70) Is England the restitution remedy was abolished after more than 150 years, after the Parliament introduced the irretrievable breakdown of marriage as the sole ground for divorce. The Indian Parliament has not so far enacted this law though it is engaging its attention.

(71) In conclusion I think that the arguments which found favor with the learned judge in holding that section 9 is constitutionally void are not sound. They, are a dangerous and fallacious line of arguments, I cannot agree that section 9 is unconstitutional however the remedy may be outmoded or out of tune with the times. The restitution decree in the scheme of the- Act is a preparation for divorce if the parties do not come together. But the Legislature first believes in coaxing 'and cajoling the withdrawing spouse to return to cohabitation, a value it prizes most. Whether the wife is a top actress as was Sareetha in the case before the learned judge or an ordinary wife, the marriage in each case has she same legal consequences.

(72) The result of constitutional logic is an astonishing conclusion reached by a research inspired by curiosity. The learned judge thought that restitution remedy achieves nothing. "Section 9 of the Act does not subserve any social good", he said. In the legislative scheme it has a purpose to serve and a role to play, .It allows the parties a cooling-off period. "People should be able to marry again when they can obtain a death certificate in respect of a marriage already long since dead". This is a road to divorce.

(73) It appears to me that restitution decree serves a legislative purpose in family law. As the poet has said: "There is a soul of goodness is things evil, Would men observantly distil it out."

(74) I might add that it may be that law is not always logical, but neither is human behavior. Law is much more concerned with human behavior than with logic. If human behavior ceases to be logical, than the law has to keep pace. with human behavior, such as it is, and not as it would be in a logical world.

(75) In the end I will repeat what I have said before. It is for the Legislature to abolish the remedy of restitution and not for the courts to strike down section 9 on the ground that it is 17 unconstitutional. In my opinion section 9 is perfectly valid. The appeal: Facts (76) Now I turn to the appeal These are the facts. The appellant, Harvinder Kaur, was married to the respondent, Harminder. Singh Chaudhary, on 10th October, 1976. The wife is a working woman. So is the husband. The wife is employed in Indian PetroChemical Limited. She was getting a salary of Rs. 600 at the time of the marriage. The husband is working as a traffic manager in Sita Travels. His present salary is about Rs. 2000 per month. There is a. child of the marriage. A son was born to them on

14th July. 1978. According to the husband the wife left the matrimonial home in May, 1978. So he brought a petition under section 9 of the Hindu Marriage Act on 14th February, 1979.

(77) In her written statement the wife has given a catalogue of her grievances to show that she was maltreated by the husband and his mother. Finally she said that she was prepared to join the company of the husband if he was willing to set up an independent residence.

(78) In the catalogue of her coroplain's she has mentioned a number of incidents to show that the husband and his mother were cruel to her and that she was turned out of the house by the husband on 19th January, 1978. The burden to prove that there was sufficient cause for withdrawal from the society of the husband lay on her. She examined a number of witnesses. To Tebut the case of the wife the husband examined himself and his parents. In a careful judgment the learned judge has discussed the entire evidence. He disbelieved the evidence of the wife. He found her evidence discrepant and unreliable. On the whole he was of the view that she and her witnesses were not trustworthy. finding that there was no reasonable cause, he granted a decree of restitution of conjugal rights to the husband. From,that decree the wife appeals to this court.

(79) In the category of complaints the wife has mentioned the following incidents: In the first place she says that on the first day of marriage she went to a fetch with her husband, his two married sisters, his brother-in-law and younger brother. They all persuaded her to accompany them to fete. She agreed. On her return from the rate the wife's, mother-in-law in a "stern and commanding voice" asked her not to leave the house without her prior permission. She has described the mother-in-law as an "absolute dictator" wielding "dictatorial powers in the home". The husband, she says, remained silent when the mother-in-law rebuked her. In her evidence she has referred only to be husband and his sister having accompanied her to the fete and none else. She goes on to say "when I returned back my mother-in-law abused me as to why I did go with my husband and sister." When she was cross-examined, she admitted that she went to the fete in the presence of her mother-in-law. A hide later she added that she did not know whether mother-in-law was there or not. On this evidence the learned judge came to the conclusion that her evidence was unreliable and that no such incident happened.

(80) Secondly, the wife said that within 2 or 3 days of the marriage she was asked to bring from her father's house cash memos regarding the furniture which had been given in marriage so that this furniture could be resold and cash may be pocketed. Her case was that this furniture was not liked by the husband's parents as it was below their standard and they did not want to keep it in the house. On this point there is no trustworthy evidence. It has not been proved as to what was the furniture that was .given' in marriage. It has not been established as lo what furniture -was sold to wife's father before marriage and what was resold by the husband's parents. The wife's positive case is that a dressing table was returned to its seller. Balwant Singh, a witness of repurchase, was produced. He said that E he had repurchased a dressing table from the husband which he had originally sold to wife's father of the value of Rs. 1070. The witness has been disbelieved. He did not produce his bill book. Neither has he proved the initial sale of furniture nor the subsequent repurchase. This witness says that he knew the wife's father because he was meeting him in a Gurdwara at Karol Bagh. The judge thought that this was not possible because the wife's father was

living in National Park and the witness was living at Malka Ganj. Gurdwara at Karol Bagh is far away from the residence of these two persons.

(81) The third complaint of the wife is that her entire salary used to be taken by the mother-in-law and she was given a paltry sum of Rs. 50 per month out of which she had to spend Rs. 40 on transport. She was left with Rs. 10 only and that was insufficient for her. It was admitted by the wife that the husband took her with him on his motor cycle and left her at the office. In September 1977 she says the husband purchased a car and took her in car to her office. She admitted that their offices were very near and they used to have lunch together. So the learned judge rejected this theory that the wife was being given only Rs. 50 for her expenses.

(82) Fourthly, the wife complained that she had to prepare in the house breakfast, lunch and dinner, and was made to do other household work including dusting. This is cited by her as an example of ill-treatment. It was admitted by the wife in her evidence that there was a part-time servant in the house. If the wife is asked to do some household work and prepare food for the family when the servant is not available there seems to me nothing wrong in this. This was one of the most trivial excuses she could make, in my opinion.

(83) Fifthly, she complained of bleeding from the vagina on three occasions when the husband did not take care of her and did not provide, medical help in time. The first occasion was a month after the marriage. One night, she narrated, the husband had sexual intercourse with her. Thereafter she started bleeding. The husband went to sleep. He did not care for the wife. In the morning her brother came and took her away and then she was given medical treatment. The second occasion when she bled was in March 1977. On this occasion she F started bleeding in the office. She borrowed Rs, 10 from one Mr. Arora, a colleague in the office, and went to her father's house straight from the office. If there is any complaint it can be only for the first occasion and not the second. On the second occasion she straightway went to her father's house. It appears to me on evidence that her complaints are without substance. Dr. Sethi (RW 10) was produced by her. From his evidence it appears that he was treating her from 1975.

(84) The third occasion of bleeding was in December, 1977. She was taken to Mool Chand Hospital and Doctor Shiela Mehra, a specialist, examined her at that time. Dr. Mehra, she says, gave "hell" to the husband on the ground that they had brought her very late and there could have been a miscarriage in the meanwhile. The doctor advised rest. But the wife was not allowed to take rest because she was asked to do the household work. Her evidence did not inspire confidence, in the judge. The wife admits that she remained in the hospital fur about a week. "It is correct that my mother-in-law stayed with me in the hospital for a day." She admits that food was coming from husband's house for some time. She admits that she was treated by Dr. Shiela Mehra. On this evidence it does not appear to me that the husband or his mother were callous and indifferent to the wife's illness. The mother-in-law stayed in the hospital at 'least for a day if not more. She sent food from home. She took her to the hospital. On the evidence it docs not appear that this complaint is justified.

(85) Sixthly, the wife said that the husband wanted to grab her plot of land which has been allotted to her in Kohat Cooperative Society on 9-2-1979. Her case is that the petition for restitution of conjugal rights was filed in February l979 to grab the plot which had been allotted a few days before to the wife. On this issue there is no worthwhile evidence. One Purshottam Singh Rw 7 was produced. In his oral testimony he deposed about the allotment of plot. But he has not produced any record of the society. If there was any allotment a registered document, whether of lease or sale, must have been executed. No such document has been produced to prove that the plot was really allotted on 9-2-1979, as is the wife's case. On a draw of lots on 27-11-77 she became entitled to a plot of land. No record has been produced either of the draw of lots or of allotment or of ownership or even of the wife's membership of the society.

(86) Seventhly, the wife in her evidence said that she was asked to bring old clothes from her mothers house which she wore before marriage. This was done, according to her, to humiliate her. But what was the real purpose of this humiliation I have not been able to understand. The wife went to her mother. She gave new clothes instead of old which she brought to the husband's house. I think it is a most trivial excuse and the judge was right in discarding it.

(87) There was considerable debate before me on one other point. It is not in dispute that the wife left the matrimonial home in 1978. But the parties arc at variance on the date of leaving. According to the wife the husband left her at her father's house on 19-1-1978. According to the husband she went away from .the Matrimonial home in May 1978. in my opinion nothing turns on this. That they are living apart is clear. That there is a withdrawal from the society of the husband is evident. The only question is : Is there reasonable excuse by the wife for withdrawing from the husband's society ? This she has signally failed in proving.

(88) Then another excuse was put forward. This was about separate residence. In her written statement the wife pleaded that she was prepared to join the husband if he "sets up an independent house to live happily." During the proceedings she said on 26-11-79 to the Judge that "she is not willing to go to live with the petitioner where his parents are also residing." In her statement as a witness she deposed : "I am ready and willing to live with the petitioner but not in the same house." It appears to me that this is the real dispute. The evidence of the mother-in-law on this point suggests that she warn from the matrimonial home of her own accord and not because of any ill-treatment. Now she refuses to return to 'the matrimonial home because the concept of a separate residence has entered her imagination.

(89) Counsel for the wife referred to Bhagat Ram v. Smt. Santosh. Kumari. 1981 Plr 46 in support of her contention that this was a good excuse for the wife and until and unless the husband sets up an independent house she has a sufficient cause for not joining her. This question was raised before the judge in the court below. He was of the view that the husband's parents are aged and dependent on him and it would not be right for him to leave them because "after all the parents eave some right upon their children and children correspondingly owe some duty to their parents. A balance has to be struck by the husband in his love towards the parents and that towards his wife". It cannot, in my opinion, be urged by the wife as a ground for living apart. The casting vote is not with her. Nor with the husband. It is a matter which has got to be decided mutually and amicably between them. By

both in co-operation. There may be cases where the husband may have to choose between his parents and his wife. But that is a question for the husband and the wife to resolve together The wife. cannot dictate to the husband that unless and until he sets up an independent residence she will not join him. That will be a unilateral decision. If it is unilateral without regard to the wishes and desires of the husband it must be termed as 'unreasonable'.

(90) There is one another point in this case. The husband and wife lived together till January 1978, as is the wife's own case. She has admitted that there were normal sex relations between them during this period. "It is correct that I had normal sexual relations with my husband". There is a child of the marriage. This is strong evidence of cohabitation. There was consortium. There was company, assistance, affection and fellowship between the spouses. When the wife left the matrimonial home consortium was broken.

(91) After November 1977 when the wife conceived there arc only three surviving complaints. One is bleeding on the occasion of December 1977. the second is that she was' required to do the household work till January 1978 when she left the matrimonial home; and the third is about the husband's attempt to grab her plot of land. I have dealt with these complaints separately. I find that there is no dependable evidence in support of these complaints.

(92) On the whole case it appears to me that the wife deliberately broke up the matrimonial home and brought to an end the matrimonial life, so far as she was able to bring those results about. The breaker-up of the home is the wife. She has disrupted the matrimonial home without sufficient cause. There is withdrawal not only from' intercourse but from cohabitation without just cause.

For these reasons the appeal is dismissed. The decree of the trial judge dated 20-4-1981 is affirmed. The parties are left to bear their own costs.