

LEGAL ASPECTS OF RESTITUTION OF CONJUGAL RIGHTS

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I. Introduction

Restitution of conjugal right arises out of a valid marriage. Now, marriage (nikah) is a civil contract which has for its objects the procreation and legalization of children. Marriage among Mohammadans is not a sacrament, but purely a civil contract and though solemnized generally with recitation of certain verses from the Holy Qur'an, yet the Mohammadan Law does not positively prescribe any service peculiar to the occasion.

Marriage confers important rights and entails corresponding obligations both on the husband and on the wife. Some of these rights are capable of being altered by an agreement freely entered into by the parties, but in the main the obligations arising out of a marriage are laid down by the law. An important obligation is consortium, which not only means living together, but also implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other.¹ Thus, where a wife, without lawful cause, refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights;² and similarly the wife has the right to demand the fulfillment by the husband of his marital duties.³ So, any of the party of a valid marriage may enforce restitution of conjugal rights on lawful ground.

1. Latey, Divorce, 166.

2. Moonshi Buzloor Ruheem v. Shumsoonnissa Begum, 1867 II M.J.A. 551.

3. Abdur Rahim, Jurisprudence 334.

In this article an attempt will be made to examine the nature of the law of restitution of conjugal rights under the Islamic Law. In this context the existing laws in the Indian sub-continent, recent legislation and contemporary decisions of the Supreme Court will also be examined.

II. Restitution of Conjugal Rights and Islam

Fulfillment of conjugal rights and duties are essential for a happy and fulfilling married life. Though neither the Holy Qur'an nor the Sunnah directly deal with the matter of restitution of conjugal rights, yet Islam goes much further in setting the course of behavior for husbands and wives and encourages fulfillment of conjugal rights and duties. There are statements of the Holy Qur'an and Sunnah that describe kindness and equity, compassion and love, sympathy and consideration, patience and goodwill towards one another. The Holy Qur'an enjoins husbands to keep their wives with kindness or to part with them with an equal consideration. Almighty Allah has laid down in the Holy Qur'an:

"O believers! ... live with them (wives)
on a footing of kindness and equity.
if you dislike something in them
may be that what you dislike,
Allah may have kept in it a great deal of good."⁴

The Prophet (PBUH) goes as far as to declare that the best Muslim is the one, who is best to his family, and the greatest, most blessed joy in life is a good, righteous wife.

III. Restitution of Conjugal Rights in the Indian Sub-continent

Based on Christian ecclesiastical law, restitution of conjugal rights developed into an English notion. This notion was applied

4. Surah 4 (Al Nisa): Verse 19.

by the English rulers in the British India. The law of restitution of conjugal rights have been practiced in the Indian sub-continent for more than a century.⁵

The law is that if a wife ceases to cohabit with her husband without lawful cause, he may sue her for restitution of conjugal rights.⁶ It is, therefore, necessary for the husband to come to the Court with clean hands, otherwise this relief will not be granted to him.⁷

The wife can similarly demand the fulfillment by the husband of his marital duties.⁸

Whenever a case of this nature arises, the Muslim husband being dominant in matrimonial matters, the Court leans in favour of the wife and requires strict proof of all allegations necessary for matrimonial relief.⁹ The husband can divorce a wife who is disinclined to live with him, or marry a second wife, leaving his first wife alone and in peace. The Court may order the husband to be attentive to his wife; and, if he has more than one wife, to be just and equal between them, notwithstanding any consent having been given by any wife to unequal treatment.¹⁰ The husband (unless he has contracted otherwise) can always divorce his wife, and thus get rid of most of his matrimonial liabilities. But he may not be willing to divorce: that might render him liable for the mahr, a circumstance that may not be negligible. The wife, on the other hand, is more in need of protection, as she cannot so release herself. The Sharaya-ul-Islam indeed suggests a kind of arbitration

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5. This is evident from the year of cases cited in this article. The year of the oldest case cited here is 1867.
 6. Moonshi Buzloor Ruheem v. Shumsoonnissa Begum, 1867 II M.I.A. 551.
 7. Mulkhan Bibi v. Muhammad Wazir Khan, P.L.D. 1959 Lah. 710.
 8. Abdur Rahim, Jurisprudence 334.
 9. Abdur Rahiman v. Aminabai, 1935, 59 Bom. 426, Tayabji, 166.
 10. Tayabji, Muhammadan Law, 167.

where there is a discord between them.¹¹

The obligation of wife to live with her husband is not absolute. The law does recognize circumstances, which would justify her refusal to live with him.¹² For instance, if he has habitually ill-treated her, has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so, he cannot require her to re-enter the conjugal domicile or ask the assistance of a Court of justice to compel her to live with him. The bad conduct or gross neglect of the husband is, under the Muslim law, a good defense to suit brought by him for restitution of conjugal rights.¹³

The husband is not entitled to restitution of conjugal rights in the following cases:

a. Irregular marriage:

Irregularity of the marriage is a good defense to a suit for restitution of conjugal rights, as it is necessary for a marriage to be valid according to Muslim personal law before the Courts can grant a decree for restitution of conjugal rights.¹⁴ Irregularity is a good defense even when consummation has taken place.¹⁵

b. Option of puberty:

When the marriage of the wife had taken place during her minority and she had repudiated it on attaining puberty, the husband cannot ask for restitution of conjugal rights.¹⁶

11. Bail II, 88-89.

12. Fayzee, *Outlines of Muhammadan Law* 3rd Edn. 116.

13. Ameer Ali, *Muhammadan Law*, 382, 6th Edn.

14. *Ghulam Muhammad v. Shah Jira Khanum*, P.L.D. 1959, Lah. 1014.

15. *Mt. Bakh Bibi v. Quaim Din* A.I.R. 1934 Lah. 907, 154 I.C. 677.

16. *Mt. Bhawan v. Gaman*, 1934, 146 I.C. 292, *Abdul Karim v. Amina Bai*, 1936, 59 Bom. 426, 157 I.C. 694.

c. Non-payment of prompt dower:

If a wife makes a demand for payment of prompt dower and it is not paid by the husband, then he would not be given a decree for restitution of conjugal rights.¹⁷ However, after the consummation of the marriage, the non-payment of dower even though proved, cannot be pleaded in defense of an action for restitution of conjugal rights.¹⁸ The Court may allow the sum due as prompt dower to be paid into Court before decree, or give decree with a condition that it can only be executed on prompt dower being paid.¹⁹

d. Cruelty to wife:

Cruelty to the wife is a good defense to a suit for restitution of conjugal rights.

Cruelty, for the purpose, has been defined in the following manner:

- i. Cruelty to a degree rendering it unsafe for her to return to his dominion;²⁰
- ii. Actual violence infringing the right to safety of life, limb and health or reasonable apprehension of such violence;²¹
- iii. Charges of immorality and adultery and the heaping of insults constitutes cruelty.²²

e. Failure to perform obligations:

If there were gross failure on the part of the husband to

17. P.L.D. 1959, Lah. 710 Supra.

18. 30 Bom. 122=8 All. 149=11 Mad.327 and 17 Cal. 670.

19. 164 PR 1889.

20. Moonshe Buzloor Ruheem v. Shumsoonissa, 1867, II M.I.A. 551.

21. Asha Bibi v. Kadir Ibrahim 1909, 33 Mad. 22, Tayabji s.88.

22. Husaini Begum v. Muhammad Rustam Ali Khan, 1906 29 All 222.

perform the obligations imposed on him by the marriage contract, the Court would be justified in refusing such relief.²³

f. False charge of adultery:

A false charge of adultery by the husband against the wife would be a good ground for refusing a decree for restitution of conjugal rights.²⁴ But if the husband bona fide retracts the charge of adultery brought against the wife earlier, a decree for restitution of conjugal rights can be given.²⁵

g. True charge of adultery:

If the charge of adultery was true, it was no ground for refusing a decree for restitution of conjugal rights²⁶. It was observed by their Lordships that refusal to grant the decree would amount to putting a high premium on immorality.

h. Treatment of wives:

When the husband has two wives, it is for him to prove that he is treating them on equal footing. If he fails to do so, he is not entitled to the discretion being exercised in his favour, in a case of restitution of conjugal rights.²⁷

i. Agreement for separate living:

No decree for restitution of conjugal rights will be given if there is an agreement between the parties for separate living. In case of estrangement between husband and wife and long separation, decree for restitution of conjugal rights should not be passed²⁸.

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23. Moonshi Bazloor Ruheem vs. Shumsoonissa, 1887, 11 M.I.A. 551.
 24. Mussamat Maqboolan vs. Ramzan 1927, 2 Luck, 482, 101 I.C. 261.
 25. Khirodenissa v. Sekandar Biswas P.L.D. 1952 Dacca 179.
 26. Jamiruddin vs. Sahera, 1927 54 Cal. 363, A.I.R. 1927 Cal 579.
 27. Mulkhan Bibi v. Muhammad Wazir Khan, P.L.D 1959. Lah. 710.
 28. Abul Hussain Bi 6 Bom. LR 728.

j. Discretion of the Court:

Restitution of conjugal rights is at the court's discretion and one has to prove that he has come to court with clean hands, for instance where he has married two wives, he must prove that he is treating both the wives on equal footing²⁹.

While concluding our discussion of the law of restitution of conjugal rights in the Indian sub-continent, it is worthy to note that the law may also be invoked by members of other communities, as it is seen in a suit for restitution of conjugal rights by a Hindu husband, where the husband is not necessarily entitled to a decree in the absence of a plea of cruelty by the wife. Where the wife has pleaded that she was deserted or neglected³⁰ by her husband and that the suit is not bona fide, he should be allowed to lead evidence so that the Court may be in a position to judge whether the relief sought for by the husband should be granted or not, and if so on what conditions, if any³¹.

IV. Restitution of Conjugal Rights and Recent Legislation

The Courts entertained suits for restitution of conjugal rights under Section 115 of the Code of Civil Procedure. In 1985, the Family Court Ordinance has been passed, which amongst others, recognizes and deals with suits for restitution of conjugal rights. Section 5(b) of the Ordinance provides

"Subject to the provisions of the Muslim Family Laws Ordinance 1961 (VIII of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to ...restitution of conjugal rights."

29. *Mulkhan Bibi v. Muhammad Wazir Khan*, P.L.D. 1959 P. Lah. 710.

30. (1935) 16 Lah.892.

31. (1927)51 Bom.329.

We should note that the Ordinance did not grant any right of restitution; It simply provided an exclusive forum for enforcement of this right.

V. Restitution of Conjugal Rights and Recent Decisions of the Supreme Court of Bangladesh

The apparently settled law of restitution of conjugal rights, which was practiced for more than a century, received a setback, for the first time, in Bangladesh, in 1982, when in a decision, the Supreme Court declared that the law of restitution of conjugal rights was unconstitutional. This mark the beginning of a long controversy. There have been a series of decisions on the topic, some declaring the law not to be in conflict with the constitutional, while others declared it unconstitutional. We will now go through these decisions and evaluate the present position of the institution of restitution of conjugal rights.

a. Nelly Zaman v. Giasuddin Khan³²

In 1982, in this case, it was held that the plea for restitution of conjugal rights is violative of the accepted state and public principle and policy and the constitutional.

His Lordship Mr. Justice Syed Mohammad Hussain held that by the lapse of time and social development the very concept of the husband's unilateral plea for forcible restitution of conjugal rights against a wife unwilling to live with her husband has become outmoded and does not fit in with the acceptable state and public principle and policy of equality of all men and women being citizens equal before law, entitled to equal protection of law and to be treated only in accordance with law, as guaranteed in Articles 27 and 31 of the Constitution of Bangladesh. In the husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to

32. 34 DLR (1982), 221 (H.C.), Date of judgment 17th March, 1982.

live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and the wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband apart from claiming maintenance and alimony. A reference to Article 28 (2) of the Constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy.

If appears that Mr. Justice Syed Mohammad Hussain's, view "In the husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and the wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband ..." cannot be considered as a correct proposition of law. For restitution of conjugal right is a mutual right available not only to the husband but also to the wife, as Sir Abdur Rahim said that the wife can also demand the fulfillment by the husband of his marital duties.³³

b. Sharmin Hossain @ Rupa v. Mizanur Rahman (Tuhin)³⁴

Following the decision of Nelly Zaman v. Giasuddin Khan (1982), in 1994, in this case it was again held that suit for restitution of conjugal rights is in violation of the constitution.

Mr. Justice Muhammad Abdul Mannan held that the law of restitution of conjugal right is void upon an application under section 24 of the Civil Procedure Code for transferring a

33. Abdur Rahim, Jurisprudence 334.

34. 2 BLC (1997) 509 (H.C.), Date of judgment 10th August, 1994.

family court case for restitution of conjugal right from Pirojpur to any other court of competent jurisdiction. The suit for restitution of conjugal rights is in violation of Article 7 of the Constitution of Bangladesh and with the promulgation of the Constitution the said provision of law has become void as the same is directly against the provisions of the Fundamental Rights guaranteed by the Constitution. The constitutional guarantee of equality of man and woman and liberty of the citizen in such circumstances the wife cannot be dragged and compelled by the husband to live with him by a decree of restitution of conjugal rights against her will. Moreover, the decree even if passed cannot be executed and so if the decree is inexecutable then the suit is infructuous. According to the provision of the Code of Civil Procedure, decree could be executed by sending the defendant to the jail for the same but subsequently it was amended in 1923 and the provision was abolished. Thereafter, it can be only executed by attachment of the property of the defendant but in almost all the cases where the suit is restitution of conjugal right against the wife by the husband the decree cannot be executed as in every case wife has got no property. The marriage is a human relationship between a man and woman and the same exists with the adjustment between the parties and if there is breach in this relationship nothing remains in respect of this peaceful happy relationship. In Muslim law marriage is a social contract between a man and woman in presence of witnesses solemnized by the recitation from the Holy Qur'an. So if there is breach of contract of marriage by any party it can be challenged in the Court. But if there is a decree in the suit against the person of the defendant be effectively executed. The male partner of the contract of marriage has got arbitrary power of divorce of his female partner just by pronouncing divorce but the female partner of marriage has got no arbitrary power in this respect and therefore subsequent legislation has allowed her right of

talak-e-taufiz. That means right of divorce by the female to her male partner in the contract of her marriage and more so she can file suit for dissolution of marriage of the husband on specific grounds as embodied in the Muslim Dissolution of Marriage Act of 1939. In the Constitution of the People's Republic of Bangladesh the Fundamental Rights under Articles 26 (2) read with Article 7 declare such law as void, Article 27, 28, 31 and 32 of the Constitution have been incorporated in the Constitution and so in consideration of those provisions of law of the Constitution it has been decided by this court that the dictum of restitution of conjugal right is a violation of life, liberty, freedom, equality and social justice as guaranteed in the above Articles of the Constitution, so no law can be passed and the existing law which is against the provision of the Constitution must become void. In such circumstances, his Lordship said that he can safely say and declare that the restitution of conjugal rights either by the husband against his wife or by the wife against her husband is an invalid and void piece of law and so no suits for restitution of conjugal right can continue before the Courts as the same are void and illegal.

c. Khodeja Begam and other v. Md. Sadeq Sarker³⁵

Following the decision of Nelly Zaman v. Giasuddin Khan (1982) and Sharmin Hossain @ Rupa v. Mizanur Rahman (Tuhin) (1994), again in 1994, in this case it was held that restitution of conjugal rights is violative of the constitution.

Mr. Justice Muhammad Abdul Mannan held that Muslim marriage is a social contract. The relationship is based on social justice and adjustment but if these social justice, equality adjustment and tolerance to each other is lost by any

35. 18 BLD (1998), 31 (H.C.), Date of judgment 4th July, 1994.

reason then there remains nothing. In cases where there is no divorce or dissolution of marriage by either side then title suit for restitution of conjugal rights can be instituted either by the husband or the wife and if there is a decree then the decree can be executed only by attachment of the defendant's property under Order 21, Rule 32 of the Code of Civil Procedure. Now, if the defendant is the wife, in most cases she has no property, then the decree against her becomes inexecutable. In such circumstances the court should not pass an inexecutable decree. So the provision for restitution of conjugal rights itself is a bad piece of law against a wife. In case of a decree against a husband the unwilling husband can divorce his wife by pronouncing his arbitrary power of divorce. Thus the suits for restitution of conjugal rights is always instituted to compel the unwilling wives to live with their husbands and always a repressive law used against the wife as an engine of harassment. Article 7 sub-Article 2 of the Constitution expresses that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void. This provision of fundamental law is expressed in the Article 26 of the Constitution in part III. Fundamental rights as "All existing laws inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void. The law of restitution of conjugal rights is a violation of social justice as enunciated in the preamble of the Constitution and under Article 27 for equal protection of law: Article 28 guarantees no discrimination of any citizen on grounds only of religion, race, caste, sex or place of birth and woman shall have equal rights with men in all spheres of state and of public liberty of the Fundamental Rights guaranteed by the Constitution. The dictum of restitution of conjugal rights is a violation of life and liberty, freedom, equality and social justice as guaranteed

in the Constitution. So the law is repugnant to the Constitution and void. Therefore, no such law and suits for restitution of conjugal rights can legally exist in Bangladesh. The relationship between the husband and wife being a mutual human relationship of adjustment and so one can not bind another by courts decree in a title suit in the nature of declaration of right, title and interest of the land and recovery of khas possession if one of the parties refuse to live with the other. It is an inhuman law where man or woman is considered as property. Moreover, the decree in respect of a suit for restitution of conjugal rights can not be executed when that relationship of adjustment between the husband and wife is lost.

d. Chan Mia (Md.) v. Rupnaha³⁶.

In conformity with the traditional law, and contrary to the three earlier decisions, one in 1982 and two in 1994, in 1998, in this case it was held that restitution of conjugal rights is neither discriminatory nor violative of any provision of the Constitution.

Mr. Justice Kazi A. T. Monowaruddin held that marriage confers important rights and entails corresponding obligation both on the husband and the wife. An important obligation is consortium, which does not merely mean living together but implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other. Thus where a wife, without lawful cause refuses to live with her husband the husband is entitled to sue for restitution of conjugal rights; and similarly the wife has the right to demand the fulfillment by husband of his marital duties and obligations. Where either the husband or

36. 51 DLR (1999), 292 (H.C.), Date of judgment 3rd March, 1998.

wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage, the court may decree restitution of conjugal rights and may put either party on terms securing to the other the enjoyment of his or her rights (Ref. Tyabji's Muslim Law, Edn. Paragraph 87; Abdur Rahim Mdn. Jurs. 334; Anis Begum Vs. Md. Mostafa Wale (1933) 55 All 743). The said right, however, is not absolute. The Qur'an enjoins husbands to keep their wives with kindness. The restitution of conjugal rights is a reciprocal right thus it is neither discriminatory nor violative of any of the provisions of the Constitution. His Lordship, however, said that it is neither desirable nor expected that the court should pass a decree for restitution of conjugal rights where the relationship of adjustment between the husband and wife is lost or it is otherwise inequitable, impracticable or impossible to implement.

e. Hosna Jahan (Munna) v. Md. Shajahan (Shaju) and Others³⁷

Again the traditional law was upheld in this case. It was also strongly urged that after coming into force of the Family Court Ordinance (1985), which in Section 5(b) amongst others recognizes and deals with restitution of conjugal rights, the decision in Nelly Zaman v. Giasuddin Khan (1982), where restitution of conjugal rights has been held unconstitutional, cannot be upheld any more. Again, the decision in Sharmin Hossain @ Rupa v. Mizanur Rahman (Tuhin) (1994), which hold that the law of restitution of conjugal right is void, has also to give way to the Ordinance of 1985.

37. 51 DLR (1999), 295 (H.C.), Date of judgment 2nd April, 1998.

Mr. Justice M. A. Aziz held that section 5 (b) of the Family Courts Ordinance, 1985 and section 281 of the Mahomedan Law provides that where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights. In section 5 (b) of the Ordinance of 1985 which amongst others deals with restitution of conjugal rights the wordings of section 281 of the Mohamedan Law, i.e. restitution of conjugal rights, have been bodily lifted and verbatim reproduced in section 5 (b) of the Ordinance of 1985 and the decision reported in 34 DLR 221 has created an anomalous situation, the one challenging the other. Those 2 (two) contradictory concepts cannot co-exist. One must give way and make room for the other. Now the question is, which one is to give way. The Family Courts Ordinance, 1985 having come into force on 30-3-85 and the decision reported in 34 DLR 221 having been delivered on 17-3-82 the findings and observation made in the judgment to the effect "A reference to Article 28 (2) of the constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy "can no longer be deemed to hold the field inasmuch as the legislature in its consolidated wisdom having considered the judgment delivered on the 17th March 1982 nullified through the enactment of section 5 (b) of the Family court Ordinance which came into force on the 30th March, 1985 exactly 3 (three) years and 13 days thereafter. The answer thus is quite obvious as to which of the 2 (two) conflicting and contradictory concepts is to give way. The decision reported in 34 DLR has to give way. The decision reported in 2 BLC 509 holding "the law of restitution of conjugal right is void" has also to give

way for the very plain and simple reason that none of the judges sitting singly and exercising jurisdiction under the 115 (1) of the Code of Civil Procedure were invested with the jurisdiction to strike down a piece of legislation which is the absolute and exclusive jurisdiction of a properly constituted court exercising jurisdiction under Article 102 of the Constitution of Bangladesh.

After going through the five recent decisions of the Supreme Court, we can summarize that,

- a. three decisions declared that the law of restitution of conjugal rights to be violative of the provisions of the Constitution; and
- b. two decisions declared that the law of restitution of conjugal rights is neither discriminatory nor violative of any provisions of the constitution.

CONCLUSION

The foregoing discussion reveals that the apparently settled law of restitution of conjugal rights, after being practiced for more than a century, now faces serious challenge due to the conflicts and contradictions for and against the recent decisions of the Supreme Court. The consolidated reasoning behind the three decisions that declared the law of restitution of conjugal rights to be violative of the provisions of the Constitution are as follows:

- a. By the lapse of time and social development this concept has become outmoded;
- b. This concept does not fit in with the acceptable state and public principle and policy of equality of all men and women being citizens equal before law, entitled to equal protection of law and to be treated only in accordance with law, as guaranteed in Articles 27 and 31 of the Constitution of Bangladesh;
- c. The law of restitution of conjugal rights violets life and liberty, freedom, equality and social justice as guaranteed in

the Preamble and in Articles 26 (1), 27, 28, 31 and 32 of the Constitution of Bangladesh. So, the dictum of restitution of conjugal rights is repugnant to the Constitution and as such void. Therefore no such law and suits for restitution of conjugal rights can legally exist in Bangladesh. The Constitution in its various Articles, such as, Article 7 (2) provides that this Constitution is the supreme law of the Republic and if any law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void. Article 26(1) of the Constitution provides that all existing laws inconsistent with the provisions of Part III of the Constitution shall, to the extent of such inconsistency, be void. Article 27 of the Constitution provides equal protection of law to all citizens. Article 28 of the Constitution provides guarantee against discrimination on grounds of religion, race, caste, sex or place of birth and woman shall have equal rights with men in all spheres of state and of public life. Article 31 of the Constitution guarantees equal protection of law and Article 32 protects right to life and personal liberty.

- d. The relationship between husband and wife is a relationship of mutual adjustment. When such adjustment no longer exists and one of the parties refuses to live with the other, then one cannot bind another by court's decree in a title suit in the nature of declaration of right, title, interest of the land and recovery of khas possession. The law of restitution of conjugal rights is an inhuman law where man or woman is considered as property. Moreover, when that relationship of adjustment between the human and wife is lost, a decree for restitution of conjugal rights cannot be executed.
- e. A decree for restitution of conjugal rights can be executed only by attachment of the defendant's property under Order 21 Rule 32 of the Code of Civil Procedure. Now, a decree against a wife who has no property cannot be executed. In

such circumstance the court should not pass an inexecutable decree. So, the provision for restitution of conjugal rights itself is a bad piece of law against a wife. On the other hand, in the case of a decree against a husband, the unwilling husband can divorce his wife by pronouncing his arbitrary power of divorce thus making the decree futile and infructuous. So, the suits for restitution of conjugal rights is always instituted to compel the unwilling wives to live with their husbands and always a repressive law used against the wife as an instrument of harassment.

- f. This right lacks mutuality and reciprocity between the respective rights of the husband and the wife since this right is not available to a wife as against her husband apart from claiming maintenance and alimony.

The consolidated reasoning behind the two decisions that declared the law of restitution of conjugal rights is neither discriminatory nor violative of any of the provisions of the Constitution are as follows:

- a. An important obligation imposed by marriage is consortium which does not merely mean living together, but implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other. Thus, where a wife, without lawful cause, refuses to live with her husband the husband is entitled to sue for restitution of conjugal rights; and similarly the wife has the right to demand the fulfillment by husband of his marital duties and obligations. Where either the husband or wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage, the court may decree restitution of conjugal rights and may put either party on terms securing to the other the enjoyment of his or her rights. This right is not

absolute The Qur'an enjoins husbands to keep their wives with kindness. However it is neither desirable nor expected that the court should pass a decree of restitution of conjugal rights where the relationship of adjustment between the husband and wife is lost or it is otherwise inequitable, impracticable or impossible to implement.

- b. The restitution of conjugal rights is a reciprocal right thus it is neither discriminatory nor violative of any of the provisions of the Constitution.
- c. Section 5 (b) of the Family Court Ordinance (1985), which amongst others, deals with restitution of conjugal rights and the decision in *Nelly Zaman v. Giasuddin Khan* (1982), reported in 34 DLR, 221 has created an anomalous situation, one challenging the other. Those 2 (two) contradictory concepts cannot co-exist. One must give way and make room for the other. Now the question is, which one is to give way. The Family Court Ordinance (1985) having come into force on 30-3-1985 and the decision reported in 34 DLR 221, having been delivered on 17-3-1982 the findings and observation made in the judgment to the effect "A reference to Article 28 (2) of the constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy", can no longer be deemed to hold the field inasmuch as the legislature in its consolidated wisdom having considered the judgment delivered on the 17th March 1982, nullified through the enactment of section 5 (b) of the Family court Ordinance, which came into force on the 30th March, 1985 exactly 3 (three) years and 13 days thereafter. The answer thus is quite obvious as to which of the 2 (two) conflicting and contradictory

concepts is to give way. The decision reported in 34 DLR has to give way. The decision reported in 2 BLC 509 holding "the law of restitution of conjugal right is void" has also to give way for the very plain and simple reason that none of the judges sitting singly and exercising jurisdiction under the 115 (1) of the Code of Civil Procedure were invested with the jurisdiction to strike down a piece of legislation which is the absolute and exclusive jurisdiction of a properly constituted court exercising jurisdiction under Article 102 of the Constitution of Bangladesh. Again, the view taken by a single of the High Court Division in the case of *Khodeja Begam and others v. Md. Sadeq Sarker* reported in 18 BLD 31 that restitution of conjugal rights is violative of social justice and repugnant to Article 27 of the Constitution is not a correct proposition of law.

Therefore, it is evident that where the wife refuses to live with her husband without lawful cause, or where the husband refuses to fulfill his marital duties and obligations, then the other spouse may sue for restitution of conjugal rights. This right is not absolute. The law does recognize circumstances where the Court should not pass a decree on this matter, e.g. where the husband habitually ill-treats his wife. This is the traditional law, which have been practiced for more than a century, and in my opinion, there is nothing wrong with the law. Right to restitution, being a mutual right, is not discriminatory, and definitely it does not violate the fundamental right to equality before law. Right to restitution is not a tool of oppression. For example, let's say two young people of sound mind and of marriagable age fell in love and they got married, which the parents of the wife do not approve. So, somehow the parents managed to get her into their house, and prevented her from going back to her husband against her will. Husband and wife, who are in love with one another, do have the right to live together. So, the husband institutes a suit for restitution of

conjugal right. This is the only way by which they could be together. In this case definitely right to restitution is not a tool of oppression, since this is the only chance they have. Again, where the wife is unwilling to live with her husband on reasonable grounds, and the husband institutes a suit for forcible restitution of conjugal rights, the Court can simply dismiss the suit, taking into account all relevant circumstances, especially the well being of the wife. So, there is nothing wrong with the right to restitution, the wrong, if any, lies in the application. If the Court is cautious in decreeing a suit for restitution, no injustice can happen. It is apparent that, short of divorce, the enforcement of right to restitution is the only remedy available to save a marriage and allow it to continue. Restitution of conjugal rights can, therefore, be strongly supported and what is needed is that a decision of the Appellate, Division of the Supreme Court, in order to put an end to the conflicting decisions of the High Court Division in this regard.