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To cite this article: Kanika Sharma, Laura Lammasniemi & Tanika Sarkar (2021): Dadaji Bhikaji v Rukhmabai (1886) ILR 10 Bom 301: rewriting consent and conjugal relations in colonial India, Indian Law Review, DOI: [10.1080/24730580.2021.1962083](https://doi.org/10.1080/24730580.2021.1962083)

To link to this article: <https://doi.org/10.1080/24730580.2021.1962083>



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Published online: 12 Aug 2021.



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Dadaji Bhikaji v Rukhmabai (1886) ILR 10 Bom 301: rewriting consent and conjugal relations in colonial India

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ABSTRACT

Through an examination of the late nineteenth century case of *Dadaji Bhikaji v Rukhmabai* this article traces the history of the doctrine of restitution of conjugal rights (“RCR”) in Hindu law in colonial India. It highlights the importance of caste in situating the life and trials of Rukhmabai in their wider social, colonial, and legal contexts. Following the methodology of the global feminist judgements projects, the paper also offers a re-written judgement for Rukhmabai’s case located in 1886. This new judgement, while bound by the legal rules of the time, puts forward an alternative application of the doctrine of RCR, one that treats the issue of consent as central to such suits. It argues that the legal transplant of RCR ought not to have been applied to Hindu marriages which are often entered into in childhood and makes a case for taking into account female consent to both marriage and to conjugal relations.

ARTICLE HISTORY

Received 29 July 2020
Revised 19 April 2021
Accepted 22 April 2021

KEYWORDS

Feminist judging; Indian legal history; Indian Feminist Judgements Project; restitution of conjugal rights; consent to marriage

I. Introduction

Rukhmabai Raut’s (1864–1955) (also written as Rukmabai) efforts to extricate herself from an impending conjugal connection, with a husband married to her in her childhood, aroused enormous controversies and a long legal battle in late 19th century India. Fought out in the Bombay Presidency, the trial against her became sensational news all across India and abroad. In response to the case, liberals, the Hindu orthodoxy and women’s rights groups in Britain and in India simultaneously began to put pressure on the colonial and imperial governments: either to support her cause or to oppose and penalize her decision. The remarkable story of Rukhmabai’s struggles exemplifies individual resistance, the rise of impactful transnational women’s rights movements, and the problematic nature of legal transplants.

The importance of Rukhmabai’s case to the Hindu women’s rights discourse in colonial India is apparent in the ways in which the complexities of the trial, and the public debate it generated, have been closely analysed through various lenses. To name just a few scholars who have researched these landmark events, Tanika Sarkar examines the case and the related public controversy in light of the larger Age of Consent movement in India and its relation to the militant nationalism emerging in the country,

especially in Bengal.¹ Padma Anagol places Rukhmabai within the matrix of a new and remarkable generation of women rebels in Bombay Presidency, counterposing them with a larger group of wrathful nationalists and religious orthodoxy in the same province.² Sudhir Chandra studies the lawsuits in close detail to establish how they made room for an articulation of women's rights.³ On the other hand, from a classically post-colonial perspective, Antoinette Burton, probes the case through sexual morality, and how British women reformers instrumentalised the Indian woman's body in the late Victorian period to foster a self-image as kind saviours of besieged Indian womanhood.⁴ More recently, Kanika Sharma analyses the Rukhmabai case in the context of early cases of restitution of conjugal rights within Hindu law to show the speed and strength of this colonial legal transplant from English ecclesiastical law to Hindu personal law in India, especially drawing on Rukhmabai's own writings on the issue.⁵

Building on these works, through a re-examination of the case and a new feminist judgement, this article provides an original contribution to the existing, rich historical scholarship in the following ways. Firstly, we focus on the legal history of RCR and offer a comparative analysis of how the doctrine evolved in England and India in the nineteenth century. Secondly, we offer a feminist understanding of consent, borrowing in part from Rukhmabai's own views on the matter, to demonstrate that consent as a concept – both as consent to marriage and consent to conjugal relations within that marriage – was not outside the imagination of the Indian judiciary or society at the time. Finally, more broadly, by focusing on a colonial legal transplant and a historical case, the work shows that the methodology of feminist judging can also be a historical and postcolonial methodology, allowing us to bring feminist and postcolonial approaches to legal history into dialogue in a novel way.

In this article, we offer an account of the vibrant social context of Rukhmabai's life and trial before delving into the trial itself and its reception in the public sphere. When Rukhmabai was only eleven, she was married to one of her stepfather's cousins, Dadaji Bhikaji – a nineteen-year-old, improvident and uneducated youth with no prospects and no signs of interest in pursuing an education. Rukhmabai continued to live in her natal home and informally pursued her studies throughout her teenage years, whereas Bhikaji lived a dissolute life by all accounts, avoiding any education. When he insisted that she join him in his uncle's house to begin marital life, Rukhmabai – supported by her stepfather – firmly refused to go to him claiming that he was, in every respect, incompatible with the way in which she had developed. These events set in motion a series of trials that gained international attention and fierce public debate. In the first sections of the

¹Tanika Sarkar, 'Rhetoric against Age of Consent: Resisting Colonial Reason and Death of a Child-Wife' (1993) 28(36) *Economic and Political Weekly* 1869.

²Padma Anagol, 'Rebellious Wives and Dysfunctional Marriages: Indian Women's Discourses and Participation in the Debates over Restitution of Conjugal Rights – The Child Marriage Controversy in the 1880s and 1890s' in Sumit Sarkar and Tanika Sarkar (eds), *Women and Social Reform in Modern India* (Indiana University Press 2007) 282–312.

³Sudhir Chandra, *Enslaved Daughters: Colonialism, Law and Women's Rights* (2nd edn, OUP 2008).

⁴Antoinette Burton, 'Conjugalities on Trial: The Rukhmabai Case and the Debate on Indian Child Marriage in Late Victorian Britain' in George Robb and Nancy Erber (eds), *Disorder at the Court: Trials and Sexual Conflict at the Turn of the Century* (Palgrave, Macmillan 1999) 33–56; Antoinette Burton, 'From Child Bride to 'Hindoo Lady': Rukhmabai and the Debate on Sexual Respectability in Imperial Britain' (1998) 103(4) *The American Historical Review* 1119.

⁵Kanika Sharma, 'Withholding Consent to Conjugal Relations within Child Marriages in Colonial India: Rukhmabai's Fight' (2020) 38 *Law and History Review* 151; Kanika Sharma, 'Restitution of Conjugal Rights and the Dissenting Female Body: The Rukhmabai Case' in Samraghni Bonnerjee (ed), *Subaltern Women's Narratives: Strident Voices, Dissenting Bodies* (Routledge 2021) 210–224.

paper, we place the events in the context of the emergence of transnational women's rights movement and the drive for social reform, all the while exploring the potential impact of caste on legal and social practices around marriage in India. The penultimate section contains a rewritten feminist judgement standing in place of the Bombay Court of Appeal judgement delivered by Chief Justice Sargent and Justice Bayley in March 1886.⁶ Through the rewritten judgement and our reflections on the trial, we provide an alternative legal resolution to the case. By examining how the doctrine of restitution of conjugal rights entered and became rooted in the Indian legal system while simultaneously falling out of favour in England, we show that this case had the potential to disrupt certain patriarchal assumptions of marriage that were considered to be part and parcel of Hindu law in late colonial India. While this potential remained unfulfilled in 1886, the rewritten feminist judgement allows us to imagine an alternate legal history today.

II. Rukhmabai's struggle

Positioning Rukhmabai's case in the context of caste, an emergent Indian feminism, and the quest for social reform

The Maharashtrian region in western India has had a complicated and entangled history of caste and gender orthodoxy from early modern times. The Peshwas of the pre-British era had enforced extremely severe gender and caste norms. Within the Hindu community, women, especially from the upper castes, lived under stringent restrictions and lack of autonomy, while lower-caste women were seen as "polluted" and "polluting" creatures.

From the early 19th century, Bombay had become the most active site of dissent and agitations in India. From the middle of the century, Jyotirao Phule, a social reformer himself from a lower caste, addressed the subordination of women alongside the stigmatization of the lower castes, as victims of Brahmanical power and discipline.⁷ Scores of Bombay women began to attend lectures by social reformers and by the 1880s, they had formed their own association, the *Striyancha Sabha* (Women's Society), to discuss reform, especially on women's education.⁸ This spread to other cities in the Presidency and women began to discuss Indian as well as western philosophical trends under the guidance of exceptionally well-educated women including Kashibai Kanitkar, Anandibai Joshi and Ramabai Ranade, and later, Rukhmabai herself.⁹

Women reformers of the period in Bombay were the first unabashed Indian feminists who staged an open rebellion against social injunctions and consequently Rukhmabai had a remarkable support base.¹⁰ As they eagerly absorbed western texts, women began to organize and to write polemical tracts of their own. For instance, Ramabai, who was applauded for her mastery of Sanskrit sacred texts, was, most unusually for women, given

⁶*Dadaji Bhikaji v Rukmabai* (1886) ILR 10 Bom 301 ('*Dadaji Bhikaji 1886*').

⁷Shailaja Paik, 'Forging a New Dalit Womanhood in Colonial Western India: Discourse on Modernity, Rights, Education, and Emancipation' (2016) 28(4) *Journal of Women's History* 14.

⁸Anagol (n 2) 284–285; Benjamin B Cohen, 'Networks of Sociability: Women's Clubs in Colonial and Postcolonial India' (2009) 30(3) *Frontiers: A Journal of Women Studies* 169.

⁹Padma Anagol, *The Emergence of Feminism in India 1850–1920* (Routledge 2016) 10.

¹⁰For a discussion of early feminism in India and especially Bombay see Anagol (n 9).

the title of Pandita, or a woman religious scholar.¹¹ After a close and systematic scrutiny of Hindu scripture Pandita Ramabai became convinced that the Hindu holy scriptures were the real source of women's subordination.¹² She, subsequently, faced the vindictive anger of Hindu revivalists and orthodox pandits for the rest of her life.

This is what Ramabai wrote about Hindu marriages:

... there were two things on which ... the Dharma Shastras, the sacred epics, the Puranas and modern poets, the popular preachers of the present day and high-caste men, were agreed, that women ... as a class were all bad, very bad, worse than demons ... The only hope of their getting ... liberation ... was the worship of their husbands. The husband is said to be the woman's god; there is no other god for her. This god may be the worst sinner and a great criminal; still he is her god and she must worship him.¹³

It is within this wider socio-historical context that Rukhmabai's case came to court. Born into the "lowly" *Suttar* or carpenter caste, the question of Rukhmabai's caste and caste customs remained an intriguing but untouched issue during the trials. It is undeniable that Hindu personal law came to be heavily modelled on scriptures and particularly the upper-caste interpretations of such scriptures. As Rudolph and Rudolph have noted,

The British *raj*, sometimes by design but more often by inadvertence, advanced the law of the upper twice-born castes (*dharmasastra*) at the expense of the decentralized and diverse customary law of the villager even while the use of western values in the law began to supersede Indian legal conceptions and social arrangements.¹⁴

However, despite the importance attributed to scriptures, customs continued to play an important, if reduced, role under the law. Custom, or the body of unwritten ritual usages, supposedly coming down from time immemorial, was trifurcated into locality-based, lineage-based and caste-based customary laws. Unlike the scriptures, the interpretation of which remained deeply Brahmanical, customs allowed non-upper caste practices to be recognized under the law.¹⁵ Importantly, Rukhmabai's caste's customary practices differed from their upper-caste counterparts on the issue of marital law.

When Rukhmabai was only two years old, she lost her father,¹⁶ leaving her mother, Jayantibai, widowed while still short of twenty years. A few years later Jayantibai remarried, and her mother's second marriage was to have a considerable effect on Rukhmabai's life and trials in the 1880s. Before her remarriage Jayantibai transferred the property she had inherited from her late husband to Rukhmabai when the latter was only eight years old, making her very wealthy in her own right. Secondly, Jayantibai's second husband and Rukhmabai's stepfather – Dr Sakharam Arjun – was an exceptional, liberal man who strongly believed in the importance of female education. As a doctor and a professor, he moved in Bombay's radical reformist circles and had

¹¹Meera Kosambi, *Pandita Ramabai: Life and landmark writings* (Routledge 2016) 14.

¹²Anagol (n 9) 26-27.

¹³Pandita Ramabai, *A Testimony of Our Inexhaustible Treasure* (Ramabai Mukti Mission 1907:1922 reprint) 10-11.

¹⁴Lloyd I Rudolph and Susanne Hoeber Rudolph, 'Barristers and Brahmins in India: Legal Cultures and Social Change' (1965) 8(1) *Comparative Studies in Society and History* 24.

¹⁵For an examination of the status of customs in Indian colonial law see Sripati Roy, *Customs and Customary Law in British India* (Hare Press 1911). For court cases on using caste customs to prevail over the official personal laws, see Chandra Mallampalli, 'Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness' (2010) 28 *Law and History Review* 1043.

¹⁶For a comprehensive discussion of Rukhmabai's life, see Chandra (n 3) 15-49.

friends among them who stood by him and helped him to make Rukhmabai's ordeal a national and international problem.

Socially degraded, the *Suttar* caste was possibly not traditionally bound by some of the Brahmanical marriage norms. Indeed, Jayantibai remarried at a time when widow remarriage, though legally permissible following the Hindu Widows' Remarriage Act 1856, continued to be socially stigmatized within the upper castes. Nevertheless, in the 19th century, upwardly mobile lower castes sought to gain ritual respectability within the overall pecking order of caste by shifting to Brahmanical rules, a common practice labelled by MN Srinivas as "sanskritization".¹⁷ However, the brunt of this process was borne by women who were treated as gate-keepers of the community. Since 'Brahmanical patriarchy'¹⁸ relied upon both caste hierarchy and gender hierarchy, any caste ascendancy could only be achieved by placing ever more stringent restrictions on female sexuality. The Hindu Brahmanical marriage was indissoluble and lasted till eternity i.e. even beyond the death of the husband, thus the customary eschewing of widow remarriage. This was certainly not the case amongst the lower castes¹⁹ as Jayantibai's second marriage demonstrated. It is uncertain whether the customary practices of Rukhmabai's caste would have allowed the courts to find in her favour as the specific caste rules of the *Suttar* caste on marriage at Rukhmabai's time remain unavailable to us.

Rukhmabai's counsel did not cite her caste custom in court in any of the proceedings, and as a result our own rewritten judgement only makes a passing reference to it below. Nevertheless, their choice not to do so is an interesting one and allows us to frame certain speculations on why they did not do so. It could be that either there was some uncertainty about whether her caste allowed withholding of conjugal rights, or that in a bid to "sanskritize" her marriage had been performed in conformity with the Brahmanical rites. Linked to the latter, there was a third possibility: Did Rukhmabai and her family avoid this route in the trials because they had attained unusual upward mobility through education, and, therefore, would not want to be reminded of their lower caste status? While caste remained an unspoken issue inside the courtroom in Bombay, all over the country and especially in Bengal, the Rukhmabai case raised the point: which marriage law should she follow? This was a moment of Hindu community building – albeit without allowing any structural change in caste hierarchy or purity/pollution norms. The orthodoxy unsurprisingly and unanimously said that all castes should follow the upper-caste model where gender was concerned.²⁰

The legal trials

The lengthy RCR proceedings between Bhikaji and Rukhmabai, first heard at the Bombay High Court in 1885²¹ and finally resolved in 1887, focused on the key issue of whether the court can order cohabitation for a couple who have never previously cohabited or

¹⁷For instance, see MN Srinivas, 'A Note on Sanskritization and Westernization' (1956) 15(4) *The Far Eastern Quarterly* 481.

¹⁸Uma Chakravarti, *Rewriting History: The Life and Times of Pandita Ramabai* (Kali for Women 1998) 31.

¹⁹For a discussion of "historically crystallized" dominant caste customs into law in the context of Northern India and their detrimental impact on women see Prem Chowdhry, 'Customs in a Peasant Economy: Women in Colonial Haryana' in Kumkum Sangari and Sudesh Vaid (eds), *Recasting Women: Essays in Colonial India* (Kali for Women 1989) 395–438.

²⁰Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion and Cultural Nationalism* (Permanent Black 6th impression 2017) 208–209.

²¹*Dadaji Bhikaji v Rukhmabai* (1885) ILR 9 Bom 529 ('*Dadaji Bhikaji 1885*').

consummated their marriage. At the time of the Rukhmabai case, two kinds of matrimonial suits for obtaining conjugal rights were recognized under the law: Under the Indian Limitation Act 1877 a suit for RCR could be brought by either party,²² but the suit for “the recovery of a wife” was only available to men,²³ and both these suits had to be brought within two years of the spouse’s refusal to cohabit. Section 260 of the revised Code of Civil Procedure 1882 prescribed prison (up to six months)²⁴ or the attachment of property if either partner defied the law.

In her defence against Bhikaji’s suit for restitution of conjugal rights, Rukhmabai submitted a written statement to the court in which she listed the three main reasons why she refused to live with her husband in his uncle’s house: His inability to provide for proper maintenance and residence for the couple, his ill-health, and the character of the people with whom he lived.²⁵ Yet, in her public interventions a far more nuanced argument emerged, and she framed her refusal of her husband as an act of resistance, challenging the very convention of child marriage. In this section, we examine the trials and their significance through an examination of the legal judgements, the views of the contemporary writers, and most importantly Rukhmabai’s own words.

As the debate around her case and the issues it raised raged around the city, Rukhmabai published two letters to the editor in the daily *The Times of India* under the pseudonym “A Hindu Lady”. In these remarkable letters Rukhmabai proved herself to be not only a resolute rebel but also an accomplished polemicist: challenging social conventions with arguments about gender abuses in Hindu society, as well as with impassioned emotional pleas against child marriage, widowhood, illiteracy, and domestic cruelty. In particular she stressed upon the ways in which early marriage restricted the young bride’s access to education and her mental and physical freedom, and urged the government to raise the minimum age of marriage to fifteen for girls and twenty for men.²⁶

In the courtroom, the Advocate General FL Latham defended Rukhmabai’s right to deny her husband conjugal rights on the basis that she had not given “personal consent” to her marriage by virtue of being a minor.²⁷ On the other hand, the defence counsel argued that the sacramental nature of the Hindu marriage left no room for questions of consent.²⁸ Without giving Rukhmabai’s counsel a chance to present their case, Justice Pinhey swiftly found in her favour. He was, it seems, much troubled by the prospect of marital coercion, and was impressed with Rukhmabai’s firm resolve to live her life on her own terms.

Pinhey forcibly argued that to compel Rukhmabai to consummate her marriage against her wishes would be “a barbarous, a cruel, a revolting thing to do”.²⁹ The thrust of his short judgement came to rest on the assertion that Bhikaji’s case was not of restitution but of “institution” of conjugal rights in an unconsummated marriage.

²²Indian Limitation Act 1877, Schedule II art 35.

²³Indian Limitation Act 1877, Schedule II art 34.

²⁴Indian Limitation Act 1877, Schedule II art 5.

²⁵*Dadaji Bhikaji 1885* (n 21) 531.

²⁶Rukhmabai writing as A Hindu Lady, ‘Infant Marriage and Enforced Widowhood’ *The Times of India* (Bombay, 26 June 1885) 4; A Hindu Lady, ‘Enforced Widowhood’ *The Times of India* (Bombay, 19 September 1885) 4.

²⁷*Dadaji Bhikaji 1885* (n 21) 531.

²⁸ibid 532.

²⁹ibid 534.

Pinhey was able to find an emancipatory space for Rukhmabai within the law precisely because Bhikaji went to court citing the colonial law. This is not to say that colonial law was more progressive on this issue than Hindu norms. Indeed, as Pinhey sought to show, it was far more regressive, for it allowed a husband to go to court to claim the body of his unwilling wife. Rapidly applied to non-Christian marriages in India from the mid-19th century onwards, RCR was sought to be portrayed as a part of the indigenous religious legal orders and its roots in English ecclesiastical law were routinely hidden. Often this was done with the blessing of the orthodox of the non-Christian religions who sought to gain from this deeply patriarchal legal transplant. As Julia Stephens has noted in the context of the leading 19th century case on RCR in Muslim marital law in India³⁰

The case law concerning conjugal rights thus illustrated the ability of rhetorical appeals to religious personal laws to mask how a distinctly colonial imagining of Indian patriarchy operated as a hidden common denominator across supposedly distinct bodies of religious law.³¹

Despite the previous legal attempts to mask the foreignness of the doctrine, Pinhey was able to successfully demonstrate that the roots of the doctrine for restitution of conjugal rights lay in English ecclesiastical law, and as such it was an alien law only very recently transplanted into the Hindu personal law system. He was also able to succinctly show how such suits had come to be discredited in England in the recent past. His arguments drew together the alien nature of the law which condemned Rukhmabai to a husband repugnant to her, her child marriage to which she could not have consented, and her refusal of consent to live with a man when she grew to maturity.³² Here, Pinhey embodies Mitra Sharafi's "semi-autonomous judge",³³ a term she uses to describe those colonial judges who were able to skilfully defy the rules that bound them – whether through legislation or common law – to protect the rights of native wives. Though Sharafi coined the term in reference to judges who favoured women in the cases of inflated Islamic dower, both her description and the accompanying caution – that even when the judges seem to be undermining the "patriarchal authority of husbands" they were not necessarily doing so in order to further a "feminist agenda" – are useful for us here.

As it happened, Pinhey's arguments created a space to greatly amplify the agitations against child marriage that had already begun in India. What was at issue in Pinhey's judgement was the framework of religion-based personal laws that had originated with Warren Hastings' Judicial Plan of 1772, and which reserved all matters related to Hindus' caste, belief, religious practice, marriage, divorce, inheritance and adoption to the scripture and custom of the Hindu communities. No new law could be made in violation of scripture and custom, and courts, till 1864, employed Pandits and Maulvis to guide them in adjudication on matters relating to Hindu and Muslim laws, respectively. Colonial statutory laws that were made in the realm of Hindu personal laws almost invariably referred to Brahmanical interpretations of scripture. They claimed that current usage was a corruption of more pristine traditions, and that the new law would restore

³⁰*Moonshee Buzloor Ruheem v Shumsoonnissa Begum* (1867) 9 MIA 551 (PC):

³¹Julia Stephens, *Governing Islam: Law, Empire, and Secularism in Modern South Asia* (CUP 2018) 64.

³²*Dadaji Bhikaji 1885* (n 21) 533–535.

³³Mitra Sharafi, 'The semi-autonomous judge in colonial India: Chivalric imperialism meets Anglo-Islamic dower and divorce law' (2009) 46(1) *The Indian Economic and Social History Review* 57.

the authentic religious practice. Once they believed that a sizable body of case law had emerged to direct the courts, under Act XI of 1864³⁴ the courts chose to rely on precedent rather than the “Hindu and Mahomedan Law Officers”. The legal domain, thus, confined gender rules and practices within the iron cage of scriptural and customary prescriptions. Two decades later, Pinhey’s obvious disapproval of suits for restitution of conjugal rights not only went against the legal precedent set in the British Courts in India, the Hindu traditionalists argued that it also went against their scriptures.

To make matters worse, by hurrying along the court proceedings and not allowing Rukhmabai’s counsel a chance to present their case, Pinhey opened himself to the charge of acting on sentiment rather than the law.³⁵ More crucially he did not allow Kashinath Trimbak Telang, a renowned expert on Hindu law, Rukhmabai’s defence lawyer and later judge of the Bombay High Court, to demonstrate, as he later did in the Court of Appeal, that such issues were not legal concerns within Hinduism. This omission allowed Pinhey’s critics to argue that he had thoroughly misunderstood Hindu law.

Pinhey’s support for Rukhmabai’s refusal to go to her husband and the potential impact of such a stance on other Hindu marriages – the vast majority of which were arranged and performed while the bride was still a child – stunned orthodox Hindus, stirring up a storm of protests and agitations across the country. Citing holy scripture, they reminded the state about its pledge to safeguard religious laws in the domain of marriage. An indignant Hindu orthodoxy – which included Bal Gangadhar Tilak, one of the most prominent nationalist leaders of the country – cited innumerable scriptural texts to show why Rukhmabai must go to her husband. In fact, Tilak’s newspapers *The Mahratta* and *Kesari* ardently supported the orthodox Hindu position.³⁶ Under this viewpoint there was no room for female consent within Hindu scriptural norms. Hindu marriages were sacramental and non-contractual. Child marriage for the girl was mandatory and the marriage lasted for eternity, even beyond the death of the husband. Hence, the rules against widow remarriage. Marriage was also, at least for the upper castes, considered to be non-dissoluble. After the sacrament had been performed, it became written in stone. Though the husband was allowed to marry as many wives as he pleased, the wife was bound to him and to him alone. Tilak alleged that not only was Pinhey totally ignorant of Hindu traditions and faith, but he was also deliberately determined to destroy them.³⁷ Anti-colonialism and cultural indigenism mingled in his arguments, a discourse that was strengthening rapidly at the end of the century. In fact, Rukhmabai’s resistance to conjugality added a great deal of fuel to late 19th century Hindu fundamentalism. On this particular issue, Hindu orthodox arguments, therefore, reveal a striking congruence between the English ecclesiastical law and traditional upper-caste Hindu norms and injunctions on the wife’s status within marriage.

However, the critics missed a crucial aspect: within Hinduism, going to the law would not be seen as a viable – or even an imaginable – option for the jilted husband. Indeed, as Telang noted in the Court of Appeal, in the rare case that a wife refused to live with her

³⁴An Act to repeal the Laws relating to the Offices of Hindoo and Mahomedan Law Officers, and the Offices of Cazeer-ool-Cozaat and of Cazeer; and to abolish the former Offices.

³⁵Suit by a Brahmin for the Restitution of Conjugal Rights: Dadajee Bikajee vs Rukmibai’ *The Times of India* (Bombay, 13 March 1886) 3.

³⁶Chandra (n 3) 59, 118.

³⁷Kumari Jayawardena, *The White Woman’s Other Burden: Western Women and South Asia During British Rule* (Routledge 1995) 85.

husband the matter would have been handled by the couple's caste panchayat because the wife would have been seen to be in violation of a religious – not a legal – duty. Unmindful of this distinction, the Hindu orthodoxy³⁸ predicted that Pinhey wanted to destroy Hindu tradition, as did Rukhmabai. Indeed, she became a folk devil, a sign of evil “westernized” modernity, for a wide spectrum of Hindus all over India.

Soon after Pinhey gave the decree, Bhikaji filed an appeal. In 1886, at the Appellate Court, Chief Justice Sargent and Justice Bayley not only accepted the maintainability of suits for restitution of conjugal rights within Hindu marriage, but they also reiterated the long-held view that Hindu marriage was sacramental and did not require the consent of the parties involved.³⁹ Dismissing Pinhey's arguments, they returned the case to the High Court for a retrial. With Pinhey having retired, the case now fell to Justice Farran, who had coincidentally, as a lawyer drawn Bhikaji's first plaint.⁴⁰ As the Appellate Court had already decided on the matter of the law and declared Rukhmabai's lack of consent to the marriage itself, as well as to consummation, inconsequential, Farran simply had to adjudicate on the point of whether Bhikaji could afford to maintain his wife, and unsurprisingly made a decree for restitution of conjugal rights in favour of Bhikaji.⁴¹ As Rukhmabai remained adamant throughout the trial that she would disregard any judgement that tasked her with performing conjugal acts, Farran threatened her with six months' imprisonment if she was to disobey the decree, an ordeal quite unimaginable for an educated middle class young woman of the time. To further punish her unwillingness, he also asked her to pay Bhikaji's costs for the original hearing.

In the meantime, Indian reformers and British feminists began to approach their governments on behalf of Rukhmabai, eventually petitioning even a sympathetic Queen Victoria to dismiss the case against her. Rukhmabai's counsel and supporters were willing to take her case all the way to the Privy Council in London if needed, but in the short term their appeal against Farran's decree once again arrived in front of Sargent and Bayley in the Appeal Court. Rukhmabai's counsel shrewdly offered to pay Bhikaji Rs 2,000 if he agreed to never execute the decree for restitution of conjugal rights awarded against her. Access to Rukhmabai's wealth was all that he had ever wanted. He jumped at the chance, and soon remarried. The option to take another wife had always been available to Bhikaji; indeed, it was an option that Rukhmabai and her supporters had often urged him to consider. Hindu men continued to retain the right to polygamy in the Bombay Presidency till the passing of the Bombay Prevention of Hindu Bigamous Marriages Act 1946, and the practice was only outlawed more widely after Indian independence under Section 17 of the Hindu Marriage Act 1955.

³⁸*Dadaji Bhikaji 1886* (n 6) 307.

³⁹*ibid* 312.

⁴⁰The Case of Ruckmibai' *The Times of India* (Bombay, 4 March 1887) 3. There was a common-law presumption of impartiality and judges could only be disqualified from a case when they possessed a disqualifying pecuniary interest, and another judge was available. Farran would not have been expected to recuse himself under the circumstances. For the basis of the rule on bias and disqualification rules, see Coke, 'Dr Bonham's Case (1610) 8 Co 114a, 77 Eng Rep 638 in William Blackstone (ed), *Commentaries on the Laws of England: Book III* (Clarendon Press 1768) 361.

⁴¹The Case of Ruckmibai (40).

The aftermath

Narrowly escaping prison in 1887, Rukhmabai prepared to study medicine. British women's rights activists and the Countess of Dufferin Fund in India funded her studies abroad and in 1889 she left for the London School of Medicine for Women. One of the earliest fully trained women doctors in India, she practiced in Surat, Gujarat till her death in 1955.

Rukhmabai's prolonged defiance of her husband's wishes, and the patriarchal law, was the first time that a lone woman's action had initiated processes of social and legal change in India. The case, much reported and hotly debated, produced strong responses. For the world of late 19th century male Hindus, this case was something that directly concerned their deepest interests as men, as husbands, as Hindus. It was symbolic of what they always possessed and what they might now lose, because a new breed of women had emerged to challenge the most sacred of traditions. At the same time, it marked the extent of women's autonomy and self-expression in defiance of a social conservatism that was growing more and more rigid and fierce in reaction to such fissures. Another remarkable feature of the feminist agitation was that it unified Hindu, Muslim, Christian and Parsi Indian women as well as British feminists. Rukhmabai's trial and its polarizing impact on public opinion also imparted great urgency to debates and agitations against child marriage in the next decade, which eventually led to the increase of the minimum age of marriage to twelve for girls through the Age of Consent Act 1891.

Unfortunately, Rukhmabai's interventions were less successful in challenging the maintainability of suits for restitution of conjugal rights in Hindu marriages. Though her case, and the widespread support her cause had garnered, had forced the government to rethink the law on restitution of conjugal rights, it bore little effect. The government initially tried to gather opinion from Indian judges – all male, of course – about amending Section 260 of the Code of Civil Procedure of 1882, but these initiatives gradually petered out.⁴² Deemed to be a part of all religious personal laws in India, the doctrine was given statutory footing under Section 36 of the Parsi Marriage and Divorce Act 1936, and after Indian independence this statutory footing was extended through Section 22 of the Special Marriages Act 1954 (“SMA”) and Section 9 of the Hindu Marriage Act 1955 (“HMA”), while for Muslims it continued through common law. This status quo was disturbed when Section 9 of the HMA was declared null and void by the Andhra Pradesh High Court in 1983,⁴³ but this intervention remained short-lived because in the very next year the Supreme Court of India upheld the constitutionality of the doctrine of RCR in India.⁴⁴ The issue remains alive even today, and recently, following the right to privacy judgement in *KS Puttaswamy v Union of India*,⁴⁵ a public interest litigation has been filed in the Indian Supreme Court

⁴²For a discussion of the proposed changes and the public response to them see Laura Lammasniemi and Kanika Sharma, 'Governing Conjuality: Social Hygiene and The Doctrine of Restitution of Conjugal Rights in England and India in the Nineteenth Century' (2021) *Australian Feminist Law Journal* 13–16.

⁴³*T Sareetha v T Venkata Subbaiah* (1983) AIR AP 356.

⁴⁴*Saroj Rani v Sudarshan Kumar Chadha* (1984) AIR 1562 (SC).

⁴⁵(2017) 10 SCC 1. For a discussion of the possible implications of this case on issues of RCR and marital rape see Sayali Bapat, 'Family Privacy in India' (2018) *International Survey of Family Law* 253.

against the continuing validity of restitution of conjugal rights under the SMA, HMA and Order 21, Rules 32 and 33 of the Code of Civil Procedure 1908.⁴⁶

In the following section, we take the place of the judges of the Appellate Court in Bombay in 1886 to provide an alternative, re-imagined judgment to the case, focusing on the history and application of the doctrine of restitution of conjugal rights. Since the original case spanned many years and many iterations in the courtroom, it offered us four distinct judgements that could have been rewritten – the High Court judgement of Pinhey in September 1885, the Court of Appeal judgement by Sargent and Bayley in March 1886, the High Court judgement of Farran in March 1887, or the second Court of Appeal judgement by Sargent and Bayley in July 1888. For us, the importance of the case does not lie in its facts, which both parties largely agreed on. The importance of this case lies in the undisputed legal status that it accorded to suits for restitution of conjugal rights within Hindu marriages, and in particular, the ways in which it explicitly extended the doctrine to include the institution of conjugal rights, and categorically negated the court's need to take into account the consent of a woman to her marriage or to conjugal relations within that marriage. Since each of these legal principles were established by Sargent and Bayley in their first Court of Appeal judgement, we return to this judgement in order to offer a different legal precedent, and, thus, a new imagined legal history for suits for RCR in Hindu law in India.

Following the methodology of previous feminist judgements projects,⁴⁷ our re-written judgement not only adheres to the original facts of the case, but it also remains true to the laws and legal doctrines of the time. We seek to show that the legal structures of late 19th century India could have allowed for a more emancipatory judgement to emerge in Rukhmabai's favour, indeed, this was something that Pinhey had tried in the earliest judgement of this case. However, the new judgement goes beyond Pinhey's in order to place the issue of consent – both consent to marriage and consent to conjugal relations – at the heart of suits for restitution of conjugal rights.

III. The rewritten judgement

Before Justice Sharma, Justice Lammasniemi, and Justice Sarkar

DÁDÁJI BHIKÁJI (ORIGINAL PLAINTIFF), **APPELLANT**

v.

RUKHMÁBÁ Í (ORIGINAL DEFENDANT), **RESPONDENT** *

***Suit No. 139 of 1884.**

- (1) In the present case, we as the Court of Appeal are asked to consider whether a writ for restitution of conjugal rights can be issued, as requested by the appellant, when a Hindu marriage has not been consummated, and against the explicit wishes of the respondent.
- (2) This appeal has been brought against the decree made by Pinhey J. at the Bombay High Court on 21 September 1885 in a suit for restitution of conjugal rights filed

⁴⁶*Ojaswa Pathak v Union of India*, WP(C) No 250/2019 (Supreme Court).

⁴⁷For a short discussion on the shared methodologies of the various feminist judgements projects see Linda L Berger, Bridget J Crawford and Kathryn M Stanchi, 'Methods, Impact, and Reach of the Global Feminist Judgments Projects' (2018) 8 *Oñati Socio-legal Series* 1215, 1219–1220.

by a Hindu husband. In his ruling, reported in ILR 9 Bom 529, Pinhey J. did not grant the appellant the relief he sought from the High Court. This Court also rejects the appellant's claim and finds in favour of the respondent.

- (3) This is an unusual case for a number of reasons. For one, under the guise of restitution of conjugal rights, the appellant seeks the Court's help in instituting such rights in an unconsummated marriage. Secondly, the respondent has repeatedly and publicly repudiated the appellant's claim, and her initial lack of consent to a marriage arranged in her childhood cannot be ignored by this Court. Each of those considerations warrant further remarks from the Court. While issuing these remarks, we will be examining a series of interrelated legal issues. First, the relationship between English common law and Hindu law will be discussed, especially in relation to the laws of Hindu marriage and the doctrine of restitution of conjugal rights. Second, we examine the device of the suit for restitution of conjugal rights as it originated within the ecclesiastical law and the present status of such suits in England. The third, and perhaps most pertinent, issue is whether the lack of consent to a marriage and to its consummation can constitute a valid defence against such suits.

Facts of the case

- (4) The facts of the case are as follows. The respondent, a pre-pubescent Miss Rukhmabai Raut, was married to the appellant Mr Dadaji Bhikaji, a cousin of her stepfather, Dr Sakharam Arjun, when she was at least eleven years old circa 1875. The appellant was nineteen at the time of the marriage. In a departure from Hindu custom, it was decided that after the wedding the appellant was to live with the respondent's family in order to further his education and so that he could – in the words of the respondent's counsel – “become a good man”. Soon after these arrangements were made and effected, the appellant objected to the compulsory education he was being subjected to. However, before he could leave the house, he was stricken by consumption. After a three-year recovery from consumption, he abandoned his studies for good and went to live with his maternal uncle. It has been implied by the counsel for the respondent that under the influence of his uncle his way of life has been less than respectable.
- (5) Though she attained puberty within seven months of the marriage, contrary to Hindu custom, Rukhmabai did not begin to live with her husband after menarche. Her decision was supported by the late Dr Arjun, against the express wishes of the appellant, the respondent's mother and maternal grandfather. Dr Arjun was a well-known citizen of Bombay, who was known for being a progressive reformist and for his views against the early consummation of marriage. In these last few years, the appellant has repeatedly approached the respondent's family in a bid to convince her to cohabit with him as husband and wife in his uncle's home.
- (6) Rukhmabai's repeated refusal to cohabit with her husband and to begin their marital life together has led the latter to bring the present suit against her. At present the respondent, at 22, is an educated woman who has been firm in her objection to live with the appellant or allow him to consummate their marriage. She points out –

rightly, in the opinion of this Court – that her consent for the marriage was never solicited, and that her lack of consent to its consummation must be taken into account at this stage. It is important to clarify here that the respondent does not state that she wishes to dissolve the marriage, through annulment or divorce. She simply does not wish to cohabit with her husband or have conjugal relations with him.

Hindu marriage and the restitution of conjugal rights

- (7) The minimum age of consent for girls has been established at ten in criminal law through the Indian Penal Code 1860. In the present case, both parties disagree as to the age of the bride upon the wedding. The respondent has stated that she was eleven, whereas the appellant alleges that she was at least thirteen years old. Under the present law, the difference between eleven and thirteen is of no consequence, as both are above the minimum age of consent. This is then a civil matter pertaining to the rights of a Hindu wife in her marriage. One cannot speak of the Indian laws of marriage without identifying the religion of the parties concerned. In his Judicial Plan for 1772 Warren Hastings, then Governor of Bengal, had stated that in “all suits regarding the inheritance, marriage, caste and other religious usages, or institutions, the laws of the Koran with respect to Mohamedans [Muslims] and those of the Shaster [sic, *Shastras*] with respect to Gentoos [Hindus] shall be invariably adhered to.” This has laid the groundwork for religion-based personal laws in the Indian subcontinent. Ever since 1772, Hindus and Muslims in India have followed distinct laws on matters of marriage, divorce and inheritance. In the present suit, the Court must restrict itself to the terms of Hindu marriage.
- (8) Allowing these multitude of laws to co-exist was a conscious decision made by the British authorities so as to refrain from interfering in the customs and religious practices of the native population. The Judicial Plan was later reaffirmed in 1780, and its spirit was reiterated in the Queen’s Proclamation of 1858: “We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief or Worship of any of our subjects”.
- (9) In the present case, Mr Macpherson, Mr Vacaji, and Mr Mankar have argued on behalf of the appellant that Hindu marriages are completed once the ceremony is performed, and that under the law, suits for restitution of conjugal rights are recognized to lie amongst the Hindus. Thus, they argue that the husband’s right to society of his wife must be enforced by the courts even if the marriage remains unconsummated as in *Kateeram Dokanee v Mussamut Gendhenee*⁴⁸ and *Gatha Ram Mistree v Moohita Kochin Atteah Domoonee*.⁴⁹ However, we must note here that in the first case cited the wife was a minor at the time of the judgement, and in the second no decree was made. In fact, Markby J. expressed his distaste for the fact that decrees for restitution of conjugal rights are ever enforced. We will later return to the views of Markby J., and the views of the courts in India more generally, on the enforcement of such suits.

⁴⁸(1875) 23 WR 178.

⁴⁹(1875) 14 BLR 298.

- (10) Away from case law, an examination of Hindu holy texts shows that the idea of “restitution of conjugal rights” is alien to the Hindu religion. No Hindu text allows for a man to approach the courts in order to force an unwilling wife to live with him. The Advocate General Mr Latham has made the argument that under Hindu law, a matter such as this was not for the courts to decide but should be dealt with by the caste community of the couple by imposing religious or social penalties. This point has also been reiterated by the counsel for the respondent, Mr Telang, who has argued that the Hindu religious texts contain no provision on how a wife should be punished if she has deserted her husband. He has further asserted that the duty of the wife to live harmoniously with her husband is an imperfect obligation that stems from her religious duties according to the Institutes of Manu. While the punishment for not following this duty is to go to hell, there is no secular punishment that had been outlined for the recalcitrant wife.
- (11) In response to the points raised by Mr Latham and Mr Telang, on behalf of the appellant Mr Macpherson has admitted that there is no direct authority for the suit in Hindu law, but he denies that the suit is inconsistent with such law. Instead, he argues that “the principles laid down in *Moonshee Buzloor Ruheem v Shumsoonnissa Begum*⁵⁰ are applicable to Hindus.” However, in the case that the counsel has cited the Privy Council was careful to recognize the legal principle that we have now upheld for over a century in India: Hindus must follow Hindu law, and the Mohammedans must follow their own. As the Right Honourable Sir James W. Colville noted: “For since the rights and duties resulting from the contract of marriage vary in different communities; so, especially in India where there is no general marriage law, they can only be ascertained by reference to the particular law of the contracting parties”.⁵¹ In this instance, the PC was very careful to restrict itself to restitution of conjugal rights in Muslim marriages alone, and we do not believe that the principles laid down in that case should be extended to Hindu marriages. We are aware that in some cases our Courts have previously issued decrees for restitution of conjugal rights in favour of Hindu husbands: *Yamunabai v Narayan Moreshvar Pendse*⁵² and *Jogendronundini Dossee vs Hurry Doss Ghose*.⁵³ However, we believe that they have applied the doctrine incorrectly.
- (12) We find Mr Latham’s and Mr Telang’s arguments to be persuasive and in the absence of any direct authority for suits for restitution of conjugal rights within the Hindu religion, we do not feel the need to pursue this case through Hindu law any further. Instead, we will limit ourselves to the idea of restitution of conjugal rights as it has developed in common law alone. However, at this stage we must also note that even if the appellant had found a direct Hindu authority in support of his claim, he may still not have received the decree that he wishes for. It has been well established that the civil courts in India have the power to differ from religious texts if they feel the need to do so, though the powers to affect such a deferral are very strictly circumscribed. First established under Sections 60 and 93 of Elijah Impey’s Judicial Regulations 1781, a departure from native laws can be allowed in order to

⁵⁰(1867) 9 MIA 551 (PC).

⁵¹ibid 610.

⁵²(1876) 1 ILR Bom 164.

⁵³(1880) ILR 5 Cal 500.

achieve “justice, equity and good conscience”. We strongly believe that to force the respondent to cohabit with the appellant against her will, so he may consummate this marriage that was arranged for her during her infancy, goes against principles of justice, equity or good conscience. We will return to this point later.

- (13) To proceed any further, we must understand the nature of suits for restitution of conjugal rights and their application within the native religions in India. It is only lately that such suits have come to be recognized within Hindu marriages in Indian courts. The first case to establish that suits for restitution of conjugal rights may extend to the native population was *Ardaseer Cursetjee v Perozeboye*⁵⁴ where a Parsi woman had initially brought the suit against her husband. The Privy Council had held that while the Ecclesiastical jurisdiction of the courts in India could not be extended to non-Christians, there was no reason why such suits could not be entertained on their civil side. A few years later, in *Moonshee Buzloor Ruheem v Shumsoonnissa Begum*⁵⁵ discussed above, their lordships held that “Mussulman husbands may institute a suit [for conjugal rights] in the Civil Courts of India, for a declaration of his right to the possession of his Wife, and for a sentence that she return to cohabitation”. In the very next year, in *Bai Prem Kuvar v Bhika Kallianji*⁵⁶ the Bombay Appeal Court, adjudicating on a case from the District of Surat, seemed to assume that a suit for restitution of conjugal rights would ordinarily lie among the Hindus too. However, the Court held that it would be cruel to force a wife to live with a man who had a “loathsome disease”. As the man in this case suffered from leprosy and syphilis, the wife was allowed to use his disease as a defence against his suit for the restitution of conjugal rights.
- (14) The idea that a suit for restitution of conjugal rights would lie for both Hindu and Muslims in the Civil Courts of the country was only expressly stated a decade ago in *Kateeram Dokanee v Mussamut Gendhenee*⁵⁷ by the Appellate High Court in Calcutta. In this case too, the Court did not, in fact, issue a decree for the restitution of conjugal rights. Instead, the case was remanded to the Judicial Commissioner of Assam for a retrial.
- (15) In light of the short history of such cases in India, we share, and reiterate, the regret articulated by Pinhey J. that this doctrine of restitution of conjugal rights was ever recognized and extended by our courts to non-Christian marriages in India. However, we are not as absolute in our repudiation of such suits as Pinhey J. We maintain this remorse insofar as the availability of such suits seems to encourage Hindu and Mussulman men to approach the courts in an attempt to gain possession over an unwilling wife. Nonetheless, we also recognize that the availability of such suits has allowed non-Christian women to approach the courts in order to gain maintenance from husbands who seek to deny them the right to live within the marital home, as has been illustrated by Perozeboye’s case referred to above. Therefore, we are of the opinion that till such time as the mechanisms for the maintenance of abandoned wives are not strengthened, a change that we fervently

⁵⁴6 MIA 348 (PC) (1856).

⁵⁵(1867) 9 MIA 551 (PC).

⁵⁶(1868) 5 Bom HCR 259.

⁵⁷(1875) 23 WR 178.

wish to see, the courts must, with reservations, continue to recognize the utility of such suits.

- (16) The counsel for the appellant has further argued that since suits for restitution of conjugal rights are recognized by English courts it is only just and equitable that this privilege is upheld for Hindu and Muslim husbands too. In answer to the counsel's plea, we will briefly turn to the present state of English law regarding the doctrine.

The origins of the doctrine of restitution of conjugal rights

- (17) The doctrine of restitution of conjugal rights is an established part of English matrimonial laws. However, the potential use of the doctrine in the present case is limited by two equally important considerations. Firstly, the doctrine has recently fallen out of favour in England, and its use has been severely limited by the Matrimonial Causes Act 1884. Secondly, a question arises about whether ecclesiastical doctrines and remedies should ever be extended to non-Christian marriages.
- (18) It is prudent to say a few words about the doctrine of restitution of conjugal rights and how it has developed in order to assess its validity in the current case. Sir Blackstone wrote in *Commentaries on the Laws of England: Book III: On Private Wrongs* (1765–1769) p. 94 that a suit for restitution of conjugal rights is:

brought whenever the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason, in which case the ecclesiastical jurisdiction will compel them to come together again, if either party is weak enough to desire it, contrary to the inclination of the other.

- (19) The laws regarding suits for restitution of conjugal rights have provided sanctions and remedies for when a party to marriage has violated the *consortium vitae*, an obligation to cohabit as husband and wife. The legal doctrine is related to the Christian doctrine of indissolubility of marriage and has its roots in ecclesiastical law. While desertion was not a matrimonial offence under the Ecclesiastical Courts, the deserted party could obtain a decree of restitution of conjugal rights ordering the deserting party to return to live as husband or wife and to resume conjugal relations. Failure to comply with the decree was punished by excommunication till the start of the present century, when the Ecclesiastical Courts Act 1813 replaced that punishment with imprisonment not exceeding six months. Imprisonment remained the punishment for failure to comply until very recently, even after civil judges took over the jurisdiction of the doctrine from Ecclesiastical Courts under the Matrimonial Causes Act 1857.

In recent years, the doctrine has received a lot of scrutiny and arguably has fallen out of favour in England following the widely reported case of *Weldon v Weldon*.⁵⁸ In *Weldon*, the husband, was ordered to take the plaintiff home and to receive her as his wife after she successfully brought a claim for restitution of conjugal rights after years of separation. He refused, at the threat of imprisonment. The case led to the speedy review and amendment of the doctrine by the Parliament under the

⁵⁸(1883) 9 PD 52.

Matrimonial Causes Act 1884. It suffices to say that the decision to review the doctrine was welcomed by many – even if the Parliament might have been sprung to action by reports on the plight of Captain Weldon – with the Parliament having previously ignored the plight of many wives in similar circumstances.

The key change brought about by the Matrimonial Causes Act 1884, also often referred to as the Weldon Relief Act, is the introduction of the concept of “statutory desertion”. Following the Act, failure to comply with the writ of restitution of conjugal rights in England is no longer punishable by imprisonment; rather, it is considered to be statutory desertion. This entitles either spouse to a decree of judicial separation, expediting divorce proceedings should they approach the courts for a divorce. If the decree is coupled with evidence of the husband’s adultery, the wife can also obtain immediate divorce, a relief which has so far only been available to men in cases of adultery. We must highlight here that the Act only applies to Christian marriages where divorce is an option available to both parties to the marriage. We shall return towards the end of the judgement to the possible ramifications of such a decree in Hindu marriages where Hindu law does not as yet recognize dissolution through divorce.

It should be noted, therefore, that the decree the appellant has sought in the present case has already ceased to have the effect he desires in Britain. Common law doctrines are living and breathing instruments, and to interpret the doctrine in a way that is fair, giving effect to the principles of “justice, equity and good conscience”, we must take into consideration how the doctrine has developed in other jurisdictions, while paying attention to British parliamentary and judicial proclamations on the topic.

The second consideration is whether an ecclesiastical law doctrine should apply in the present case at all. In our view, it should not for two compelling reasons. Firstly, ecclesiastical law on marriage is not compatible with Hindu marriage as ecclesiastical law requires consent to marriage from both parties. Secondly, the present case is not, in fact, a case for “restitution” of conjugal rights at all as the marriage has not yet been consummated.

On the first point, we note that under ecclesiastical law, the central condition for the validity of a marriage is the consent of both parties. Following this, both in ecclesiastical law and in English criminal law, there is no further requirement for consent to conjugal relations as the consent to such relations is, in our opinion wrongly, contained within consent to marriage itself. Since under Hindu law the validity of marriages is not dependent upon the consent of either party, we argue that in the absence of this central condition for validity being met, ecclesiastical law remains incompatible with the Hindu idea of marriage and must not be extended to it.

On the second point, we note that under such ecclesiastical law, the doctrine of restitution of conjugal rights gives rights to a deserted spouse to seek the deserter to *resume* married life. When a married couple have consummated their marriage, and are habituated to living together, the decision of one party to live apart may be challenged by the other in Court. In the present suit, both the appellant and the respondent agree that conjugal rights and cohabitation were never established in their marriage. There is no precedent for issuing a writ where conjugal rights have

not been established. We agree with the esteemed Pinhey J. that it remains a misnomer to call this a suit for “restitution” of conjugal rights. What the appellant seeks is not a “restitution” of conjugal rights, but the Court’s intervention in instituting such rights. The Court does not have jurisdiction to order an “institution” of conjugal rights as such a doctrine simply does not exist.

This Court cannot expand the scope of the existing doctrine. In the case of *Orme v Orme*⁵⁹ it was held that the single duty which a Court can enforce in cases of restitution of conjugal rights is that of married couples “living together”. The Court therefore refused to order a husband to return to the marital bed which he had withdrawn from, confirming that it cannot enforce any super-addition beyond issuing a writ ordering cohabitation. Ordering the “institution” of conjugal relations would be such and, therefore, it is not within the powers of the Court to do so. Furthermore, we must add that the doctrine should never be expanded to include “institution” of conjugal rights. Doctrines such as restitution of conjugal rights have developed in line with English customs and traditions, just as Hindu marriage practices have developed in line with Hindu customs and traditions. The chasm between “restitution” and “institution” is too big for our courts to bridge. Investing the courts with the power to order an “institution” of conjugal rights is not only repugnant to morality, but also against the principles of justice and good conscience. Ecclesiastical courts have the right to refuse an immoral petitioner and have discretion as to the remedies they issue. An order to institute marital relations against the wishes of a party to marriage is immoral, and therefore is contrary to the very core of ecclesiastical law. The decision on when or whether to institute and maintain marital relations must remain with both the parties to a marriage and should be made freely without interference from the Court, the religious authorities, or the community within which they live.

Consent to marriage and to conjugal relations

- (20) We have already stated above that it is not the place of the courts to compel a couple, despite the bonds of marriage, to cohabit or to care for each other if a party to the marriage no longer wishes to do so. Yet, it remains prudent to say a few words about the issue of consent. This final consideration for the Court is perhaps the most complex one.
- (21) In our view, there are two separate notions of consent relevant here – i.e. consent to marriage and consent to conjugal relations within the marriage. So far, in the present case, these two distinct notions of consent have been dealt with in an intertwined way. For instance, Pinhey J. argued:

The defendant, being now of full age, objects to going to live with the plaintiff, objects to allowing him to consummate the marriage, objects to ratifying and completing the contract entered into on her behalf by her guardians while she was yet of tender age. It seems to me that it would be a barbarous, a cruel, a revolting thing to do to compel a young lady under those circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will . . .

⁵⁹(1824) 2 ADD 382.

- (22) On the issue of consent to marriage, relying on Mayne's *Hindu Law*, counsels for the appellant have argued that Hindu marriage is not a contract and therefore does not need consent in order to validate the marriage. Instead, they argue that Hindu law treats marriage as a *Samskara* or sacrament, an irrevocable religious rite. It is true, that previously, our courts have held that if a marriage has been solemnized without fraud or force, then the doctrine of *factum valet* applies, and the marriage is irrevocable.⁶⁰ In fact, in *Madhusudhan Mukherjee v Jadubchander Bannerjee*⁶¹ our courts have gone so far as to state that even the absence of consent of a girl's father would not invalidate her marriage.
- (23) The prevailing view in the conservative realms of Hindu society is that decisions of marriage are best left to the bride's father and other men in her family who are well-versed in the ways of the world. Proponents of such a view argue that a female, no matter how old, is never competent enough to choose her own life partner. This, in our opinion ill-advised, view highlights the irrelevance of the bride's consent due to her presumed intellectual immaturity and inability to make such decisions. In the present case, the respondent's strong character and her well-argued objections to early marriages challenges such a view.
- (24) Since the consent of the bride is not required at the time of a Hindu marriage, it is widely believed that the bride also loses her ability to withhold consent within the marriage, especially in matters of cohabitation. Respectfully, we must disagree with this notion. It is precisely because the bride's consent is not sought at the time of the marriage, that her consent must be obtained at the time of consummation of marriage. This situation is unique to the Hindu marriage.
- (25) The Court is well aware of the respondent's sustained and public objection to the cohabitation. While this is not the court of public opinion, nor do her public announcements form part of submissions, it is only natural that this Court take her objections to the cohabitation and consummation of marriage, and the reasons for it, into account. The respondent has publicly voiced her dissent to cohabitation in the strongest terms. Her letters to *The Times of India*, a well-respected newspaper, are articulate, compelling, and well-argued. These are not the words of a young woman swayed by the passing influences of the occasion as her critics allege. Rather, they are the thoughtful remarks of a person who shows remarkable maturity and composure.
- (26) When her marriage ceremony was performed, she was too young to voice her consent or dissent; this is no longer so. Aged 22, the respondent is able to, and has strongly voiced, her lack of consent. We are not able to ignore her objections to this marriage and its consummation. Decisions about the consummation of marriage and when to bear children are not for the courts to make. We should proceed with an understanding that a bride's consent to her marriage should be sought wherever possible. If for reasons of age or religion, such consent has not been sought at the time of marriage, the husband must secure such consent before the couple can cohabit or the marriage is consummated.

⁶⁰See *Brindaban Chandra Kurmoker v Chandra Kurmoker* (1885) ILR 12 Cal 140.

⁶¹(1865) 3 WR 194.

- (27) We must also stress here that the appellant is a Hindu man, and like all Hindu men he has the right under the law to take multiple wives. If he simply wished to enjoy conjugal rights under the sanctity of marriage, neither the Hindu religious texts nor the laws of the land are preventing him from marrying another woman. The respondent too has shown no aversion to this idea. The fact that despite this choice, the appellant wishes to force himself on the unwilling respondent either indicates a moral repugnancy that cannot be sanctioned by this Court or suggests that the suit is brought forward due to motivations other than those of marital reconciliation – namely financial concerns. In the present case, unusually it is the wife, Rukhmabai, who holds a claim to family property that is of significant value. Rukhmabai’s father died when she was only two years old, and before her mother remarried, the family property valued in excess of Rs. 25,000 was transferred to Rukhmabai. At the time of proceedings, Rukhmabai has not asserted her rights to the property, and it is her maternal grandfather, Harichand Yadowji, who collects rents on the land. The appellant stated in his submission to the court that Rukhmabai’s family only objected to the couple’s cohabitation as they feared that once she began living with him, she would “assert her right to the property of her deceased father”. The respondent has dismissed this claim, and since the appellant’s counsel has not seen it fit to pursue this issue, the Court cannot speculate any further on this matter.
- (28) Before we proceed further, it is pertinent to discuss the limits that courts have placed on their powers to enforce conjugal rights in native marriages. Our courts have previously shown a reluctance to enforce a suit for restitution of conjugal against the wife by giving physical possession of her to the husband. In *Chotun Bebee v Ameer Chund*,⁶² the question of enforcing a decree for restitution of conjugal rights was not strictly under judicial consideration. However, Macpherson J. and Jackson J. held that the courts could only enforce a suit against the wife through her imprisonment, or the attachment of her property, or both. This majority decision was later followed by the Agra High Court in *Ram Tahul v Madho*.⁶³
- (29) Following *Chotun Bebee and Shaikh Koobur Khansamah v Shaikh Jan Khansamah*,⁶⁴ Section 200 of the Code for Civil Procedure 1859, which deals with “Decree for moveable property, performance of contract, or alternative”, was amended to specifically note that:

A decree for the plaintiff, in a suit by a husband for restitution of conjugal rights, ought to be declaratory only, and to be enforced, in case of disobedience, by attachment, and not by ordering the lady to be given up as a ‘specific moveable’ under this section.⁶⁵

- (30) Subsequently, courts have held that even the attachment of property is unsuited in such cases. In our opinion, our courts’ distaste for enforcing suits for restitution of conjugal rights in any way at all was best articulated by Markby J. in *Gatha Ram*

⁶²(1866) 6 WR 105.

⁶³(1867) 2 CCA 111.

⁶⁴(1867) 8 WR 467.

⁶⁵LP Delves Broughton, *The Code of Civil Procedure being Act VIII of 1859* (4th edn, Thacker, Spink and Co., 1871).

Mistree v Moohita Kochin Atteah Domoonee. He acknowledged that though in some cases of restitution of conjugal rights the courts had ordered⁶⁶ a wife to be delivered bodily to the husband in execution, such a practice was “shocking to our feelings of humanity” and “universally condemned”. He further argued that even the alternative of forcing a wife to comply through threat of fines or imprisonment was “generally repudiated,” and came to the conclusion that the decree of restitution of conjugal rights should only be declaratory in nature and not enforceable in any way.⁶⁷

- (31) Soon after *Gatha Ram Mistree*, Section 260 of the new Code of Civil Procedure (Act X of 1877 and now Act XIV of 1882) allowed for the disobedience of such decrees to be punished by “imprisonment, or the attachment of his property, or by both”. Under Article 5 of Schedule II of the Indian Limitation Act 1877, the maximum period for such imprisonment was set at six months. Faced with this option of imposing imprisonment or attachment of property of a wife who refused to follow the court’s decree for restitution, courts have previously declined from choosing either punishment. For instance, in *Furzund Hossein vs Janu Bibee*,⁶⁸ the Calcutta High Court upheld the suit for restitution of conjugal rights but argued that the decree was simply declaratory in nature.
- (32) If we were even to countenance the idea that a suit for restitution of conjugal rights should be entertained in the case, following the cases we have just cited, we would limit ourselves to a declaration alone. As it stands, in both these cases conjugal rights had been established before the case was brought to court. Since in the present case conjugal rights have never been instituted, we are of the firm opinion that even a declaratory decree is unwarranted.
- (33) So far, we have restrained ourselves to outlining the Hindu woman’s rights within her marriage. We would be remiss if we did not also, however briefly, touch upon her potential rights to dissolve her marriage. It is argued that the Hindu woman, much as the Hindu man, has no right to dissolve her marriage. This understanding of the indissoluble Hindu marriage stems from the idea, discussed above, of Hindu marriage being a sacrament and not a contract. It cannot be denied that many Hindu religious texts or *Smritis* take this view. However, the courts, while looking at the *Smritis* for legal guidance, have also taken into account the *acharas* of particular castes and regions while coming to their decisions in Hindu law. *Acharas* are the local customs; in legal parlance they may take the form of customary law. This Court notes that though the counsel for the respondent did not make this submission in Court, nor has the respondent herself ever alluded to the desire to dissolve her marriage, the customary laws of the lower castes such as the *Suttar* or carpenter caste to which both the appellant and the defendant belong, often recognize the dissolution of marriages and, indeed, the remarriage of the spouses. In their haste to uphold the sanctity of the Hindu marriage, our learned friends on the bench have so far always held that dissolution is alien to Hindu law and customs. We humbly beg to submit that Hinduism is not a monolithic religion, and the dissolution of Hindu

⁶⁶(1875) 14 BLR 298.

⁶⁷*ibid* 307.

⁶⁸(1879) ILR 4 Cal 588.

marriage may not be as alien an idea as it first appears to be. While upper-caste Hindu society may not be ready for such changes yet, our courts' commitment to justice and good conscience may soon lead us to a position where we would have to recognize not only the dissolubility of the Hindu marriage, but also a Hindu woman's right to demand such a dissolution.

Conclusion

- (34) For the reasons given above, we are convinced that neither the secular nor the religious laws in England or India, nor the practice of our courts, allow us to make an order to "institute" conjugal rights within an unconsummated marriage. This is especially the case when the respondent has not consented to the marriage or its consummation, and where such marital relations remain clearly repugnant to her. Our decision does not affect the validity of the marriage between the respondent and the appellant.
- (35) We confirm the decree of the Division Court with costs.

IV. Reflections on writing a feminist colonial judgement

In keeping with the chosen methodology of the feminist judgements projects, while rewriting the judgement we constrained ourselves to the materials that were available to the Court at the time that the case was first heard. By so doing, we sought to disperse the myth that the logic of the original judicial pronouncement was inevitable, and in the process hoped to expose the contingency of law. However, just as the original judgement of the Court of Appeal was not inevitable, our feminist take on the case is not inevitable either.

At their heart, the rewritten feminist judgements are 'collective, collaborative enterprises'⁶⁹ that reveal the multiplicity of feminist viewpoints and concerns that can be brought to bear upon a single case. As legal historians working on India and the United Kingdom, and a historian of women's histories and social movements in India, respectively, we came to this case from resolutely feminist, but diverse, starting points.

One of our first concerns was whether a feminist judgement could be written for this case while remaining true to the facts and the contemporary legal system. An examination of the colonial legal history in the realm of personal law reveals how two distinct patriarchal systems – the native religious orthodoxy and the colonial administration – combined to create an institutional patriarchy that proved to be near inescapable for Indian women. As Sarkar has previously demonstrated, in India the English judges were glad to find "a relatively unquestioned patriarchal absolutism which promised a more comfortable state of affairs than what emerged after bitter struggles with Victorian feminism at home".⁷⁰ Indeed, restitution of conjugal rights is an excellent example of a patriarchal tool long fallen into disuse in England, yet still being employed against Indian women in the 21st century. Recognizing this capacity of colonial intervention to provide an even more favourable outcome than Hindu law, many Hindu men (and in

⁶⁹Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20(2) *Feminist Legal Studies* 135.

⁷⁰Sarkar (n 20) 201.

some cases Hindu women) actively forum shopped.⁷¹ This desire for a more sympathetic judgement may have driven Bhikaji, too, to the Bombay High Court rather than his caste panchayat. But it is precisely this liminal space between Hindu law and colonial law that allows us to carve out room to protect Hindu women's rights. We do so not only by recognizing the alien nature of suits for restitution of conjugal rights, but also by resolutely refusing to extend these rights of "restitution" into rights to "institution" in the vein of Pinhey. However, in our obiter comments we expand this reasoning, and make a case for taking into account female consent to both marriage and to conjugal relations. We make a further case for recognizing a Hindu woman's right to ask for dissolution of marriage, and adequate and fair ancillary relief. With the issues of consent to conjugal relations within a marriage and dissolution of marriage still remaining contentious issues for women within modern Hindu marriages today, this rewritten judgement returns to the historical context to offer an alternate path to equality within marriage.

Acknowledgments

We would like to thank the editors of the Indian Feminist Judgments Project for the invitation to contribute to this volume. Thanks are also due to Maebh Harding and the anonymous reviewers from ILR whose feedback has helped strengthen this paper.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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⁷¹For instance, see Lauren Benton, *Colonial Cultures: Legal Regimes in World History 1400–1900* (CUP 2002) 137.