

# Restitution of Conjugal Rights - An Analysis

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**Abstract :** The Restitution of Conjugal Rights is a concept to provide relief to people who suffer from separation from their spouse even when they are unwilling and this provision provides them great relief by enforcing the spouse to stay back. But is this provision actually helpful? The fact that spouse can be legally forced to stay with their partners can sometimes turn against their personal liberty as prima facie fact the spouse separated because they were unwilling to cohabit and forcing them to do something which they are unwilling can worsen the wedlock. The idea behind creation of this provision though was noble, but unfortunately it did not turn out the way it was meant to be.

**IndexTerms - Consent, Willingness, Restitution, Liberty**

## I. INTRODUCTION

The term restitution means the restoration of something that is lost or is stolen, in terms of personal rights it means reinstatement of the rights and in terms of relationship it means restoration of the relationship and according to the Oxford Dictionary the word conjugal means, 'of pertaining to marriage or to husband and wife, in their to each other'. The essence of marriage is a sharing of a common life, a sharing of all the happiness that life had to offer and all the misery that is faced in life, living together is a symbol of such sharing. Living apart is a symbol indicating the negation of such sharing.<sup>1</sup> It is one of the remedies available to a spouse whose other half has withdrawn from his or her society and house without giving any proper reason or justification. The concept of Restitution of conjugal rights is an English concept and goes back to the early 1800s. In England the concept of restitution of conjugal rights was not recognised earlier it was controlled by the Ecclesiastical Courts<sup>2</sup> which looked after all marriage related cases and it did not recognise desertion. The court developed the concept that when a spouse leaves without any justification or explanation, he/she could obtain an order of restitution and on obtaining such order from the court the other spouse under the order of the court had to return back to his/her matrimonial house and failure to comply with such order, the deserting spouse was penalised with Excommunication<sup>3</sup>, it basically meant banishment of the person who did not follow the order of restitution.

Before the advent of the British, India did not recognise any such concept, as the concept of marriage in India was and is still sacramental and separation is considered sin. It was neither considered by Dharmshashtra nor Muslim law made any provision for it<sup>4</sup>. The concept of restitution of conjugal rights came in India with the British and was introduced for the first time in the year 1866 by the Privy Council in the case of *Moonshee Bazloor vs. Shamsoonaissa Begum*.<sup>5</sup> In this case, such an action was considered as specific performance.<sup>6</sup>

## II. Essential Ingredients:

To obtain the relief of restitution of conjugal rights the aggrieved on pre-requisite basis need to establish the presence of the following essential ingredients:

1. One of the spouses must have withdrawn from the society of another.
2. The withdrawal must be without any reasonable cause or justification.
3. The aggrieved party (spouse), must file a petition for obtaining the relief of Restitution of Conjugal Rights.
4. The court must be satisfied in the statements made by the petitioner.

On establishment of the above mentioned ingredients, the court will take a cognizance of the case.

<sup>1</sup> The 71st Law Commission Report titles "Irretrievable Breakdown of Marriage as a ground for Divorce", para- 6.5.

<sup>2</sup> An ecclesiastical court, also called court Christian or court spiritual, is any of certain courts having jurisdiction mainly in spiritual or religious matters, [https://en.wikipedia.org/wiki/Ecclesiastical\\_court](https://en.wikipedia.org/wiki/Ecclesiastical_court), Visited on 14-07-2017.

<sup>3</sup> Excommunication may involve banishment, shunning, and shaming, depending on the group, the offense that caused excommunication, or the rules or norms of the religious community, <https://en.wikipedia.org/wiki/Excommunication>, visited on 14-07-2017

<sup>4</sup> Diwan Paras, *Law of Marriage and Divorce*, 3<sup>rd</sup> ed. 1999, pg-98.

<sup>5</sup> <http://www.legalservicesindia.com/article/article/restitution-of-conjugal-rights-1934-1.html>, visited on 15-07-2017 at 3:26 p.m.

<sup>6</sup> Ananya Ghosh and Vaishnodevi P. Gouda: *Restitution of Conjugal Rights: Meaning and Scope* [https://www.lawvedic.com/blog/restitution-of-conjugal-rights-meaning-and-scope-50#\\_ftnl](https://www.lawvedic.com/blog/restitution-of-conjugal-rights-meaning-and-scope-50#_ftnl), visited on 15-07-2017 at 04:06 p.m.

### III. Restitution of conjugal rights in various Customary Laws in India.

As discussed above, the nature of conjugal rights is based upon the institution of marriage. In India, Marriage is considered to be a sacred institution when man and woman with the acceptance of society starts to cohabit and consume their married life. In other words Marriage is a formal union of two individuals and is regarded as a social and legal contract between them. It joins two individual in a social, legal, emotional bond and most importantly it is a sacred bond. Hence, when one of the individual sets him/her apart from this bond, the society and law demands explanation. When one of the spouse without any logical justification separates from the cohabitation, the other has a legal right to file a suit under section 9 of the Hindu Marriage Act, 1955 which talks about the restitution of conjugal right of the aggrieved party. Therefore, 'When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly'<sup>7</sup>. In the case of *Gurdev Kaur vs Sarwan Singh*<sup>8</sup>, where the wife filed an appeal against the order favouring her husband, it was held that, 'there was reason to believe that actions were taken by way of a 'reasonable cause' and thus conjugal rights had to be restored'.<sup>9</sup>

The concept of Restitution of Conjugal rights is prevalent in other customary laws as well. For example, under Muslim laws<sup>10</sup>, in words of Tyabji, "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, may put either party on terms securing to the other the enjoyment of his or her rights".<sup>11</sup> There are two conflicting thoughts under the Muslim laws, one finds its remedy of restitution of conjugal rights in the English Common Law where it talks about the remedy is based upon the idea of Justice, Equity and good Conscience but on the other hand, in the case of *Abdul Kadir vs. Salima*<sup>12</sup>, it was held by the Allahabad High court that, 'the concept of restitution must be decided on the principles of Muslim Law and not on the basis of Justice, Equity and good Conscience'. In Chapter VII of the Muslim Personal Law (Shariat) Application Act, 1937, the provision of Restitution of Conjugal Rights is Present under section 32 and 33, which reads as, Section 32- Petition for Restitution of Conjugal Rights.

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

And section 33 reads as, Answer to the Petition:

Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

It is mainly upon the court to decide that whether to follow the Mohammadan Law strictly or follow the principle of Justice, Equity and good conscience. Like in the case of *Itwari v Asghari*<sup>13</sup>, where a Muslim husband filed a petition for restitution against his wife, it was held that he cannot force the wife to live with him and the court can refuse the relief if it finds that it will not be just and reasonable to do so and it will be inequitable to pass a decree.

Further in Parsi Law also we find the prevalence of the Restitution clause<sup>14</sup> which describes, 'Either party to a marriage, whether solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988, may sue for divorce also on the ground,—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties'.

Similarly a Christian man or woman call file a suit for restitution of conjugal rights under section 32 and 33 of the Indian Divorce Act, 1869. In the case of *Hyde v. Hyde and Woodmansee*<sup>15</sup>, "the status of partners in Christian marriage was stated as "Marriage has been well said to be something more than a contract, either religious or civil, to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout

<sup>7</sup> Section 9, Hindu Marriage Act 1955.

<sup>8</sup> AIR 1959 P & H 162

<sup>9</sup> Swarup Aditya: *Constitutional Validity of Restitution of Conjugal Rights: Scope and Relevance*, April 2008, Nalsar University of Law, Hyderabad, available at <http://works.bepress.com/adityaswarup/8/>.

<sup>10</sup> *Sinha Dr. R. K, Muslim Law, 6th ed., Central Law Agency, Allahabad, pg-64.*

<sup>11</sup> *ibid*

<sup>12</sup> (1886) ILR 8 All 149

<sup>13</sup> AIR 1960 All. 684

<sup>14</sup> Section 32A of the Parsi Marriage and Divorce Act, 1936

<sup>15</sup> (1866) LR 1 P. & D. 130

Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring.”

Apart from the customary laws the Special Marriage Act<sup>16</sup>, it describes as,

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

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

#### IV. The Effect of non-performance of the decree:

When a decree of Restitution of Conjugal Right is passed ordering in favour of the aggrieved party, and the other party fails to obey or wilfully disobeys such decree by court, the decree holder has an option to file an application for execution of decree under Order 21 Rule 32 of the Civil Procedure Code, 1908. The order states, ‘where the party against whom a decree for restitution of conjugal rights, has been passed, and has had an opportunity of obeying the decree and has wilfully failed to obey it the decree may be enforced by attachment of his property.’

#### V. The Constitution Validity of the Restitution of Conjugal Rights.

The constitutional validity of restitution of conjugal rights is a matter of discussion and has been debated since a very long time. For example in the case of *T. Sareetha vs. T. Venkatasubbaiah*<sup>17</sup>, the validity of the provision was questioned and was held to be unconstitutional, the court in this case said that section 9 of the Hindu Marriage Act which provides the relief to the aggrieved who has been deserted by their spouses without a reasonable justification, offends Article 21. The explanation given by the court was that article 21 talks about right to liberty along with right to privacy and the fact that one spouse is leaving the other is their private matter and section 9 of HMA violates such privacy, On behalf of the wife it was argued that the right to privacy confers on a woman “a right of free choice as to whether, where and how her body is to be used for the procreation of children and also the choice of when and by whom the various parts of her body are to be sensed,<sup>18</sup> it also violates article 14 by making the provision equal for both husband and wife and the court believed that Man and woman are inherently unequal, but in the case of *Saroj Rani vs. Sudarshan*<sup>19</sup>, the judgement of *T. Sareetha* was over-ruled and the constitutional validity of restitution of conjugal rights was upheld and declared as valid. Further in the case of *Dharmendra vs. Usha Kumari*<sup>20</sup>, it was held by the Supreme Court that, “we are unable to accept the position that s. 9 of the said Act (Hindu Marriage Act) is violative of Art. 14 or Art. 21 of the Constitution. This is because firstly the purpose of the decree for restitution of conjugal rights is only “to offer inducement for the husband or wife to live together” and to settle their differences amicably.”

#### VI. Analysis

Does the Clause of Restitution of Conjugal Right prove to be beneficial for the matrimonial cohabitation or is a provision to force the unwilling spouse to cohabit with the decree holder? The question here is debatable and depends on case to case. Where in a case the husband filed a petition of relief of Restitution of Conjugal Rights and the wife filed a complained in the court against the petition of the said relief alleging that her father-in-law has an evil eye on her and her husband ill-treats her, the court passed a decree in favour of the husband, forcing the wife to cohabit in the same matrimonial house where she alleges to be ill-treated and father in law having an evil eye on her, the decree passed in favour of her husband by the court simply forces her to live with husband even in the grave circumstances and against her will.<sup>21</sup>

Further, in the case of where the husband vehemently stated that he no longer wanted to live with his wife and his wife opted for the relief of Restitution of Conjugal Rights, the Court passed an order favouring the wife, forcing the husband to cohabit with his wife even when his will was absent.<sup>22</sup>

<sup>16</sup> Section 22 of the Special Marriage Act, 1954.

<sup>17</sup> AIR 1983 AP. 356

<sup>18</sup> *T. Sareetha vs. T. Venkatasubbaiah*, AIR 1983 AP. 356

<sup>19</sup> AIR. 1984 SC 1562

<sup>20</sup> AIR 1977 SC 2218

<sup>21</sup> *Huhhram vs Misri Bai*, AIR 1979 MP 144

<sup>22</sup> *Atma Ram vs Narbada Devi*, AIR 1980 RAJ 35

Dr. M Gangadevi in her article<sup>23</sup>, stated that the relief of restitution of conjugal rights cannot be justified on the grounds on just and fairness nor can it be supported on social and legal grounds. She clearly states that the relief of Restitution of Conjugal rights is against the Natural Laws.

Though the relief was primarily formed for the benefit of the spouses, and it held a very noble cause but at times it mostly doesn't give the desirable result. It was formed to protect the very sacred institution of marriage, to provide a safeguard from the sheer whims and wear and tear of marital relationship. It intends to bring the broken relationships and spouses who leave without any justification back together and protect their marital interest. The Legislations like Marriage Laws (Amendment Act), 1976 completely changed the concept of marriage. It brought the contractual factor into the sacramental institution of marriage and it became more of a contract. The relief definitely has many loopholes and also raises a question on its efficacy.

At times the relief of Restitution of Conjugal Rights is misused and is used as an element to obtain divorce, for example in the case of *Malkiat Singh vs Shinderpal Kaur*<sup>24</sup>, the court found out that the insincerity of the petitioner who deliberately kept the decree unsatisfied to obtain divorce and refused to grant divorce on this premise.

Therefore, it is clear from the above discussion that though the idea behind formation of the relief of Restitution of Conjugal Rights was noble but the effectiveness did not turn out to give the desired result.

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<sup>23</sup> Restitution of Conjugal Rights: Constitutional Perspective,

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