

THE REMEDY OF RESTITUTION OF CONJUGAL RIGHTS UNDER HINDU LAW-A NEGATION OF CONSTITUTIONAL LIBERTIES AND GENDER JUSTICE

Karan Jawanda

Assistant Professor, University Institute of Legal Studies, Panjab University, Chandigarh, India

Received: 09 May 2018

Accepted: 22 May 2018

Published: 02 Jun 2018

ABSTRACT

“The concept of restitution of conjugal rights is a relic of ancient times when slavery or quasi-slavery was regarded as natural. This is particularly so after the Constitution of India came into force, which guarantees personal liberties and equality of status and opportunity to men and women alike and further confers powers of the State to make special provisions for their protection and safeguard.”¹

KEYWORDS: *Conjugal Rights, Slavery, Quasi-Slavery*

INTRODUCTION

Marriage constitutes the very basis of social organization. Marriage under all matrimonial laws is a union imposing upon each of the spouse's certain marital duties and gives to each of them certain legal rights. The necessary implication of marriage is that parties will live together. Each spouse is entitled to the comfort and consortium of the other. The term conjugal right applies to the right to cohabit with each other. It is the right which husband and wife have to each other's society, comfort and affection. This concept is found in most of the personal laws in India. The provision is a remnant of the British Raj. The English law borrowed the concept from the Jewish Law. The remedy of restitution of conjugal rights dates back to feudal England, where marriage was, primarily a property deal and the wife was a part of a husband's possessions. It dates back to an era when the wife was treated like a cow who if ran away from the master's shed could be roped back.² Neither the Hindu nor the Muslim law originally recognized this concept; it was used by English lawyers who were practicing in the newly set up courts both in the presidency and moffusil towns.³ However, marriage was always considered a sacrament among Hindus and Hindu law enjoined upon the spouses to have a society of each other. While the old Hindu law stressed on the wife's implicit obedience to her husband, it did not lay down any procedure for compelling her to return to her husband against her will.⁴

¹ *Shakila Banu vs Gulam Mustafa* AIR 1971 Bom 166

² Sharmishtha Ghosh, “Restitution of Conjugal Rights- A Feminist Jurisprudential Critique”, (2004) 7 ACE (J), pp. 43-55 at p.48

³ Flavia Agnes, *Family Law, Vol. II: Marriage, Divorce and Matrimonial Litigation*, p. 22, (2011)

⁴ Priyanka Priyadarshini, “The Futility of The Provision of Restitution of Conjugal Rights (As Under Hindu Marriage Act 1955) In The Present Scenario”, available at <http://ijldai.thelawbrigade.com/wp-content/uploads/2015/09/11.pdf> visited on 21.4.16

The remedy of restitution of conjugal rights was introduced by legislation in various personal laws.⁵ The codified Hindu Law provides for the remedy under *The Hindu Marriage Act, 1955*. Section 9⁶ of *The Hindu Marriage Act 1955*, provides for restitution of conjugal rights by either of the spouses who have been denied the company of the other spouse without any fault of the aggrieved spouse. The term conjugal right applies to the right to cohabit with each other. It is the right which husband and wife have to each other's society, comfort and affection.⁷

The courts are required to examine two things namely, one of the spouses has without reasonable cause withdrawn from the society of the other and there is no legal ground because of which the court may refuse to grant the relief.⁸ Thus, if a spouse has a reasonable apprehension of physical or mental harassment at the hands of the other spouse, the court shall not force them to stay together.⁹ This remedy, though set up for an extremely noble cause and result in mind doesn't lead to the desired outcome mostly. It was set up to preserve the very sacramental bond of marital relationship and to protect it from mere whims of the spouses or from petty wear and tear of marriage. It is to see that an aggrieved spouse is not deprived of all the marital pleasures just because of some unreasonable cause of his spouse. It is to see that the parties are able to find a way back to each other and sort out their differences. However, this provision became controversial and was seen as discriminatory against women, which were used by men to force their wives to return to their matrimonial homes against their wishes.

It is interesting to note that in *Dadaji Bhikaji v. Rukhmabai*,¹⁰ one of the initial cases regarding restitution of conjugal rights, the single judge who had initially heard the case in 1885, refused to grant the husband the remedy. One of the grounds on which he based his decision was that it would be barbarous, cruel and revolting thing to compel a young lady to go to a man whom she dislikes, in order that he may cohabit with her against her will and that the remedy was transplanted from England and it has no foundation in Hindu law.¹¹ However, the husband was later granted the remedy on appeal by a division bench of the Bombay High court. The English law has discarded the remedy; however, we still continue to cling on to it. The provision has been the subject of controversy and has been considered to be discriminatory against the women. Though technically both husband and wife are able to use this remedy, studies reveal that far more husbands file for this remedy than wives.¹² It has been seen that whenever women file a suit for maintenance, the husbands file for restitution of conjugal rights to defeat their claim. The case of *Dalbir Singh v. Simar Kaur*¹³ was of such a kind. In this case, the husband had filed for restitution of conjugal rights. The wife stated that the suit had been filed to avoid maintenance proceedings by the wife. The courts found that in fact the wife was thrown out of the husband's house, beaten by him and terrorized by adult children from the husband's previous marriage. Thus, there was a reasonable cause for the

⁵ Section 9, Hindu Marriage Act 1955; section 32 and 33, Indian Divorce Act 1869; section 36, Parsi Marriage and Divorce Act; section 22, Special Marriage Act 1954

⁶ *Hindu Marriage Act 1955*, Section 9 "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

⁷ Janak Raj Jai, *Divorce Law and Procedures*, p. 61, (2004)

⁸ Anuja Aiyappan, "Restitution of Conjugal Rights : A Comparative Study Among Indian Personal Laws" available at <http://www.legalindia.in/restitution-of-conjugal-rights-comparative-study-among-indian-personal-laws> (visited on 23.1.13)

⁹ *Ibid*

¹⁰ (1885) ILR 9 Bom. 301

¹¹ *Supra* 1

¹² *Id.*, p.24

¹³ II (2002) DMC 371 P&H

wife to stay separate. Thus the petition filed by the husband was dismissed. It may not be wrong to say that a lot of unnecessary litigation takes place because of this provision.¹⁴

The provision of Restitution of Conjugal Rights was used by many husbands to compel their wives to leave their jobs from distant places and join them at the matrimonial home. In *Tirath Kaur v Kirpal Singh*¹⁵, the wife pleaded that she was willing to carry on with the marriage, but was not prepared to give up the job. But the court disallowed her plea and ruled in favor of the husband and held that his wife's refusal to give up the job amounts to withdraw from society without any reasonable cause. This entitled the husband for a decree of restitution of conjugal rights.¹⁶ In 1966, in the case of *Gaya Prasad v. Bhagwat*¹⁷ the Madhya Pradesh High Court held that a wife's first duty to her husband is to submit her obediently to his authority and to remain under his roof and protection. In 1973, the Punjab and Haryana High Court reiterated its stand on section 9. In *Surinder Kaur v Gurdeep Singh*¹⁸ it was held that the Hindu law imposes on the wife the duty of attendance, obedience to and veneration for the husband to live with him wherever he chooses to reside. In 1977, the Full Bench of the Punjab and Haryana High Court in the case of *Kailash Wati v Ayodhya Parkash*¹⁹ held that "any working woman entering into matrimony by necessary implication consents to the obvious and known marital duty of living with a husband as a necessary incident of marriage."²⁰

Thus, it seems that the courts were influenced by the ideal of Hindu marriage being sacramental wherein the wife was supposed to obey her husband, even at the cost of sacrificing her own right to work and take up a job independently. The courts undoubtedly bowed to the notion that only a husband had the right to determine the matrimonial home. Thus the decisions manifest the patriarchal assertions prevalent in the society

It is only around 1975 that the courts began to recognize the woman's right to hold on to a job away from her husband's residence. The Gujarat High Court in the case of *Praveenben v. Sureshbhai*²¹ denied the relief of restitution of conjugal rights to the husband and held that the husband and wife are equally free to take up a job and retain it. Since there had been a mutual arrangement, it was not a case, where it could be said that the wife had withdrawn from the society of the husband.

Similarly, the Madras High Court, in *N.R. Radhakrishna v. Dhanalakshmi*²², held that under the modern law, the concept of the wife's obedience to her husband and her duty to live under his roof under all circumstances does not apply. In this case the wife's income was used to sustain herself and her child.

In another landmark judgment the Delhi High court in 1978, in *Swaraj Garg v R.M. Garg*²³ dissented from the Full Bench decision in *Kailash Wati* and held that in the absence of a pre-marital agreement between the parties, it cannot be said that the wife who had a permanent job with a good income had to live in a place determined by the husband when the husband did not earn enough to maintain the family. Providing constitutional validity to the wife's right to hold on to

¹⁴ *Id.*, para 2, 6 available at <http://www.indiankanoon.org/doc/301921/> (visited on 24.1.15)

¹⁵ AIR 1964 Punj 28.

¹⁶ *Id.*, para 7 available at *MANU/PH/0390/1962* (visited on 24.1.15)

¹⁷ AIR 1966 MP 212

¹⁸ AIR 1973 P&H 134.

¹⁹ 1977 HLR 176 P & H (FB)

²⁰ *Id.*, p 182 cited in B. K. Sharma, *Hindu Law*, p 67 (2008)

²¹ AIR 1975 Guj 69.

²² AIR 1975 Mad 331.

²³ AIR 1978 Del 296.

the job, it was held that an exclusive right to the husband to decide the matrimonial home would be violative of the equality of the sexes clause under Article 14 of the Constitution. Thus, a change in the trend was clear. However, in most of these cases, the wives were earning more than the husband and her income was essential to run the house. This fact also had a bearing upon the courts.

The constitutional validity of section 9 of the *Hindu Marriage Act, 1955* was challenged before the Andhra Pradesh High Court, in *T. Saritha v. T. Venkatasubbaiah*,²⁴ The Hon'ble High Court observed that section 9 of the Hindu Marriage Act violated the right of privacy and human dignity guaranteed under Article 21 and is, therefore, ultra vires. The Hon'ble Court further held –

A decree of restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It denies a woman, her choice whether, when and how, her body is to become the vehicle for the procreation of another human being.²⁵

Holding section 9 of the Act, violative of Article 14 of the Constitution, the Hon'ble Court observed that section 9 did not promote any legitimate public purpose based on any concept of social good and thus being arbitrary, was violative of Article 14 of the Constitution.

The judgment rightly upheld the dignity and freedom of a married Hindu woman, but unfortunately the High Court of Delhi in *Harinder Kaur v. Harinder Singh*,²⁶ held otherwise. Justice Rohtagi, observed that the introduction of Constitutional Law in the matrimonial home was like the introduction of a bull in a china shop. Finally the Supreme Court, in *Saroj Rani v. Sudarshan*,²⁷ overruled the judgment of the Andhra Pradesh High Court delivered in *T. Saritha v. T. Venkatasubbaiah*, approving the Delhi High Court judgment delivered by Justice Rohtagi. The constitutional validity of section 9 was upheld on the ground that it serves a social purpose.

It is unimaginable how a social purpose could be served by forcing a spouse to stay with the other. Conjugality in the true sense can only be restored by mutual consent, which may be the result of counseling of the spouses. Justice Chowdhary²⁸ had rightly opined that in actual fact the remedy works only for the benefit of husbands and is oppressive to women.

The views of Dr. Paras Diwan are extremely relevant in this context. While criticizing the judgements in favor of retaining section 9, Dr. Diwan comments:

It is submitted that the approach of both the judges misses one fundamental aspect of family, i.e. when the home is broken beyond all possibilities of repair, when it has become an arena of bouts between the spouses, neither the restitution of conjugal rights nor the constitutional law can help. Such a union should be broken with maximum fairness and minimum bitterness, distress and humiliation.²⁹

²⁴ AIR 1983 AP 356

²⁵ *Id.*, para 25 available at <http://www.indiankanoon.org/doc/1987982/> (visited on 26.1.15)

²⁶ AIR 1984 Del. 66

²⁷ AIR 1984 SC 1562

²⁸ In *T. Sareetha v. T. Venkatasubbaiah* AIR 1983 AP 356.

²⁹ Dr. Paras Diwan, *Law of Marriage and Divorce*, p. 285-286, (1997)

It has been considered to serve only one purpose, i.e. the non-compliance of the decree of restitution of conjugal rights is a ground of divorce.³⁰ It forms a part of the breakdown theory. However, this can be no justification to retain this oppressive provision, especially when the proposal to introduce the breakdown grounds in the *Hindu Marriage Act 1955* is already under consideration. We should not forget that under rule 33, Order 21, *Civil Procedure Code*, financial Coercion can still be exercised for the enforcement of the decree of restitution of conjugal rights.

In my humble submission, the remedy of restitution of Conjugal Rights stifles the freedom of a married woman in more than one way. It is a direct contravention of her right to privacy as a part of the right to life and liberty granted to her under Article 21 of the Constitution. The right to sexual autonomy and reproductive choice are guaranteed to her within the ambit of Article 21. This has been accepted by the Hon'ble Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkata Subbaiah* wherein the court quoted Professor Tribe on this dimension of the right to privacy in his commentary of American Constitutional Law:

“Of all decisions a person makes about his or her body, the most profound and intimate relates to whether, when, and how one's body is to become the vehicle for another human being's creation”³¹

The American Supreme Court has also given decisions in this context. In the case of *Planned Parenthood of Missouri v. Danforth*³², the stand taken by the American Supreme Court in *Eisenstadt v. Barid* was reaffirmed- “The right to privacy belongs to a person or an individual and it is not lost by reason of their marriage.” In these cases the right to privacy was given a wide interpretation so as to include activities like procreation and contraception.

A nine-judge constitution bench in *Justice K S Puttaswamy v. Union of India*³³ recently declared that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. In relation to this, a petition was filed in the Delhi High Court, which recently sought the response of the Centre on a plea seeking to declare the sections relating to the restitution of conjugal rights in various Acts as unconstitutional. The petitioner claims that the provision of restitution of conjugal rights “amounts to state interference with a woman's private decision whether or not to engage in sexual activity”.³⁴

Traditionally, the position of a wife under the Hindu personal Law is somewhat different. An ideal Hindu wife is considered to subject herself to the will of her husband and is not to exercise her own free will. She is hardly able to exercise her choice regarding procreation of children. The concept of restitution implies sexual cohabitation. Thus, when a husband obtains the decree of restitution of conjugal rights, he also gets the right to have marital intercourse with his wife. “As a result, the choice to have or not to have marital intercourse gets transferred from the Hindu wife to the State, which delegates this authority to the Hindu husband. Secondly, by virtue of a decree for restitution of conjugal rights, the Hindu wife's choice as to whether she wants to allow her body to be used as a vehicle for another human being's creation is also transferred to the Hindu husband is-à-vis the state.”³⁵ The term voluntary implies that the parties have freely consented. However, the provision under section 9 seems to be a blatant violation of such a premise. Thus the remedy of restitution of

³⁰ Section 13(1A)(ii), *The Hindu Marriage Act, 1955*.

³¹ *Supra*, 3, p.45-46; also see *T. Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356.

³² 1976-49 L ed 2d 788; cited in *T. Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356.

³³ Available at <http://supremecourtfindia.nic.in/pdf> (visited on 25.9.17)

³⁴ <http://indianexpress.com/article/india/restitution-of-conjugal-rights-delhi-hc-issues-notice-to-centre-4842427/> (visited on 25.9.17)

³⁵ *Supra* 3, p.53; also see *T. Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356.

conjugal rights is a tool in the hands of a husband to submit her to his will in order to exercise his right of marital cohabitation which results in denial of the right of a wife to sexual autonomy. In my view, it serves little purpose and should be discarded.

When the provision regarding Restitution was being debated in parliament, many members voiced their opinion against it. J.B. Kriplani said: “*This provision is physically undesirable, morally unwanted and aesthetically disgusting..*”.

Mr. Khardekar had opposed the remedy, saying, “*to say the least this particular cause is uncouth, barbarous and vulgar. That the government should be abettors in a form of legalized rape is something very shocking...*”³⁶

In India, people file restitution of conjugal rights mainly for two purposes: A hassle free divorce, and as a defense for maintenance. It is high time this misuse or abuse of the court process is stopped, and provisions for restitution of conjugal rights are abolished.

The remedy is blatantly misused to achieve ulterior purposes other than reconciliation. The root cause of this problem lies in S.13 (1-A) (ii) of Hindu Marriage Act, 1955. This section says that if a restitution decree has not been complied with for a period of one year the parties can file for divorce. The general trend in restitution claims is that the “aggrieved party” files a restitution petition, then does not willingly comply with the decree and after the statutory period of one year, files for divorce under S. 13 (1-A) (ii) on the ground of non-compliance with the decree. In fact, Justice Rohtagi in *Harvinder Kaur v Harminder Singh*³⁷ recognized that “the legislature has created restitution of conjugal rights as an additional ground for divorce”.³⁸

In *Veena Handa v Avinash Handa*³⁹, the husband in order to frustrate his wife’s claim for maintenance sold all his property like television, scooter, etc. He divested all his property to his relatives and alleged that he did not own any property in land. After the decree of restitution was passed, and then after a year he filed for divorce on the ground that there has been no restitution for a year. When the trial court granted the relief, he immediately married another girl, notwithstanding the wife’s appeal against the divorce decree in the higher Courts. Similarly, in *Bitto v Ram Deo*⁴⁰ the husband falsely accused his wife of being unchaste to frustrate her claim for maintenance when she filed for restitution. This shows how restitution petitions are blatantly misused for ulterior purposes other than reconciliation.

When a person fails to comply with a decree of restitution the Court has a power to enforce the decree under Order 21 Rule 32 of Civil Procedure Code, 1908. Under Rule 32 (1),⁴¹ if the party willfully does not comply with the decree, then the Court can attach the property of the decree- holder. Under Rule 32 (3),⁴² the Court has the power to sell

³⁶ Parliamentary Debates on Special Marriage Bill (10th December,1954)

³⁷ *Harvinder Kaur v Harminder Singh*, AIR 1984 Del 66.

³⁸ *Id* para 74

³⁹ *Veena Handa v Avinash Handa*, AIR 1984 Del 444

⁴⁰ AIR 1983 All 371.

⁴¹ *Code of Civil Procedure 1908*, Order 21, r. 32(1):“Where the party against whom a decree of restitution of conjugal rights has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree of restitution of conjugal rights by the attachment of the property...”

⁴² *Code of Civil Procedure 1908*, Order 21, r. 32(3):“Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment –debtor has not obeyed the decree and such decree holder has applied to have the property attached property sold, such property may be sold; and out of the proceeds the Court may award the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment –debtor on his application.”

the attached property if the decree holder has not complied with the decree for six months. The difficulty arises if the judgement-debtor has no actual property in possession. In India, we find that in most cases and especially in rural India that wives' do not have actual possession over any property. In such cases, if a restitution decree does not comply with, then the court is required to ascertain the share of the wife in the property of her husband, when it is not divided and arrive at her share in the property, but this involves cumbersome procedures. The difficulty also arises if the husband is a property-less person—say, a daily wage laborer living in a slum—how will the Court execute the decree in such cases? It is naive to think that coercing a person that his property would be attached and sold away can change the attitude of the adamant spouse and make him obey the decree. The aim of this remedy is the cohabitation of the spouses, but when the property is attached and sold, it will lead to bitterness between the spouses and the purpose of the remedy is frustrated

CONCLUSION AND SUGGESTIONS

Restitution of Conjugal Rights is a concept, which had great significance at the time, when it had evolved. But, with the changing times and changing social scenario, it has lost its significance. Though the aim of this provision was to preserve the marriage, it is more of a tool in the hands of the husband to submit his wife to his will. It is a reinforcement of the patriarchal notion that the wife must stay with the husband in the matrimonial home and the place of the matrimonial home is also determined by the husband. The remedy of restitution of Conjugal Rights stifles the freedom of a married woman in more than one way. It is a direct contravention of her right to privacy as a part of right to life and liberty granted to her under Article 21 of the Constitution. Over the years, this remedy has been misused; abused and exploited. The remedy directly affects the right to life, right to privacy and the right to equality and hence a negation of constitutional liberties granted under articles 14, 19 and 21. Though this remedy is based on a noble cause, its consequences are far more detrimental and fail to bring about the desired effect in most of the cases, statistically. Thus, there is a need for relook in the statutory provisions dealing with the concept of restitution. Such a provision which is incompatible with changing times should be done away with and novel ideas for reconciliation which are effective should be brought about.

Reconciliation is fast, effective and practical solution to restitution of conjugal rights. Perhaps it is the only solution to put an end to this barbarous remedy. Matters of the family, which can be repaired must be mediated and settled by sewing and patchwork. Human relationships must be bonded by settlement and, as far as possible, not litigated in court. The effective resolution of family disputes by mediation or conciliation may provide lasting solutions for the overall good. Since the object of the provision for Restitution of Conjugal Rights was to preserve the marital tie, there is a need to emphasize on the use of mediation as a remedy to solve any matrimonial dispute and bring about reconciliation where possible rather than fighting a legal battle which only brings bitterness. An attempt in this direction has already been made by opening the mediation center by Punjab and Haryana High Court and even at district levels. Under a pilot project in the Tricity(Chandigarh-Mohali-Panchkula), it was decided that the women's cells would refer pending matters for resolution to the mediation center. Thus, by changing the focus from litigation to reconciliation through mediation, the need for an archaic remedy of restitution is already lost. There is a need for lawmakers to amend the legislative provisions accordingly, replacing this remedy with remedies like reconciliation.

Introducing the ground of irretrievable breakdown of marriage as a ground for divorce will do away with the misuse of the provision of restitution. In the majority of cases the petition is filed with an intention to flout it and later

claim it as a ground of divorce. So, irretrievable breakdown should be introduced as a ground of divorce. Consequently, the provision of restitution will be of little use and should be accordingly deleted from the statute books.

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