

## An Analytical View on Restitution of Conjugal Rights under Hindu and Muslim Personal Laws

Raghuveer Kulkarni<sup>1</sup>

<sup>1</sup> Author is a Research Scholar at Karnataka State Law University, Hubballi, Karnataka, India

### Abstract

The Institution of Marriage evolved out of the gradual processes. Though it was initially based on the practices, it finally entered into the state of legal recognition through the personal laws. The Institution of Marriage is viewed from many different angles, for that is intimately connected with the crude customs of a locality. Generally speaking marriage is the act of marrying, which confers status on a union of man and woman for some legal purposes. The Institution of Marriage provides certain rights and liabilities to both Man and Woman. And one of them is the right to Maintenance.

However, the Maintenance Right available in India is not uniform. In India, matrimonial proceedings reflect the diversity of laws throughout the country relating to Maintenance. There are different standards in different personal laws with respect to eligibility to claim maintenance by the spouses. In rare branches of Personal Laws both the spouses are entitled to maintenance, but the majority have favored wives. The judicial approach to the Maintenance of the Spouses under Personal laws is more realistic, pragmatic and in conformity with the valuable goal of a welfare state. The role of the legislature, however, has not been encouraging and uniform. The Hindu woman is protected through certain legislations in which she can get a good matrimonial remedy. Whereas the Muslim woman is not supported by any such kind of laws. Hence the position of a Hindu woman is better than a Muslim woman with regard to the Maintenance Right.

**KEYWORDS :** Restitution of Conjugal rights, Maintenance, Constitution, Supreme Court, Marriage, Spouse, Husband, Wife

### Introduction:

The remedy of restitution of conjugal rights was neither recognised by the *Dharmashastra* nor did the Muslim law made any provision for it. It came during the British ruling in India. It is remarkable that this was the only matrimonial remedy which was made available by the British rulers of India to all the Indian communities under the general law. In England, it came from the Jewish law. The Ecclesiastical courts enforced this remedy by excommunicating the guilty spouse. The statute of George III substituted excommunication with imprisonment.

Like any other anachronistic remedies, the restitution of conjugal rights dates back to feudal England, where marriage was primarily a property deal and the wife and the children were part of man's possessions as other chattels. Thus, the wife was treated like a cow, who if ran away from the master's shed could be brought back. At that time a decree could be executed by arresting the wife. It is remarkable that many other outdated common law actions were gradually abolished but they survived in matrimonial law and from English matrimonial law they were exported to the

<sup>1</sup> Author is a Research Scholar at Karnataka State Law University, Hubballi, Karnataka.

colonies. However, it was abolished now in England by the Law Reform (Miscellaneous Provisions) Act, 1970.

The remedy of restitution of conjugal rights is still retained by the Indian matrimonial laws. When the provision in the Special Marriage Bill and the Hindu Marriage and Divorce Bill was debated in Parliament, many members voiced their opposition to it. J. B. Kriplani said: "This provision was physically undesirable, morally unwanted and aesthetically disgusting".<sup>2</sup> In *Shakila Vs. Gulam*,<sup>3</sup> Justice Vaid, very prominently observed that, "Restitution of conjugal right is a relic of ancient times when slavery and quasi-slavery were regarded as natural. This is particularly so after the Constitution of India came into force, which guarantees personal liberty and equality of status and opportunity to men and women alike".

It may also be mentioned that under the Civil Procedure Code, 1908, Order 21, Rule 32, a decree for the restitution of conjugal rights can still be executed by the attachment of respondent's property. The non-compliance of the decree of the restitution of conjugal rights for a period of one year under the Hindu Marriage Act, 1955 and under the Special Marriage Act, 1954 entitles either party to obtain a decree of divorce. Under the Parsi Marriage and Divorce Act, 1936 defendant's non-compliance with the decree of restitution of conjugal rights for one year entitles the plaintiff to sue for divorce. It is submitted that this provision should be substituted by laying down that if parties are living separate from each other either under a decree of judicial separation or under a separation agreement or otherwise for a period of 1 year, then either party should be allowed to seek divorce.

### **Restitution of Conjugal Rights Under Hindu Law:**

Section 9 of the Hindu Marriage Act, 1955 States that, 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 the 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 to the Section:**

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.

The Vedic injunction regarding the necessity for a son who relieves his father from hell called 'Puth' resulted in the desire for a male offspring for the continuance of the family and for the performance of funeral rites and offerings. Consequently, the sacredness of the marriage tie was recognised by the Hindu law. The wife was given an honoured position in the house, as the Ardhangi, i.e., half her husband and completes him. The texts of Hindu law also recognised the principle 'let mutual fidelity continue until death'. Hindu law enjoined on the spouses to have the society of each other.

<sup>2</sup> Parliamentary Debates on Special Marriage Bill, 10th December, 1954.

<sup>3</sup> AIR 1971 Bom 166: 72 Bom LR 623.

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. It became necessary to find some remedies and procedures so as to see the marriage tie is intact and would not be disturbed by some petty quarrels between the spouses. The procedure or restitution of conjugal rights recognised in England by the Ecclesiastical Courts was also introduced in India by the British rulers.<sup>4</sup> However, this concept was first laid down in *Moonshe Buzloor Vs. Shumsoonissa Begum*,<sup>5</sup> considering such actions as a species of suits for specific performance. That procedure is now statutorily recognised in this provision.

It is one of the cardinal principles of the marriage that, the spouses must live together and it is an equally well established rule of matrimonial law that one spouse is entitled to the society and consortium of the other. If, therefore, one spouse leaves the other without any just cause or excuse, the latter can approach a Court of Law praying for a decree of restitution of conjugal rights. Provision to this effect has been made in Section 9 of the Hindu Marriage Act, 1955. Restitution of Conjugal Rights is a hope of bringing nearer both the spouses and to avoid conflicts. It is a ray of hope. It is a last resort to establish amicable relations between them. Sometimes, conflicts may arise between the spouses and force them to live separately. The decree of restitution of conjugal rights may bring them together and get them united, which is the object of the marital life.

#### **Constitutionality of Section 9 of the Hindu Marriage Act, 1955:**

In *T. Sareetha Vs. T. Venkata Subbaiah*,<sup>6</sup> a question arose as to the constitutionality of Section 9 of the Hindu Marriage Act, 1955. The question was whether the remedy of restitution of conjugal rights violates the right to privacy guaranteed by Article 21 and the right to equality guaranteed by Article 14 of the Constitution. In this case, the High Court of Andhra Pradesh observed that, "A decree for restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice whether, when and how she is to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body are to be sensed." It, therefore, violates the right of privacy and human dignity guaranteed by Article 21 of the Constitution. The court further held that, though section 9 of the Act applies to both the husband and wife the remedy actually works to the disadvantage of the wife whose life pattern is altered and nothing affects to the life style of the husband. Hence section 9 of the Act does not sub serve any social good and must therefore be held to be arbitrary and void offending Article 14.

In *Smt. Harvinder Kaur Vs. Harmander Singh Chaudary*,<sup>7</sup> the Delhi High Court did not agree with the opinion of the Andhra Pradesh High Court and held that Section 9 of the Hindu Marriage Act, 1955 is to promote harmony and amicableness between the wife and husband, which is the primary purpose of the marriage and in

<sup>4</sup> *Mayne's Hindu Law & Usage* (Revised by Justice Ranganath Mishra & Dr. Vijender Kumar, Bharat Law

House, New Delhi, 16<sup>th</sup> Ed. 2010) at p. 201.

<sup>5</sup> (1867) ii, Moo IA 551.

<sup>6</sup> AIR 1983 AP 356.

<sup>7</sup> AIR 1984 Delhi 66.

the married life. There is no question of 'ultra freedom' and negative thoughts like 'one is superior and another is inferior'.

In *Smt Saroj Rani Vs. Sudarshan Kumar Chadda*,<sup>8</sup> the Supreme Court has held that, "In India conjugal rights is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself. The term conjugal rights may be viewed in its proper perspective by keeping in mind the dictionary meaning of the expression 'conjugal'. Section 9 is only a codification of pre-existing law. It serves a social purpose as an aid to the prevention of breakup of marriage.

The Court further observed, "The object of the restitution decree is to bring about cohabitation between the estranged parties so that they can live together in the matrimonial home in amity. The remedy of restitution aims cohabitation and consortium and not merely sexual intercourse".

### **Essential requirements to seek the remedy:**

#### **(1) Existence of a valid marriage between the spouses:**

The remedy under this for restitution of conjugal rights presupposes a valid and subsisting marriage between two spouses. Where in *Parbia Ram Vs. Thopili*,<sup>9</sup> a *Harijan in sub-tehsil Siraj in Kulu* district married with customary ceremonies a person of that tribe, it was held that, it was a valid marriage and the husband is entitled to restitution.

The words "restitution of conjugal rights" in the normal circumstances to mean restoration of conjugal rights which were enjoyed by the parties previously. The remedy provided in this section is something more than mere reinstatement of something which was already enjoyed and it would mean compelling one of the spouses to fulfil the matrimonial obligations which flowed from the marital tie. In *Venugopal Naidu Vs. Lakshmi Ammal*,<sup>10</sup> the Court held that, "for obtaining the remedy of restitution it would not be necessary that the parties should have at some time cohabited with each other and then separated. It is necessary to prove the fact of withdrawal from the society of the other spouse either from the date of marriage or from the time when cohabitation was withdrawn till the date of commencement of the proceeding".

This section states that where either the husband or the wife has withdrawn from the society of the other without reasonable cause, the aggrieved party may apply 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. These conditions are in addition to the condition that there was a valid subsisting marriage between the spouses on the date of the petition. In *Ranjana Vinod Kumar Kejriwal Vs. Vinod Kumar Kejriwal*,<sup>11</sup> the Court held that, "Application for restitution of conjugal rights can be maintained against one of the spouses only if their marriage is legal".

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<sup>8</sup> AIR 1984 SC 1562.

<sup>9</sup> AIR 1966 HP 20.

<sup>10</sup> AIR 1936 Mad 288.

<sup>11</sup> 1998 (1) HLR 328.

## (2) **Withdrawal from the Society of the other spouse:**

In *Ramesh Chandra Vs. Premlatha*,<sup>12</sup> the Court held that, “the expression ‘withdrawal from the society of the other’ involves, a mental process besides physical separation. The act of temporarily leaving the matrimonial home would not amount to withdrawal from the society of the other, when she had no intention to withdraw permanently”. Failure to render conjugal duties, refusal to stay together or of marital intercourse with the other spouse, would normally constitute withdrawal from the society of the other spouse.

The expression ‘society’ used in this section should be understood as marital cohabitation that is to say that the husband cherishing and supporting his wife as a husband should do and a wife rendering duties as a housewife and does not necessarily imply a husband and wife living together physically for the purpose of sexual intercourse under the same roof. Though they may not live under the same roof yet there would be cohabitation in the wider sense of the term if they fulfil the mutual duties to each other as husband and wife. But if one of them does not fulfil the marital obligations it amounts to withdrawal from the society of the other as they cannot be said to be cohabiting with each other and a decree for restitution of conjugal rights can be passed.

The Punjab and Haryana High Court in *Balwinder Jit Kaur Vs. Kuldeep Singh*<sup>13</sup> held that, “for recording a finding that the wife has withdrawn from the company of the husband, mere *ipse dixit* of the husband is not enough. Such a finding can be recorded only when the husband is able to clearly show that he is not responsible for the withdrawal by the wife from his society”.

### **Reasonable excuse for withdrawal by one spouse from the society of the other:**

Unless the withdrawal by one spouse from the society of the other is founded on a reasonable excuse no decree can be passed under this section. However the expression ‘reasonable excuse’ is not defined in the Act. What would be a reasonable excuse cannot be reduced to a formula and would vary with time and circumstances and will have to be determined by the court in each individual case. The expression reasonable excuse cannot be equated with a matrimonial offence nor can it be said that a reasonable excuse cannot exist except in the form of a ground recognised by the Act as valid for judicial separation or for nullity of marriage or divorce. Something less than such a ground or a matrimonial offence may, therefore, amount to a reasonable excuse within the meaning of section 9 (1) of the Act.

In *Krishnamurthy Vs. Syamanthakamani*,<sup>14</sup> the Court held that, “The grounds on which judicial separation or nullity of marriage or divorce under section 10, 12, or 13 of this Act can be taken as reasonable excuses within the meaning of the section, but the court may consider any other ground as a ground just or sufficient as reasonable excuse on the part of respondent to live separately from the other spouse”.

The court in *Jagadishlal Vs. Syamama*<sup>15</sup> held that, “it can grant a decree for restitution of conjugal rights if there is a reasonable excuse for the husband or wife

<sup>12</sup> AIR 1979 MP 15: 1978 Jab LJ 733: 1979 MPLJ 24.

<sup>13</sup> 2002 (1) HLR 452 (P&H).

<sup>14</sup> ILR 1977 (1) Kant 246.

<sup>15</sup> AIR 1966 All 150: 1965 All WR (HC) 43.

withdrawing from the society of the other even though a ground for judicial separation or for nullity of marriage or divorce has not been made out”.

Under section 18 (2) of the Hindu Adoptions and Maintenance Act, 1956, the wife is entitled to live separately from her husband without forfeiting her claim for maintenance if clauses (a) to (g) of that sub-section are satisfied. The circumstances under which the wife is entitled to live separately from her husband under that sub-section would constitute a reasonable excuse for the wife withdrawing from the society of the husband, though they are not exhaustive. The expression ‘any other justifying cause’ in clause (g) of that sub-section is equivalent to a reasonable excuse within the meaning of this section.

In the second proviso to section 125 (3), of the Criminal Procedure Code 1973, the expression used is ‘just ground’ for refusing to live with the husband. In *Siraj Mahammad Khan Vs. Hafizunnisa*,<sup>16</sup> the Court held that, “The expression ‘reasonable excuse’ in this section has to be interpreted in the same way as ‘just ground’ in section 125 of the Criminal Procedure Code 1973”. Hence decisions dealing with the expression ‘just ground’ under section 125 of the Criminal Procedure Code 1973 can be relied upon in cases arising under this section.

The wife against whom a decree of restitution of conjugal rights has been passed shall not be entitled to claim maintenance allowance under section 125 of the Criminal Procedure Code 1973, if in the proceedings of restitution of conjugal rights a specific finding has been recorded that the wife refuses to live with the husband without sufficient reason. However, where the husband has got an ex parte decree of restitution of conjugal rights from the civil court, such a decree shall not be binding on the Criminal Court in exercise of its jurisdiction under section 125, of the Criminal Procedure Code 1973.

In *Brij Lal Vs. Krishna*,<sup>17</sup> the Court held that, “it is for the wife to prove that there is sufficient cause for living separately from the husband when she does not want to cease the matrimonial relationship but she wants to keep away from the company of the husband on excuses when the husband accepted the condition of the wife for living independently from the parents”.

### **Burden of Proof:**

The burden of proof lies on the party who seeks a decree for restitution of conjugal rights. The petitioner has to establish the following three important ingredients:

- i) That the other spouse has withdrawn from his or her society;
- ii) That such withdrawal is without reasonable excuse; and
- iii) That there is no legal ground disentitling the petitioner from the relief of restitution of conjugal rights.

The petition can be allowed only if the aforesaid conditions satisfactorily proved by the petitioner. It is for that spouse to prove the conditions which have

<sup>16</sup> 1982 HLR 62 (SC).

<sup>17</sup> 1997 (1) HLR 185 (P&H).

necessitated living separately as one spouse is always expected to live with the other. In *Shyamalal Vs. Saraswati Bai*,<sup>18</sup> the Court held that, “in all matrimonial cases all the necessary facts for obtaining the relief are to be established beyond reasonable doubt. The court has to keep in view the physical and mental condition of the parties, their age, environment, standard of living, their culture and status in life”.

Section 23 (3) of this Act states that before proceeding to grant any relief under this Act it shall be the duty of the court in the first instance in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties; provided that nothing in the sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in Section 13 (1), (ii), (iii), (iv), (v), (vi) or (vii) of the Act. A decree under this section in disregard of Section 23 (2) is null and void.

However, in *Manilal Harjeevan Das Vs. Gangaben*,<sup>19</sup> a contrary view was expressed for judicial separation under Section 10, and held that a decree is valid even if no effort was made by the court for reconciliation.

Under Section 23, if there is no legal ground why the application should not be granted, the court may pass a decree under this section. Under Section 23 (1) (a) the court has to see that the petitioner shall not take advantage of his or her own wrong or disability for the purpose of relief and under Section 23 (1) (b) that the petitioner has not in any manner been accessory to or conceived at or condoned the acts complained of, that the petition is not presented or prosecuted in collusion with the respondent, there has been no unnecessary or improper delay and if the court finds any of those grounds present it may refuse granting a decree.

Even though some of the clauses refer only to grounds mentioned in Section 13, as it has already been noted these grounds may form ‘reasonable excuse’ within the meaning of this section and hence the clause would equally apply to a petition under Section 9. It has to be noted that Section 23 applies to all proceedings under the Act which includes the one under this section. In *Madasetti Satyanarayana Vs. Veeramani*,<sup>20</sup> the Court held that, “Where the court finds the ground of desertion against the husband it would be a ground for the wife to defend the petition of the husband for restitution of conjugal rights even if she did not prefer a counter claim under Section 23(a) which was brought on the statute book by Section 17 of the Marriage Law (Amendment) Act, 1976”.

#### **Execution of Restitution Decree:**

Unlike other decrees, a decree for restitution of conjugal rights cannot be executed by compelling the respondent to live and cohabit with the petition. Order 21, rule 32 of the Civil Procedure Code, 1908 provides for the mode of execution of decree for restitution by attachment of property of the respondent and if within one year after attachment the decree is not obeyed, then the property so attached may be sold by the court and out of the sale proceeds the court may award such compensation as it thinks just and fit in the circumstances.

<sup>18</sup> AIR 1967 MP 204.

<sup>19</sup> AIR 1979 Guj 98: (1978) 19 Guj LR 1076: 1979 HLR 288: 1979 Mat LR 245: 1971 Cut LJ 778.

<sup>20</sup> AIR 1980 AP 123.

Rule 33 of the Civil Procedure Code, 1908, provides that, the court at the time of passing the decree or subsequent thereto may make an order that, if the decree is not obeyed within a specified time the respondent shall make such periodical payments as fixed by the court and such an order can be executed as a money decree. It may be noted that rule 33 contemplates a decree obtained by a wife and that remedy is not available to the husband. But Section 25 of this Act empowers the court to pass an order either at the time of passing the decree or subsequent thereto against the respondent whether it be a wife or husband, to pay maintenance in the manner the court thinks fit and also to create a charge on the respondent's property and if such an order is passed under Section 25 it can be executed as a money decree.

Section 28 of this Act states that all decrees under this Act except the decree for costs are appealable as decrees passed in exercise of the original civil jurisdiction. In *Kanu Charan Deep Vs. Birla Deep*,<sup>21</sup> the Court held that, "when the wife came up for the relief of restitution of conjugal rights and relief was granted it becomes obligatory on both the spouses to lead a conjugal life in consequence of decree. If one of them departed away from the decree, then the other spouse can have the liberty to get the decree satisfied in its proper way".

In *Vijay Kumar Vs. Neelam Rani*,<sup>22</sup> the Court held that, "when a decree for restitution of conjugal rights is not obeyed, then the only thing which the executive Court can do is that it can attach the property of the opposite party. The plea that the executive Court before taking action could have gone for reconciliation is not tenable. The opposite party is shown not to have any existing property; application for execution is properly dismissed".

### **Restitution of conjugal rights under Muslim Law:**

During the British rule in India, the matrimonial remedy of restitution of conjugal rights was made available to all the communities, including the Muslims. This was evidenced by the earliest Privy Council decision in 1867, in *Moonshee Buzul-ul-Raheem Vs. Shum-Soonissa*.<sup>23</sup> This remedy is available in modern India by a suit of restitution of conjugal rights in the lowest civil court.

In *Md. Ali Vs. Fareedunissa*,<sup>24</sup> the Court held that, "the remarkable feature of this remedy is that, it is available only to the husband and not to the wife. The reason seems to be that in most of the cases the suits for restitution of conjugal rights have been filed by the husband. There seems to be another reason also: the husband can frustrate the wife's petition at any time pronouncing the divorce on her".

The remedy is available to both the parties. Thus, according to 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 and may put either party on terms securing to the other the enjoyment of his or her legal rights".<sup>25</sup> The proposition of law thus formulated would be more precise if the word 'without

<sup>21</sup> 1996 (2) HLR 594.

<sup>22</sup> AIR 2004 Raj 256: 2004 (2) HLR 117 (Raj).

<sup>23</sup> (1876) 11 MIA 551.

<sup>24</sup> 1970 AP 298.

<sup>25</sup> Dr. Paras Diwan, *Muslim Law in Modern India* (Allahabad Law Agency, Haryana, 10th ed., 2011) at p. 106.



reasonable cause' has been substituted for 'without lawful ground'. The term 'reasonable excuse' or 'reasonable cause' has a well established meaning under the English law, the Hindu Marriage Act and the Special Marriage Act and it is submitted that there is no reason why the same meaning should not be ascribed or the same defences should not be available to the defendant under Muslim law. In addition to these defences, some more may be available under Muslim law. Thus, where a ground for divorce is available to the wife or where the marriage is void or irregular, the husband's petition for restitution of conjugal rights should not succeed. Although it is submitted that the husband has the right to resist the wife's suit for restitution of conjugal rights on the same grounds on which the wife can resist the husband's suit.

There is some ancient authority for the view that the court may order a husband to be attentive to his wife and where he has more wives than one, to be just and equitable to all of them. It is submitted that whether courts will do so in modern India is doubtful, since courts have no means to enforce such orders. In *Jani Vs. M.D. Khan*,<sup>26</sup> a full bench of the Jammu and Kashmir High Court took the view that, "a husband was living as *Khana damad* and the wife refused to cohabit with him in her father's house, for no fault of his, the husband's suit for restitution of conjugal rights will be decreed".

### **Conclusion:**

Like any other outdated remedy, the restitution of conjugal rights dates back to the feudal England, where the marriage was primarily a property deal and the wife and the children were part of man's possessions as other chattels. The remedy finds its origin from the Ecclesiastical Courts of England. Before 1813, the sanction of such a decree was excommunication. Later on, Six years imprisonment was substituted by the English Parliament. Hence a decree could be executed by arresting the wife. It is remarkable that, many other anachronistic common law actions were gradually abolished but they survived in English matrimonial law. The decree could no longer be executed by the arrest of the respondent but it could be by the attachment of the property.

However, afterwards this mode of execution of the decree was also abolished. The non-compliance of the decree amounted to constructive desertion, thus becoming a ground for divorce. The modern English law has fortified wife's position by making adequate financial provisions for her. The British Law Commission in its report submitted on 9th July 1969 recommended for abolition of this remedy. This has resulted in Section 20 of the Matrimonial Proceedings and Property Act, 1970, which has abolished the right to claim Restitution of Conjugal Rights from the English Courts.

It is submitted that, in modern matrimonial law, the remedy of restitution has no place. It has been abolished in most countries including England and there seems to be no reason why India should retain it in the personal law of any Indian community. Hence in India also, this matrimonial remedy has to be abolished.

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<sup>26</sup> 1970 J&K 154 (FB).