

## **Restitution of Conjugal Rights: An Analysis**

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### **INTRODUCTION-**

Hindu Law has been wedded to notion that on marriage husband and wife become one. Marriage as an important institution has been accepted in the personal laws of all the religions. The particular fall out of the common law doctrine of unity of personality was that one spouse could not sue the other.

The passage of time, complexity increased with areas of divorce, judicial separation and conjugal rights came up in personal law and it became necessary to codify the laws relating to marriage in India. The result was that the only remedy that a deserted spouse had against the other was the petition for restitution of conjugal rights. The remedy of restitution of conjugal rights is a positive remedy that requires both parties to the marriage to live together and cohabit.

Marriage under all matrimonial laws imposing 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 comfort of the other.

After the solemnization of marriage both husband and wife are legally bound by the law to maintain their conjugal life together. If either of the spouse depart from the other then the aggrieved spouse may acquire a statutory matrimonial relief guaranteed under the codified personal law to restore their status of the other subject to validation of certain facts. This can be done by filing a petition in court seeking for resumption of cohabitation. This right is known as Restitution of Conjugal rights.

### **1. HISTORICAL BACKGROUND-**

The remedy of Restitution of Conjugal Rights is a new for the Indian matrimonial jurisprudence that finds its origin in the Jewish laws. The remedy was unknown to Hindu law till the British introduced. In fact it is the only matrimonial remedy which was

made available under the British rule to all communities in India under the general law. After independence this remedy found place in the Hindu Marriage Act, 1955. This remedy opposed by-

- 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”
- Bromley has also opposed this concept in his book.
- Vehemently opposed the remedy saying, “I have not once known a restitution petition to be genuine, that these were merely a convenient device either to enforce a money demand or to obtain divorce.”

As stated by Paras Diwan, the remedy of restitution of conjugal rights was neither recognized by the Dharmashastra nor did the Muslim law made any provisions for it. Restitution of conjugal rights has its roots in feudal England, where marriage was considered as a property deal and wife was part of man’s possession like other chattels. The concept of restitution of conjugal rights was introduced in India in the case of *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* 1867, where such actions were regarded as considerations for specific performance.

In modern India, the remedy is available to Hindus under Section 9 of the Hindu Marriage Act, 1955, to Muslims under general law, to Christians under Section 32 and 33 of the Indian Divorce Act, 1869, to Parsis under Section 36 of the Parsi Marriage and Divorce Act, 1969 and to persons married according to the provisions of the Special Marriage Act, Section 22 of the Special Marriage Act, 1954.

## **2. MEANING OF RESTITUTION OF CONJUGAL RIGHTS-**

Restitution of conjugal rights basically comprises of two major words, “Restitution” and “Conjugal Right”.

- **RESTITUTION:** The restoration of something lost.
- **CONJUGAL RIGHT:** rights relating to marriage or the relationship between husband and wife.

If either party to a marriage withdraws from the society of the other without reasonable cause, the aggrieved party has a right to file a petition claiming relief for restitution of conjugal rights. The court will grant the relief if there is no legal bar to such decree.

The legal definition given under Section 9 of Hindu marriage act 1955. The idea of providing for restitution by a court decree is to preserve the marriage tie as far as possible, by enabling the court to intervene and enjoin upon the withdrawing party to join the other. The condition to be satisfied for obtaining such decree are-

- A. The other spouse has withdrawn from the society of the petitioner.
- B. There is no reasonable excuse for such withdrawal. Should the respondent allege reasonable excuse, the burden of proof lies on him/her.
- C. The court satisfied as to the truth of the statements made in the petition.
- D. No legal grounds exist for refusing the decree.

There is withdrawal from society when one of the spouses, without reasonable excuse, terminates an existing relationship with the intention of forsaking the other, and permanently or indefinitely abandoning such relationship. Thus, while a husband and wife might be at times living apart, but maintaining a frequent and regular social and conjugal relationship, in such a case there would be no withdrawal from society. So after the solemnization of the marriage if either of the spouses without reasonable excuse withdraws himself or herself from the society of the other then aggrieved party has a legal right to file a petition in the matrimonial court for restitution of conjugal rights.

In **Ranjana Kejriwal v. Vinod Kumar Kejriwal**<sup>1</sup>, Petitioner Wife alleged that the husband was already married and had suppressed the fact from her. The Court held that the petition for restitution of conjugal rights is not maintainable since there is no legal marriage.

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<sup>1</sup> AIR 1997 Bom 380

### **3. SPECIFIC PROVISIONS-**

The provisions dealing with restitution of conjugal rights in the various personal laws, the remedy is available under

1. Section 9 of the Hindu marriage act, 1955.
2. Section 32 or 33 of the Indian divorce act 1869
3. Section 36 of the Parsi marriage & divorce act 1969
4. Section 22 of the Special Marriage Act, 1954 in case of inter-caste marriage.

In order to get the decree of restitution of conjugal rights, the either party has to file for the decree under the above mentioned provisions and then it will not be obligatory on the parties to cohabit after such decree.

### **4. CONSTITUTIONALITY: RELIEF OF RESTITUTION OF CONJUGAL RIGHTS-**

During the time of introducing the provision for restitution of conjugal rights in the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955, there were heated debates in the Parliament for and against it. It is significant to note that in 1983-1984, the constitutional validity of section 9 of Hindu marriage act 1955 became a subject matter of debate as a result of these case laws-

- The constitutional validity of the provision for restitution of conjugal challenged before the Andhra Pradesh High Court in **T.Sareetha v. T. Venkatasubbaiah**<sup>2</sup>. In this case sareetha claimed that section 9 of the Act is liable to be struck down as violative of the fundamental rights in part III of the Constitution of India, specifically Article 14 and 21. Justice Choudary held that section 9 is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. It denies the women her free choice whether, when and how her body is to become the vehicle for

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<sup>2</sup> AIR 1983 AP 356

the procreation of another human being. The woman loses her control over her most intimate decisions. Clearly therefore, the right to privacy guaranteed by Article 21 is flagrantly violated by a decree of restitution of conjugal right. As a result the section 9 of Hindu marriage act 1955 was unconstitutional.

- In fact, Justice Rotagi in **Harvinder Kaur v Harminder Singh** recognised that “the legislature has created restitution of conjugal rights as an additional ground for divorce”.
  
- In **Shakila Banu v. Gulam Mustafa**, 1970, the Hon’ble High Court observed: “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 on the State to make special provisions for their protection and safeguard.”
  
- Ultimately Supreme Court in **Saroj Rani v. Sudharshan**<sup>3</sup> gave a judgment which was in line with the Delhi High Court views and upheld the constitutional validity of the Section 9 of the Hindu Marriage Act, 1955 and over-ruled the decision given in **T. Sareetha v. T. Venkatasubbaiah** . here the some Para of the Saroj rani case judgment-
  - ✓ In para 87 the learned Judge recognises restitution of conjugal rights is an archaic remedy “I cannot agree that S.9 is unconstitutional howsoever the remedy may be outmoded or out of tunes with the times. The restitution decree in the scheme of the Act is a preparation for divorce if the parties do not come together”.
  - ✓ Para 91 shows the true intention of the Judge “in the end I will repeat what I have said before it is for the legislature to abolish the remedy of restitution and not for the Courts to strike it down in the ground that it is unconstitutional. In my opinion

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3 AIR SC 1984 1562

S. 9 is perfectly valid". The judge seems to want to do away with the remedy, but the existing laws tie his hands.

The court observed that the object of the section is to bring about cohabitation between estranged parties so that they can live together. That in the privacy of home and married life neither article 21 nor article 14 has any place.

## **5. APPLICATION OF THE PROVISION IN DIFFERENT COMMUNITIES-**

The restitution of conjugal rights is one of the reliefs that are provided to the spouses in distress in the institution of marriage by law. Decree of restitution of conjugal rights could be passed in case of valid marriages only. Apart from legislation relating to matrimonial law, courts in India in case of all communities have passed decrees for restitution of conjugal rights.

### **5.1 Hindu**

Section 9 of the Hindu Marriage Act, 1955 provides for the restitution of the conjugal rights. The aggrieved party may apply, by petition to the District Court, for the restitution of conjugal rights. One of the important implications of Section 9 of the Hindu Marriage Act, 1955 is that it provides an opportunity to an aggrieved party to apply for maintenance under Section 25 of the Hindu Marriage Act, 1955. The legal grounds for refusing to grant relief are:

- For instance, any ground on which the respondent could have asked for a decree for judicial separation or for nullity of marriage or for divorce;
- Reasonable excuse for withdrawing from the society of the petitioner;
- Any conduct on the part of the petitioner or fact tantamount to the petitioner taking advantage of his or her own wrong or any disability for the purpose of such relief;
- Unnecessary or improper delay in instituting the proceeding.

### **6.2 Muslim**

If the husband either deserts a wife or neglects to perform his marital obligations without any proper reason, then the wife can apply for restitution of conjugal rights. Even husband can apply for restitution of conjugal rights. But the court can refuse to grant order of restitution of conjugal rights for following reasons:

- Cruelty by husband or in-laws
- On the failure by the husband to perform marital obligations
- On non-payment of prompt dower by the husband

### **6.3 Christian**

A Christian husband and wife can also apply for an order of restitution of conjugal rights. The Court cannot pass the decree for following reasons:

- Cruelty of husband or wife
- If either of the spouse is insane
- If any one of the spouse marries again.

## **1. SUGGESTIONS-**

- The court develop the new process regarding right of restitution of conjugal rights for this the might be authorized to appoint a committee for reconciliation.
- Instead of the judge, sitting as one of the committee member's let some eminent person/s of the society do the job.
- The committee formed be a semi-independent committee to the extent that it is appointed and supervised by the Court.
- This committee must be guidance of an expert e.g counselor or psychiatrist.

- The procedure should be liberal as termed counseling.
- If the committee fails in the counselling even after taking expert's help let this be viewed as failure of the marriage and be treated as a ground for divorce. If not treated as a ground for divorce then the parties will go back to Courts and the whole procedure of counselling will be a mere mockery.

## **2. CONCLUSION-**

In the above paper I familiarized with the legal provisions related to restitution of conjugal rights. Here one question arises whether any one forced to live with a partner he/she does not want to live with? Marriage is a pure relation between two person but it is not right to only prevent for this relation force to live together However, there is a bigger debate we need to dwell into. As understood, the restitution of conjugal rights is a part of the personal laws of the individual, thus they are guided by ideals such as religion, tradition and custom. A very important feature of restitution of conjugal rights to be emphasized is that it is a remedy is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation. It serves to aid prevention of the breakup of marriage, thus is a means of saving the marriage. The decree of restitution of conjugal right or right to stay together is not obeyed for a period of more than one year, subsequent to the date of the decree, it becomes a good ground for divorce.

So the restitution of conjugal rights remedy tries in promoting reconciliation between the parties and maintenance of matrimonial. It tries to protect the society from denigrating. But the final decision is that of the parties whether to obey the decree of restitution of conjugal rights and to continue with the matrimony or not.