

# LEGALFOXES LAW TIMES

## Constitutional Validity of Restitution of Conjugal Rights

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### **INTRODUCTION:**

Marriage is a unique bond between two individuals and under the matrimonial laws of different religions this social institution of marriage imposes certain marital duties upon the spouses. One of the important implications of marriage is that the spouses are expected to live together and each spouse is entitled to the comfort of the other. As we know in India marriage has always been considered to be very pious and it is a strong relationship that exists not only between two individuals but also between two families. However, sometimes the marriage does not seem to be working and a situation can arise where a spouse might not feel comfortable living with the other spouse or there can be some other reason why one of the spouses chooses to live separately. Now, the law of restitution of conjugal rights is available to the aggrieved party upon fulfillment of certain conditions. However, there have been many contentions about the unconstitutionality of this law and the question that arises is whether a law that came into India about 140 years ago is still relevant and ethical or not?

### **RESTITUTION OF CONJUGAL RIGHTS - MEANING AND APPLICABILITY:**

One of the important implications of marriage is that the spouses are expected to live together and each spouse is entitled to the comfort of the other. Now, if either of the spouses departs from the society of the other without any reasonable cause then the aggrieved spouse may acquire may file a petition in court seeking for the resumption of cohabitation. This right is known as restitution of conjugal rights.

Restitution of conjugal rights comprises of two major words, 'Restitution' and 'Conjugal Right'. The word 'RESTITUTION' means the restoration of something lost. On the other hand 'CONJUGAL RIGHT' means rights relating to marriage or the relationship between husband and wife.

The legal definition of restitution of conjugal rights is given under Section 9 of the 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 for the sole purpose of preservation of the marriage ties.

For seeking a decree for restitution of conjugal rights the following conditions needs to be met:

1. Firstly, the respondent must have withdrawn from the society of the petitioner.
2. The withdrawal was without any reasonable cause or excuse. However, if the respondent alleges any reasonable excuse then the burden of proof lies on him/her.
3. Thirdly, the court must be satisfied as to the truth of the statements made in the petition.
4. Lastly, no such legal ground that the relief should not be granted.

The expression withdrawal from society means cessation of cohabitation by a voluntary act of the respondent. Withdrawal from Society is measured as the withdrawal from the totality of the conjugal relationship, such as refusal to live together, not maintaining a regular and social relationship, and refusal to give company and comfort to each other. So after the solemnization of the marriage if either of the spouses without any reasonable excuse withdraws himself or herself from the society of the other then the aggrieved party has a legal right to file a petition for restitution of conjugal rights. However the right for restitution will be dismissed if the petition is not bonafide, that is, filed with good and sincere intention or is filed with some ulterior motive such as to take possession of wife's property.

In the case of *Mirchumal V. Devi Bai*<sup>1</sup>, the court held that if there is no refusal on the part of the wife to allow access to her husband and no reluctance on her part in going to her husband, then mere refusal on her part to resign her job is not a sufficient ground for the husband to seek relief for restitution of conjugal rights. Hence, the petition was dismissed.

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<sup>1</sup> AIR 1977 Raj 113

In another case of **Ranjana Kejriwal v. Vinod Kumar Kejriwal**<sup>2</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.

So, to get the decree of restitution of conjugal rights, 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.

### **HISTORICAL BACKGROUND:**

Restitution of Conjugal Rights has its origin in Jewish law. This remedy was taken not from Dharmashastra or any other personal law existing in the Indian subcontinent but from the English common law. This law was introduced in India in the case of *Moonshee Buzloor Ruheem V. Shumsoonissa Begum* in 1867 and through legislative actions found its way into the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, and other personal laws.

The restitution of conjugal rights dates back to Feudal England, where the marriage was considered a property deal and the wife was treated as a man's possession like other chattels. The wife was treated like a cow and, if it ran away from the master's shed could be roped back.<sup>3</sup> In modern India, this remedy is available to Hindus under Section 9 of the Hindu marriage act, 1955. Further, for Christians, this remedy is available under Section 32 or 33 of the Indian divorce act 1869, for Parsis under Section 36 of the Parsi marriage & divorce act 1969, to Muslims under the general law, and to persons marrying in the civil form under Section 22 of the Special Marriage Act, 1954 in case of inter-caste marriage.

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<sup>2</sup>AIR 1997 Bom 300, 1998

<sup>3</sup> 'FAMILY LAW' by Dr. Paras Diwan, pg 122.

## CONSTITUTIONAL VALIDITY OF RESTITUTION OF CONJUGAL RIGHTS:

Coming to the test for constitutional validity It is to be mentioned that even for a personal law to be valid it must not be in violation of the fundamental rights given in part 3 of our constitution<sup>4</sup>.

The issue of the constitutional validity of this Section 9 of the Hindu marriage act, 1955 was first raised in *T Sareeta v Venkatasubbiah*<sup>5</sup>, in this case, the Andhra Pradesh High Court had held that Section 9 of the Hindu Marriage Act violates the right to privacy and human dignity guaranteed by article 21 of the Constitution and it thus held the section as unconstitutional. In this case, Justice Choudary believed that this law denies the women of her free choice in the matters of procreation and thus she loses her control over the most intimate decisions in life.

However, in the case of *Harvinder Kaur v Harminder Singh*<sup>6</sup>, Justice Rohtagi showed a difference of opinion and according to him, Justice Chaudhary in the case of *T. Sareetha V Venkatasubbiah* seemed to have an opinion that restitution of conjugal rights only has a maiden purpose that is, to force the women into sexual intercourse and for her bear children even if she doesn't want to. So, here it was seen that restitution of conjugal rights is more about than just restitution of sexual relations in the marriage.

Finally, the Supreme Court in the case of *Saroj Rani V. Sudharshan Kumar*<sup>7</sup> upheld the constitutional validity of Section 9 of the Hindu Marriage act and overruled the decision given in the *T.Sareetha* case.

The researcher would be discussing the constitutionality of this law concerning certain fundamental rights that it seems to violate.

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<sup>4</sup> A three-judge Supreme Court bench in the *Mudaliar* case of 1996 held that personal laws are void to the extent that they violate the fundamental rights.

<sup>5</sup> A.I.R 1963 AP 356.

<sup>6</sup> A.I.R 1984 Del 66.

<sup>7</sup> A.I.R 1984 Del 66.

#### - ARTICLE 14 AND RESTITUTION OF CONJUGAL RIGHTS:

It is well known that there is widespread discrimination based on gender in Indian society. However, article 14 of the constitution states that “The state shall not deny to any person equality before the law or the equal protection of laws within the territory of India”.<sup>8</sup> Now, there are many contentions concerning the fact that Section 9 of the Hindu marriage act is biased towards females and it renders them unequal in the eyes of law however, the Hindu Marriage amending act 44 of 1964, states that “either party to a marriage” is allowed to present a petition on the grounds given in Section 9 and Section 13(a). Thus, the concept of gender discrimination has not been incorporated in the Hindu Marriage Act and all are treated as equals under this section.<sup>9</sup> Hence, it can be said that there is no classification of sexes in Section 9 and all equals have been treated equally in this area and there is complete equality before the law under Section 9 and it cannot be struck down as violating Article 14 of the Constitution.

#### - ARTICLE 19 AND RESTITUTION OF CONJUGAL RIGHTS:

It is contended that the restitution of Conjugal rights violates the freedom of expression, association, and other freedoms guaranteed under Article 19 of the Constitution. Article 19 (1) of the Indian Constitution prescribes the freedom to form associations and to reside in any area in India<sup>10</sup>, the freedom to practice any profession<sup>11</sup>, and the freedom of free speech and expression.<sup>12</sup> Grant of a decree of restitution of conjugal rights compels a spouse to live with his/her spouse against his/her will. This violates the freedom of association guaranteed under Article 19 of the Constitution of India. Since we can also see that in a country like India where the majority of the marriages are arranged and mostly when marriages take place in rural areas the female is not even aware of whom she is marrying and hence forced to reside with her husband. A forced marriage is a violation of human rights and is also gender violence. Article 16

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<sup>8</sup> The Constitution of India, 1949.

<sup>9</sup> Restitution of conjugal rights: a comparative study among Indian personal laws by Paluck Sharma, available at: <https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-indian-personal-laws/> (last visited on 7th January 2021)

<sup>10</sup> Article 19(1) (g) The Constitution of India

<sup>11</sup> Article 19(1) (c), The Constitution of India

<sup>12</sup> Article 19(1) (a), The Constitution of India

of UDHR also states that marriage shall be entered into only with the free and full consent of the intending spouses.<sup>13</sup>

- ARTICLE 21 AND RESTITUTION OF CONJUGAL RIGHTS:

The Right to Life of a person is regarded as the most important aspect of a person's fundamental rights. It is stated in the Constitution that "No person shall be deprived of his life or personal liberty except according to the procedure established by law".<sup>14</sup>The first case of the right to privacy in the Supreme Court was the case of *Kharak Singh v State of UP*, A.I.R. 1963 SC 1295. Justice Subba Rao said: "*any definition of the right to privacy must encompass and protect the personal intimacies of the home, family, marriage, motherhood, procreation, and child-rearing.*"<sup>15</sup>

Thus, even where section 9 of the Hindu marriage law does not render sexual relations obligatory, forcing a woman to remain in her marital home involves putting her in danger of marital rape. Forceful cohabitation of two spouses unwilling to reside with each other would further lead to forced sexual intercourse against a spouse. 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"<sup>16</sup>

The Supreme Court in the case of *Govind V. State of Madhya Pradesh*<sup>17</sup> held that that individual privacy and dignity were protected by Article 21, with the rider that 'privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior'.

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<sup>13</sup> Article 16, Universal Declaration of Human Rights, available at: <https://www.un.org/en/universal-declaration-human-rights/>

<sup>14</sup> Article 21, The Constitution of India

<sup>15</sup> *Kharak Singh v State of UP*, A.I.R. 1963 SC 1295

<sup>16</sup> Agarwala, Raj Kumari. 'RESTITUTION OF CONJUGAL RIGHTS UNDER HINDU LAW: A PLEA FOR THE ABOLITION OF THE REMEDY'. *Journal of the Indian Law Institute* 12, no. 2 (1970): 257-68.

<sup>17</sup> 975 AIR 1378, 1975 SCR (3) 946

**SUGGESTIONS AND CONCLUSION:**

Issues in such a sphere cannot be resolved with a black-and-white approach. In India where divorce is still considered a social taboo in the 21st century, this remedy encroaches upon the ability of separation without divorce for many people who are unable to support themselves or rely on their families. This section allows the court to force individuals to cohabit with their partners even when they don't want to and in many cases, this can cause them to be a threat to their safety, security, and even life.

However, just because a section has the scope to be misconstrued, it doesn't imply it should cease to exist. It is known that the ultimate aim of section 9 is to preserve the marriage bond from getting unreasonably disrupted. There is no reason to prevent cohabitation if there is nothing wrong with the marriage and the way due consent has been acquired by both parties. It is seen that Section 9 of HMA, 1955 is not entirely constitutional and leaves wide scope for ambiguity. Hence, reforms should be brought in to provide complete and unambiguous justice to all.

So, laws like these are required but also we need to get done with the ambiguity that the law leaves with respect to reasonableness. Thus, the causes for a spouse leaving should be valued concerning different aspects of their lives and the possible consequences of the same should also be taken into consideration since one person's reasonable ground can be unreasonable for another. Furthermore, instead of going directly to the court mediation should be the first option whenever deemed necessary.