

“Constitutional Validity and Ethicalness of Restitution of Conjugal Rights in India”

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ABSTRACT

Marriage is a legal union of a man and a woman¹ and is considered as one of the strongest pillars of the society as this institution is the very reason for the existence of a family and survival of race. In our tradition, marriage is not merely bringing about the relationship of husband and wife, between, a man and a woman. It is the union of two families, who merge as one. However, the interpretation of this institution “marriage” differs from person to person, regions, traditions and religions.

In India, marriage is existant in different forms, such as it is a sacrament under the Hindus, but, on the other hand it is a contract in Islam. For Christians it is a holy union. It is beyond the bounds of possibility to achieve a perfect and flawless marriage. There are times when there are disagreements between the husband and the wife, and many a times such a discord may reach to an extent where the partners do not wish to stay together any longer. However ending a relationship of the highest level is not a solution to these disagreements. Law provides with various matrimonial remedies to the married couple to bring them at peace and save the sacred institution of marriage. This paper shall focus on one such remedy which is known as Restituion of Conjugal Rights, under Hindu Marriages (Section 9) and in cases of Muslim Marriages.

The author shall dive deep into the historical perspective of this remedy to uncover its origins and foundation. Subsequently the paper will elucidate upon the current situation and practice of this remedy and deliberate upon its constitutional validity. The fundamental discussion of the research is to discern whether or not restitution as a remedy, is ethical and whether or not this practice is constitutionally valid.

Keywords: Marriage, sacrament, Hindu Marriage Act, 1955, restitution of conjugal right, constitutional validity.

¹ Webster’s Dictionary (1913)

OBJECTIVE OF THE PAPER

The main purpose of the paper is to discover the ethicalness of Restitution of Conjugal Rights, *en plus* deliberate upon the constitutional validity of the same.

METHODOLOGY

This paper relies on the secondary data for research and review of literature. The style of paper is descriptive and exploratory in nature.

LIMITATIONS OF THE PAPER

The paper is descriptive and based on secondary data and hence its reliability or trustworthiness is subject to the available literature in this regards. Considering the limitations of time and money at the disposal of present writer of the paper, this paper is confined to the discussion related to the main objectives and identifying proofs of the hypothesis.

HYPOTHESIS

The null hypothesis is designed as “ The proviso of Restitution of Conjugal Rights is ethical and constitutionally valid”.

INTRODUCTION

Social organisation in a society is constituted on the basis of marriage. Under the Hindu Law, marriage is a sacrament. Manu’s declaration was that “neither by sale nor by desertion is wife released from the husband.” These rights were available to the husband alone and not the wife. In order to prevent such inequality between the husband and the wife the Hindu Marriage Act, 1955, contained certain matrimonial remedies such as judicial separation and divorce on the grounds of desertion, cruelty, and refusal to carry out matrimonial obligations, et cetera. However, the addition of the provision of restitution of conjugal rights that is Section 9, led to pandemonium.

This section to the act has led to many issues and created a confusion in the recent years, to the extent of the section’s constitutionality being challenged. The sad situation is such that the actual real life exercise of the right goes against the very purpose of the provision and neglecting the intention behind the insertion of the section by the legislature. The remedy of Restitution of Conjugal Rights is available under Section 9 of the Hindu Marriage Act, 1955, which reads as follows:

“When either the husband or the wife has, without a reasonable excuse, withdrawn from the society of the other, the distressed party may apply for restitution of conjugal rights.”

In the Vedic times, the wife was obligated to stay with the husband after they got married, throughout his lifetime and support him in every situation. But, with time the traditions have undergone a change. Now, the wife is not duty bound to stay with her husband throughout her

life if she is unhappy and unsatisfied with the marriage. She cannot be compelled to stay in her matrimonial home against her wishes. In present times, the husband or the wife can renounce the matrimonial society of each other as and when he/she wishes, condition precedent being that the removal of society should occur on account of prior notice, if not the aggrieved party has every right to file a petition for restitution of conjugal rights and ask for reasons for leaving the matrimonial society. To crystallize this concept, it is imperative to explore certain terms which had or can cause perplexion.

Firstly, what does the term matrimonial society imply. Matrimonial Society or Matrimonial home is nowhere defined in any statute. But, according to the Black Law Dictionary² matrimonial home refers to the house where husband and wife live together. The courts have exhaustively interpreted the said concept, not restricting to its nacent form, which is a shared household.

In *Kailash Vati v. Ayodhia Parkash*³ the court said that the idea of the matrimonial home appears to lie at the very centre of the concept of marriage in all civilised societies. The home epitomizes the finer nuances of the marital status. The bundle of indefinable rights and duties which bind the husband and the wife can perhaps be best understood only in the context of their living together in the marital home.

Secondly, the word 'withdrawn' is many a times misunderstood, it does not only mean separation or desertion, but also includes, the withdrawal from carrying out any sexual relationships with the spouse, refusing to collaborate in the execution of conjugal commitments, intending to abandon, and the suspension of living together by wilful demonstration by the wife.

However, in order to avail this remedy, there are three prior conditions that have to be fulfilled:

1. There is one person who has withdrawn from society,
2. The same withdrawal is in absence of any reasonable reason or lawful ground.
3. There should be no other legal ground for refusal of the relief.

The restitution of conjugal rights is applied by for by the aggrieved party. These rights mainly connote to two ideas that are observed in any marriage:

- (a) The right that the spouses stay with each other in the society;
- (b) Marital intercourse.

The aggrieved parties must approach the District Court for a decree of restitution and satisfy the Court about the truth of the statement made in the petition.

SCHEME OF THE PAPER: The remainder of the paper is organized in the following manner; Section A gives a historical background of the remedy and its current scenario. Followed by,

²Black Law Dictionary 7th Edition 1999

³ILR (1977) 1 Punj. & Har. 642

Section B which deals with the constitutional evolution of the remedy and discussing on whom the burden of proof lies. Further, Section C canvasses the eligible grounds of justifications for withdrawal of matrimonial society. Lastly, Section D, the author will venture to provide with few suggestions to improvise the difficult situation in regards with the remedy and finally surmise the conclusion.

A] HISTORICAL BACKGROUND

The origin of this remedy namely, restitution of conjugal rights, can be traced back to the Jewish family law, which has been borrowed by most of the personal laws in India. This was the only matrimonial remedy available during the British India, under the general law. But this remedy was subject to a lot of criticism over the years.

When the Hindu Marriage Act, 1955, was in its nascent stage, this remedy of marriage led to heavy debates between the drafters and makers of the Act. One 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...”

This concept was also opposed in ***Russell vs. Russell***⁴, one of the judges of the bench commented

“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.”

Under the Muslim Law of Marriage, restitution of conjugal rights, is equated with the freedom to enjoy or to secure the enjoyment of legal rights to the spouse. Previously, a contract of marriage was attached with the concept of specific performance.

But later, it was decided in the case of ***Abdul Kadir vs. Salima***⁵, that conjugal rights will be dealt with on the basis of the Muslim Law and not on the concept of justice, equity and good conscience.

For Christians’, the remedy of restitution of conjugal rights, can be enforced with the help of Sections 32 and 33 of the Indian Divorce Act, 1869. Under the Parsi Marriage and Divorce Act, 1936, Section 36 deals with restitution of marriages.

CURRENT STATUS OF THE REMEDY

This remedy has been receiving negative criticisms ever since it was incorporated into the personal laws and some scholars have expressed their desire to abolish the remedy. At the same

⁴ (1880) LR 14 Ch D 471

⁵ (1886) ILR 8 All 149

time, this remedy has been abolished by England under the Law Reforms (Miscellaneous Provisions) Act, 1947.

The insincerity on part of the petitioner in a restitution cases, is one of the many problems in delivering decisions in a dispute of marriage. Over the years, it has been identified that the main problem of restitution lies in Section 13 of the Hindu Marriage Act, 1955, which states that a couple can file for a divorce within a period of one year if they do not comply with the restitution decree that has been issued by the court. As well as, this remedy is used as a defence in case of maintenance suits under Section 125 of the Criminal Procedure Code, 1973.

If a woman has applied for a restitution remedy, the wife's claim for maintenance will be valid, this was case in England up to 1949.

Another way for enforcement of this remedy is by way of enforcing a decree of restitution. If a restitution decree is complied with, the Court can enforce the decree under Order 21 Rule 32 of the Civil Procedure Code, 1908 deals in the cases for specific performance of a decree of conjugal rights.⁶ But this is a major cause of problem in rural India, where woman do not own property after the divorce has been finalised. The court needs to ascertain the share of the wife in the property of the husband, though this is a time-consuming process. It has also been held in a number of other cases, which a petition filed by a Muslim husband for restitution is on the same lines as a suits of specific performance and can be enforced under the Code of Civil Procedure, 1908.

It was held in the case of *Moonshi Buzloor Ruheem vs. Shamsonnissa Begum*⁷.

However, there are some instances in which a petition for cohabitation has been filed by either spouses in the marriage but none of it is valid. In *Wily vs. Wily*⁸, it was held that each party agreeing to stay together without any molestation, does not amount to matrimonial cohabitation.

It does not mean that all the petitions in relation to Restitution are accepted by the court. There are three conditions in which, the petitions are rejected:

1. If the person who has withdrawn from society in this case the respondent, has a ground to claim another relief.
2. If there is misconduct on part of the petitioner, such as constant demand for dowry etc.

B] CONSTITUTIONAL EVOLUTION OF THE REMEDY

This remedy in the earlier times has been challenged in many instances. It was observed that, it was in the olden times, that the wives usually acted as slaves of the husbands, however, since the enforcement of the Indian Constitution, it is the right of every individual to get protection under

⁶For reference: Prabhakara Adiga v. Gowri & Ors. (SLP (C) Nos. 1483-1484 of 2015)

⁷(1867) 11 Moo Ind App 551

⁸(1918)

the Indian Constitution as well as to make special provisions to safeguard them or protect them, it was held by the Bombay High Court in the case *Shakila Banu vs. Gulam Mustafa*⁹.

The Andhra High Court in the case, *T. Sareetha vs. Venkata Subbaiah*¹⁰ which said that this remedy is unconstitutional as it violates Article 14 as well as Article 21 of the Constitution of India and this remedy is null and void as it does not satisfy the theory of minimum rationality. This test is an addition to reasonable classification under Article 14, but the H'ble Supreme Court declared it as arbitrary.

However, in the case *Harvinder Kaur vs. Harmander Singh*¹¹, the Delhi High Court held that, the view of the Andhra Pradesh High Court was too narrow as it didn't take into account the provision of Section 13 of the Act, as well as, court said that the restitution remedy, aims at cohabitation and consortium and seeks to uphold the institution of marriage, thus making the remedy valid and that it is not violative of Article 14 and 21 of the Constitution of India.

The contradictory decisions in the two cases, led to the landmark case of *Saroj Rani vs. Sudarshan Kumar Chadha*¹² wherein the decision was taken in relation to the validity of the remedy to finally be presented because the Supreme Court.

In this decision, the court upheld the decision delivered by the Delhi High Court to be more appropriate. It is not on the courts to decide whether the Section 9 is unconstitutional and have no right to strike down the remedy as that right lies with the legislature, this has been said so in Paragraph 91 of the judgment given by the court in the Saroj Rani case.

However, even after this judgment was delivered, it was contended from the provision in Section 9 that it is violative of Article 21.

In *Kharak Singh vs. State of Uttar Pradesh*¹³, it has said that right to privacy includes, the protection of intimacy. The Bombay High Court however disagreed with the decision and, said that a wife can't be forced to live with her husband against her will, this decision was also upheld in the case *Bai Jiva vs. Narsing Lalbhai*¹⁴.

The American Supreme Court in the case of *Eisenstadt v Baird*¹⁵ held "the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person".

⁹AIR 1971 Bom 166

¹⁰ AIR 1983 AP 356

¹¹ AIR 1984 Del. 66

¹² AIR 1984 4 SCC 90

¹³AIR 1963 S C 1295

¹⁴AIR 1927 Bom 264.

¹⁵405 US 438, 31 L Ed 2d 349, 92 S Ct 1092

In reference to the decisions pronounced by the various High Courts across the country and the decision of the H'ble Supreme Court in the Saroj Rani case, the remedy provided for under Section 9 of the Hindu Marriage Act, 1955 is valid and is not violative of Article 14 and 21 of the Indian Constitution.

BURDEN OF PROOF

In all restitution cases, burden of proving the case embodies at two levels.

The primary burden lies on the husband, who in most cases happens to be the petitioner. He or the petitioner has to convince the Court that his wife or the respondent has withdrawn from the matrimonial society. After the following is proved, the burden of proof shifts on the wife or the respondent. Then the respondent has to bear the burden of giving an appropriate and convincing reason for her withdrawal. A valid reason for restitution can include, any act which makes it impossible to live together as well as matrimonial misconduct. If the ground of withdrawal is reasonable and acceptable, then the petition is dismissed.

C] JUSTIFICATION OF THE GROUNDS OF WITHDRAWAL

1. Remarriage of the Husband

Bigamy is an offence in most of the personal laws, except under the Muslim law where having up to four wives is acceptable and is not an offence.

Under the Hindu Marriage Law, if the husband marries another woman while the first marriage is valid and is not declared to be brought to an end legally, then the withdrawal from society by the wife is justified. In such cases, the wife has the right to file for restitution of conjugal rights.

However, under the Muslim Law, which is governed by the Shariat law, has stated that, a Muslim person must comply with this law and to follow the law. This law states that even polygamy is legal and is not punishable upto a number of four wives by a husband. However, a provision has been made in this law to protect the wife or wives, if the husband remarries and mistreats the existing wife or wives, then a restitution petition can be filed by the wife and can also be charged for the offence of cruelty.

The Madras High Court, in the case of *Kothar Beevi vs. Aminuddin*¹⁶ stated that, the remedy of restitution, cannot be given to the husband when he remarries during a pending court case.

2. If the wife is required to stay away from the husband due to work

In the earlier times, it was assumed that the wife after she is married should serve her husband and his family. For this purpose she would have to leave her own home and career behind to fulfill the responsibilities of her husband's family. Thus, as a matter of fact, earlier, the wife did not have the freedom to withdraw from society.

¹⁶ S.A. (MD) No. 62 of 2006

Even if she wished to withdraw from, she had to get a valid consent from her husband. However, in the recent times, this matrimonial relationship has undergone change and such practice seems unreasonable as nowadays most of the wives wish to continue their careers even after marriage.

This conception of the modern era, was solidified in the case of *Shanti Nigam vs. Ramesh Chandra Nigam*¹⁷ that a woman cannot be confined to her household and if it is important if the wife wishes to work, by staying away from her husband she must be able to do so. As upkeep of the family is the primary duty and the husband cannot file for restitution.

In some cases, it has been argued that there is no necessity for the wife to work and live separately, this issue was dealt with in the case of *Smt. Kailash Wati vs. Ayodhia Prakash*¹⁸, where the court said that the husband's right to abandon his wife is not given, as well as he need not give up his matrimonial house. But, the decision lies with the court in which the case holds jurisdiction. In addition to this, the court is of the opinion that, the facts of the case must be taken into consideration, and must enforce the rights of the parties accordingly.

Sometimes, there are agreements between the couples before the wedding that, addresses many of the issues which have to be dealt with in case there is a divorce, which is validated by the notary department. Even though the content can be different in accordance with the circumstances, these agreements cannot be dealt with in spheres with relation to financial along with an involvement of personal matters, such matters require the intervention of the courts to resolve the issues that may arise after the divorce is finalized.

In the case of, *Hamidunnessa Biwi vs. Zohiruddin Sheikh*¹⁹, the wife was dependent on the agreement for restitution, and the agreements that were made by them. But the Court struck this down stating that this was a personal matter and didn't involve any finances at stake and nothing about this is mentioned in the agreement. Under Hindu Law, in *Krishna Iyer vs. Ballaman*²⁰, says that if it is opposed to public policy, then the matter(s) between the parties at stake for divorce will not be enforceable.

DI SUGGESTIONS AND CONSLUSION

When a marriage is plagued with quarrels and fights, and when the times get arduous for partners to stay with each other, staying away from each other for a while may help. But when this 'for a while' does not end, and continuous indefinitely, this doesn't help the marriage in any way, rather distances the couple.

Restitution as a remedy in such cases will restore the marriage. Wranglings do happen in a marriage, and at times when understanding of the partners in marriage is blurred, they are incapable to win over each other by themselves. During these times a family member, usually a

¹⁷ 197 All LJ 67

¹⁸ LXXIX P. L. R. 216. (1977)

¹⁹ (1890) 17 Cal 670

²⁰ (1911) 34 Mad 398

older member, or a friend or a colleague may come to aide. But sometimes bias shown by them is the biggest problem and cannot be predicted.

An alternative solution would be referring the issue to a non-biased, independent party. The Parliament of India, once suggested that any matters under this remedy should shift to arbitration. A major change can be brought about by adapting arbitration in the family matters. The benefit of involvement of such courts is that, it will reduce the process of decision making and deliver faster judgments enabling the couple to get a quick relief. i.e. a divorce if the couple cannot by any stretch of possibility live together, or a restitution if the arbitrator is successful to bring some hope in the marriage.

Incorporation of such a process will expediate in solving the family issues, in a way that it will reduce the burden on family courts and help in dealing with the issue of pending court cases and subsequently deliver faster justice. It can be seen in many cases that the time delay plays to the will of the respondent in some cases and he/she gets away with the charges that are levied on him/her by the spouse.

In many European countries, arbitration in family matters has proved to be useful and has reduced the workload of the judiciary in these countries tremendously. It also motivates the lawyer who is handling the case to be more skilful as it is on his advice that parties will be acting and hopefully, in many cases, a win-win situation can be achieved between the husband and the wife to solve the dispute that has arisen between them.

The use of arbitration in restitution of conjugal rights has proved to be useful in a socio-legal study in Poland, Belgium, Denmark and many other countries. Though this is done in a small percentage and is an upcoming solution for dispute resolution, as many spouses still prefer going to the court as it has made its impact on the people who are required to feel the effect.

The only thing is that, the people must be given time to settle into this new system and must be given the opportunity to familiarize themselves with the system so that they fully understand this system and are able to avail the facilities that are available to them in the legal system.

It is also a pocket-friendly remedy as it is not a time-consuming as compared to going to courts, if there is a possible win-win situation for both the parties.

It is less burdensome and acts as a weapon to solve more cases and help everyone to get quicker delivery of justice. In addition to this, it is not only economically and socially friendly, but also helps the parties in dispute in a psychological manner as it is faster compared to the court.

This process, also does not involve any cumbersome procedure which is lengthy and tiring, where one party may think that it is better to withdraw the case and resolve the problems internally and settle it within the family members and come up with a solution to solve their problem.

In case, of restitution of conjugal rights it is an effective tool at the disposal of a common man and the only available remedy to this remedy of marriage which is compared inkustb by many people in the world.

A useful suggestion proposed by the author, would be to form an indirectly dependent committee that is not connected or supervised by the judiciary and that, which can take the advice of the judiciary only, in cases where it is too complicated to be decided by the committee on its own. However, if the committee is not able to solve the issue of marriage then it is the duty of the judiciary to solve such matter, in the usual way.