

WITHHOLDING CONSENT TO RESTITUTION OF CONJUGAL RIGHTS- A DETRIMENTAL AND ARCHAIC TRANSPLANT FROM RUKMABAI'S CASE TO OJASWI PATHAK'S CASE

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Abstract

Marriage is an union between two individuals which is bounded by contractual and sacramental obligations. The matrimonial laws are the ones which are guaranteed to the individual which discusses the marital duties followed by legal rights which are obligated to them. The different personal laws in India has the provision of the restitution of conjugal rights which may differ from one other but the meaning and usage remains same- When the husband or the wife withdraw themselves from the society of the other without any legal grounds or reasonable excuses, the aggrieved party may file a suit of restitution of conjugal rights in the district court so that the other party could live with them. With the enactment of laws, the different religions are obliged to the restitution under different provisions. To the Hindus, the restitution to conjugal rights is mentioned under section 9 of the Hindu Marriage Act,1955, In the case of Muslims, it is being mentioned under the general laws, the section 32 and 33 of the Indian Divorce Act,1869 mentions about the provisions of restitution of conjugal rights. There is also a provision which is given to the people who are married under Special Marriage Act,1954 under the section 22 of the act, they can claim for restitution of conjugal rights. There should be withdrawal by the respondent from the petitioner's society, there should be no reasonable excuse or legal grounds for the respondent to withdraw from the society of the aggrieved party. It is the court's desecration to provide the petitioner a relief in case there is no legal ground for the respondent's defence. The court has time to time established its authority to provide the relief to the aggrieved party and also has not overlooked the conditions and circumstances of the other spouse who has withdrawn himself/herself from the society of the other.

Key words: Restitution, reasonable excuse, matrimony, relief, withdrawal.

Introduction to Restitution of Conjugal Rights

The concept of restitution of conjugal rights is mentioned under section 9 of the Hindu Marriage Act, 1955. The word restitution mainly means a compensation given for any losses suffered by the other party but in the reference to marriage it means, A suit that is filed by which the party injured may compel the other to return to cohabitation. If either husband or the wife, without reasonable excuses, withdraws from the society of the other, the aggrieved party may approach the Court for restitution of conjugal rights.¹ The decree of restitution of conjugal rights cannot be executed by forcing the party who has withdrawn from the society of the person who instituted the petition for restitution. The decree can be executed only by attachment of the properties of the judgement. However, if the decree of restitution of conjugal rights is not honoured for a period of more than one year subsequent to the date of the decree, it becomes the ground for divorce.

The word society represents cohabitation between the spouse, and withdrawal means cease of cohabitation. Understanding it, if the husband or the wife withdraws from the society of the other, the aggrieved party can file a petition in district court seeking relief to stay with the party. It is the duty of the court to look for the legal grounds and whether it constitutes a valid reason for the withdrawal or the absence of it which results in providing the aggrieved party a relief. The burden of proof lies on the individual who has withdrawn himself/herself from the society of the other. The statement of the party and their parents is considered as standard evidence.

There are grounds which are required to constitute the provision of restitution. First in the line is the improper behaviour of the spouse which should not amount to adultery, because adultery is considered to be a ground of divorce. There should not be any reasonable ground because if a reasonable ground is proved the party cannot receive restitution. Moving forward, the next ground can be mere frailty of temper and habits which are distasteful to the other spouse. There can be numerous reasons such as emotional habits, cultural habits, societal habits, and others doesn't constitute a ground for the withdrawal of society of the other spouse, on other terms we can say the habit of intemperance or hysterical outbursts, though they may remain for longer time

¹ Paluck Sharma- Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws. (October 30, 2020, 6:45 PM)
<https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparitive-study-among-indian-personal-laws/>.

than usual and prolonged it also cannot be a ground for not providing the aggrieved party with the relief. The other reasons could be if the wife doesn't cooperatively live with her step children or the discovery pre-marital affair of the husband not amounting to the pregnancy with the other person can also not be a reasonable excuse for the wife to withdraw from the society of the other spouse. Insanity is a debated ground whether it is a ground for restitution or not, the court and law has considered insanity to be a valid reason for the withdrawal of the spouse as in the condition of insanity a person could cause harm to the other which may lead to death. Though it has been considered as a reasonable excuse, if the development of insanity is after the marriage and doesn't create an appreciation or fear that the insanity of the individual may cause harm to the other in such cases the spouses may live together. The appreciation is the main criteria of the court to decide and allow the individual for the restitution of conjugal rights.

On contrary to the grounds of provision of restitution of conjugal rights, there are some reasons where the restitution is not provided to the spouse. One of the main reasons could be grossly indecent behaviour. These behaviours could be mainly those behavioural patterns of the spouse which are seemingly indecent whether in household or in the society, the utmost behaviour of any of the spouse can lead to no restitution of conjugal rights by the court to the petitioner. There are some provisions of given specifically to the husband and the wife. In accordance to the husband, "extravagance on the part of the wife" is given, these are the situation where the wife is responsible for affecting the financial position and prospects of the husband. In such a case if the husband withdraws from the society of the wife, the wife cannot file a suit for restitution. Excessive consumption of alcohol is another ground for not granting restitution. A recently developed rule where homosexuality and cohabitation with the same sex has been decriminalised.² People have started misusing the statement. If one of the spouses persistently implants false charges of having committing unnatural offences, and later files for the restitution of conjugal rights cannot be given the same if the spouse has withdrawn for the society of the other.³ Even in the case where either of the party refuses to undergo marital intercourse which might not require a sufficient is sufficient to non allowance of restitution of conjugal rights. The most convenient and simplest way is the ground of agreement between the spouses, where they

² Navtej Singh & others v. Union of India, Thr. Secretary, Ministry of Law and Justice (SCC) WP (CrI.) 76/2016, Pg. No. 1 Introduction, Pg. No. 66-74- Transformative Constitutionalism and the rights of LGBT community [P- 79, para.121]

³ Sanjeev Gupta v. Ritu Gupta, 296 of 2018 Allahabad High Court

can decide and agree to live together or separately. The mutual agreement between two parties doesn't bring a question of restitution and the parties can further file for divorce. Anything that exceeds the grounds of restitution of conjugal rights arises the grounds of divorce mentioned under section 13 of the Hindu Marriage Act. As discussed earlier about the special provisions to the either spouse, in accordance to the wife, if a man questions on the purity of his wife. He cannot be allowed for the restitution of conjugal right. Any imputation of unchastity by husband on wife, several attempts of husband to defame wife's character could be a ground for not allowing the husband with restitution of conjugal rights.⁴ The Constitution of India also has some provisions under the restitution of conjugal rights, through the various rights provided under section 14, 19, 21 and other such rights which is helpful for the protection of a person's liberty and integrity. Time and again it has been observed that the provision under section 9 of the Hindu Marriage Act, 1955 which talks about restitution of conjugal rights is a violation of Article 21 of the Indian Constitution. After 98 years of Rukmabai Raut's case in 1885, the court opinionated that it would be a violation of Article 21 or the Right to privacy mentioned under Right to personal liberty for a woman to force her to live with her husband against her will, it could lead to sexual molestation and abuse and the husband can forcefully undergo cohabitation leading to pregnancy against the consent of the wife. Giving decisions in the favour of one party leaving the other party unheard would also constitute the violation of Article 14 which talks about the Right to equality of every citizen of the Country. In the famous case of a South Indian film actress it was contended that the restitution of conjugal rights was a violation of Article 21 of the Indian Constitution. It amounts to control over the choice of the woman which indicates both her life and body. It was considered to be the grossest form of violation of an individual's Right to privacy. It was held that section 9 of the Hindu Marriage Act is savage and barbarous remedy⁵ and is a infringement to the right to privacy guaranteed under Article 21 of the Constitution of India⁶. It was again contended that the purpose of the Section 9 is not to violate the provisions of Article 21, it was further opined that the only purpose of section 9 i.e. Restitution of conjugal rights is cohabitation of consortium, which neither promotes marital

⁴ Avinash Eknath Nikalje v. Sou. Leela Avinash Nikalje, AIR 2003 Bom 224

⁵ T. Sareetha Venkata Subhaiah v. State, AIR 1983 AP 356

⁶ Kanika Sharma-Restitution of Conjugal Rights: A Pernicious Legal Transplant
<https://lawandhistoryreview.org/article/kanika-sharma-restitution-of-conjugal-rights-a-pernicious-legal-transplant/>.

violence nor invades the Article 21 of the Indian Constitution which was contended in the earlier case.⁷

Restitution of conjugal rights: Background and Evolution

The restitution of conjugal rights traces back to the first case in 1867. In the earliest and the landmark case, it was decided that if there is cruelty which amounts to unsafety of the wife to her husband's house, the court will not provide any restitution to the husband. Even in situations where the husband is not compatible to follow his marital duties which he has sought to do for his wife's welfare, it stands sufficient to not provide him with relief in such suits⁸. Further we trace back to 1884, which is considered to be a revolutionary case that led to the enactment of Age of Consent Act, 1891. In the case, the husband sought restitution of conjugal rights after 12 years of his marriage. The British precedent could not be implemented because it dealt with cases consenting adults.⁹ But in this case, the woman was a minor of 11 years who was married to a man who was 19 years old during the time of their marriage. When the wife turned 23, the husband filed a suit for restitution of conjugal rights, so that Rukmabai's would start staying with him instead of staying with her mother and step-father who was a surgeon. When the restitution was filed the lower court flavoured the wife, but when the case went to the higher court, the court brought a dilemmic situation before her where she was ordered to decide either to stay with her husband or had to serve a punishment of imprisonment for 6 months. Without a second thought over it, Rukmabai was ready to serve the term of 6 months of imprisonment. She was trapped down to the stereotypical and pre-dominant nature of the Courts where she was asked to pay 2000/- to buy her own freedom¹⁰. After several failed attempt she thought of approaching to the Queen-Victoria. It was when the queen was herself involved into the welfare of the women in the society. Queen Victoria overruled the verdict presented by the higher court and dissolved the marriage. This not only brought a change in the life of Rukmabai, but also helped in evolving of

⁷ Harmirdar Kaur v. Harmendar Singh Chaudhary, AIR 1983 Del 66.

⁸ Mooshi Buzloor Ruheem v. Shamsonnissa Begum, 1866, 11 M.I.A 551 P.C

⁹ <https://www.livehistoryindia.com/snapshort-histories/2017/07/22/rukhmabai-fighting-her-way-to-the-top/>.

¹⁰ *ibid.*,

Age of Consent Act, 1891, which set the age limit of marriage from 10 years to 12 years¹¹ in British India¹².

In *Tirath Kumar v. Kirpal Singh*,¹³ It was observed that the wife used to work at a place which was away from the husband's house with his consent on both taking up the job and the migration. They underwent cohabitation during visitation, but after some years the husband wanted the wife to leave her job and stay with him. On refusal to do so by the wife, the husband filed a suit for restitution. It was opined that in such a case the wife could virtually withdraw from her husband's society,¹⁴ which means that she can almost withdraw from her husband's society.

It is very important to understand that all the provisions of restitution of conjugal rights are followed. Having mere suspicions of illicit relationships of the either spouse does not constitute a reasonable excuse for the court to provide the restitution under the law.¹⁵ In some cases it is clearly visible that the actions of either spouse was enough to prove the withdrawal from the society of the other, if any action of the husband or the wife is proved that the desertion has no reasonable excuse, the petitioner can get the restitution of conjugal rights.¹⁶ In a 1997 case, it was seen that the petitioner-wife accused the husband of being married and intentionally hiding the facts of it. The court did not provide the restitution as well as the maintenance which is to be provided under section 25 of the Hindu Marriage Act, 1955 to the wife because it was not a legal marriage.¹⁷ The presence of first wife or husband if alive and not divorced, the second marriage of the party stands null and void, as bigamy is not allowed in the hindu marriage. In some cases the court did not consider the facts of the petition of restitution of conjugal rights and gave its verdict in the favour of the defendant, considering that the withdrawal from the society of the other spouse had a reasonable excuse which cannot be unseen.¹⁸ On the other hand, we see that time to time the relief has been provided to the either spouse and has been upheld by the court.

¹¹ Rukmabai and Her Case-Centre for the Study of Culture and Society.
<https://cscs.res.in/dataarchive/textfiles/testfile.2007-09-20.5610179936/>.

¹² *Dadaji Bhikaji v. Rukmabai* I.L.R (1886) 10 Bom, 301

¹³ *Kirpal Singh v. Tirath Kumar*, 1964 Punj, 28

¹⁴ <https://thefactfactor.com/tag/tirath-kaur-v-kirpal-singh/>.

¹⁵ *Charanjit Kaur v. Sham Singh* 1958 VOL I

¹⁶ *Sushila Bai v. Prem Narayan*, AIR 1964 MP 225

¹⁷ *Ranjana Kejriwal v. Vinod Kumar Kejriwal*, AIR 1997 Bom 380

¹⁸ *Gurdev Kaur v. Sarwan Singh*, AIR 1956 P&H 162

There are some marriages that are considered prenuptial agreements. The term prenuptial agreement can be said to be as a pre-marital agreement between the spouses.¹⁹ In the landmark case of prenuptial agreement among hindus, The case read with Sri Bataha Barik v. Musammat Padma,²⁰ where in, the restitution of conjugal rights was filed by the husband, the wife agreed to an agreement presented to her during the time of marriage, that the husband would be staying with his in-laws and would not force her or take her away. It was opined that the marriage under Hindu law is both contractual and sacramental in nature, hence the wife has to stay with her husband whenever he wishes to, it was also held that the agreement which was relied upon was against the public policy.²¹

Constitutional validity of section 9- Hindu Marriage Act.1955

After evaluating the cases it is utterly clear that restitution of conjugal rights is a violation to the wife's right to privacy. Kharak Singh v. State of UP²² and Govind v. State of MP,²³ were the cases where the court recognised the right to privacy as an essential element Right to Personal liberty under Article 21 of the Indian Constitution.

In ibid, T. Sareetha Venkata Subhaiah v. State, the husband filed a case of restitution of conjugal rights against the defendant-wife. The court contended that the section 9 of the Hindu Marriage Act, 1955 is a violation of Article 21 of the Indian Constitution, if the wife is compelled to live with her husband against her will be a violation of the right of privacy of the wife. In some cases it has been observed that the court has given its contention which were against the aggrieved party though, there were reasonable excuses for the party to withdraw from the society of the other spouse.²⁴ In 1984, the court upheld the validity of section 9 of the Hindu Marriage Act,1955, in the case which also overruled the judgement delivered in the case of T. Sareetha Venkata Subhaiah v. State. It stated that the purpose of the section 9 is to offer an inducement for

¹⁹ <https://blog.ipleaders.in/restitution-of-conjugal-rights/amp/>.

²⁰ Sri Bataha Barik v. Musammat Padma, AIR 1969 Ori 112

²¹ Tekait Mon Mohin Jemadai v. Basant Kumar Singh (1901) 23 Cal 751

²² Kharak Singh v. State of UP, AIR 1963 SC 1295

²³ Govind v. State of MP, AIR 1975 SC 1378

²⁴ Huhhram v. Mishri Bai, AIR 1979 MP 144

the husband and wife to live together in harmony,²⁵ and that the restitution of conjugal rights does not violate the provisions mentioned under the article 14 and 21 of the Indian Constitution,²⁶ which talks about Right to Equality and Right to Privacy respectively.

Consent has been upheld in the cases of restitution. In several cases, the court has opined that taking up employment and moving to different places without the consent of the other spouse, itself explains that the person has withdrawn from the society of the other without reasonable excuses.²⁷

In 2019, two law students of Gujarat National Law University (GNLU), Gujarat²⁸ challenged the validity of restitution of conjugal rights mentioned under section 9 of the Hindu Marriage Act, 1955; the petition stated that the legal scheme which is provided in the restitution of conjugal rights is a violation of constitutional right of an individual,²⁹ Though the 3 bench-judge held that section held that section 9 was a prevention of breakup of marriage, the petition further added that the Constitution guarantees to every individual the right to personal liberty and privacy, forcing the individual to undergo cohabitation is a violation of the right. Section 22 of the Special Marriage Act, 1954, rules 32 and 33 of the Code of Civil Procedure, 1908 are the other acts which also talks about restitution of conjugal rights.

Conclusion

In the above research paper, I have connected the legal provisions and the cases which are related to the restitution of conjugal rights. Further it can be observed that in some cases, the consent of the spouses has been upheld whereas somewhere it is not. Whether Section 9 of the Hindu Marriage Act, 1955 is a violation of the constitutional rights of an individual is a debated issue, because in most of the cases it was seen that the wife is forced to live with her husband against her consent. The restitution of conjugal rights is considered to be a part of the personal laws which dwell in India. As we understand that the hindu marriage is not only contractual but

²⁵ https://www.lawctopus.com/academike/marriage-and-restitution/#_ednref24.

²⁶ Saroj Rani v. Sudarshan, AIR 1984 SC 1562

²⁷ Gaya Prasad v. Bhagwati, AIR 1966 MP 212

²⁸ https://www.business-standard.com/article/news-ani/sc-see-ag-s-assistance-on-plea-against-constitutional-validity-of-restitution-of-conjugal-rights-120011401698_1.html.

²⁹ Ojaswi Pathak and Mayank Gupta v. Union of India WP (C) No. 250/2019 PIL-W

also sacramental in nature which are guided by traditions, customs and religion. Unlike divorce and judicial separation, the main aim of restitution of conjugal rights is to save the marriage from breakage and not violate any right of an individual. The decree of restitution of conjugal rights extends to one year, which means if the right to stay together by the spouses is not adhered for more than one year of withdrawal, it forms a ground for divorce. Hence, the main purpose of the restitution to conjugal rights is to save the marriage and promote reconciliation between the parties. But despite all the enactments, it depends on the consent and will of the spouses whether they want to continue the marriage or not. It is concluded that the society is evolving and the private interest of the individual should be a major concern. The state should not compel in the matters of conjugal rights. The restitution of conjugal rights is a right given to both the husband and the wife as a matrimonial right. Any of the spouses can claim for restitution, if the other spouse withdraws from the society. Though time and again it is seen as a negative effect of marriage as it infringes the privacy of an individual.

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Hindu Marriage Act § 9, § 11 (1955)

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