

# LEGALFOXES LAW TIMES

## Restitution of conjugal right: remedy and a curse

By: Riya Pandey

### Abstract

Marriage is a legally recognized bound between two people as spouses. It is a very tender but complex interrelationship that brings rights and obligations for each spouse. These obligations bring rise to conjugal rights, which are the essence of marital life. According to the Hindu marriage act, there are three central essentials justice, procreation, and pleasure. Justice refers to fulfilling matrimonial obligations. In the Law's eyes, the spouse is entitled to live in another spouse's society and fulfill all the obligations. If the spouse withdraws from society without any reasonable excuse, the aggrieved spouse is entitled for Restitution of conjugal rights' decree.

The Restitution of conjugal rights is ruled by the statutory provisions in Hindu, Christian, and Parsi personal laws whereas Muslim Law has introduced and applied this remedy by equity, justice, and good conscience. The section is recognized under the Hindu marriage act 1955, the divorce act, the Parsi Marriage and divorce act, the criminal procedure code, and secular Law through the special marriage act. In courtrooms, restitution of conjugal rights constitutional validity is a matter of debate. Most of the petitions questioned whether being a personal law, Restitution of conjugal rights violates fundamental rights? In the people's eyes, Restitution of conjugal rights is a remedy for one and a curse for the other.

### Introduction

Under section 9 of the Hindu marriage act 1955 the Restitution of conjugal rights is explained. The Restitution of conjugal right implies to bring back the guilty spouse and to live with the aggrieved spouse. The decree is granted when either the husband or the wife has, without any reasonable excuse, withdrawn from the society; the aggrieved party may apply for the Restitution of conjugal rights. The court believes the statements made in such petition factual, and there is no legal ground for the application not to be granted. The court may grant decree restitution of conjugal rights<sup>1</sup>.

The remedy has originated from the ecclesiastical Law of England. The Privy Council in *Moonshee Bazloor v. Shamsoonaissa Begum* for the first time applied restitution is conjugal right.

<sup>1</sup> <https://indiankanoon.org/doc/322349/>

In the case of Ranjhana V. Kejriwal Vs. Vinod Kumar Kejriwal<sup>2</sup>. The court held that the decree would only be granted in a valid marriage but not in the case of a void marriage.

Three main elements have to be proven for the decree- withdrawn from society, either by husband or wife, without any reasonable excuse. Here, term 'society' means cohabitation and consortium, which the spouses expect from their marriage. The other concept related to society is withdrawn from fulfilling rights and obligations arose after the marriage. The concept of reasonable excuse is a critical element. The reasonable excuse for withdrawal can be cruelty, demand for dowry, refusal to sex, adultery, and any act by the petitioner, making it difficult for the spouse to cohabit. Whether there has been a reasonable excuse for withdrawal arises, the burden of proving reasonable excuse rests on the spouse who has withdrawn from society.

### **Statutory Provisions**

We have several personal laws ruling different provisions related to section 9 but the basis are same. Either husband or wife should have withdrawn from society without any reasonable excuse. Some of the provisions are:-

1. Section 9 of the Hindu Marriage Act 1955.
2. Section 22 of the Special Marriage Act, 1954
3. Section 32 of the Indian Divorce Act, 1869
4. Section 36 of the Parsi Marriage and Divorce Act, 1936

### **Why We Need Restitution of Conjugal Right**

The question regarding the need for Restitution of conjugal rights has always been a matter of argument. Some people consider it a remedy to their marriage; on the other hand, it is a curse for some. It is a remedy for some people because it gives them a chance to rethink and rebuild their marriage and correct their mistakes. Simultaneously, it is a curse because one spouse is forced to return to their marital house without their will. In countries like India, marriages are considered sacrament people believe Restitution of conjugal rights as a tool to repair and protect their marriage. The answer to the question of its need is clear. We need it to protect and give a second chance to the marriage rather than deserting it.

It is critical to think about the need for it on moral grounds. Restitution of conjugal rights seems to violate a person's rights under the Indian constitution. It violates freedom of association, freedom to live in and settle in any part of India, and right to the profession. We have always heard that marriage is a crucial part of human life, and it is necessary to save it rather than declining it. So, to put force to do something good for society, it is necessary, and it does not matter whether it is best or evil in people's eyes.

### **WORLDWIDE POSITION**

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

The Edict of Restitution of conjugal rights is an issue observed in the whole world. In the below-mentioned paragraphs, we will see other countries' viewpoints on the Restitution of conjugal rights.

1. UK: In English Law, there was a common belief that the decree for Restitution of conjugal rights was the only matrimonial matter over which the ecclesiastical courts had jurisdiction. It could be issued against either the husband or wife who withdraws from the society without any good ground, and if successful, the parties would be forced to stay together. It was followed for an extended period in Beirut in 1969: A report was published by the law commission mission that recommended abolishing the action. As a result, it was abolished by the Matrimonial Proceedings Act, 1970.

2. Scotland: In Scotland, the term used for Restitution of conjugal rights laws was "adherence," and it was revoked by section 2(1) of the Law Reform Act, 1984.

3. Ireland: In Ireland, it was abolished by the Family Laws Act, 1988, as it was considered unconstitutional by the courts in many cases.

4. South Africa: It is another one of those countries which had got rid of the Restitution of Conjugal Rights in early 1979 through Section 14 of the Divorce Act, 1979.

5. Canada: The family law in this country has varied from time to time, and till now, it is continuously evolving, but it is somewhat based on the common English Law. The decree was considered in Law but not in all provinces of Canada but only in some. It was after the 20th century only that standardization of Family Law has taken place. After that, only Restitution of Conjugal Rights has been considered as a valid law in the whole of Canada.

### **Constitutionality**

Constitutional Validity of the Restitution of conjugal is always questioned in courtrooms. The following are some cases that throw light in the section's constitutionality.

- The constitutional validity of Restitution of conjugal was challenged in the High Court in *Sareetha v. T. Venkatasubbaiah*<sup>3</sup>. In the case, it was said that section 9 of the Act had deemed a violation of the fundamental rights in part III of India's Constitution, especially Article 14 and 21. Justice held that section 9 is a crude and inhuman remedy. It violates the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Therefore Restitution of conjugal rights under section 9 of the Hindu marriage act 1955 was unconstitutional.
- Justice Rotagi in *Harvinder Kaur v Harminder Singh*<sup>4</sup> recognized that "restitution of conjugal right is nothing but the new ground for divorce."

<sup>3</sup> AIR 1983 AP 356

<sup>4</sup> AIR 1984 Delhi 66

- In *Shakila Banu v. Gulam Mustafa*<sup>5</sup> the High Court commented: "The concept of Restitution of conjugal rights is same as slavery in ancient times when it was natural. Mainly after India's Constitution came into force, which guarantees personal liberties and equality of status and opportunity to men and women and gives the State powers to make special provisions for their protection.
- At Last Supreme Court in *Saroj Rani v. Sudharshan*<sup>6</sup> gave judgment in favor of section 9 constitutionality and over-ruled the decision given in *Sareetha v. T. Venkatasubbaiah*. Here the some Para of the Saroj rani case judgment- "In para 87 the learned Judge recognizes Restitution of conjugal rights is an ancient remedy. "I cannot agree that S.9 is unconstitutional howsoever the remedy may be outmoded with the times. The restitution decree in the Act is preparation for divorce if the parties do not come together". Para 91 showed the Judge's intention "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, it is unconstitutional S. 9 perfectly valid".

The court observed that the section's idea is to bring parties back and make them live together. It is completely based on spouses privacy and it is not a violation of article 21 and article 14 whereas it is constitutional.

### Conclusion

It is concluded that the concept of Restitution of Conjugal Rights is based on good faith and intention to save a marriage from breaking down. Simultaneously, it does hinder an individual's right to be left alone as it sometimes forces an individual to cohabit with the partner and thus may interfere with his/her privacy. Hence, it brings out a situation that needs to be looked upon by the courts. A balance should be maintained between the partners. Therefore, the courts should use their perceptive to solve the case. Section 9 is constitutional though at the same time it is a curse and a remedy.

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<sup>5</sup> AIR 1971 Bom 166

<sup>6</sup> 1984 AIR 1562