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## RESTITUTION OF CONJUGAL RIGHTS: ITS LEGALITY AND AMBIGUITY IN PRESENT DAY INDIA

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### ABSTRACT

In India marriage is a vital part of individual's life, it is considered a pious and divine act. It creates a pious and strong bond between two people as well as their family. The concepts of progressive marriage which is acceptable by the society and the law is trying to find its place, however even though marriage is a pious bond which binds two individuals together but sometimes marriage doesn't seem to be working which can create instances where a spouse might not want to live with the other spouse and thus has withdrawn from his/ her the society with any proper justification. One of the remedies which ensures bringing back the spouse who has withdrawn from society of his/her spouse without any reasonable cause is Restitution of conjugal rights, it is one of the legal right available to the spouse from whose society his/her spouse has withdrawn. However, though this legal right which is considered to provide remedies there are various loopholes and patriarchal essence in this remedy, such as burden of proof, or burden of demonstration excuse for withdrawal lies on the person who has withdrawn from the society who mostly are women, who have escaped from the grip of their abusive husband, thus practically is hard to prove abuse. So, the injustice which lies within this section has been continuously challenged and criticized on the grounds of violating of individual's fundamental right and thus the Supreme Court must scrutinize this pertaining remedy is not unconstitutional.

**Keywords:** Marriage, Pious, Restitution, Burden of proof, Fundamental right, Unconstitutional

## Introduction

Marriage is not a concept which just developed with course of time, it can be traced back to ancient time, the essence of marriage remains the same which *a ritual or pious ceremony which create a pious lifetime union between a male and female*, it remain the same, what changes is the ceremony, the ceremony is different for every community. Thus, marriage is a very pious and strong bond between two individuals as well as families. In earlier times there was no concept of divorce, but with the progression of society and development of various individual rights, the concept of marriage molded itself, the irretrievable and pious relationship lost its hold for the better. The patriarchy got vaguely chagrined as women as well as society spoke for them, earlier they were merely as chattel, but with advent of time it changes.

As we know, from time to time there might arise a circumstance in a marriage where it become a plight for a spouse to cohabit with other spouse, due to which the spouse may withdraw from his/her society, this withdrawal breaks the most basic requirement of marriage. One of the most fundamental requirements of marriage is that both spouses should respect each other and live together. The legal provisions relating to restitution of conjugal right allows the aggrieved spouse to make the husband/wife to lawfully resume cohabitation whose has withdrawn from aggrieved society with reasonable justification, this is Restitution of conjugal rights. It can be said that this right is a way to preserve marriage and save marriage but in practical life, it doesn't seems so, as in most of the cases it is the wife who withdrew from the society of the abusive husband, and later the husband file the petition from restitution of conjugal rights, and almost all the time the wife who has escaped from the grip of her abusive husband fails to prove the withdrawal was justified, which forces the women to resume cohabitation with her abusive husband. Hence, this remedy on paper seems to be a remedy to save a marriage, but in reality, it coerced one to cohabit along the other spouse with whom the spouse who withdrew doesn't want to cohabit. So, it creates a question of its constitutional validity that weather it violates fundamental right of privacy enshrined by our constitution of India.

## Historical Background

### Origin and Evolution of Principle of restitution-

We often think and ponder that concept of restitution must have come from our ancient customs as we are made to believe and generalized things that as it is patriarchal concept it must be

evolved from our culture, but it is now, rather restitution of conjugal right is an English concept. This concept finds its roots in feudal English laws and was introduced in India by the British. Some of the landmark cases in this subject give a deep overview into the origin and evolution of restitution of conjugal right over the years. As stated in Paras Diwan, the remedy of restitution of conjugal rights was neither recognized by the Dharmashastras nor did Muslim law mention such provision to protect the sanctity of marriage. It came with the British Raj.

“This right of restitution was never an Indian Concept, it has its roots in feudal England, where marriage was considered as a property deal and wife was part of man’s possession like another chattel. This concept was introduced in India in the case of *Moonshee Buzloor Ruheem v Shumsoonissa Begum*<sup>1</sup> where such actions were regarded as consideration for specific performance. After some time, it was introduced in the Indian Personal Laws.”

In today’s time the remedy is available to Hindus u/s 9 of the Hindu Marriage Act, 1955, to Muslims under general law, to Christians u/s 32 and 33 of the Indian Divorce Act, 1869 to Parsi u/s 36 of Parsi Marriage and Divorce Act, 1936 and to persons married according to provisions of the Special Marriage Act, section- 22 of the special Marriage Act, 1954.

### **‘Restitution’**

The dictionary defines the word ‘Restitution’ as an act of giving back some thing that has been lost.<sup>2</sup> In terms of private rights, restitution is restoration of that right. The Black’s Law dictionary Restitution is paid to the person who suffered the harm or loss because of the defendant's actions. As discussed, this right is an English concept and dates to 19<sup>th</sup> century, this right was not recognized. During that time martial rights in England were governed by Ecclesiastical Courts, these courts had jurisdiction over all matrimonial cases such as marriage, divorce, separation, annulment except desertion. These courts introduced a notion that when a spouse departs without valid, he/she must seek a court order for restitution and on such order requires the other spouse return back it his/her matrimonial house, failure to comply resulted in severe consequences, including excommunication, which meant the expulsion or banishment of the non-compliant spouse.

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<sup>1</sup> *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, 1867

<sup>2</sup> <https://www.dictionary.com/browse/restitution>

## Legal Provisions – In different personal laws

The foundation of conjugal rights stems from the institution of marriage. In India marriage is a sacred union, in which man and woman starts cohabiting together with societal and legal approval. So, it can be said marriage is the legal union of two individuals, recognized as both a social and legal agreement, which holds the two people together in legal, social and emotional bond and most importantly in pious bond. In today's time this right is available to Hindus under section- 9 of the Hindu Marriage Act, 1955, while Muslims have recourse under general law, the Christians under section 32 and 33 of the Indian Divorce Act, 1869, Parsis under 36 of Parsi Marriage and Divorce Act, 1936 and individuals married according to the provisions of the Special Marriage Act, under section- 22 of the Special Marriage Act, 1954.

### Hindu Law

Provision of Restitution of conjugal rights are same in Section 22 of the Special Marriage Act, 1954 and section 9 of Hindu Marriage Act, 1955. It provides:

*“When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.”*

*“Explanation. —Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society<sup>3</sup>.”*

When either spouse without reasonable excuse leaves cohabiting with other, the other spouse under this provision can file a petition in district court for restitution of conjugal right.

### Muslim Law

Under Muslim Law the concept of Restitution of conjugal Right is known by word ‘**Tyabji**’, “Where either the husband or wife has, without lawful ground withdrawn from the society of

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<sup>3</sup> The Hindu Marriage Act, 1955, Section 09, No. 25, Acts of Parliament, 1955 (India)

the other, or neglected to perform the obligation imposed by law or by the contract of marriage, the court may decree restitution of conjugal rights, may put either party on terms securing to the other enjoyment of his rights.”

So, we can say that Muslims retains the concept of Restitution as ensure that the other spouse the retains their legal and contractual rights. So evidently it can be said that this remedy was taken from English Common Law where it was based upon the principle of Justice, Equity and good conscience but in *Abdul Kadir vs Salima*, it was said that this right is attached with the specific performance, Allahabad High Court held ‘concept of restitution but be decided on principle of Muslim Law and not on the basis of Justice, Equity and good Conscience. So, in this case it was held that compensation must be determined not by judicial morality or natural law but as per Muslim Law (Sharia).’

### **Christian**

A Christian individual can also apply for an order of restitution, but there are following grounds on which the court will not pass a decree from restitution, if :

1. there exist cruelty of either spouse
2. either or both spouse is insane
3. either spouse marries again.

A Christian Husband or wife can file a petition for restitution under section 32 and 33 of Indian Divorce Act, 1869.

### **Implication of Restitution of conjugal rights**

#### **As per section of Hindu Marriage Act, 1954:**

*“When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Explanation. —Where a question arises whether there has been reasonable excuse for withdrawal from the society, the*

*burden of proving reasonable excuse shall be on the person who has withdrawn from the society<sup>4</sup>.*”

**Here the important factors for the decree:**

1. Withdrawal of spouse from society of other spouse without reasonable excuse.
2. The satisfaction of court with petitioner’s statement.
3. Non-existence of legal ground for dismissing the petition.

The problems with these loose and ambiguous language of provision created ambiguities in this section, such as term like ‘*withdrawn and reasonable excuse*’ was not defined and left for court to interpret, its subjectively was what created many questions. As for example, withdrawal in most of circumstance is forceful not wilful but still the burden of proof lies with the person who withdrew from society. Likewise, a reasonable excuse is also subjective what is reasonable excuse for me may be reasonable excuse for others.

**1. “What does withdrawing from society mean? Does a wife’s refusal to leave a job amount to withdrawal from society”**

This question arose may a time and the India court tried to answer this question through various ruling.

In **Tirath Kaur v. Kripal Singh**- ‘the wife left husband’s house to pursue her job, the Huband often visited her and she used to give him some portion of income, but she stopped giving her portion of income when his demand for money increase, so the husband asked the wife to leave her job, she refused the husband filed a petition of restitution u/s-9 of HMA, 1955. The Punjab High Court, after relying on Mulla’s opinion that it is the foremost duty of wife to submit herself to her husband’s authority and to remain under roof with his protection.’ The court cannot hold that the wide can be allowed to virtually withdraw her from the society of the husband.<sup>5</sup>

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<sup>4</sup> The Hindu Marriage Act, 1955, Section 09, No. 25, Acts of Parliament, 1955 (India)

<sup>5</sup> Tirath Kaur v. Kirpal Singh, 1964 Punj 28

This decision laid down a position that a wife can take a job or a vocation against the wishes of her husband and if her husband ask her to take down the job, she must do that.

However, this trend stopped in case of **Shanti Devi v. Ramesh Chandra Roukar and Ors.**, the Allahabad High Court, gave different judgement where it was held, '*that mere denial of wife to resign for her job doesn't amounts to withdrawal from society and thus it is not sufficient ground for granting a decree under restitution of Conjugal right*'<sup>6</sup>. Similarly, Gujarat, Madras and Rajasthan High courts observed, '*the proposition that wife must always stay under the roof of the husband might have been right in past, but it is no longer true now.*'

## 2. Cohabitation means?

There were many cases filed in which the petitioner husband contented that wife has withdrawal from cohabitation as she is not living under the same roof and under his protection, Grover, Bhargava, Verma and Sandhwalia, J.J pointed out that, "Cohabitation here means wife living under the roof and under protection of husband in, but it not necessarily implies that both husband and wife are living together physically under the same roof, if that were so there are large classes of person to whom the term would have no application such as: married domestic servant, who cannot live under the same roof day and night but yet may cohabit in the wider sense of term<sup>7</sup>, such will also in case of travelling agents, railway guards, conductors and drivers and some of the businessmen who are most of the time away from their home, they cannot be said that they don't cohabit."

So, Cohabitation doesn't have a liner definition, it simply is more of personal latent acquiesce between spouse, which they can sense and feel.

## 3. Reasonable excuse?

Reasonable excuse is an ambiguous term as it has not been defined or no elements given in statute which constitute a reasonable excuse, fair enough as what may be reasonable excuse to me might not be a reasonable excuse to other person, so what do we determined what constitutes or comes under the ambit of reasonable excuse.

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<sup>6</sup> AIR1969PAT27, AIR 1969 PATNA 27

<sup>7</sup> Bradshaw v. Bradshaw, (1897) P24 at 26, per Sir FN Jone, P

In modern matrimonial law following amounts to reasonable excuse:

1. Existence of a ground on which, the respondent can claim any matrimonial relief.<sup>8</sup>
2. If petitioner is found to have committed a serious matrimonial offence that doesn't come under matrimonial relief.
3. If petitioner is guilty of an act or omission that renders it impossible for the respondent to cohabit with them.

#### **4. Burden of Proof**

Explanation under section 9 provides that burden of proving reasonable excuse rests on the spouse who withdrew from the society, it means that initial burden rests on petitioner that respondent has withdrawn from the society of petitioner, and when this burden is discharged, burden of proving that such withdrawal was reasonable lies on the respondent.

#### **Constitutional validity of Restitution through case laws**

Section 9 has always been into the limelight, debated provision due to its constitutional validity, many questioned its legality as it violates fundamental rights, although this provision was framed with the objective of protecting the right and interest of the parties in marriage, but this provision has been subject to criticism and challenges. The concept of Restitution has been contented and thus the courts have given different judicial interpretation to this provision in various rulings from T. Sareetha and Saroj Rani.

#### **T. Sareetha v. T. Venkata subbhaish<sup>9</sup>**

In this case the Andhra Pradesh High Court ruled that, Section 9 of the Hindu Marriage Act, 1955 is unconstitutional as it violates both Article 14 i.e Right to life and Article 21 Right to Privacy.

In this case the court opined that this provision is barbarous and hostile against women. Due to such forced cohabitation, her right over her own body is compromised and she loses her free right over her sexual autonomy, as a right to privacy guaranteed Article 21 has tend violated by

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<sup>8</sup> Deep Kahar, 1962 Punj 183

<sup>9</sup> T. Sareetha v. T. Venkatasubbaiah, MANU/AP/0161/1983



this decree. Accordingly, this provision was first declared unconstitutional by the Court in 1983 stating that matters such as sexual cohabitation are intimate decisions of the husband or the wife, and the state should not interfere with the same.<sup>10</sup>

Facts of the case: Husband filed a petition u/s 9 for restitution against his wife (Sareetha) a popular film star. Argument made on behalf of wife was that “a woman has a right to free choice as to whether, where and how her body is to be used for procreation of children, as well as the choice of when and by whom various parts of her body are to be sensed under right to privacy. The state is infringing on this fundamental right protected by Article 21 by recognizing remedy of restitution of conjugal right.”

Therefore, an individual’s right to privacy is inherent to them and contingent upon their marital status.

### **Govind V. State of Madhya Pradesh<sup>11</sup> 1975**

The apex court in this case held by defining privacy as something that preserves the intimacies of the home, the family, marriage, motherhood, procreation and child-rearing, which means that there can be no interference by law with in private space of home.

### **Harvinder Kaur vs Harmander Singh Choudhry, 1983<sup>12</sup>**

The ruling given in Sareetha’s case by Allahabad High Court was rejected by Delhi High Court while deciding the validity of section 9, the court stated that marriage is a religious ceremony and efforts have been made by legislature to preserve this bond and hence restitution of conjugal right is given under this Act to ensure the bond never breaks without valid reason. So the true motive behind this provision should be taken into account which considering its constitutional validity.

### **Saroj Rani v. Sudarshan Kumar Chadha<sup>13</sup> 1984**

Various stances of various courts were put to an end in 1984 by the judgement of the supreme

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<sup>10</sup> Ruchita Devu and Ananya Mohapatra, Limitation of Restitution of Conjugal Rights, Manupatra, -Articles, 25 March, 2022. <https://articles.manupatra.com/article-details/LIMITATIONS-OF-RESTITUTION-OF-CONJUGAL-RIGHTS>

<sup>11</sup> AIR 1975 SC 1378

<sup>12</sup> AIR 1984 DELHI 66

<sup>13</sup> Saroj Rani v. Sudarshan Kumar Chadha, 1984 AIR 1562

court in this case. The court affirmed with the opinion of Delhi High Court in case of Harvinder Kaur and overruled the decision of Allahabad High court given Sareetha's case in which Section 9 was declared unconstitutional as it infringes individual privacy, so in this case the Supreme court overruling the Allahabad High Court's decision stated that this provision "serves a social purpose as an aid to the prevention of breakup of marriage" and this it act as a remedy, even though this remedy look archaic in nature but its objective is to act as a ground for divorce in case the concern parties deny such restitution. Furthure more it is upon the legislature to abolish section 9 as a remedy and not for the courts to decide,

Thus section 9 was held constitutionally valid in this landmark judgement.

### **Recent Development**

The Law commission of India, based on recommendations from the High-level Committee on the status of Women in 2015, proposed the elimination of Section 9 of the Hindu Marriage Act, 1955 and Section 22 of the Special Marriage Act, 1954, in Its 'Consultation Paper on Reform of Family Law' in 2018. These suggestions stemmed from the committee's view that the concept of restitution of conjugal rights holds no relevance in modern India.

Additionally, 2017, the apex court ruled in the case of K.S Puttaswamy v. Union of India that the fundamental right of privacy grants individual complete autonomy over their bodies. This landmark judgement was cited in case of Joseph Shine v Union of India (which dealt with the decriminalization of adultery), where apex court observed that the right to privacy hinges on individuals' exercise of autonomy.

Following this judgement, a petition challenging the constitution validity of section 9 was filed. The petition was heard by former Chief Justice of India, Rajan Gogoi, and has been referred to a larger bench for further review.

### **Conclusion**

It's unjust to prevent married individuals from residing together, as marriage signifies a pure bond between two people. Yet, there's a broader issue that warrants contemplation. As previously discussed, various personal laws govern the reinstatement of conjugal rights, guided by cultural, religious, and traditional values. Emphasizing that this remedy aims to preserve rather than disrupt marriage, unlike divorce or legal separation, is crucial. It serves as a tool to

salvage a marriage by averting its breakdown. Failure to comply with a decree of conjugal rights for over a year can provide grounds for divorce. Consequently, the reinstatement of conjugal rights aims to safeguard matrimonial property and foster reconciliation, contributing to societal stability. However, the ultimate decision to continue the marriage and adhere to the conjugal rights decree rests with the parties involved. It's high time for the Indian judiciary to embrace a progressive understanding of marriage and adopt more forward-thinking perspectives. Should the judiciary devise a new approach to conjugal rights, it could consider establishing a reconciliation committee. These committees could offer opinions on the feasibility of reinstating conjugal rights, without imposing decisions on the spouses. Marriage hinges on mutual consent to share autonomy and freedom, rather than mere ceremonies.