

Extent And Significance of The Constitutional Validity Of Restitution Of Conjugal Rights In India

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ABSTRACT

Marriage is always careful to be a very pious and strong relationship that exists not only between two individuals but between two families. However, from time to time the marriage does not seem to be working and a circumstance might arise where a spouse might not feel happy living with the other spouse. However, the restitution of conjugal rights provides a right to the spouse to call the other spouse back to live with him/her again. The essence of marriage is a sharing of a common life, a sharing of all the happiness that life had to offer and all the misery that is faced in life, living together is a symbol of such sharing. Living apart is a symbol indicating the negation of such sharing. It is one of the remedies available to a spouse whose other half has withdrawn from his or her society and house without giving any proper reason or justification. With all the ambiguities that lie within the sections pertaining to restitution of conjugal rights, it has become extremely important for the Supreme Court to look into the matter and to ensure that this right which is considered as a remedy does not violate somebody's fundamental rights and in case if it violates the fundamental rights, then the same must be held unconstitutional at the earliest.

KEYWORDS: Marriage, Conjugal Rights, Validity, Marriage Act.

INTRODUCTION

Marriage is always careful to be a very pious and strong relationship that exists not only between two individuals but between two families. However, from time to time the marriage does not seem to be working and a circumstance might arise where a spouse might not feel happy living with the other spouse. However, the restitution of conjugal rights provides a right to the spouse to call the other spouse back to live with him/her again. While this right seems to be valid from the point of view that it is a remedy or a chance to care for the relationship and to save the family, the same does not seem to be so from the point that it forces one to stay with a person with whom he/she does not want to stay. Thus, this right has always been a very notorious topic with questions regarding its constitutional validity that whether this right violates the right to privacy as guaranteed by the Constitution of India.

TERM 'RESTITUTION' DEFINE

The term 'restitution' means the restoration of something that is lost or is stolen, in terms of personal rights it means reinstatement of the rights and in terms of relationship it means restoration of the relationship and according to the Oxford Dictionary the word conjugal means, 'of pertaining to marriage or to husband and wife, in their to each other'. The essence of marriage is a sharing of a common life, a sharing of all the happiness that life had to offer and all the misery that is faced in life, living together is a symbol of such sharing. Living apart is a symbol indicating the negation of such sharing. It is one of the remedies available to a spouse whose other half has withdrawn from his or her society and house without giving any proper reason or justification. The concept of Restitution of conjugal rights is an English concept and goes back to the early 1800s. In England the concept of restitution of conjugal rights was not recognised earlier it was controlled by the Ecclesiastical Courts which looked after all marriage related cases and it did not recognise desertion. The court developed the concept that when a spouse leaves without any justification or explanation, he/she could obtain an order of restitution and on obtaining such order from the court the other spouse under the order of the court had to return back to his/her matrimonial house and failure to comply with such order, the deserting spouse was penalized with Ex-communication, it basically meant banishment of the person who did not follow the order of restitution.

OBJECTIVE OF THE STUDY

The main aim of the study is to find out the ethicalness of Restitution of Conjugal Rights, en plus intentional upon the constitutional legality of the same.

METHODOLOGY OF THE STUDY

This paper is mainly based on the secondary data for research and review of literature. The study is evocative and systematic in nature.

DIFFERENT LAWS OF CONJUGAL RIGHTS

The nature of conjugal rights is based upon the institution of marriage. In India, Marriage is considered to be a sacred institution when man and woman with the acceptance of society starts to cohabit and consume their married life. In other words Marriage is a formal union of two individuals and is regarded as a social and legal contract between them. It joins two individuals in a social, legal, emotional bond and most importantly it is a sacred bond. Hence, when one of the individuals sets him/her apart from this bond, the society and law demands explanation.

When one of the spouse without any logical justification separates from the cohabitation, the other has a legal right to file a suit under section 9 of the Hindu Marriage Act, 1955 which talks about the restitution of conjugal right of the aggrieved party. Therefore, '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'. In the case of *Gurdev Kaur vs Sarwan Singh*, where the wife filed an appeal against the order favouring her husband, it was held that, 'there was reason to believe that actions were taken by way of a 'reasonable cause' and thus conjugal rights had to be restored'.

MUSLIM LAW

Under Muslim laws the word of Restitution of Conjugal rights is 'Tyabji', "Where either the husband or wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations 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 the enjoyment of his or her rights". There are two conflicting thoughts under the Muslim laws, one finds its remedy of restitution of conjugal rights in the English Common Law where it talks about the remedy is based upon the idea of Justice, Equity and good Conscience but on the other hand, in the case of *Abdul Kadir vs. Salima*, it was held by the Allahabad High court that, 'the concept of restitution must be decided on the principles of Muslim Law and not on the basis of Justice, Equity and good Conscience'. In Chapter VII of the Muslim Personal Law (Shariat) Application Act, 1937, the provision of Restitution of Conjugal Rights is Present under section 32 and 33, which read as,

Section 32- Petition for Restitution of Conjugal Rights.

When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife, or husband may apply, by petition to the District Court or the High 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.

Section 33 reads as, Answer to the Petition:

Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree of nullity of marriage. It is mainly upon the court to decide that whether to follow the Mohammadan Law strictly or follow the principle of Justice, Equity and good conscience. Like in the case of *Itwari v Asghari*, where a Muslim husband filed a petition for restitution against his wife, it was held that he cannot force the wife to live with him and the court can refuse the relief if it finds that it will not be just and reasonable to do so and it will be inequitable to pass a decree. Further in Parsi Law also we find the prevalence of the Restitution clause which describes, 'Either party to a marriage, whether solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988, may sue for divorce also on the ground,— (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties'. Similarly a Christian man or woman can file a suit for restitution of conjugal rights under section 32 and 33 of the Indian Divorce Act, 1869. In the case of *Hyde v. Hyde and Woodmansee*, "the status of partners in Christian marriage was stated as "Marriage has been well said to be something more than a contract, either religious or civil,

to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of “husband” and “wife” is a recognised one throughout.

CHRISTENDOM

The laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring.” Apart from the customary laws the Special Marriage Act 16, it describes as, “When either he 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 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.

LEGALITY OF THE LAW

The constitutional validity of restitution of conjugal rights is a matter of discussion and has been debated since a very long time. For example in the case of T. Sareetha vs. T. Venkatasubbaiah, the validity of the provision was questioned and was held to be unconstitutional, the court in this case said that section 9 of the Hindu Marriage Act which provides the relief to the aggrieved who has been deserted by their spouses without a reasonable justification, offends Article 21. The explanation given by the court was that article 21 talks about right to liberty along with right to privacy and the fact that one spouse is leaving the other is their private matter and section 9 of HMA violates such privacy, On behalf of the wife it was argued that the right to privacy confers on a woman “a right of free choice as to whether, where and how her body is to be used for the procreation of children and also the choice of when and by whom the various parts of her body are to be sensed, it also violates article 14 by making the provision equal for both husband and wife and the court believed that Man and woman are inherently unequal, but in the case of Saroj Rani vs. Sudarshan, the judgement of T. Sareetha was over-ruled and the constitutional validity of restitution of conjugal rights was upheld and declared as valid. Further in the case of Dharmendra vs. Usha Kumari, it was held by the Supreme Court that, “we are unable to accept the position that s. 9 of the said Act (Hindu Marriage Act) is violative of Art. 14 or Art of the Constitution this is because firstly the purpose of the decree for restitution of conjugal rights is only “to offer inducement for the husband or wife to live together” and to settle their differences amicably.”

However, the judgement was rescinded by the Delhi High Court in the case of Harvinder Kaur v. Harmander Singh and was overruled by the Supreme Court in the case of Saroj Rani v. Sudarshan where consideration was given to family, togetherness and preserving matrimonial relation between husband and wife.

The Supreme Court relied on its previous judgement given in the case of Gobind v. State of Madhya Pradesh, wherein the court held that “the right to privacy protects the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing” which means that there can be no interference by law within the private space of a home.

Further, in the case of Saroj Rani v. Sudarshan Kumar Chadha, Justice Mukherjee observed that the purpose of Section 9 is to bring an estranged couple back together so that they can live together in a matrimonial house in amity. On the point of forcing a spouse to have sexual intercourse with her spouse, Justice Mukherjee added that the aim of the impugned Section is ‘consortium’ and not sexual intercourse. The purpose behind granting a decree under this Section is to cohabit the couple in the same household with love, care and affection and it in no sense compels the parties to have sexual intercourse.

However, since marital rape is not considered as an offence in India, forcing a wife to stay with her husband is equivalent to taking away her choice of having sexual intercourse or not because the husband can anytime violate her right over her body without any legal actions.

VIOLATIVE OF ARTICLE 19

The decrees of restitution of conjugal rights violate:

- Freedom of association 19(1)(c)
- Freedom to reside or settle in any part of India (19)(1)(e)
- Freedom to practice any profession 19(1)(g)

FREEDOM OF ASSOCIATION UNDER ARTICLE 19(1) (C)

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. In the case of Huhhram v. Misri Bai, the wife left her husband because her father-in-law had an evil eye on her and the husband treated her badly. Even after that, the Madhya Pradesh High Court granted a decree of restitution to the husband. It can be concluded that If she was

molested by her father-in-law because of her association with her husband due to the decree, then the decree of the court would be responsible for the mishap.

Further, in the case of *Atma Ram v. Narbada Devi*, the Rajasthan High Court granted a decree of restitution in favour of the wife even when the husband clearly stated that he does not want to live with her. This clearly violates the freedom of association of the husband.

Freedom to reside or settle in any part of India under Article (19)(1)(e) and Freedom to practice any profession under Article (19)(1)(g)

The decree of restitution of conjugal rights violates the freedom to reside in any part of India because a spouse is forced to come and live with another spouse in his/her matrimonial home. Additionally, it also violates the freedom of practising any profession in many cases.

In the case of *Tirath Kaur v. Kripal Singh*, the wife was staying away from her husband in order to practice her job. However, due to certain conflicts, the husband asked his wife to leave her job and on denial, he filed a petition for restitution of conjugal rights. The court granted him the decree thus, forcing the wife to live with her spouse. This is a clear violation of freedom to settle in any part of India and to practice any profession.

NEW DEVELOPMENT OF THE LAW

As per a report presented by the High-Level Committee on the status of women in 2015, the restitution of conjugal rights has no relevance in independent India. The Law Commission of India, on the recommendation of the report, suggested the deletion of Section 9 of the HMA, 1955, and Section 22 of the SMA, 1954 in its 'Consultation Paper on Reform of Family Law' in 2018.

Further, in the case of *K.S. Puttaswamy v. Union of India*, the Supreme Court upheld the fundamental right to privacy which grants individuals complete autonomy over their body.

Additionally, in the case of *Joseph Shine v. Union of India*, the apex court observed that the right to privacy depends on the exercise of autonomy by individuals. If an individual is disabled from exercising his/her the right to privacy then the court must take steps to ensure that the person's right is realised in its fullest sense. The Court further observed that an individual's right to privacy cannot be infringed by regarding familial structures as private space.

Post this verdict, a petition was filed in the Supreme Court challenging the constitutional validity of Section 9 of the HMA and Section 22 of the SMA. The petitioner contended that granting a decree for restitution of conjugal right is a 'coercive act' on the part of the state compelling a spouse to live with another spouse opposed to his/her will. Further, the act is violative of one's sexual autonomy, the right to privacy, and right to live a dignified life as guaranteed under Article 21 of the Constitution of India.

The petitioner further contended that even though these sections provide a right to both husband and wife to approach the court, however, these sections are discriminatory against women and women are treated as 'chattel' by these laws.

The petition which was heard by a two-judge bench led by the former Chief Justice of India Ranjan Gogoi has been referred to a larger bench. The petition is pending before a three-judge bench of the Supreme Court of India.

CONCLUSION

Granting a decree for restitution of conjugal rights can compel spouses to live together but it in no way can ensures an effective relationship. Further, if such a decree violates any constitutional right, then it becomes extremely crucial to repeal it. With all the ambiguities that lie within the sections pertaining to restitution of conjugal rights, it has become extremely important for the Supreme Court to look into the matter and to ensure that this right which is considered as a remedy does not violate somebody's fundamental rights and in case if it violates the fundamental rights, then the same must be held unconstitutional at the earliest.

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