SHOULD RESTITUTION OF CONJUGAL RIGHTS BE REMOVED?

Written by ***Ruchi Makhija***

2nd Year BA LLB Student, OP Jindal Global Law University, Sonipat, India

DOI: doi.org/10.55662/SALRJ.2023.902

INTRODUCTION

In India, the societal opinion on marriage has historically been very conservative; divorce is considered to be taboo. Being in line with such views, personal laws are shaped in India in such a way where judges are directed to be very paternalistic; to try their best at reconciliation first. This is clearly mentioned in both, the Hindu Marriage Act[i] and the Special Marriage Act[ii]. In addition, similar provisions relating to the restitution of conjugal rights exist throughout various personal laws[iii]. *Jani & Anr. v. Mohammed Khan*[iv] and *Monshee Bazloor v. Mohammed Khan*[v]are some examples of Muslim personal law providing such a matrimonial relief of restoration of cohabitation. Owing to this deeply rooted relief in Indian law, there are a majority of cases which have come to Court requesting this decree to be passed. A majority of these cases have been ruled in favour of the party petitioning for restitution of conjugal rights. However, keeping in mind the changing times and the recent debate on the right to privacy[vi], the law must adapt to the new sentiments of its citizens. Numerous petitions have come about, arguing that such a law is archaic and in violation of the constitutional right to privacy, the most recent one in front of the Supreme Court being *Ojaswa Pathak v. Union of India*[vii] (2019-date). This topic has become the basis of a debate among Courts. Therefore I explore the question, 'Should restitution of conjugal rights be retained or removed?'

Restitution of conjugal rights is a matrimonial relief provided to spouses of a valid marriage[viii] under Indian law. The aim of such a law was the idea that the people in a marriage are entitled to the consortium of each other; comfort, affection and aid. This was believed to be fundamental to the institution of marriage. Section 9 of the Hindu Marriage Act, 1955 states, "When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for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 with 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." Let us break this down and understand what this actually means.

What does withdrawing from the society of the other mean? It means that one of the partners has physically or, in some cases, mentally removed themselves from their partner. This could be in the form of living separately or just not being a couple mentally anymore. Society here does not mean a society in the normal sense of people living together in a community, but it means cohabitation of partners in each other's space and performing marital obligations. What does reasonable excuse entail? A reasonable excuse is anything that the Courts might deem to be something a reasonable man would not tolerate and remove themselves from. This could be cruelty[ix], partner suffering from a loathsome disease like STDs[x], conversion of partner to another religion[xi], expulsion from caste[xii] and so on. The burden of proving that the excuse was reasonable lies on the partner who has withdrawn from society (as mentioned in the explanation of Section 9 of the Hindu Marriage Act, 1955). Therefore, we can conclude that there are three elements laid down in this section; the respondent has withdrawn from the society of the petitioner, this withdrawal was made without a reasonable excuse, and there is no legal ground for refusing such an application.

Section 22 of the Special Marriage Act, 1954 talks about such a matrimonial relief and is the same as Section 9 of the Hindu Marriage Act, 1955. The Civil Procedural Code, 1908 describes the procedure through which such a decree might be passed. Order XXI Rule 31 and 32 of the Civil Procedure Code details the discretion of the Court in executing decrees for restitution of conjugal rights, wherein the if the decree is not complied with, the respondent's property could be seized or they could be put into civil prison.

CASE FOR RETENTION OF RESTITUTION OF CONJUGAL RIGHTS

Retention of restitution of conjugal rights has been argued by many. The Delhi High Court, in *Harvinder Kaur v. Harmander Singh*[xiii], critiqued the judgment by the Andhra Pradesh High Court in *T. Sareetha v. T. Venkata Subbaiah*[xiv].

Justice A.B. Rohtagi dissented the opinion of the Andhra Pradesh High Court. He was of the opinion that "this remedy is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation"[xv]. Justice A.B. Rohtagi believed that the Andhra Pradesh High Court emphasised too much on sex rather than maintaining the relationship between the two spouses, which would be beneficial for the children and society. Sexual intercourse is just an element of the institution of marriage and not the sole aspect of it; there are others such as companionship, comfort, aid and society; hence what the Courts are then removing is the right of cohabitation if such relief is made void. According to Justice A.B. Rohtagi, "to say that restitution decree 'subject a person by the long arm of the to a positive sex act' is to take the grossest view of the marriage institution."[xvi] The Justice also argued that the section aimed at consortium and reconciliation is an obligation of the Courts under Section 23 (2) of the Hindu Marriage Act, 1955. The Supreme Court also upheld the decision of the Delhi High Court and overruled the decision of the Andhra Pradesh High Court.

The judgement of *Saroj Rani v. Sudarshan Kumar Chadha*[xvii] expressly supported the stand taken in *Harvinder Kaur v. Harmander Singh* and dissented that of *T. Sareetha v. T. Venkata Subbaiah*[xviii]. Since this judgement was given by the Supreme Court, it technically overruled what was held in *T. Sareetha v. T. Venkata Subbaiah*[xix]. Although, this case poses a different argument in favour of retention of restitution of conjugal rights. What happens when there is a case of cruelty, and the financially dependent party of marriage is thrown out of the matrimonial home with no recourse? There are many such cases where the wife is thrown out of the house because the husband was in an inebriated state and got angry, or she is thrown out for non-payment of dowry or not being able to produce an heir or, more specifically, a male heir. The mental health of the person subjected to such behaviour would also be harmed. Given the society's 'hush-hush' take on divorce or any kind of separation of married couples, the reputation and dignity of such a person would also be greatly harmed.

In conclusion, restitution of conjugal rights should be retained on the basis of the fact that it is the only relief an aggrieved party in a marriage can get against desertion. Such a relief exists to try and reconcile a couple and provide them with a second chance at making their

marriage work. Removal of such a right would hence take away one's right to consortium and deprive them of the affection and aid that they deserve.

CASE FOR REMOVAL OF RESTITUTION OF CONJUGAL RIGHTS

The judgment of the Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkata Subbaiah*[xx] is a landmark judgment which discusses the matter of restitution of conjugal rights as a law that violates the constitution. The petitioner, T. Sareetha, pleaded that restitution of conjugal rights was void due to being in violation of Articles 14, 19 and 21 of the constitution. In the case of Article 14 (right to equality), the Court remarks that whereas the remedy is articulated in a gender-neutral manner, it has been proven in Court that more often than not, there are instances of men asking for restitution of their rights[xxi]. In the matter of the remedy being violative of Article 21 (which guarantees the right to life and personal liberty against State action), the Court found that the right to privacy includes the right to bodily autonomy. This right does not go away once a person marries. Right to bodily autonomy plays a part in this argument as once a plea for restitution is passed in favour of the petition, forced cohabitation in most cases also results in sexual cohabitation. This then becomes violative of the right to privacy. Justice P.A. Choudary stated, "The coercive act of the State compelling sexual cohabitation, therefore, must be regarded as a great constraint and torture imposed on the mind of the unwilling party."[xxii] He also quoted *Russel v. Russel*[xxiii] , where Lord Herschell talked about the barbarity of such a judicial remedy. Lord Herschell observed, "I think the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call barbarous." Further, it also opens up a woman to become pregnant and then carry a child against her wishes; hence such a law was found to be one which puts women at a far greater disadvantage. This becomes a violation of the right to equality as well. The judgement also states that as and when the law was made, wives were treated as property; thus, section 9 of the Hindu Marriage Act is a cruel remedy and void.

Critique of restitution of conjugal rights

I. Violative of Article 21

Justice A.B. Rohtagi talked about how marriage is sacred, and the Court must not and cannot interfere in private matters of marriage. Justice P.A. Choudary in *T. Sareetha v. T. Venkata Subbaiah*[xxiv], challenges this by elaborating on the point of forced cohabitation leading to sexual cohabitation. The fact that marital rape is not a crime in India makes the problem more aggravated. The landmark case of *K.S. Puttaswamy v. Union of India*[xxv] decisively set down that the right to privacy also includes a person's right to exercise autonomy over their own body. Justice P.A, Choudary opined that this relief is violative of every individual's right to bodily autonomy. It is then highly unfair to put any individual at the risk of losing his/her autonomy over their own body. "Such a right is one which is fundamental to human existence and cannot be waived."[xxvi]

II. Violative of Article 19(1)

Article 19(1) of the Indian constitution guarantees the freedom of forming associations. This right is two-fold; it has a negative and positive obligation. Such a right would also guarantee the freedom to decline being part of an association. Therefore, if one of the spouses do not want to be a part of a matrimonial relation anymore, they constitutionally cannot be forced into it. The futility of such a decree in bringing about reconciliation is evident from this. The 23rd Law Commission of England which brought about the abolition of this remedy in England, stated that "A court directing individuals to live together is hardly an effective measure of attempting to effect reconciliation"[xxvii] . The objective of such a law in modern day is to prevent marriages from breaking down and giving couples a second chance to make it work. If one party does not wish to reside with their spouse, their marriage would not be 'fixed' if they are forced to live together. Legally forcing a withdrawing spouse continue cohabitation with the aggrieved spouse doesn't bring about the emotional connection. A decree such as this brings about only physical cohabitation and does not guarantee love and affection which is present in a relationship. Such a remedy is an excessive intervention by the State into one's life. When the courts have themselves refrained themselves from and have taken extra measures to ensure that they don't meddle in private affairs[xxviii], such an intrusion is unconstitutional. There is no reason to continue carrying the colonial legacy.

III. Violative of Article 14 and Article 15(1)

Another problem that retention of such a matrimonial relief poses is that it edges on deprivation of women from the right to employment, which is a constitutional right under Article 15(1) and the right to equality under Article 14. In *Kailashvati v. Ayodhya*[xxix], after the parties got married, Kailashvati moved to Ayodhya's village and got a posting in his village to teach. However, soon after, she was posted back to her parent's village. Ayodhya filed for restitution of conjugal rights and asked Kailashvati to quit her job. The Court, in this case, decides that everything starts at the matrimonial home. They cite an American case, *Pace v. Pace*[xxx] and an English case, Justice Henn Collins, in *Mansey v. Mansey*[xxxi] , to establish that the husband decides the matrimonial home. The reasoning for this being that there is a disproportionate burden of maintenance on the husband in matrimonial laws, and this is balanced with the man's right to decide the matrimonial home. Further, "in general, it is the duty of the wife to submit to the determination of the husband and to follow him to the domicile of his choice"[xxxii]. In totality, what this case lay precedent for was that even if the wife is working and the husband 'allows and encourages' her to do so, it does not deprive him of the legal right to have his wife live in the matrimonial home. This is a violative of right to equality. A contention to this argument could be the case of *Swaraj Garg v. K.M. Garg*[xxxiii], but in this case, the husband was not doing well financially while the wife (who had moved away for employment) was earning well and hence the Court did not grant a decree of restitution of conjugal rights to the husband. The fact that the wife earns more than the husband should not be the determining factor when discussing whether the wife should return to the matrimonial home if she has moved away for work. In fact, a judgment from the Supreme Court dubbed a married woman's focus on her careers as 'neglect' of her household responsibilities[xxxiv]. "Equality must not always be written but it must also be seen to be done and implemented in reality, i.e., the changing realities of equality between men and women must be shown"[xxxv].

IV. Ulterior motives

There are sometimes ulterior motives involved within petitioning for a decree of restitution[xxxvi]. In *Gurdev Kaur v. Sarwan Singh*[xxxvii], The court outlined the objectives that the husband sought to accomplish by requesting restitution, including (i) forcing the wife's resignation from her position, (ii) preventing the wife's claim to maintenance and (iii) laying the groundwork for a judicial separation or divorce. There has been a myriad of cases in which

the husband has filed a petition for the restitution of conjugal rights just to counterblast the applications of their wives for maintenance under section 125 of The Code of Criminal Procedure, 1973. *Gurdeep Singh v. Ranjit Kaur*[xxxviii], *Darshan Ram v. Maya Bai*[xxxix], *Veena Handa v. Avinash Handa*[xl] and *Charan Sigh v. Jaya Wati*[xli] are some cases where a petition for such a remedy was used as a defence against maintenance suits. In addition, as non-compliance of a decree of restitution of conjugal rights is a ground for divorce under section 13 (1-A) (ii) of the Hindu Marriage Act, 1955. This provision gives the aggrieved party of the restitution suit to file for divorce if there has been no restitution for a period of one year after the passing of the decree. Usually, in these proceedings, after getting the decree the 'aggrieved spouse' will simply not comply with the decree out of their own will and file for a divorce after the statutory period of one year. There are countless number of cases which prove this pattern such as *Santosh Kumari v. Mohan Lal*[xlii] and *K.S. Latitamma v. NS Hirianniah*[xliii].

V. Outdated and archaic

Restitution of conjugal rights is a law introduced to us by the British in the colonial period. This law was made at a point when women were considered chattels and property. In India, this right became a way for husbands to coerce their wives into staying through formal proceedings of the justice system. However, the very country that introduced such a right to us, abolished it in their own country soon after. This was done through section 20 of the Matrimonial Proceedings and Property Act 1970 of England, proposed by the 23rd Law Commission Report of England.

Judgements such as *Shayara Bano v. Union of India*[xliv], which led to the ban on triple talaq, proves that bringing a change is possible; even when the practice of such a law has been going on for decades. *Joseph Shine v. Union of India*[xlv] resulted in the declaration of the opinion of a woman as a chattel as unconstitutional; thus, furthering the notion of equality among men and women. This judgement directly proves that such a law has outlived its original purpose of creating rights for the 'owner' of the property that was a woman. Restitution of conjugal rights is a feudal English law that has no place in India which aspires to be a constitutional setup that guarantees personal liberties and equality of status to both men and women and allows the state to make special provisions for safeguarding these rights and protecting them.

VI. International standing on restitution of conjugal rights

Almost every other commonwealth country has abolished this remedy from their legal system such as Australia, Scotland, Ireland and New Zealand. Such a law has been deemed barbaric and it has been unanimously decided that with changing times, such a law must also change. The very country that introduced this law to us, abolished it.

In Australia, the Family Law Act, 1975 abolished RCR as a legal remedy. In Ireland, it was abolished by the Family Law Act, 1988. In 1983, the Scottish Law Commission concluded that 'actions of adherence', an equivalent of restitution of conjugal rights, were outdated, obsolete and discriminatory[xlvi]. In South Africa, it was eradicated by the Divorce Act, 1979.

Further, such a relief directly violates and contradicts the international human rights standards that India is bound by. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an international treaty adopted by the United Nations General Assembly in 1979. CEDAW elaborated on equality in marriage family relations in General Recommendations 21[xlvii]. CEDAW was ratified by India, however India made one reservations and two declarations. India has been urged time and again to comply with Article 5(a) and 16(1) but it has not done so till date. CEDAW was ratified by India, however India made one reservations and two declarations. India has been urged time and again to comply with Article 5(a) and 16(1) but it has not done so till date[xlviii]. It is imperative that the Indian government abrogates the restitution relief from the marriage legislation in order to fulfil its commitments under CEDAW.

CONCLUSION

Restitution of conjugal rights is a remedy provided by the Indian law to married couples. It is present in all religious laws in India as a means of getting one's spouse to inhabit the same society or space with them. Such a relief is very problematic in today's world. While the courts in India are still reluctant to remove such a provision through the justification that breakdown of marriage is detrimental to society and the courts are directed to do everything in their power to prevent a breakdown. I agree with the critiques of the existence of such a law; it

must be made void. It is in violation of Article 21, Article 15(1) and Article 14. Forced cohabitation does not lead to emotional reconciliation and it is in violation of Article 19 which entails the right to freedom of association. There is also a large-scale misuse of such a provision, a case for restitution is mostly filed with other motives. This remedy is archaic in nature and has outlived its purpose. The colonial state which introduced this law to us has repealed it. Additionally, the same has been followed by majority of the other colonies under it. Another reason for removing such a law is the complying with the obligations that India has already ratified. The negative aspects of such a remedy outweigh the positive aspect that it aims to bring out, hence such a futile remedy must be removed.

ENDNOTES

[i] Section 23(2)
[ii] Section 34(2)
[iii] Under section 9 of the Hindu Marriage Act, 1955, under section 32 and 33 of the Divorce Act, 1869, under section 36 of Parsi Marriage and Divorce Act, 1936 and under section 22 of the Special Marriage Act, 1954
[iv] AIR 1970 J&K 154.
[v] (1867) MIA 55.
[vi] Owing to the Justice K. S. Puttaswamy (Retd.) and Anr. v. Union Of India And Ors, (2017) 10 SCC 1.
[vii] W.P.(C) No. 000250 - / 2019
[viii] *Sanjeev Kumar v Priti Kumari*, AIR 2011 Jha 1 (if the marriage was neither solemnised nor registered, relief was not granted).
[ix] *Dular Koer v. Dwarka Nath*, (1905) 34 Cal 971.
[x] *Bai Premkuvar v. Bhika*, (1868) 5 Bom HCR (App.) 209.
[xi] *Paigi v. Sheonarain*, (1886) 8 All 78.
[xii] *Bai Jina v. Kharwah Jina*, 31 Bomb 366.
[xiii] AIR 1984 Del 66.
[xiv] AIR 1983 AP 356.
[xv] *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66.
[xvi] *Id.*
[xvii] AIR 1984 SC 1562.
[xviii] AIR 1983 AP 356.
[xix] *Id.*
[xx] AIR 1983 AP 356.
[xxi] Gupte, S., 1947. *Hindu law in British India*. 2nd ed. Bombay: N.M. Tripathi, p.929. attests to this fact.
[xxii] *Supra* note 13 at 10.
[xxiii] (1897) AC 395.
[xxiv] *T. Sareetha v. T. Venkata Subbaiah* AIR 1983 AP 356
[xxv] (2017) 10 SCC 1.
[xxvi] *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180: the Supreme Court here held that a fundamental right guaranteed to a person cannot be waived; nor can an estoppel prevent the operation of such right.
[xxvii] 23rd Law Commission of England's report, *Proposal for the Abolition of the Remedy of Restitution of Conjugal* Rights (1969).
[xxviii] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1: it laid down that right to privacy also includes protection from regulation of marital intimacies.

[xxix] (1977) 79 PLR 216.
[xxx] 154 Georgia 712.
[xxxi] 1940 (2) All. E.L.R. 424.
[xxxii] *Pace v. Pace*, 154 Georgia 712.
[xxxiii] AIR 1978 Delhi 296.
[xxxiv] Suman Kapur v. Sudhir Kapoor AIR 2009 SC 589.
[xxxv] *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1.
[xxxvi] This has been affirmed in *Gurdev Kaur v. Sarwan Singh*, AIR 1959 Punj 152, pp. 281–282.
[xxxvii] AIR 1959 Punj 152, pp. 281–282.
[xxxviii] (1966) 1 HLR 191 (P&H).
[xxxix] (1966) 2 HLR 88 (P&H).
[xl] AIR 1984 Del 444.
[xli] (1966) 1 HLR 454 (All).
[xlii] AIR 1980 P&H 325.
[xliii] AIR 1983 Kar 63.
[xliv] AIR 2017 9 SCC 1.
[xlv] AIR 2018 SC 4898.
[xlvi] Scottish Law Commission, paras 3.4–3.6.
[xlvii] CEDAW Committee General Recommendation 21—UN Doc. A/49/38 (1994) paras 16–17, 22–40, 50.
[xlviii] M. Mehra, 'India's CEDAW Story' in A. Hellum and H. Sinding Aesen (eds.), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) pp. 385–409, 386.