



RESTITUTION OF CONJUGAL RIGHTS-SAFEGUARDING MARRIAGE OR LEGITIMIZING MARITAL RAPE?

Aadrika Goel¹ & Prakriti Goenka²

Abstract

This research paper delves into the intricate and contentious legal concept of "Restitution of conjugal rights" within the context of marriage. The restitution of conjugal rights is a legal remedy that obligates spouses to cohabit and fulfill marital obligations, but its implications have sparked fervent debate. This study critically examines whether this legal provision serves as a safeguard for the institution of marriage or if it inadvertently legitimizes instances of marital rape. By employing a multidisciplinary approach, the paper explores the historical evolution of this remedy, its socio-cultural underpinnings, and its contemporary relevance. It scrutinizes legal frameworks and case law from various jurisdictions to understand how courts have grappled with the tension between upholding marital harmony and protecting individual autonomy and dignity. Ultimately, this research paper seeks to contribute to the ongoing discourse surrounding conjugal rights by offering insights into whether this legal remedy can be reconciled with modern notions of consent, autonomy, and gender equality within the institution of marriage, or if it should be reevaluated and potentially reformed to better protect individuals' fundamental rights and well-being.

Keywords: Restitution, Conjugal, Marital Rape, Spouse, Abuse, Remedy.

Introduction

In Indian society, marriages hold a significant role, being regarded as sacred and divine. In a world where the relationship between societal norms and legal changes progresses slowly, the idea of progressive marriage faces challenges. Conjugal rights refer to the entitlement of a spouse to cohabit with their partner in case either spouse decides to separate from the other, the law allows the spouse at fault to resume cohabitation with the distressed spouse. This process is known as the Restitution of Conjugal Rights, which is aimed at avoiding marital dissolution and safeguarding the sanctity of marriage. As an example, A and B after 5 years into their marriage,

¹ BBA LLB. (3rd Year) National Law University, Odisha.

² BBA LLB. (3rd Year) National Law University, Odisha.

A chose to live separately from B without any justifiable cause. Here, A's conjugal rights have been violated and she has the restitution of conjugal rights. A is regarded as the party at fault, while B is the party who has been wronged.

The perception of Restitution of Conjugal Rights originated in the United Kingdom, where abandoning one's spouse was not regarded as a violation of marriage vows in earlier times. This concept was initially given in the 1867 case of *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*³ wherein it was held that if a wife unreasonably stops living with her husband, the husband has the right to legally request the wife to return and fulfill her conjugal duties. This article seeks to conduct thorough research on the Restitution of Conjugal Rights, which is a legal remedy provided under the Hindu Marriage Act of 1955. The authors have also assessed the rulings issued by the apex court concerning conjugal rights. Furthermore, the authors have clarified these aspects by exploring the purpose, range, and degree to which Section 9⁴ of the Hindu Marriage Act, 1955 is applicable and if it legitimizes Marital Rape?

Restitution of Conjugal Rights in Hindu Law

“Restitution of conjugal rights is addressed in Section 9 of the Hindu Marriage Act, 1955, which states that if one spouse withdraws from the other spouse’s company without providing any justification, the affected spouse has the right to file a petition for restitution of conjugal rights. The court may issue the decree of restitution of conjugal rights if it is satisfied that the claims made in the petition are true and there are no legal restrictions on granting the remedy of restitution.”⁵ According to this Section, the court has the discretion to issue a decree for the restoration of conjugal rights in the following circumstances:

1. When one party has withdrawn from the company of the other spouse without providing any justification;
2. The petition’s assertions that they are valid are accepted by the court as accurate;
3. There is no legitimate basis for rejecting the petition.

³ *Moonshee Buzloor Ruheem v Shumsoonissa Begum* 11 Moo Ind App 551

⁴ Hindu Marriage Act 1955

⁵ Restitution of Conjugal Rights: An Anathema to Human Rights | Gaurav Chaliya and Jayesh Kumar Singh

[Oxford Political Review] (Oxford Political Review.com 14 October 2020)

<<https://oxfordpoliticalreview.com/2020/10/14/restitution-of-conjugal-rights-an-anathema-to-human-rights/>>
accessed 3 September 2023

A person's expectation of cohabitation and companionship in a marriage is referred to as "society" under this Section. Withdrawal from a committed relationship is what is meant by the phrase "withdrawal from society."

Essentials of Section 9

1. The applicant and defendant's marriage is legitimate, existing, and legal.
2. The defendant needs to leave the applicant's social circle.
3. Such social withdrawal ought to be unfair and unreasonable.
4. The applicant's petition and the facts stated in it must be believed to be accurate by the court.

The judge must be convinced that there is no legal justification for rejecting the decree.

Who May File An Application Under Section 9 Of H. M. Act 1955?

1. Either spouse can file the petition.
2. The affected party in the marriage who has been abandoned by the other spouse
3. The party attempting to rebuild their marriage by compelling the other party to meet their responsibilities and fulfill the marital commitment.

The Procedure and Location Where the Application Can Be Made Under Section 9

The family court with jurisdiction over the specified region has the authority over applications for the restitution of conjugal rights when the following conditions are met:

1. The marriage ceremony was conducted within its jurisdiction.
2. The spouses used to cohabit within its jurisdiction.
3. The wife currently resides within its jurisdiction.

Following a hearing involving both parties and the determination that the departing spouse has failed to provide a valid reason for their absence, the relevant family court will issue an order requiring the absent spouse to reunite with the aggrieved party. Additionally, if deemed necessary, the court may issue a decree that includes the attachment of the defendant's property. If the defendant fails to adhere to the instructions specified in the decree within one year of receiving it from the family court, the petitioner is entitled to file for divorce.⁶

⁶ Oshin Nehru, 'Redirecting...' (heinonline.org) <<https://heinonline.org/HOL/Page?handle=hein.journals/ijlmhs9&collection=journals&id=1867&startid=1867&end id=1879>> accessed 3 September 2023.

Grounds for Rejection of the Petition

The court determined in *Sushila Bai v. Prem Narayan*⁷, that the following can be used as defense to a restitution lawsuit:

- The respondent has a right to ask for matrimonial relief under the lawsuit.
- Any proof that the petitioner has engaged in any misconduct
- When it is impractical for both partners to cohabit in the same home.

The following reasons could be used to deny the request for the restoration of conjugal rights:

- The petitioner's cruel behavior
- Improper marital conduct
- One of the spouses remarries
- The commencement of the proceedings was delayed

Meaning of Reasonable Excuse

According to Section 9 of the HMA, a “reasonable excuse” could be any of the following:

1. Anything that could provide the respondent with matrimonial relief qualifies as a reasonable excuse.
2. If the petitioner has committed a serious enough act of matrimonial misconduct, which is not a legal basis for divorce or legal separation under the Act, it constitutes a valid defense.
3. Conjugal misconduct or any other act or omission that makes it difficult or nearly impossible for the respondent to live with the petitioner would also be regarded as a reasonable justification.

Any one of the following could be a valid justification:

- Cruelty
- Impotence
- Dowry demand
- False Adultery allegations
- Refusal to live together

⁷ *Sushila Bai v. Prem Narayan* AIR 1986 MP 225

- Any conduct renders the other person unable to cohabit with the petitioner in the future.

Safeguarding Marriage through Restitution of Conjugal Rights

The government often uses the argument that marriage is a crucial institution in society to weaken the rights of women in an already unequal marriage partnership. A decree of restitution of conjugal rights essentially requires the spouse who is at fault to live with the spouse who has been wronged. This is the only option for a spouse who has been abandoned by their partner. Either a husband or wife can initiate legal proceedings to seek the restoration of their right to live with their spouse. However, enforcing this decree can be quite difficult.

While the court has the authority to issue such a decree, it lacks the ability to ensure that it is followed through legal means. If the spouse at fault fails to comply with the court's decree, it can effectively lead to the breakdown of the marriage. Currently, according to family laws in India, the wronged spouse can file for divorce one year after the decree is issued. The competent court can grant a divorce decree in favor of the wronged spouse. To enforce the decree of restitution of conjugal rights, the court can resort to seizing property i.e. attachment, and if the other spouse still does not adhere to the decree, the court has the discretion to penalize them for contempt of court. However, it's important to note that the court cannot compel the erring spouse to consummate the marriage under any circumstances. It's crucial to emphasize that a decree of restitution can only be granted to spouses in valid marriages.”⁸

Are Courts Legalizing Marital Rape Through “Restitution Of Conjugal Rights?”

The Concept of Marital Rape in Indian Context:

“The Indian Penal Code has defined rape as any act that includes any type of nonconsensual intercourse with an individual. But under Section 375's Exception 2, if a man and a woman are married and the girl is over 15, they may engage in non-consensual sexual activity, and in such cases, it will not be regarded as rape.”⁹

“Currently, if a wife marries her husband, it is assumed that she has given implied consent for them to have sex after the marriage. Non-consensual sexual contact between a spouse is not a crime in the world. However, this is still not a crime in India.”¹⁰

⁸ Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws, ‘ Indian National Bar Association’ < <https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-Indian>> accessed on 23 July, 2023

⁹ Indian Penal Code S 375

¹⁰ Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws, ‘ Indian National Bar Association’ < <https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-Indian>> accessed on 23 July, 2023

Violation of Provision of the Indian Constitution

“No person shall be denied equality before the law,” according to Article 14¹¹ of the Indian Constitution. Even though the country's criminal laws guarantee equal protection for women, they refuse to make it a crime for husbands to rape their wives. A married woman was not regarded as a separate legal entity in the 1860s when the Indian Penal Code was being written. She was instead treated like her husband's chattel.¹² If a spouse commits forceful abuse on their spouse, such acts will not be considered “rape” according to Exception 2. This notion comes from the very fact that the woman's identity becomes entwined with her husband's. Exception 2 violates a married women's rights because it denies them equal protection under the law against sexual harassment. This Exception shields unmarried women from the same abuse while allowing married women to suffer at the hands of their partners as it creates a classification that has no logical connection to the goal of the law, Exception 2 violates Article 14 of the Indian Constitution. In a few instances, the Supreme Court ruled that a classification could only be upheld if it has a logical connection to the goal. However, Section 375's Exception 2 forbids punishing rapists. It is incomprehensible why the husband should not be punished and why married and unmarried women suffer the same consequences. Due to financial restrictions, unmarried women who suffer abusive and toxic environments at their homes find it more difficult to leave their husbands' abusive behavior. Courts have begun to acknowledge a person's right to forego sexual consummation. A person's right to be free from unwanted sexual activity is included. The Apex Court ruled in the case of *Karnataka v. Krishnappa*¹³ that an act of violence committed against a woman to humiliate her constitutes a breach of her right to privacy, both physical and sexual violence in the same case. The right to make decisions regarding sexual activity was later acknowledged by the Supreme Court. In India, statistics show that 30% of women have encountered domestic violence at least once since the age of 15, with approximately 80% of women aged 15-49 who have experienced physical violence reporting that their husbands were the perpetrators of such violence. By upholding the validity of these provisions, the Court indirectly supported a system where women's rights and bodily autonomy were subordinated to the perceived stability and sanctity of marriage. It suggested that the preservation of the institution of marriage, even in cases where

Association' < <https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-Indian>> accessed on 23 July, 2023”

¹¹ The Constitution of India Art. 14

¹² Shalu Nigam, ‘The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities’ (papers.ssrn.com 2 June 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613447 accessed on 3rd September 2023

¹³ *Karnataka V. Krishnappa* 2000 CRIL 1793

women suffered violence or other forms of harm within that institution, was more important than their well-being and their right to live free from abuse. However, the situation has evolved somewhat. “The concept of Restitution of Conjugal Rights has raised concerns about the potential for it to be misused to coerce marital rape. This issue was duly discussed in Parliament during the enactment of the HMA in 1955. However, during that time, the Law Minister contended that it lacked a practical enforcement mechanism, which made it unlikely to pose a real threat.”¹⁴ According to the Supreme Court's ruling in *Puttaswamy*,¹⁵ decisional autonomy is an aspect of privacy, encompassing choices such as whom to marry or live with and other intimate decisions, primarily related to one's sexual or procreative nature. The Court also recognized bodily privacy, which includes the right to prevent others from violating one's body. It should be noted, though, that procedural laws do provide a mechanism for enforcing the decree of restitution of conjugal rights. According to Order XXI Rule 32¹⁶ of the Code of Civil Procedure, 1908, if the order for restitution of conjugal rights is willfully disobeyed, the property can be attached as a form of enforcement. This threat was acknowledged by the Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkatasubbaiah*.¹⁷ However, the Supreme Court rejected this argument, “stating that the decree only provided for cohabitation and not forced sexual relations, which the Court cannot enforce in any case.” However, it should be emphasized that in such a context of forced cohabitation with the abuser spouse, nothing exists to prevent marital rape, making it a dangerous prospect.

Conclusion

The trend indicates that the restitution of conjugal rights is sometimes employed to restrict a wife's right to pursue employment in a location distant from her marital home. This situation arises due to the socio-cultural transformations ushered in during the constitutional era, which have provided enhanced educational and job prospects for women. The concept of restitution of conjugal rights is significantly problematic because it disproportionately affects the wife, exposing her to the risk of marital rape and limiting her ability to pursue employment in a location of her choosing. Her rights are contingent upon the consent of the husband. Conversely,

¹⁴ Snehil Kumar Singh, Restitution Of Conjugal Rights Has Outlived Its Founding Rationale, Undesirable For Social Transformation, *The Guardian* (24 March 2022) < <https://www.firstpost.com/India/Restitution-Of-Conjugal-Rights-Has-Outlived-Its-Founding-Rationale-Undesirable-For-Social-Transformation-10345831.html> > Accessed 3rd September 2023

¹⁵ Justice KS Puttaswamy vs. Union of India, (2017) 10 SCC 1.

¹⁶ The Code of Civil Procedure Rule 32

¹⁷ *T. Sareetha V. T. Venkatasubbaiah* Air 1983 AP 356

there are no such limitations placed on the husband, as he is traditionally seen as the primary earner in the marriage. The institution of restitution of conjugal rights has surpassed its original rationale, which was aimed at reinforcing the subordination of wives to husbands and maintaining a clear "public-private" divide. It was also intended to prevent the breakdown of marriages when divorce was not an option and marriage was considered indissoluble. However, contemporary norms have evolved to grant equal rights to spouses, with wives no longer expected to occupy a subservient role or remain confined to the private sphere under the authority of their husbands. In Indian society, there is an expectation that couples should put in a concerted effort to maintain their relationship.

While this idea provides a legal foundation for marriages, it also compels couples to stay together even if they no longer wish to, leading to the irretrievable breakdown of marriage. This theory acknowledges that sometimes, neither party is at fault, but the marriage has become unsustainable, nor it is in the best interest of both individuals to dissolve it. While this concept is not currently accepted as a ground for divorce, courts have recognized its validity in their judgments. The Indian judicial system should adopt a more progressive approach to marriage and relationships. Instead of enforcing cohabitation, they can facilitate reconciliation between the parties to prevent misuse of legal provisions like Restitution. Furthermore, rather than resorting to court decrees and sanctions in cases of noncompliance, the courts could encourage couples to live together and consider maintenance from the abandoning spouse to the one who cannot maintain a decent standard of living without their support.
