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## Restitution of Conjugal Rights: Retain or Remove

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*A legal reunion by a man and woman is called marriage and this marriage is considered as one of the basic elements in the society as it is the reason for the existence of a family and also the survival of the race. Merely, under Indian tradition marriage is not about bringing the relation between male and female together but also uniting and merging their families as one. The interpretation of the term marriage can differ from person to person, region, religion, and traditions. The existence of marriage is in various forms in India such as it is very sacramental to Hindus, whereas it is a contract to Muslims and a holy union for Christians. There are times when there are misunderstandings and disagreements between the husband and wife, and further, it reaches an extent where the partners do not want to be together any longer. However, it should be admitted that the ending of the relationship is not the only way to resolve the disagreements. So, Law stipulates and provides various matrimonial remedies to married couples to resolve their dispute and to behold the sacred relationship of marriage. One such remedy is the Restitution of Conjugal Rights, which is dealt with under section 9 of the Hindu Marriages Act, 1955.*

*Conjugal rights are the rights accompanied by the persons, who are married. If due to some reasons these married couples want to end their relation then what happens to these conjugal rights, are they restituted? Restitution is nothing but whether these conjugal rights are restored or applied even though the marriage is dissolved. The restitution of conjugal rights is a topic that is constantly debated. We must first understand the constitutional legality of the restitution of marital rights to understand the debate. When it comes to the recovery of marital rights, there are a few basic aspects to consider. If one of the party's rights or fundamental aspects is violated, it must be proven that the other party is also violating these rights. This means that neither the husband nor the wife should be able to take away the other's rights without good reason. It is guaranteed that one of the persons*

*will force his or her partner to stay with him or her against their will. Because there has been a violation of a person's will, there is a continuing discussion about the constitutionality of conjugal rights and the restitution of such rights. Initially, the article deals with the introduction, historical background of conjugal rights. Later, it focuses on legal provisions involving conjugal rights and the need for a conjugal right. The next half of the article deals with how conjugal rights are striving for a balance between accepting morality and violation of fundamental rights.*

**Keywords:** *rights, conjugal rights, marriage.*

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## INTRODUCTION

According to Hindu Law, marriage is a notion of sacred wedlock between male and female, and through marriage, they became one. Marriage is considered an important institution in society and has also been accepted in every religion and under all personal laws. Under matrimonial law, marriage imposes certain marital responsibilities and duties and further legal rights are imposed on each other. Living together is an essential implication of marriage, and one spouse has the right and authority to console the other. One spouse should not sue the other after marriage, according to the doctrine of the law of the unity of personality.

Because of the complications among married people in previous generations, personal laws such as divorce, judicial separation, and conjugal rights were created. Restitution of conjugal rights is one of the remedies allowed by our legal system. A separated spouse has the right to sue the other under this provision. This restoration or return of conjugal rights is an extremely positive and beneficial remedy since it encourages and forces both parties to live together and cohabit. After the separation of married persons or solemnization of marriage, the law binds legally both the husband and wife to maintain both of their conjugal rights together. If a spouse leaves the other, then the aggrieved spouse can claim for conjugal right. The aggrieved spouse can be guaranteed statutory matrimonial relief through personal laws and the spouse can restore the conjugal rights from the other through validation and attestation of certain facts. The aggrieved spouse can initiate this process by submitting a petition in court requesting the restoration of conjugal rights. Restitution of conjugal rights is the term for this.

The provisions related to restitution or restoration of conjugal rights after separation of spouses are stipulated in section 9 of the Hindu Marriage Act. This very existence of this idea of giving courts the power to provide relief in this regard is taken from English Law. The interpretations of Indian Courts while giving judgments in matters related to the restitution of conjugal rights deliberately shows that in some cases the principles and statutes borrowed from the English Law were explained as barbaric by Lord Herschell but since the law have been affected by considerable changes and the provisions and rules stipulated under latest legislation have the effect of the abolition of remedy<sup>1</sup> of restitution or restoration of conjugal right.

### **HISTORY OF RESTITUION OF CONJUGAL RIGHTS**

The Conjugal Rights has its origin traced back from the Jewish personal law but this Jewish personal had borrowed mostly its laws from Indian personal laws. Under General Law, this remedy of restitution or restoration of Conjugal rights is considered as only matrimonial relief in the British area but later this relief faced many criticisms from the past few years. At the initial stage of making the Hindu Marriage Act, there had been huge arguments and debates between the makers and drafters of the act regarding the matters of this relief of marriage. It was opposed by Mr. Khardekarhad by stating that this ideology or principle of restitution or restoration of conjugal rights is barbaric, vulgar, and uncivilized. Further, this concept was opposed in the case *Russell v Russel*<sup>2</sup>. In this case, this relief was criticized by stating that it is nothing but a device either for claiming money or to get a divorce.

According to Paras Diwan, neither the Dharmashastras nor the requirements of Muslim law address nor identify this idea of alleviation and restitution of conjugal rights. Furthermore, the origins of restitution of conjugal rights can be traced back to Feudal England, where marriage was viewed as a property transaction and a woman's possession was treated similarly to other chattels. *Moonshee Buzloor Ruheem v Shumsoonissa Begum*<sup>3</sup> was the first case in India to

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<sup>1</sup> Matrimonial Proceedings and Property Act 1970, s 20

<sup>2</sup> *Russell v Russel* [1880] LR 14 Ch D 471

<sup>3</sup> *Moonshee Buzloor Ruheem v Shumsoonissa Begum* [1867] 11 Moo Ind App 551

introduce this relief of restitution of conjugal rights, in which the court decided that these actions of restitution of conjugal rights are considered particular performance.

## **INDIA'S LEGAL PROVISIONS RELATING TO THE RESTITUTION OF CONJUGAL RIGHTS**

The purpose of section 9 of the Hindu Marriage Act, 1955 is to maintain the sacrifice aspect of marriage by eliminating disparities that arise between spouses. This can be accomplished by granting section 9 relief of restitution of marital rights. This remedy of restitution of conjugal rights is a beneficial privilege because it allows divorced spouses to be together and cohabit. However, it is also used incorrectly in several instances. Over the past few years, the concept of restitution is dealt with by section 13<sup>4</sup> of the Hindu Marriage Act is considered a major problem as the section itself is complicated. Section 13 provides the right to married couples to claim for divorce within one year of the passing of a decree of restitution if the couple can't comply with the decree.<sup>5</sup> This remedy is also used as a defense in maintenance cases regarding section 125<sup>6</sup> of the Cr.p.c.

Other than the Hindu marriage act, there are special provisions in other personal laws in India dealing with the restitution or restoration of conjugal rights. Under these personal laws, either the husband or wife who has been separated from society can petition the court for restitution of conjugal rights judgment. The following are the provisions:

- S.22 of Special Marriage Act, 1954
- S. 32 of Indian Divorce Act, 1869
- S.36 of Parsi Marriage and Divorce Act, 1936.

## **RESTITUTION OF CONJUGAL RIGHTS: NEED AND IMPORTANCE**

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<sup>4</sup> Hindu Marriage Act 1955, s 13

<sup>5</sup> *Ibid*

<sup>6</sup> Criminal Procedure Code 1973, s 125

The need for “Restitution of Conjugal Rights”<sup>7</sup> is a challenging issue that has been facing many contentions for the past few years. On one hand, it is regarded as positive tight as it is useful for trying to unite the separated spouses and also to protect the sacred institution of marriage which plays important role in a traditional and sacramental country like India. On the contrary, this relief is considered negative because it forcing the person to stay with the spouse against the will of the person. This relief is can also be considered as a tool to bring people who are withdrawing from society i.e. from his or her partner, back to their senses and also to cohabit by performing the marriage rights and obligations. Therefore, there is a need for this remedy to restitution or restoration of conjugal rights until there is the formation of a new right for preserving marriages of people with more efficacies.<sup>8</sup>

### **JUDICIAL PERSPECTIVE: STRIVING FOR BALANCE BETWEEN FUNDAMENTAL RIGHTS AND MORALITY**

Marriage gives rise to a very sensitive but complicated relationship between the spouses and also imposes some rights and responsibilities on each other. These obligations and rights are constituted as conjugal rights and are also regarded as the quintessence of the marital union<sup>9</sup>. In general, each spouse is obligated to comfort and care for the other. If one spouse abandons the other for no reason, the aggrieved spouse can petition the court for restitution or restoration of conjugal rights ruling.<sup>10</sup> In Hindu, Christian, and Parsi law, this remedy is usually governed by particular regulations, however, in Muslim law, it is used based on justice, equity, and good conscience, as adopted from British common law.

In *T. Sareetha v T. Venkata Subbaiah*<sup>11</sup>, the court observed the facts and passed a decree granting the relief of restitution or restoration of conjugal rights by the civil court was not only mentioning cohabiting together but also forcing the separated spouse to perform marital

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<sup>7</sup> Agrim Jain & Abhinav Aggarwal, ‘Restitution of Conjugal Rights: Is it still relevant?’ [2018] International Journal of Law Management & Humanities ISSN: 2581-5369

<sup>8</sup> *Ibid*

<sup>9</sup> M Gangadevi, ‘Restitution of Conjugal Rights: Constitutional Perspective’ (2003) 45 Journal of the Indian Law Institute 453

<sup>10</sup> *Ibid*

<sup>11</sup> *T Sareetha v T Venkata Subbaiah* AIR 1983 SC 356

intercourse with the other party. The decree is undoubtedly interfering in the choices of either to have or not to have marital intercourse with the other person and also by enforcement of decree the person should surrender his rights by allowing his or her body as a tool for the usage of another person.<sup>12</sup> So, the enforcement of this decree of restitution or restoration of conjugal rights is no doubt an infringement and violation of the fundamental rights of a person. This decree leads to invasion of marital privacy and further offends the integrity of the persons. No person should be forced against his will to perform the act of sex if forced so then nothing is more outrageous and degrading to the human spirit and dignity of humans. No person is subjected to a positive sex act under the order of law. So, the Honorable high court of A.P ruled that the decree restitution or restoration of conjugal rights is no doubt but This relief was also struck down as a blatant breach of Article 21<sup>13</sup> of the Indian Constitution since it infringed on the right to privacy and human dignity.

On the contrary, Delhi made its emphasis on the importance and morality of marriage and opined that sacred marriage is only preserved through the restitution of conjugal rights. Hence, in *Harvinder Kaur v Harmander Singh Choudhry*<sup>14</sup>, the court viewed that the preservation of marriage is only done through the relief of restitution or restoration of conjugal rights dealt with under section 9. The decree was enforced only for cohabitation of spouses but not the sexual intercourse as the respondent only agreed to live together and cohabit with the appellant but not agreed for marital intercourse.<sup>15</sup> Further, the court stated that section 9<sup>16</sup> is the extension of subsection (2)<sup>17</sup> and (3)<sup>18</sup> of section 23 of the act. The principle behind the Hindu Marriage Act is for the maintenance of marriages but not to dissolve marriages. Hence, the Delhi High court further observed that this legislation has its purpose to serve and has an important role to play. The court finally held that the legislature has to strike down legislation but not courts on the ground as it is constitution so Section 9 is constitutionally valid.

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<sup>12</sup> *Ibid*

<sup>13</sup> Constitution of India, art 21

<sup>14</sup> *Harvinder Kaur v Harmander Singh Choudhry* AIR 1984 SC 66

<sup>15</sup> *Ibid*

<sup>16</sup> Hindu Marriage Act 1955, s 9

<sup>17</sup> Hindu Marriage Act 1955, s 23(2)

<sup>18</sup> Hindu Marriage Act 1955, s 23(3)

Further, to resolve the conflicting views in this regard by the High courts, the Supreme Court looked into the matter of constitutional validity of section 9 in *Sudharshan Kumar v Saroj Rani*<sup>19</sup>. In this case, the Supreme Court stated that conjugal rights are rights or the responsibilities imposed on either husband or wife to look after their spouses. The court further held that passing a decree or judgment granting the relief of restitution or restoration of conjugal rights is to give a chance to separated wife and husband to live together and to settle up their inequalities. The aim and purpose of this section are to serve and preserve the sacred institution of marriage and this section is serving its purpose.<sup>20</sup> The court further stated the High court of A.P regarded interpreted this section 9 incorrectly as the section is constitutionally valid and is no violation under article 14<sup>21</sup> and article 21 if this section is utilized properly.

Further in *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd. and Ors*<sup>22</sup>, the honorable supreme court stated that the marital disputes in matters of judicial separation, divorce, and restitution of conjugal rights are “non-arbitrated disputes” so it is solely on the parties concerned to resolve and settle the dispute among themselves. If the recent judicial decisions are taken into consideration, then the Supreme Court is giving more importance to the fundamental rights of the persons and also interpreting cases based on the ground of morality.<sup>23</sup> In one of the recent case laws *Shafin Jahan v Asokan*<sup>24</sup>, the supreme court viewed that the choice of a partner of his own choice exclusively lies under the domain of an individual. The interests or intimacies of marriage lies within the matters of right to privacy and should not be violated under any circumstances.

Further in *Justice K.S. Puttaswamy and Ors. v Union of India (UOI) and Ors*<sup>25</sup>, The court stated that a person's right to privacy is safeguarded and protected by Article 21 of the Indian constitution, which guarantees and protects the right to life and personal liberty. It is the

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<sup>19</sup> *Sudharshan Kumar v Saroj Rani* AIR 1984 SC 1562

<sup>20</sup> *Ibid*

<sup>21</sup> Constitution of India, art 14

<sup>22</sup> *Booz Allen & Hamilton Inc v SBI Home Finance Ltd & Ors* AIR 2011 SC 2507

<sup>23</sup> *Ibid*

<sup>24</sup> *Shafin Jahan v Asokan* AIR 2018 SC 1933

<sup>25</sup> *K S Puttaswamy & Ors v Union of India & Ors* AIR 2017 SC 4161

choice of an individual to choose regarding matters involving with whom to live and to be in what relationship.<sup>26</sup> The right to privacy of a person must be protected by family; procreation and sexual intercourse as these all are the important aspects and features of human dignity. So, it was finally interpreted that the choices made by the individuals should have prevailed over the societal interests. Therefore, the view in *Puttuswamy's Case*<sup>27</sup> is again the same view of the *T. Sareetha case*<sup>28</sup>. The court came to the same conclusion that the decree of restitution or restoration of conjugal rights is nothing more than a breach of a person's basic fundamental rights, although the decree does not mention or underline a basic fundamental right covered by article 21.

## CONCLUSION

The utmost propriety of the restitution or restoration of conjugal rights is to save and preserve the broken marriages and also to preserve the sanctity of the marriages. The intentions behind passing the decree or judgment of granting relief of restitution or restoration of conjugal rights are positive and good faith. But on the contrary, it should not intrude the privacy of a person by forcing them to act against their will. Therefore, this matter is sensitive and complex so the courts should look into the matter carefully and the courts should maintain the balance between morality and individual rights. So, the courts should not follow any strict approach leading to the imbalance either to an individual or a society. Thus, it is solely left to the discretion of courts to decide whether the restitution of conjugal rights is relevant or not.

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<sup>26</sup> *Ibid*

<sup>27</sup> *Puttuswamy* (n 24)

<sup>28</sup> *Sareetha* (n 11)