

AN ANALYSIS OF CONSTITUTIONALITY OF RCR

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ABSTRACT

After the recent judgment of the Hon’ble Supreme Court¹ affirming the right to security as being incorporated inside the extent of fundamental privileges, the door for discussion of the validity of various archaic laws has opened up. One of these is the provision of restitution of conjugal rights, discussed through this paper regarding the Hindu Marriage Act in its Section 9. Though this is not the first time the lawfulness of this remedy has been discussed, the first question regarding its constitutionality was raised way back in 1983. It becomes even more important to discuss it today because of the liberal values we all hold dear concerning individual freedom. This paper firstly gives an introduction explaining the concept of restitution in brief. It then goes on to discuss three important judgments of different High Courts and the Apex Court when they gave their verdict on this matter. In the last section, I discuss all these cases in detail and try to explain why there is an urgent need to revisit this matter up close.

Keywords: Family, Husband, Wife, Conjugal Rights.

INTRODUCTION

Marriage is the sacred union between two souls. This union is emphasized, especially in Indian society, where it’s considered that both husband and wife accompany each other throughout seven lives. But due to the complex behaviour of humans, it is bound that differences, fights, arguments, and misunderstandings will accrue between both spouses. Sometimes, one party intentionally fails to complete their marital duties and desert the other spouse due to these differences. To maintain the aggrieved spouse and keep the scope open for reconciliation between the parties, the Legislature has provided the provision for restitution of conjugal rights.

TERMINOLOGY & MEANING

Breaking this term word by word, we get the words restitution and conjugal rights. According to

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¹ *Justice K.S. Puttaswamy vs. Union of India*, (2017) 10 SCC 1.

Legal Metry Law Journal (Volume 1, Issue 4)

Merriam Webster², restitution is a legal action that causes restoration of a previous state. Conjugal rights are the rights of a spouse to the society of the other spouse.³ Such a right is presumed to be conferred to the spouses by the very institution of marriage itself.⁴ The law of RCR stipulates that whenever either spouse withdraws without reasonable excuse, the aggrieved spouse may approach the appropriate court for a decree seeking RCR. This essentially means that the courts can direct the exiting spouse to live with their spouse again. Furthermore, the Code of Civil Procedure provides that resistance with such a declaration might result in the seizure of the property of the disobeying spouse.⁵

ORIGIN

This remedy does not originate from Common law. Rather, it dates back to the medieval Ecclesiastical Laws of England, which were not aware of any other matrimonial remedy of desertion, other than restitution. Earlier, this remedy was enforced by Ecclesiastical Courts, and later by ordinary courts. Traditionally, Hindu matrimonial law has never recognized this remedy. Yet it affirmed the wife's obligation to submit to her husband⁶. In India, this provision has been provided to various communities under their respective personal laws, such as Section 9 of the Hindu Marriage Act, Section 36 of the Parsi Marriage and Divorce Act, Section 22 of the Special Marriage Act (for civil marriages), and Section 32 of the Divorce Act (for Christians).

Ex facie, this provision seems to protect the marital institution, but in doing so, it directly involves courts interfering in someone's personal life. Lawmakers, as well as the courts, realized this. At the time when the Hindu Marriage Act was in the process of formation, various administrators had named this provision as a component for "legalized rape"⁷. In opposition to the remedy, Mr. Khardekar said that "to say the least this particular cause is uncouth, barbarous, and vulgar. That the government should be abettors in a form of legalized rape is something very shocking."⁸

• T. SAREETHA V. T. VENKATA SUBBAIAH

The mark of the lawfulness of this arrangement initially preceded the Andhra Pradesh High Court in 1983, when the Court discussed the lawfulness of the Hindu Marriage Act, particularly of Section

² *Deepali GunduSurvase vs. Kranti Junior Adhyapak Mahavidyalaya*, (2013) 10 SCC 324.

³ Merriam Webster, 'Restitution and Conjugal Rights' (1828) <[Dictionary by Merriam-Webster: America's most-trusted online dictionary](#)> accessed 15 January 15, 2022.

⁴ Saroj Rani vs. Sudarshan Kumar Chadha, (1984) AIR 1562.

⁵ The Code of Civil Procedure, 1908 (Act 5 of 1908).

⁶ *T. Sareetha v. T. Venkata Subbaiah*, (1983) AIR 1983 AP 356.

⁷ Parliament of India, Lok Sabha Debates 7626 (Lok Sabha Secretariat 1955).

⁸ Jaspal Singh, *Law of Marriage and Divorce in India*, (Delhi Pioneer Pub. 1983) 83.

9, in the case of T. Sareetha v. T. Venkata Subbaiah.⁹

The Court saw that sexual dwelling together structures an indistinguishable part for an announcement of RCR. Therefore, it grants the other spouse relief for the company and increases the right to have sexual relations with that spouse. With the implementation of this decree, sexual intercourse and the choice to permit one's body to be utilized as a vehicle for another's procreation are transferred from the individual to the State. For the specific performance of this decree, the Court can impose monetary approvals by seizure and sale of the respondent's property. Therefore, a decree for RCR gets reduced to achieve the goal of coercing the unwilling party to have sex against their will, with the decree-holder through the judicial process.

The Court noted that having autonomy for choosing sexual partners is one of the few features which sets humans apart from other animals. One's sexual articulation is essential to their personality, and it would be difficult to envision sexuality without consensual participation from the opposite gender. Taking away consent has severe consequences for the wife, as coerced sex is just as effective as consensual sex in producing a pregnancy. The procreation of the child takes place inside the female body. It is her flesh and blood. Even though it is so intimately related to her body, a decision of RCR excludes her.

The Court also analyzed Section 9 of the Act in respect of Article 21 of the Indian Constitution. Under Article 21 of the Constitution, the individual's right to life and freedom is protected against state interference. In short, its scope, by preventing the State from depriving someone of their life or individual liberty, except within the framework of the legally established procedure, is of paramount importance and has overwhelming constitutional importance.

Citing the case of Gobind v. State of MP¹⁰, where Justice Mathew held that "Article 21 embraces the right to privacy and human dignity and any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing", the Court established that Article 21 protects the right to privacy and promotes individual dignity as expressed in the preamble of our Constitution.

The Court saw that this cure is exclusively utilized by the husband and is seldom reported by the wife. This is mainly because of the physiological differences between a man and a woman. It is highly likely that by enforcing this decree, the wife's life changes irretrievably, whereas the husbands can remain as unchanged as it was before. Considering that the wife should bear and conceive a kid,

⁹ T. Sareetha (n 6).

¹⁰ Gobind vs. State of MP, (1975) 3 SCR 946.

treating the husband and wife, who are fundamentally unequal, Section 9 affronts the reasonable classification test and thus violates Article 14 of the Constitution.

The Court observed that a decree of RCR amounts to the severest type of legislative encroachment of individual character and person's zone of individual choices. Justice P.A. Choudary remarked that, in addition to losing control over her body, the victim is exposed to the humiliating act of sexual attack and the persuasive loss of her valuable right to choose if and when she should give birth to another person. In addition, the order for restitution of conjugal rights takes away the sufferer's autonomy of control over personal identity intimacies. Finally, it renders the reluctant victim's body heartless and dismal for bringing into reality another person.

Thus, the Court ruled that Section 9 of the Hindu Marriage Act encroaches on the right to security ensured under Article 21 of the Constitution. Therefore, it is constitutionally void.

- **HARVINDER KAUR V. HARMENDER SINGH¹¹**

Within a few months of the T. Sareetha decision, the constitutionality of Section 9 of the Act had been raised in front of the Delhi High Court in the case of Harvinder Kaur v. Harmender Singh. However, the Court took a different view this time.

The Court saw that the basic role of the restitution decree is to preserve the marriage and resume cohabitation between the estranged spouses to sort out their differences and live peacefully. Dissenting from the view of Justice Choudhary, the learned Court held that sexual intercourse does not form the core element of cohabitation. Justice A.B. Rohatgi explained that cohabitation entails the husband functioning as a husband to his wife and the wife behaving like a wife to her husband. It simply means, husband, caring and supporting his wife and the wife providing housewifely duties to the husband. Sexual intercourse may occur between the parties if they're cohabiting, but it does not mean that if the couple is not having sexual relations, they're not cohabiting. The court attempts to investigate the causes that led to the separation of the spouses and the investigation should only be limited to this fact. If the Court finds no valid reason for the withdrawing party to live separately, the Court directs the withdrawing party to resume cohabitation.

Justice Rohatgi stressed the importance of good divorce laws. Section 9 of the Act is structured around the fault theory, where after finding fault with the withdrawing spouse, the legislature gives them one year to resume their cohabitation, but when they do not comply, the marriage is declared dissolved. But the fault theory has completely failed and hasn't offered any solution to marriages on the rocks. On account of the fault concept, the Courts are sometimes constrained to assigning

¹¹ Harvinder Kaur vs. Harmender Singh, (1984) AIR 1984 Del 66.

faults to each spouse, an issue that, at times, becomes rather difficult for the average person to discern. If the parties disobey the decree for a year-long period and don't resume cohabitation, then it is the best proof of the end of a marriage. Section 13(1-A) and 13(iii) of the Act are a legislative recognition of the breakdown theory.

The Court explained the objective of good divorce laws in a twofold manner:

Firstly, to strengthen the stability of the marriage rather than undermine it. Section 9 seeks to achieve this objective. It's an underlying principle of matrimonial law that each spouse has a rightful claim to the comfort and society of the other. Earlier, when one spouse left the other for no reason, the old religious courts would, in line with the other, issue a declaration restoring marital rights. The Court enforces matrimonial cohabitation. Though the Court cannot compel the duty of marital intercourse, matrimonial cohabitation may.¹²

Secondly, if a marital tie has irretrievably broken down, allow the empty legal shell to be destroyed with maximum fairness and minimum bitterness, distress, and humiliation. In that case, this purpose is achieved by Section 13(1-A)(ii). Disobedience to an RCR decree may cause either spouse to divorce. Section 13(1-A)(ii) is founded on section 9, they're both one piece. The abolition of Section 9 will also entail the repeal of a liberal divorce law of Segment 13(1-A)(ii), the kindness is discarded with the awful.

The Court admitted a general outcry against RCR, but they described RCR as the venturing stone to the more genuine advance of separation, a visa to separate. Observing that the Indian Legislature thought that a sudden break up of marriage was not desirable. It believed in reconciliation. They maintained that the cooling-off period is not just desirable but essential. Dicta of eminent judges are all not in favour of the view that the declaration of RCR compels the wife "to have sex" with an "unwilling party". There has nothing been said along these lines in any case ever. Therefore, Section 9 does not violate Article 21 of the Constitution.

Justice Choudhary concluded that Article 14 of the Constitution of our country is being violated by Section 9 of this act. It has been observed that female spouses rarely file a suit for restitution. Countering this argument, Justice Rohatgi quoted the Amendment Act of 44 of 1964¹³, which allows "either party to a marriage" to introduce a petition based on Section 13(1-A)(ii). "The theory that one cannot take advantage of one's wrong has not been adhered to in the Hindu Marriage

¹² Forster vs. Forster, (1863) 4 B & S 187.

¹³ The Hindu Marriage (Amendment) Act, 1964 (Act 44 of 1964).

Act.”¹⁴.

There is all-out uniformity of the genders and equal security of the law. Thus, Section 9 does not infringe Article 14 of the Indian Constitution.

The Delhi High Court disagreed with the Madras High Court on the constitutionality of Section 9. The Court admitted that this provision may sometimes become out of date, but considered it as a tool to prepare for divorce if the parties fail to resolve their differences. The legislature believes that the withdrawing spouse should be encouraged and cajoled back into cohabitation. Although laws don't always follow logic, neither do human actions. Law is better worried about human conduct than logical laws. Assuming that human conduct stops to be legitimate, then, at that point, the law should adjust.

- **SAROJ RANI V. SUDARSHAN KUMAR CHADHA¹⁵**

This matter even came up before the Hon'ble Supreme Court. Breaking the tie between the Andhra Pradesh and Delhi High Courts, the Apex Court upheld the Delhi High Court's decision in this case.

The Court noted that conjugal rights in India are not simply a product of the law; this right is presumed to be conferred to the spouses by the very institution of marriage itself. The provisions of Section 9 are merely codifications of pre-existing laws. The shields in Section 9 keep it from turning into oppression. Throwing light on the Law Commission's Seventy-first Report where it had described the different aspects of sharing an ordinary life, the Court emphasized that living apart is the indication of disruption of the essence of marriage, the negation of sharing the happiness, misery, and all that the life has to offer. Therefore, RCR serves a social purpose by preventing marriage breakdowns.

Further, unlike the specific performance of contracts, RCRs can only be sanctioned by confiscating property, which follows willful conduct those results from disobedience, i.e., is purposeful, despite the valuable open doors and there could be no different obstacles that may be implemented by the capture of property. Article 9 cannot be interpreted as a violation of Article 14 or 21 when it takes into account the reason for the declaration for restitution of conjugal rights and how it is enforced in case of disobedience.

CONCLUSION & SUGGESTIONS

RCR as a remedy was challenged multiple times in various High Courts. The different views of the

¹⁴ The Hindu Marriage Act, 1955, 71st Report, 16 (Act 25 of 1955).

¹⁵ Saroj (n 4).

High Courts were settled by the Supreme Court in 1983 when it upheld the constitutionality of this remedy. While favoring the decision of the Delhi HC, the Supreme Court held that conjugal rights are inherently present in the marital institution itself. But this is not true, not at least in Indian society because this remedy has no relation with India's traditional Hindu or Muslim Law.¹⁶ Originally, this remedy was used when marriage was viewed as a property bargain where the wife was considered a possession like other goods. She was treated like a cow that could be roped back if she ran away from her master's shed.¹⁷ This fact itself casts serious doubt on the use of this remedy. It essentially treats a spouse as the property of the other by tying her to the marital life even if maltreatments are being subjected on her. In the present society, where bodily autonomy is emphasized¹⁸, where the right to move freely forms part of the fundamental rights¹⁹, this remedy mandates cattle-like treatment to the respondent party by coercing her to cohabit with the other party.

This matter was first augmented in front of the Andhra Pradesh High Court. The High Court recognized that sexual cohabitation is an essential component of a restitution order. Opposing this view, the Delhi HC had said that having sexual relations is only one of the many elements that make up a marriage. The Court only enquires into the causes that lead to the separation of parties. Here, the view of AP HC cannot be outrightly discarded because it is presumed in law that there is implied sexual intercourse between spouses when they're living under a roof. The Rajasthan High Court reiterated this principle in the case of *Indu Mishra v. Kovid Kumar Gaur*²⁰, where it was held that circumstantial evidence for proving adultery to the extent that the adulterer had lived with another person under one roof for a considerable period would suffice. So, sexual cohabitation does become an inseparable ingredient of this decree. Even the inquiry into the causes of separation constitutes a gross violation of privacy as enshrined in Article 21²¹ because the Court is delving into the private matters of a couple without the consent of the respondent party.

The Delhi HC termed the provision of restitution as good divorce law. Its objective is to strengthen the marriage and end the marital tie with minimum bitterness, distress, and humiliation. But this decree cannot fulfil the purposes mentioned above. The Court essentially coerces an unwilling person to cohabit with another party. This infringes the right to life of a person, as mentioned in Article 21, putting women in a graver position compared to men as they lose the right to privacy and autonomy on their bodies. Due to inter-gender dynamics, women are susceptible of forced

¹⁶ Paras Diwan, *Hindu Law* (Orient Publishing Company 2006) 689.

¹⁷ Paras Diwan, *Family Law* (Allahabad Law Agency 2018) 122.

¹⁸ Joseph Shine vs. Union of India, (2018) SCC OnLine SC 1676.

¹⁹ The Constitution of India, 1949, art. 21.

²⁰ Indu Mishra vs. Kovid Kumar Gaur, (2005) SCC OnLine Raj 110.

²¹ Justice (n 1).

sexual intercourse. The wife also can't complain about this issue because marital rape is not considered an offence in Indian law, as reiterated by the Chhattisgarh HC in the recent case of Dilip Pandey and others v. State of State Chhattisgarh.

The Delhi HC held that Section 9 does not violate Article 14 of the Constitution because Section 13(1-A) allows either spouse to present a petition for restitution. Thus, there is absolute uniformity of genders and equivalent security of laws. But this is true only on paper, not in reality. As observed by the AP HC, this remedy is indeed mostly taken by husbands rather than wives.²²

It is needed to keep in mind that seeking a remedy from the courts is seen as the last-ditch effort by the people in Indian society when they believe there is no further scope of reconciliation. This is well known for many reasons, such as court proceedings stretching over various months, if not years, expensive litigation fees, etc. And when it comes to marital life, where everyone prefers to keep privacy by not making the whole world know about the intimate details of one's life and resolve all the disputes with the help of family and friends, approaching the Court to resolve conflicts is never considered as a favoured option.

The Court does nothing more than sprinkling salt over the wound by instructing the respondent party (who has probably exhausted all the methods to conciliate with the petitioner) to cohabit with the petitioner under a common roof. Human beings are not mechanical; they are emotional entities. One can bring a horse to a pond, but it cannot be forced to consume water from the pond. It is more accurate, more so in the case of humans. A court award ordering restitution cannot suddenly make the aggrieved spouse forget about the emotional (actual or imaginary) misgivings meted out by the other spouse.²³

Further, by imposing a financial sanction, that too by confiscation and sale of property for specific performance of the decree by the respondent, the Court is severely infringing the right of personal liberty of the respondent. A marital institution is built on the ties of love and affection. In the cases of restitution, an unwilling party who the other party has most likely maltreated is forced to live together on the edge of the sword that if she does not comply with the decree, then her property will be seized. This is nothing but the grossest violation of the personal as well as sexual autonomy of an individual. This will only lead to the most painful and unpleasant end of an already broken marriage that will stretch for a year-long period.

While the Hindu Marriage Act had been drafted, RCR was not subjected to keen as well as fair-

²² National Commission for Women, *Equal Justice to Women: Role of Courts and Judges* (1999) 74; Gupte, *Hindu Law in British India* (2nd edn., 1955) 929.

²³ Raj Kumari Agarwala, 'Restitution of Conjugal Rights: A Plea for the Abolition of the Remedy' [1970] PL 257. Legal Metry Law Journal (Volume 1, Issue 4)

minded examination and was hastily duplicated from English law books. This provision was not discussed as energies within and outside the legislature were intensely focused on defending several other new provisions, including that of divorce.²⁴ Incidentally, the country where we derived this law has abolished it way back in 1970 by the Matrimonial Proceedings and Property Act, 1970.²⁵ This was done after only a year when England's Law Commission submitted its report in 1969. The grounds which favoured the abolition primarily revolved around the futility of the nature of the remedy because firstly, if RCR proceedings can be used to exhibit a life partner's endeavours to save the marriage by showing an ability to continue the conjugal coexistence, it can also be indicated in other ways. If the latter fail to bring in cohabitation, then it is unlikely that RCR would be sufficient. Secondly, It is hardly appropriate to force adults to live together as a means of resolving their problems. A similar trend has been followed in other Common Law countries such as Australia, Scotland, and South Africa.

Even the Law Commission of India in its Consultation Paper on 'Reforms on Family Law' of India²⁶, and the High-Level Committee on the 'Status of Women in India' instituted by the Ministry of Women and Child Development of the Government of India²⁷ has suggested for the abrogation of this cure, but the Legislature has not acted on these recommendations.

The provision of restitution infringes Articles 14 and 21 of the Constitution. It also does not have a place in the present world because if there is strength and life in a marital relationship, it will get into effect without any substantial intervention. Courts cannot compel the emotions of a married couple to accept each other. Hence, it is high time when this provision is abolished, either by the Supreme Court or the Parliament.

²⁴ Kanika Sharma, 'Restitution of Conjugal Rights: A Pernicious Legal Transplant' (Law & History Review 2020) <[Kanika Sharma: Restitution of Conjugal Rights: A Pernicious Legal Transplant – Law & History Review \(lawandhistoryreview.org\)](https://www.lawandhistoryreview.org/)> accessed 15 January 2022.

²⁵ Matrimonial Proceedings and Property Act, 1970.

²⁶ Law Commission of India, 'Consultation Paper on Reform of Family Law' (Government of India 2018) <[CPonReformFamilyLaw.pdf \(lawcommissionofindia.nic.in\)](https://lawcommissionofindia.nic.in/)> accessed 15 January 2022.

²⁷ Ministry of Women & Child Development, 'HLC on Status of Women' (2022) <[HLC on Status of Women | Ministry of Women & Child Development \(wcd.nic.in\)](https://wcd.nic.in/)> accessed 15 January 2022.