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Restitution of Conjugal Rights: Is it still relevant?

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ABSTRACT:

In this article we will study about restitution of conjugal rights. Conjugal Rights refers to those rights which are accrued upon the persons by status of being married. There has been a constant debate relating to constitutionality of restitution of conjugal rights, for this it is necessary to understand the topic in detail. There are certain elements which need to be proved that the rights of the person have been truly violated; these are that there should be actual withdrawal by either the husband or the wife, from the society of other partner, it should be without a reasonable cause. This decree ensures that the person can force his partner to live with him or her against that partners will. Thus, this act of forcing the person to live with the person against the will was challenged in the court of law. It was first observed in the case of T. Sareetha Vs T Subbaiha, in which the court held that the decree was unconstitutional as it is violative of certain rights of the person guaranteed under the Indian constitution, and it was immoral to force any person to live with a person against will. It was after some time that the High Court of Delhi in case of Harjinder Singh Vs Harvinder Kaur held that the decree was constitutional as it is a positive relief which aims to protect the marriage rather than end it on a small matter. This view of the High court was supported by the Supreme Court in the case of Saroj Rani vs Sudarshan Kumar Chadha, and it also declared the decree as constitutional and overruling judgement of the lower court given in the case of T. Sareetha Vs T. Subbaiha. In this article we will also study about decree for restitution of conjugal rights from an international perspective and also try to analyse the same from judicial as well as societal point of view to finally decide whether the same is still relevant in today's time or not.

I. INTRODUCTION

Concept of Restitution of Conjugal Rights is a consequence of a legal and a Valid marriage. So, what do we mean by Conjugal Rights? Conjugal Rights refers to the rights of the parties of a marriage to stay together. Thus, the concept of Restitution of Conjugal Rights raises the question that if one of the parties withdraws from the society of the other party, then the act of compelling that party to live with the other party is constitutional or unconstitutional? The courts have answered it in number of cases, it was first declared as unconstitutional in case of T Sareetha Vs T Subbaiha but now in the cases of Harvinder Kaur Vs Harminder Singh and Saroj Rani Vs Sudarshan Kumar Chadha, the court has taken a u turn and has declared it as constitutional and a positive relief. So, now let's understand the whole concept in detail.

II. EXPLANATION

The concept of degree of restitution of conjugal rights has been explained in section 9 of the Hindu Marriage Act, 1955. It states that restitution of conjugal rights is a relief given to the married person in case of withdrawal from society of other either by the husband or the wife without any just and reasonable ground. It was stated in the case of Ranjhana V. Kejriwal Vs Vinod Kumar Kejriwal that this decree is possible only in

case of a valid marriage and also possible in case of a voidable marriage as it is a valid marriage till a decree is passed against it but not in case of a void marriage.

Elements

1. Withdrawal from society;
2. Either by Husband or Wife;
3. Without any just and Reasonable Ground.

The term society means the companionship, cohabitation or consortium which a married person expects from the marriage. The other concept related to it is the concept of withdrawal from the society of other means withdrawal from the conjugal relationship. There is an exception to the concept that if withdrawal is for a just and reasonable ground then it would not amount to unreasonable withdrawal from the society. Some examples of reasonable excuse are;

a. Cruelty;

b. Impotency;

c. Act or conduct which makes it impossible for respondent to cohabit with the petitioner;

d. Demand for Dowry;

e. False accusations of Adultery;

f. Refusal to have sex.

Burden of Proof

Burden of Proof mainly refers to two things in context of this;

a. Initial burden is on the petitioner to prove that respondent has withdrawn from the society without any reasonable excuse;

b. If the petitioner is able to discharge its burden, then it shifts on to the respondent to prove that withdrawal was for a reasonable excuse.

III. LEGAL PROVISIONS IN INDIA RELATING TO RESTITUTION OF CONJUGAL RIGHTS

In India different personal laws prescribe different provisions relating to restitution of conjugal rights, the basic being that when either the husband or the wife withdraws from the society of other than the other person may move to the court for decree of restitution of conjugal rights. Some of the provisions are:

1. S.9 of HMA, 1955

2. S.22 Of Special Marriage Act, 1954
3. S. 32 Indian Divorce Act, 1869
4. S.36, Parsi Marriage and Divorce Act, 1936.

IV. RIGHT TO SET UP MATRIMONIAL HOME

Another point of contention is that can a husband force his wife to give up her employment and stay with him or can she stay where she is gainfully employed. The court has decided number of cases. The court adopted at first a conservative approach and in cases like Tirath Kaur Vs Kripal Singh and Surinder Kaur Vs Gurdeep Singh, the court held that if a wife takes a job away from matrimonial home without his consent, then she is said to withdraw from the husband society. The court in the case of Kailashwati Vs Ayodhya Pradesh, held that the taking up of job by wife in another village and only visiting on weekends was held to be not valid and it was held that it was withdrawal from society by the wife and thus a decree of restitution of conjugal rights was passed in favour of the husband. It was after some years that the courts started to take a progressive route and it was in the case of Swaraj Garg Vs K.M. Garg that the court held that taking up of a job by wife away from matrimonial home was valid. The facts of the case were that the wife got the job as a headmistress in a school and husband got a job in Delhi but did not had his own home. The wife visited him for sometime but then stopped after some time and husband filed for the decree but the courts held that it is not always wife who needs to resign from her jobs and if she is in better condition then com pared to husband then the husband be forced to resign and move in with the wife. Thus, a change was observed for the first time in the point of view of the courts.

V. NEED FOR RESTITUTION OF CONJUGAL RIGHTS

The need for Restitution of Conjugal Rights is an issue which has come into contention year after year. Some people consider it as a negative relief while on the other hand it is considered as a positive relief by some people as well. It is a sort of both according to us as, it being negative relief due to the forcing of a person to stay with the person without will, while on other hand it is considered as a positive relief as it is a tool which is used to protect marriages which in countries like India is considered more sacramental than a contract or any other thing. Marriage is seen as an eternal, unbreakable and indissoluble union which is formed in heaven and can't be broken by the humans. It is considered as a way to bring people withdrawing from the society of his or her partner back to their senses and come back home and perform their marital obligations. Thus, it is quite clear that there is a need of ROCR until the point of time that there is another law formed which could preserve the marriage of the persons more efficiently and in a more positive manner.

It is important to understand the need of Restitution of Conjugal Rights from a moral perspective as well. Looking at it, it may seem as violative of certain rights guaranteed by the Indian Constitution like Article 19(1) (c), I.e. Freedom of Association; Article 19(1) (g), I.e. Freedom to reside and settle in any part of India, and Article 19(1) (g) which guarantees right to profession, but on the contrary as we have studied above that marriage is considered as an important part in humans life and it is important to save it rather than being over conscious of the rights of the people sometimes some kind of persuasion or force is necessary to do something good fir the whole society even if it means looking bad or evil in the eyes of people of the world.

VI. INTERNATIONAL PERSPECTIVE

The concept of decree of Restitution of Conjugal Rights is an issue which has been of observed in whole of the world. In the following paragraphs we will study countries like U.K., Scotland, Ireland, South Africa, Canada.

1. **UK:** In English law there was a common belief that the decree for restitution of conjugal rights was the only matrimonial matter over which the ecclesiastical courts had jurisdiction. It was that it could be issued against the person, either the husband or wife who withdraws from the society of other without any good ground and if successful the parties would be forced to stay together. It was followed for a long period of time Beirut in 1969 a report was published by the law commission mission which recommended the abolition of the action and as a result it was abolished by the Matrimonial Proceedings Act, 1970.
2. **Scotland:** In Scotland the term used for restitution of conjugal Rights laws was “adherence” and it was abolished by section 2(1) of Law Reform Act, 1984.
3. **Ireland:** In Ireland it was abolished by the Family Laws Act, 1988 as it was considered unconstitutional by the courts in number of cases.
4. **South Africa:** It is another one of those countries which had got rid of the Restitution of Conjugal Rights in as early as 1979 through the Section 14 of the Divorce Act, 1979.
5. **Canada:** The family law in this country has varied from time to time, and till now it is continuously evolving but it is somewhat based on the common English Law. The Decree for Restitution of Conjugal Rights was considered as in law but not in all provinces of Canada but only in some and it was after the 20th century only that standardisation of Family Law has taken place and after that only Restitution of Conjugal Rights has been considered as a valid law in whole of Canada.

VII. JUDICIAL ANALYSIS: STRIKING A BALANCE BETWEEN INDIVIDUAL RIGHTS AND MORALITY

The interpretative aspect and constitutionality of Restitution of Conjugal Rights has been discussed at large in three cases by the hon'ble courts namely, *T. Sareetha vs. T. Venkata Subbaiah, Harvinder Kaur vs. Harmander Singh Choudhry* and *Sudharshan Kumar v Saroj Rani.*

In **T. Sareetha vs. T. Venkata Subbaiah[1],** it was observed **t**hat a decree for restitution of conjugal rights passed by a civil court extends not only to the grant of relief to the decree-holder to the company of the other spouse, but also embraces the right to have marital intercourse with the other party. The consequences of the enforcement of such a decree are firstly to transfer the choice to have or not to have marital intercourse to the State from the concerned individual and secondly, to surrender the choice of the individual to allow or not to allow one's body to be used as a vehicle for another human being's creation to the State. There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and the mind subjected, to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of such a person. No positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act. Therefore, the single judge bench of the hon'ble Andhra Pradesh HC ruled that **a decree for restitution of conjugal rights constitutes the grossest from of violation of an individual's right to privacy and human dignity** thus should be struck down as it violates Article 21 of the Constitution.

However, the Delhi HC at the same time had a different opinion regarding the constitutionality of Restitution of Conjugal Rights giving more emphasis to morality and the importance of marriage as a social institution which needs to be protected. Therefore, in **Harvinder Kaur vs. Harmander Singh Choudhry**[2] the court observed that the leading idea of section 9 is to preserve the marriage. The outstanding fact is that the husband and wife are living apart and leading their own separate lives. The court seeks to enquire into this separation. The inquiry into the affairs of the matrimonial life is to be confined to this one fact "Is there a just cause for the respondent to live apart and separate from the petitioning spouse?" Further delving into their matrimonial life is not necessary. The court also observed that it cannot enforce sexual intercourse, but only cohabitation, and restitution of conjugal rights can't be ordered where the respondent refuses sexual intercourse but continues to cohabit with the petitioner.[3] Section 9 in a sense is an extension of sub-sections (2) and (3) of section 23 of the

[1] AIR 1983 AP 356
[2] AIR 1984 Delhi 66
[3] Jackson v. Jackson (1924) Pro 19 (2).

Act which encourage reconciliation by the court. The court is enjoined to make every endeavour to bring about a reconciliation between the parties. The policy of the Act is to assist in the maintenance of marriages other than those reduced to a mere shell. The court further observed that in the legislative scheme it has a purpose to serve and a role to play, it allows the parties a cooling-off period. Therefore, it was ruled that it is for the Legislature to abolish the remedy of restitution and not for the courts to strike down section 9 on the ground that it is unconstitutional and section 9 was held perfectly valid.

Furthermore, to resolve the conflicting views of two HCs, the hon'ble SC finally took the matter of constitutionality of ROCR in **Sudharshan Kumar v Saroj Rani**[4]. The court in this case observed that conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself and further explaining the relevant section held that hat the court can only decree if there is no just reason for not passing decree for restitution of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of marriage. It cannot be viewed in the manner the learned single judge of Andhra Pradesh High Court has viewed it and therefore it is unable to accept the position that Section 9 of the said Act is violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in vie. Thus, resting the issue at hand.

As regards to the procedural aspect of ROCR, the Calcutta High Court in Mita Gupta v. Prabir Kumar Gupta[5] has ruled that mere non-compliance with the decree for restitution of conjugal rights would not, by itself, amount to any 'wrong' to disentitle the spouse, against whom the decree is passed, to obtain a divorce under Section 13(1A)(ii) of the Hindu Marriage Act, thus making it not necessary to comply with a ROCR decree.

The hon'ble SC in Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors[6]. also observed that matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights are non-arbitrable disputes, thus reducing the scope to decide such issues amicably between the parties concerned.

As regards to the recent trend of judicial decisions, the hon'ble SC is moving towards giving more importance to individual rights such as privacy over societal concepts such as morality.

In **Shafin Jahan v. Asokan**[7], the SC ruled that the choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which

[4] 1984 AIR 1562
[5] AIR 1989 Cal 248
[6] AIR 2011 SC 2507

is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. Social approval for intimate personal decisions is not the basis for recognising them.

Further, in **Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors.**[8] the court ruled that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity. Thus, again emphasising on the fact that individual choices must prevail over societal pressures.

Therefore, the judiciary is again reaching to the point in KS Puttuswamy from where it began in T Sareetha case where it was ruled that a decree of ROCR is violation of right to privacy, but at that time the same was not interpreted as a fundamental right within the ambit of Article 21.

VIII. CONCLUSION

It can be stated that the concept of Restitution of Conjugal Rights is based on good faith and intention to save a marriage from breaking down, with preserving the sanctity of marriage being its utmost priority. But at the same time, it does hinders upon right of an individual to be left alone as it may sometimes coerce an unwilling individual to cohabit with his or her partner and thus may intrude upon his/her privacy. Therefore, it brings out a delicate situation which needs to be looked upon by the courts carefully and a balance should be maintained between the two as following a strict approach on either side may prove to be fatal for both an individual or the society as a whole. Thus, to decide whether ROCR is still relevant or not, the courts should use their wise discretion and at the same time ensure utmost care and not indulge in judicial adventurism while it plays an active role in the society.

[7] AIR 2018 SC 1933
[8] AIR 2017 SC 4161