

---

## WOMEN, RESTITUTION OF CONJUGAL RIGHTS AND COLONIAL JUDICIARY: AN ANALYSIS OF CASE LAWS FROM 1853-1941

TAUSEEF FATIMA

---

**Abstract:** Law puts stress upon the sustenance of matrimonial relations, and for that the right to restitution of conjugal rights is exercised as a relief available to a husband or wife whose spouse refuses cohabitation without any reasonable ground. Though available to both the husband and wife, in practice, in most cases, it became a prerogative of husband against wife. The present paper attempts to trace the attitude of judiciary in the process of adjudication of cases relating to restitution of conjugal rights, and how far these judicial pronouncements contributed in the elevation of women's status. The paper limits itself to Hindu and Muslim law and the relative position of men and women as far as colonial judiciary is concerned.

**Keywords:** Colonial Courts, Law, Matrimonial, Restitution of Conjugal Rights

---

**Introduction:** The issue of conjugal rights is recognized in all the religions but with some minor difference. However, 'suits for restitution of conjugal rights were unknown in pre-colonial India'.<sup>[1]</sup> After the codification of Hindu law in independent India, Section 9 of the Hindu Marriage Act, 1956 dealt with it exclusively.<sup>[2]</sup> In colonial India right to restitution of conjugal rights was practiced among Muslims as well. The relief of restitution of conjugal rights might be said to envelope forced sexual relations with aggrieved spouse and was later described in the post-independent India as repugnant to the spirit of the Constitution of India.<sup>[3]</sup> Though the relief has enveloped much criticism and debate on the ground of it being violative of the constitutional principles, yet we could not do away with it. However, in English laws the remedy of restitution of conjugal rights has been abolished by Section 20 of the Matrimonial Proceedings and Property Act, 1970.

It is evident from the facts that peaceful sustenance of the matrimonial relations is one among the many objectives of the 'law' in colonial India. In pursuance of this objective courts conform to the patrilocal norms of society that expects wife to reside with the husband at his place after marriage. Moreover, it is incongruous to note that 'law', whose claim lies in its objectivity, neutrality, and in being value free, sustains and supports patriarchy in multiple ways, and one among them is the ways how right to restitution of conjugal rights is practiced by the courts in colonial India.

Among the possibly found cases, eleven cases dealt with the restitution of conjugal rights, and are analyzed in the present paper. Mostly, relief of the restitution of conjugal rights was sought by husband, and was not granted by the courts in cases of cruelty, dissolution of marriage after conversion to Islam, apostasy, repudiation of marriage after attaining puberty etc. It seems ironical that Court has taken shield of customary practices of a particular caste

when validity of divorce as per Hindu law was challenged. As we witness that reliance on the customary practices was not preferred by the judiciary after the codification of laws and the establishment of the High Courts. But here we do find that off late in 1941, the dependence of court on customary law is witnessed where existence of divorce was challenged as per the norms of Hindu law. So, one can discern that courts have shown inherent contradictions in some cases.

One also notices difference in the practices of lower and higher courts. Lower courts, often tried to be conformist to the practices and customs prevalent among the communities, where as higher courts, be it High Courts of various presidencies or the Privy Council tried to adhere to the notions of justice, equity and good conscience. But there also one finds variations as per the circumstances and facts of each case.

The suit where a Parsi wife sued for restitution of conjugal rights and for maintenance against her husband was of *Ardaseer Cursetjee vs. Perozeboye*.

<sup>[4]</sup>The husband protested the suit on the ground that the Supreme Court of Bombay had no jurisdiction to entertain such a suit. On appeal Privy Council accepted this plea of husband, and thus claim of the wife failed. However, wife was directed to apply for adequate relief in a civil court against her husband. But the notion was upheld that courts in India, on the Ecclesiastical side, should not entertain such suits.<sup>[5]</sup>

Next was the much celebrated case of *Moonshee Buzloor Ruheem vs. Shumsoonnissa Begum*,<sup>[6]</sup> where Privy Council observed that a Muhammadan husband may institute a suit in the Civil Courts of India to enforce his marital rights. However, if there be cruelty or gross failure by the husband of the performance of obligations and duties which the marriage contract imposes on him for the benefit of wife, the Court may refuse the relief of restitution of conjugal rights. In the present case the question of

cruelty was not properly entered into, but on the ground of the conduct of husband towards wife, the Judicial Committee declined to direct the wife to be sent back to her husband.

In case of Bai Parwati, wife of Mansukh Jetha vs. Ghanchi Mansukh Jetha,<sup>[7]</sup> a decree for restitution of conjugal rights was passed in favour of plaintiff, the husband by the lower appellate court. The plaintiff Ganchi was married to Bai Parwati in the year 1908. For about two years after marriage, Bai Parwati lived with her husband and then she was convicted on a charge of administering poison to her husband and father-in-law and was sentenced to three years rigorous imprisonment. On her return from jail she lived with her maternal uncle. In 1917 the plaintiff filed a suit for restitution of conjugal rights. Bai Parwati, contended that the plaintiff and his brother ill-treated her and that she apprehended imminent danger to her life by the treatment of her husband. The Subordinate judge at Ahmadabad dismissed the suit on the ground that ill-treatment alleged by was proved. On appeal, the Assistant judge reversed the decree and directed the wife to cohabit with her husband and in event of willful disobedience of the court's order, the wife will be sent to jail as she had suffered rigorous imprisonment for three years on a criminal charge and was quite accustomed to that life. On appeal to the High court, it was held that the wife should not be sent to jail. If she refuses to follow the decree, it will be sufficient consequence that she could not claim maintenance from her husband. The statement of the Chief Justice Norman Macleod made in 1920 hold importance in this context where he showed reluctance in sending women to jail in civil matters as it was against the tendency of modern legislation. He further stated:

'It may be said that decrees for restitution of conjugal rights are of a particular nature, that the law recognizes that the husband is entitled to have his wife living with him, and that the only way to enforce obedience to such an order would be by ordering the detention of the wife in prison if she refuses to comply with the decree. But the days are past when the wife was considered as a mere slave or chattel of the husband. In my opinion a decree for the restitution of conjugal rights is a relic from the barbarous and middle ages. It is recognized, and has been recognized for many years in England, that a decree for restitution of conjugal rights is merely preliminary step to enable a wife to get a divorce when she would not otherwise be able to do so, since the refusal of the husband to obey a decree for restitution of conjugal rights is considered as desertion, and desertion equivalent to cruelty, and therefore such desertion, coupled with adultery, will be sufficient to enable a wife to get a decree for

divorce. That is only use to which proceedings for restitution of conjugal rights are now put in England. In this country they may be used by the husband as a means for preventing the wife from claiming maintenance, since if the court passes an order against a wife to go and live with her husband and if she refuses to do so, she is debarred herself from making any claim to maintenance...'<sup>[8]</sup>

In case of Aziz Banu vs. Mohammad Ibrahim Husain<sup>[9]</sup> an appeal arose against a decree for restitution of conjugal rights where wife claimed that marriage between a shia and sunni cannot be a legal valid marriage, as it was contracted by her father in her minority, she repudiated the marriage on attaining puberty. Both the lower courts had decreed the claim of the plaintiff i.e. her husband for the restitution of conjugal rights. Justice Sulaiman and Justice Mukherjee had gone in detail regarding the question of the validity of marriage between a shia and sunni, and expounded it legal. But acting upon the principle of justice, equity and good conscience, the Court observed that wife had an option of repudiation which has been duly exercised, and thus marriage did not subsist, and the decrees of the Courts below were set aside.

Husband's suit for restitution of conjugal rights failed in case of Haripada Roy vs. Krishna Benode Roy and others<sup>[10]</sup> where wife first converted to Muhammadanism, and pleaded and thus attained a decree for dissolution of her marriage with the plaintiff. She later reverted back to Hinduism and then married to another Hindu person. It was contended on behalf of husband that when his wife reverted back to Hinduism, decree for dissolution of marriage became inoperative. But Calcutta High Court declared marriage as dissolved for all time to come and suit for restitution of conjugal rights failed. Bombay High Court upheld the customary practice of a particular caste of Ahmedabad as late in 1941. In case of Jina Magan Pakhali vs. Bai Jethi<sup>[11]</sup> husband filed for restitution of conjugal rights while wife contended that she had already been divorced from plaintiff. On behalf of husband it was contended that the institution of divorce itself is opposed to the spirit of Hindu law. But the Court attached more weight to the practice of the caste to which parties belonged to, and among them custom of divorce was well established. Free and Voluntary consent of the husband to divorce was also proved, thus, divorce being legal and valid, husband was not entitled to the relief of restitution of conjugal rights.

The normal exercise of the right to restitution of conjugal rights demands the wife to reside with husband at his house. However, we have a found a case where exceptionally lower court has asked the husband to reside with wife at her father's house, but

later on the appeal to restitution of conjugal rights was dismissed by Allahabad High Court. The reason behind this exceptional treatment was the cruel and violent behavior of husband towards wife. Generally, the attempt of the courts is to make reconciliation between the parties by bringing them together. But the High Court here had different ruling in case of a callous and unkind husband. In case of Mt. Khurshedi Begam (Defendant- Appellant) vs. Khurshed Ali (Plaintiff- Respondent)[12] appeal arose out of a suit for the restitution of conjugal rights instituted by the plaintiff Khurshed Ali, against his wife, Khurshedi Begam, and her father Hashmat Ali. It became clear from the facts of the case that his wife Khurshedi Begam owned property worth about Rs. 20,000 which she had inherited from her maternal grandfather and from her former husband. Plaintiff seemed to have persuaded his wife to execute a power of attorney in his favour to enable him to manage her property. He began misappropriation of her property, and on her refusal to consent to the sale arrangement, he began to abuse and ill-treat her as alleged by the defendant. His violent behavior compelled the wife to seek refuge at her father's place. On 2<sup>nd</sup> June 1911, Mr. Pearson, Magistrate of Meerut, ordered the husband to furnish security for keeping peace, to prevent him from committing acts of violence against the wife or her father. The plaintiff had on his part filed this suit for the restitution of conjugal rights. The Court of first instance dismissed the suit, whereas on appeal the claim for restitution of conjugal rights was decreed subject to the condition that the husband will not remove wife from her own house where she resides unless she herself agrees to that. The defendants are enjoined to allow the plaintiff to live with and exercise all the conjugal rights with his wife wherever she lives. The wife has appealed against this decree in the Allahabad High Court. The Court observed that it was evident from the finding and the circumstances of the case that the husband was a selfish and unscrupulous young man who cared more for his wife's property rather than her, and who did not hesitate to resort to violence and abuse to coerce her into yielding his views regarding misappropriation of property. He made her life in her husband's house intolerable and unbearable and compelled her to seek refuge and safety in her father's house. It was not safe under the present circumstances to leave the young wife to the tender mercies of an ill-tempered and unkind husband. The High court observed that danger and apprehension of cruelty and ill-treatment of the wife by the husband existed in about the same degree whether she lived at the husband's house or at hers. Therefore, the Court refused to grant to the plaintiff the relief of the restitution of conjugal rights. Thus

the conditional grant of the restitution of conjugal rights by the lower appellate court where wife was asked to receive husband at her place and to fulfill her conjugal duties was reversed, and the Court refused to grant to the plaintiff the relief of restitution of conjugal rights. We notice that the lower courts were ore conformist to the authority of husband over wife's person as a norm prevalent among the community and upheld the same. But the High court was more concerned about the safety of the wife, and refused to grant the relief to the husband.

Another case where cruelty towards wife made the court refuse the right to restitution of conjugal rights was of Bhawani Prasad vs. Subhagi and others.[13] It was observed by the Court that where a Hindu husband starved his wife, did not give her proper clothing, shut her up every time he went out of the house and frequently used personal violence to her and was proved to have turned her out more than once from his house, there was legal cruelty in as much as the facts were of such character as to endanger the personal health, if not the safety of wife. One of the circumstances which justified desertion by a wife under the Hindu law was cruelty in a degree which rendered it unsafe for the wife to return to her husband. Thus the plea for restitution of conjugal rights failed.

**Conclusion:** Number of cases came before the courts where issue of conversion and apostasy was involved. One such case was Amin Beg vs. Musammat Saman.[14] The husband and wife being Muhammadans were married a number of years ago. The wife has apostatized from Islam and become a Christian, and has since left the protection of her husband. He has sued for the restitution of conjugal rights, whereas wife contended that by the fact of her apostasy the marriage tie became dissolved and a decree cannot be passed for restitution of such rights. The Court consulted the works of Amir Ali, Bailei, Hamilton etc, and came to the conclusion that authorities on the issue provided that if a Muslim husband or wife apostatize from Islam, the apostasy has the effect of dissolving the marriage tie between the parties. Therefore appeal of the husband was dismissed. Another case of such nature was of Mt. Resham Bibi vs. Khuda Bakhsh[15] where wife has become an apostate while husband was bent upon asserting his conjugal rights against her. The Lahore High Court had granted the declaration that plaintiff's marriage stood dissolved as soon as she became an apostate.

In case of Hanna Sheikh and others vs. Jurro Sheikh [16] it was observed that in a suit for restitution of conjugal rights by a Muhammadan husband against his wife the plaintiff must establish the requirements

of a valid Muhammadan marriage. The issue was of consent on behalf of the minor, and it has been argued that if the consent was given by mother of the minor, the marriage was invalid.

Wife's right to reside in the parental home was argued in case of Imam Ali Patwari vs. Arfatunnesa and another.[17] The present appeal arose out of a suit for restitution of conjugal rights brought by the plaintiff, a Muhammadan against his wife. The wife asserted that at the time of marriage it was agreed by a kabinnama (deed of marriage settlement prior to

the marriage ceremony) that the husband would reside with the wife in her parent's house, and in case he did not act according to the agreement, she would have the power to divorce him. Such a condition and agreement was held to be void. The High Court passed a decree against wife for restitution of conjugal rights. But before the execution of decree, plaintiff had to satisfy the Court of first instance about the fulfillment of the two conditions i.e. payment of prompt dower, and separate residence for the wife.

### References:

1. Padma Anagol, 'Rebellious Wives and Dysfunctional Marriages: Indian Women's Discourses and Participation in the Debates over Restitution of Conjugal Rights and the Child Marriage Controversy in the 1880s and 1890s', Sumit Sarkar and Tanika Sarkar (eds.), *Women and Social Reform in Modern India: A Reader*, Vol. I, Permanent Black, 2007, p.428.
2. '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 courts on being satisfied of truth of the statement 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.' Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency, 2002, p.156.
3. Tahir Mahmood, 'Two Striking Judicial Rulings of 1983', *Islamic and Comparative Law Quarterly*, Vol. III, No. 4, December, 1983, p. 261.
4. Moore's Indian Appeals, Vol.6, 1856, pp. 233-263.
5. For detailed analysis of this case, see, Padma Anagol, op.cit., pp.430-431.
6. Moore's Indian Appelas, Vol.11, 1867, 551.
7. The Indian Law Reports: Bombay Series, Vol. XLIV, 1920, pp. 972-977.
8. Ibid., p.975
9. The All India Reporter 1925 Allahabad 720 cited from -<http://indiankanoon.org/doc/388462/>.
10. The All India Reporter 1939 Calcutta 430 cited from -<http://indiankanoon.org/doc/1288848/>.
11. (1941) 43 The Bombay Law Reporter 651 cited from - <http://indiankanoon.org/doc/917309/>.
12. The All India Reporter 1914 Allahabad pp.452-457.
13. The All India Reporter 1914 Allahabad 308.
14. Indian Kanoon- <http://indiankanoon.org/doc/919484/>.
15. The All India Reporter 1938 Lahore 482.
16. The All India Reporter 1914 Calcutta, pp. 392-393.
17. AIR 1916 Calcutta, pp. 223-224.

\*\*\*

Tauseef Fatima/Guest Faculty/  
Centre for Women's Studies/  
Aligarh Muslim University/Aligarh/  
Uttar Pradesh/ tauseeffatima21@yahoo.com