



Restitution of Conjugal Rights under Muslim Law: Reassessing Personal Law through a Human Rights Lens

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Date of Submission: 03-05-2026

Date of Acceptance: 13-05-2026

Abstract

Marriage under Muslim law is regarded as both a social institution and a legal relationship founded on mutual rights and obligations. Among the remedies available for the preservation of matrimonial relations is the doctrine of restitution of conjugal rights, which enables an aggrieved spouse to seek judicial intervention when the other spouse withdraws from cohabitation without reasonable cause. Traditionally, this remedy has been justified as a means of protecting the sanctity of marriage and ensuring marital companionship.

However, in contemporary legal discourse, the remedy of restitution of conjugal rights has attracted significant criticism from the perspective of human rights, gender justice, privacy, dignity, and individual autonomy. The enforcement of cohabitation through judicial decree raises important constitutional and ethical concerns, particularly in relation to the rights of women under Muslim personal law. This study critically examines the concept of restitution of conjugal rights under Muslim law by analysing its legal foundations, judicial interpretations, and compatibility with modern human rights principles. The paper further evaluates whether the remedy continues to serve a legitimate social purpose in light of evolving constitutional values and international human rights standards.

Keywords: Restitution of Conjugal Rights, Muslim Personal Law, Human Rights, Gender Justice, Constitutional Rights, Privacy and Dignity.

I. Introduction

Marriage according to the Muslim law is not a sacrament but a civil contract.¹ All the rights and obligations it creates arise immediately and, are not dependent on any condition precedent such as the payment of dower by husband to a wife.² The concept of matrimonial remedies is an indigenous

part of family laws of every religion. Like other rights, restitution of conjugal rights is one of the matrimonial remedies. One of the important obligations of marriage is consortium, which does not mean simply living together but implies a union of fortunes.

A marriage under Muslim law is essentially a contract and a suit for restitution of conjugal rights would be a suit for the specific performance of the terms of the marriage contract. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other. The Muslim law does not specifically provide for the matrimonial relief of restitution of conjugal rights. However, where a wife without lawful cause refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights³, and similarly the wife has the right to demand the fulfillment by the husband of his marital duties.⁴

The Quran enjoins husbands to retain their wives kindness and to part with them with an equal consideration.⁵ Whenever a case of this nature arises it is to be borne in mind that as the Muslim husband is dominant in matrimonial matters the court leans in favour of the wife and requires strict proof of all allegations necessary for matrimonial relief.⁶

II. Meaning and Key Concepts of Nikah (Marriage)

'Nikah' literally means 'to tie up together' and referred to the Islamic marriage. It is a matrimonial contract as well as an institution that gives the women a particular and high status in the society. Nikah was to ensure stability in a married life as it bound both the partners together for an indefinite

¹ Sir Dinshaw Fardunji Mulla, *Mulla Principles of Mahomedan Law* 329 (LexisNexis, Gurgaon, 20th edn., 2014).

² *Abdul Kadir v. Salima* (1886) 8 All. 149.

³ Sir Dinshaw Fardunji Mulla, *opcit*, at 367.

⁴ Tahir Mahmood (ed.), *Asaf A.A. Fyzee Outlines of Mohammadan Law* 91 (Oxford University Press, New Delhi, 5th edn., 2008).

⁵ Quran LXII : 2.

⁶ *Abdul Rahiman v. Aminabai*, (1935) 59 Bom. 426.



period and also required the woman to be honoured with the mahr.⁷

In *Hedaya*, it is defined as:

“Nikah in its primitive sense means carnal conjunction.”

Justice Mahmood defines:

“A Muslim marriage as a civil contract upon the completion of which by proposal and acceptance all the rights and obligations, which it creates, arise immediately and simultaneously.”

The **Prophet Mohammad** (s.a.w.) of Islam is reported to have said:

“That Marriage is my sunna and those who do not follow this way of life are not my followers.”

Restitution of conjugal rights means restoring the right of a spouse to live with the other. In every marriage it is implied that husband and wife both have legal right to cohabit and live together.⁸ The concept of Restitution of Conjugal Rights under which after solemnization of marriage if any spouse lives separately without any reasonable excuse and deprives the other from his or her company, the other spouse is deprived of his or her legal conjugal right. Such other aggrieved spouse is then entitled to file a suit against the party who lives separately; the aggrieved party has a legal right to file a petition in the matrimonial court for restitution of conjugal rights. This right can be granted to any of the spouse.⁹

III. Origin of Restitution of Conjugal Rights

The principle of restitution of conjugal rights has been borrowed into Indian laws from

⁷ Marriage under Muslim Law, available at: <https://kanwarn.wordpress.com/2010/11/25/marriage-under-muslim-law/>, (last visited 14th March, 2017).

⁸ Restitution of Conjugal Rights under Muslim Law in India, available at: <http://www.shareyouressays.com/117531/restitution-of-conjugal-rights-under-muslim-law-in-india>, (last visited 15th March, 2017).

⁹ Saloni Tuteja, Restitution of Conjugal Rights: Criticism Revisited, available at: <http://www.legalserviceindia.com/articles/abol.htm>, (last visited 15th March, 2017).

English law.¹⁰ In English law, wife and husband were treated as a single entity and therefore a wife could not sue her husband or vice versa.¹¹ The remedy for restitution for conjugal rights owes its origin to the Ecclesiastical Courts of the West. Such courts by decree of restitution of conjugal rights compelled the recalcitrant spouse to discharge the due obligation towards the complaining spouse. Later in England the remedy was recognized by the various Matrimonial Causes Acts passed from time to time.¹²

From England these rights passed on to her various colonies onto which her Anglo-Saxon jurisprudence was grafted and India was no exception in this regard. The provision was never a part of Muslim, Hindu, Sikh or Parsi Law, but the British imported it into India, through judicial pronouncements.

IV. Grounds for Restitution of Conjugal Rights

If either party to a marriage contract has withdrawn from the society of the other without any valid reason, or has neglected to perform the marital obligations, the aggrieved party may bring a suit in a civil court for the restitution of conjugal rights. Thus, where a wife refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights.¹³ The conceptualization of the provision for restitution of conjugal rights under Muslim law by *Tayabji* is as follows:

“Where either the husband or wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage, the court may decree restitution of conjugal rights, may put either party on terms securing to the other the enjoyment of his or her rights”

Thus, the Muslims equate this concept with securing to the other spouse the enjoyment of his or her legal

¹⁰ A.M. Bhattacharjee, *Matrimonial Laws and the Constitution* 17 (Eastern Law House, Calcutta, 1996).

¹¹ Paras Diwan, *Family Law* 113 (Allahabad Law Agency, Faridabad, 1998).

¹² Hari Sangu Gour, *The Hindu Code* 978 (Law Publishers Pvt. Ltd, Allahabad, 2002).

¹³ V.P. Bharatiya, *Syed Khalid Rashid's Muslim Law* 68-69 (Eastern Book Company, Lucknow, 4th edn., 2008).



rights. Earlier, it was also attached with the specific performance of the contract of marriage. In *Abdul Kadir v. Salima*¹⁴, the Allahbad High Court decided that:

“the concept of restitution must be decided on the principles of Muslim Law and not on the basis on justice, equity and good conscience.”

If the husband either deserts a wife or neglects to perform his marital obligations without any proper reason, then the wife can apply for restitution of conjugal rights. But the court can refuse to grant order of restitution of conjugal rights for following reasons:

1. Cruelty by husband or in-laws;
2. On the failure by the husband to perform marital obligations;
3. On non-payment of prompt dower by the husband;
4. Suit for Restitution of Conjugal Rights

V. Defences against restitution conjugal rights

There are number of valid defences available to a wife in a suit for restitution of conjugal right. These are as follows:

- a. **Legal Cruelty:** The court leans in favour of the wife and the law recognizes circumstances which would justify her in refusing to live with him. Hence, in a husband's suit for restitution, the wife may take the plea of legal cruelty by her husband.¹⁵ To prove this fact, it is essential for wife to prove and show that there was actual or reasonable apprehension of violence or any other act of such a nature as to endanger her personal health or safety. Any reprehensible conduct on the part of the husband, if properly proved, affords a good ground for refusal of a decree for restitution of conjugal rights.¹⁶ Wife cannot be compelled to live with her husband, if she has a reasonable apprehension that living with her husband would be unsafe for the wife. The relief of granting restitution of conjugal rights in

husband's suit means ordering of an unwilling wife to live with her husband.¹⁷

There are number of valid defences to a suit for restitution of conjugal rights and we shall now consider some of the most important among them. The leading case on the restitution of conjugal rights is *Moonshee Buzloor Ruheem v. Shamsoonnissa Begum*¹⁸, in this case the court held that:

“a suit for restitution of conjugal rights would lie in a Civil Court by a Muslim husband to enforce his marital rights, but if there were cruelty to a decree rendering it unsafe for her to return to his dominion, or if there was a gross failure on his part to perform the obligations imposed on him by the marriage contract, the Court would be justified in returning such relief.”

In *Anis Begum v. Muhammad Istafa*¹⁹, it was laid down by *Sulaiman C.J.*, that the Courts in this country have a large discretion when a suit is brought for restitution of conjugal rights. In this case, the husband was keeping a mistress in the same house with his wife and whenever there were quarrels, his behavior with his wife used to be cruel. The Court decreed restitution of conjugal rights in favour of the husband but imposed conditions on the husband, viz.,

- i. He would not keep any mistress in the house;
 - ii. A separate house would be provided for the wife; and
 - iii. He would provide two servants for her choice for her personal safety.
- According Muslim law, a wife would not be entitled successfully to defend a suit for restitution of conjugal rights on the basis of a simple fact that the

¹⁴ (1886) 8 All. 149.

¹⁵ Iqbal Ali Khan, *Aqil Ahmad Mohammedan Law* 136 (Central Law Agency, Allahabad, 25th edn., 2013).

¹⁶ *Khurshed Begum v. Abdul Rashid*, AIR 1927 Nag. 139.

¹⁷ *Shahila Bano v. Gulam Mustafa*, AIR 1971 Bom. 166.

¹⁸ (1976) 11 MIA 551.

¹⁹ (1933) 55 All 743.



husband has another wife. A husband's second marriage may in certain circumstances, involve cruelty to first wife, justifying her refusal to live with him.²⁰ Thus, the position is that a decree for restitution of conjugal rights can be passed even though the husband has another wife. But the matter is quite different when one has to consider the provisions of Section 125 of the Criminal Procedure Code, 1973.²¹ The explanation of Section 125 (3) makes it abundantly clear that if the husband had contracted a marriage with another woman, then that itself would be just ground for his wife for refusal to live with him.²²

In *Itwari v. Asghari*²³, it was laid down that in a suit for restitution of conjugal rights by a Muslim husband against the first wife after he has taken a second, if the Court feels that the circumstances are such as to make it inequitable for the Court to compel the first wife to live with him, it will refuse such relief. Muslim law permits polygamy but does not encourage it and the Quranic injunction show that in practice perfect equality of treatment on the part of the husband is, for all practical purposes, impossible of achievement. Hence, Muslim law, as enforced in India has considered polygamy as an institution to be tolerated but not encouraged. This strong judgment shows clearly that since the passing of Dissolution of Muslim Marriage Act, 1939, the Courts have learned heavily in favour of the wife in all such cases and restitution cannot be had by the husband unless the wife is clearly in the wrong. Some of the valid grounds to prove legal cruelty may be such as:

1. Unfounded accusation of adultery against his wife;
2. Institution of various civil and criminal cases against the wife;

3. Grievous chastisement;
4. Gross failure of the husband in the performance of the obligations and duties which are imposed by a valid marriage contact for the benefit of the wife;²⁴
5. Trying to enforce the wife to sign deeds disposing of property and on her refusing to do so, beating and abusing her;
6. Agreement to divorce;
7. Ex-communication of husband;
8. Impotency.

In *Raj Mohd. v. Saeeda Amina Begum*²⁵, where the petitioner husband took a second wife during the proceedings for restitution of conjugal rights filed by him, the Court held that:

"the husband's suit was not bonafide, and he was not entitled to the relief."

In *Nazrul Islam v. Mustt Sajeda Begum*²⁶, in this case the parties were living separately since 1966, the wife filed maintenance claim under Section 125 of Criminal Procedure Code, 1973, which was granted and the husband was directed to pay Rs. 500/- p.m. to each of the daughters residing with the wife. In the year 1988 the husband sent her a *Talaqnama* divorcing her as per Muslim law. The wife even accepted the same. Thereafter, she filed an application for setting aside the *Talaqnama*, and for a decree of restitution of conjugal rights which was granted by family court. On appeal against this by the husband, it was held that:

"the facts and circumstances of the case clearly indicated that the marriage is practically dead, and so it was better to end it."

In *Abdul Moin v. Rafia Bano*²⁷, in this case the petitioner has clean antecedents and has never been involved in any criminal activities. The marriage was duly solemnized between the parties. The wife since the day one of the said marriage started demanding a separate house. However, the wife picked up

²⁰ Tahir Mahmood (ed.), *opcit*, at 91.

²¹ Sir Dinshaw Fardunji Mulla, *opcit*, at 367.

²² See B.M. Prasad and Manish Mohan, *Ratanlal & Dhirajlal The Code of Criminal Procedure* 132-153 (LexisNexis, Gurgaon, 21st edn., 2014).

²³ AIR 1960 All 684.

²⁴ (1867) 11 MIA 551.

²⁵ AIR 1976 Kant. 200.

²⁶ AIR 2006 Gau. 159.

²⁷ 13th March, 2014.



quarrel with the husband and his family members. Wife started openly threatening the husband and his family members of committing suicide. However, the husband facing acute financial problem therefore he was unable to provide her separate residence. In the meantime, they had one daughter. But the behavior of the wife still not changed towards her husband and his family members. She refused to live in her conjugal home and get back to her parent's house with her daughter. The husband filed a petition for restitution of conjugal rights. Court passed the decree of restitution of conjugal rights in favour of the husband and against the wife.

In *Mohd. Haroon v. Mrs. Shabnam*²⁸, the marriage was solemnized between the parties. Since, the inception of the marriage the behavior of the wife was not proper and she used to misbehave with her husband and in-laws. The family members of the wife started pressurizing the husband to live separately with wife at the parental home of the wife after disposing of the property. But the husband refused to do so. The wife along with her mother went to her parental home after assuring to comeback, but she did not come back to her matrimonial home. The husband filed petition for restitution of conjugal rights. The court ordered in favour of the husband.

In a husband's suit for restitution of conjugal rights, wife's evidence about cruelty does not require corroboration because corroboration is not required in civil cases. But she will have to prove both physical and legal cruelty.

2. **False charge of adultery:** A false charge of adultery by a husband against his wife is a valid defence for the wife in a restitution suit by her husband.²⁹ But if the wife is actually living in adultery, and the charges proved to be true, it will not be a proper defence, and the husband is entitled to the decree sought for.³⁰
3. **Non-payment of prompt dower:** The wife may take the defence that her refusal of the society of her husband is due to the fact that she has not been paid her prompt dower on demand. This plea will not overthrow the suit for restitution but a decree conditional on this payment may be passed, if the marriage has been consummated. If the marriage has not been consummated, non-payment of dower is a complete defence to the suit. Muslim law entitled the wife to resist the claim of the husband for cohabitation with her by pleading non-payment of her prompt dower. If the suit for restitution is brought after sexual intercourse has taken place with her full consent the proper decree to pass is not a decree of dismissal but a decree for restitution conditional on payment of prompt dower.
4. **Ex-communication:** When the husband has been expelled from the caste, the suit for restitution may be refused to the husband. The Bombay in *Bai Jina v. Kharwa Jina*³¹, where the parties belonged to the Muslim Kharwa community of Baroach, the High Court refused to pass a decree for restitution of conjugal rights against the wife, on the ground that the husband having been

²⁸ 24th March, 2012.

²⁹ *Musammatt Maqboolan v. Ramzan* (1927) 2 Luck. 482, 101 I.C. 261.

³⁰ *Jamiruddin v. Sahara* (1927) 54 Cal. 363, 101 I.C. 60.

³¹ (1907) 31 Bom. 366.



expelled from the caste, the wife was not bound to live with him.

5. Agreement enabling wife to live separate from the husband:

Valid ante-nuptial or post-nuptial agreements may also be set up in the defence. But void agreements would be of no avail. An ante-nuptial agreement enabling the wife to divorce herself would be a good defence.

But an agreement entered into by the parties that the wife shall be at her liberty to live with her parent after marriage is void and it will be no defence for her against the suit for restitution. In *Abdul v. Hussenbi*³², in this case court held that:

"an agreement entered into before the marriage by which it is provided that the wife should be at liberty to live with her parents after marriage is void, and does not afford an answer to a suit for restitution of conjugal rights."

In **Meherally v. Sakerkhanoobai**, Court held that:

"an agreement, entered into after marriage between a husband and wife who were for some time before the date of the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, she should be free to leave him, is void, and it is not a defence to the husband's suit for restitution of conjugal rights."

6. Lian and Zihar: When it is improper for the husband and wife to cohabit, a suit for restitution would fail.

7. Apostasy: Before the Dissolution of Muslim Marriage Act, 1939, apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of

the marriage.³³ Now Section 4 of the Dissolution of Muslim Marriage Act, 1939 applies to the case of apostasy from Islam of a married Muslim woman, and atopsy of the Muslim husband would still operate as a complete and immediate dissolution of the marriage.³⁴ Thus, Apostasy affords a good and valid defence against the suit for restitution.

8. Repudiation of marriage: In her defence the girl may exercise her option to repudiation of marriage and may thus absolve herself from the suit for restitution.³⁵ According to Section 2 (vii) of the Dissolution of Muslim Marriage Act, 1939, a wife is entitled to the dissolution of her marriage if she proves the following facts, namely:

- i. the marriage has not been consummated;
- ii. the marriage took place before she attained the age of 15 years; and
- iii. she has repudiated the marriage before attaining the age of 18 years.

9. Impotency of husband: This may also serve as a good defence against the suit of restitution of conjugal rights. The wife is entitled to obtain a decree for the dissolution of marriage if the husband was impotent at the time of the marriage and continues to be so.³⁶

10. Payment of dower money: Under the Islamic law a husband cannot ask for restitution of conjugal rights, if he has not paid the dower money.³⁷ A woman may refuse to admit her husband to a carnal connection, until she has received her dower from him, so that her right to the return may be maintained in the same manner as that of her husband to the objection for which the return is given, as in sale. In *Eidan v. Mazhar Hossain*³⁸, the Allahabad High Court said that in a suit by the husband to enforce his conjugal rights, the wife was entitled to refuse to cohabit with him until he had paid her dower, and

³² (1904) 6 Bom. L.R. 728; *Iman Ali v. Arfatunessa* (1913) 18 Cal. W.N. 693, 21 I.C. 87.

³³ *Amin Beg v. Saman* (1910) 33 All. 90, 7 I.C. 342.

³⁴ Section 4 and first proviso, Dissolution of Muslim Marriage Act, 1939.

³⁵ *Zubeda Begum v. Vazir Mahomed* (1940) 190 I.C. 94.

³⁶ Section 2 (v) read with proviso (c), Dissolution of Muslim Marriage Act, 1939.

³⁷ *Iqbal Ali Khan, opcit*, at 138.

³⁸ (1885) ILR 7 All 230.



that she was not precluded from doing so by the mere fact of having consented to cohabit with him since the marriage.

VI. Conclusion

It may be concluded that marriage is a sacrosanct creation of society and should be protected by all personal laws and the idea of marriage should be protected by law. Each spouse is entitled to comfort consortium of the other. So, after the solemnization of the marriage if either of the spouses without reasonable excuse withdraws himself or herself from the society of the other then aggrieved party has a legal right to file a petition in the matrimonial court for restitution of conjugal rights and such decree may be passed. A very important feature of restitution of conjugal rights to be emphasized is that it is a remedy is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation. It serves to aid prevention of the breakup of marriage, thus is a means of saving the marriage. So, the restitution of conjugal rights remedy tries in promoting reconciliation between the parties and maintenance of matrimonial.

The success or failure of a suit for restitution of conjugal rights depends on the fact whether the other spouses have any just cause for living separately or not. If a spouse lives separately due to some reasonable and just cause e.g., completing studies or due to transfer in service, the other spouse cannot compel him or her to live together. Earlier the remedy of restitution of conjugal rights was not recognized under the Muslim law. The concept was introduced in India in the case of *Moonshee Buzloor v. Shumsoonissa Begum*, where such actions were regarded as considerations for specific performance of marriage. In modern Muslim law the restitution of conjugal rights recognized under general law and through various judicial pronouncements.