

---

**2<sup>ND</sup> SURANA AND SURANA AND ARMY INSTITUTE OF LAW NATIONAL FAMILY**

**LAW MOOT COURT COMPETITION 2020-21**

---



---

**BEFORE THE HON'BLE FAMILY COURT OF NEW DELHI**

---

**Petition under Section 13 of Hindu Marriage Act, 1956 for dissolution of marriage**

**SANDEEP**

**(PETITIONER)**

**v.**

**ANJALI**

**(RESPONDENT)**

---

*Clubbed with*

**Petition under Section 9 of Hindu Marriage Act, 1956 for Restitution of Conjugal Rights**

**and under Section 25 of Guardians and Wards Act, 1890 for custody of child**

**ANJALI**

**(PETITIONER)**

**v.**

**SANDEEP**

**(RESPONDENT)**

---

**MEMORIAL FOR THE PETITIONER/RESPONDENT- SANDEEP**

---

**TABLE OF CONTENTS**


---

INDEX OF AUTHORITIES	iii
LIST OF ABBREVIATIONS	vii
STATEMENT OF JURISDICTION	viii
STATEMENT OF FACTS	ix
STATEMENT OF ISSUES	x
SUMMARY OF ARGUMENTS	xi
ARGUMENTS ADVANCED	1
ISSUE 1: THAT DECREE OF DIVORCE SHOULD BE GRANTED. ....	1
[1.1] The conduct of anjali since the beginning of marriage cumulatively amounts to cruelty on sandeep.	1
[1.2] The cruelty of Anjali continued even after the birth of their child.	3
ISSUE 2: THAT RESTITUTION OF CONJUGAL RIGHTS CANNOT BE GRANTED TO ANJALI.....	5
[2.1] Existence of ground for cruelty on which the respondent has filed for a divorce proceeding accounts for a valid contention against the restitution proceeding.	5
[2.2] Existence of matrimonial misconduct sufficiently weighty and grave enough for withdrawing from the society of the petitioner	7

[2.3] The act, omission and conduct on behalf of petitioner makes it impossible for the petitioner to live with the respondent.	9
ISSUE 3: THAT SANDEEP SHOULD HAVE CUSTODY OF THE CHILD. ....	10
[3.1] Anjali has no legal right to claim custody of the child	10
[3.2] That giving custody of child to Sandeep will ensure her welfare.	13
PRAYER	xi

---

**INDEX OF AUTHORITIES**


---

**Cases**

A. Jaychandra v. Aneel Kumar, (2005) 2 S.C.C. 22.....	2
Akash v. State of Andhra Pradesh, A.I.R. 2000 A.P. 261.....	13
Anjali Kapoor v. Rajiv Bajjal, (2009) 7 S.C.C. 322 .....	13, 14
Baburao v. Sushila Bai, A.I.R. 1964 M.P. 73.....	9
Baby Manji Yamada v. Union of India, (2008) 13 S.C.C. 518 .....	11
Bai Jivi v. Narsing Lalbhai, 29 Bom. L.R. 332 .....	7
Central Inland Water v. Brojo Nath Ganguly, A.I.R. 1986 S.C. 1571.....	11
Chitra Sachin Mapara v. Sachin Kr. Mapara, (2017) 1 A.I.R. Bom. R. 582.....	3
Gaya Prasad v. Mst. Bhagwati, A.I.R. 1966 M.P. 212 .....	3
Gurcharan Singh v. Sukhdev Kaur, A.I.R. 1979 P. & H. 98.....	3
Gurdev Kaur v. Sarwan Singh, A.I.R. 1959 P. & H. 162 .....	9
Gurdev Kaur v. Swaran Singh, A.I.R. 1959 Punj. 162 .....	8, 9
Gurdev v. Sarwan, 1966 P.L.R. 744 .....	9
Hindu Minority and Guardianship Act, 1956, § 13, No. 32, Acts of Parliament, 1956.....	13
J. Meena v. T. Manikandan, 2017 S.C.C. OnLine Mad. 10856 .....	12
Jan Balaz v. Anand Municipality, A.I.R. 2010 Guj. 21 .....	11, 12
Kanna v. Krishnaswami, A.I.R. 1972 Mad. 247.....	8
Madhukar Bhaskar Sheorev v. Saral Madhukar Sheodev, A.I.R. 1973 Bom. 55.....	9
Mausami Moitra Ganguli v. Jayant Ganguli, (2008) S.C.C. 673 .....	13
Mausami Motra Ganguli v. Jayanti Ganguli, (2008) S.C.C. 673 .....	14
Munish Kakkar v. Nidhi Kakkar, (2020) 14 S.C.C. 657.....	4

---

Murari Lal Sidana v. Anita, A.I.R. 2013 Raj. 100.....	13
N. Nirmala v. Nelson Jayakumar, 1995 S.C.C. OnLine Mad. 932.....	13
Naveen Kohli v. Neelu Kohli .....	1
Naveen Kohli v. Neelu Kohli, (2006) 4 S.C.C. 558 .....	1
Nirali Mehta v. Surendra Kr. Surana, A.I.R. 2013 Bom. 123 .....	13
Parveen Mehta v. Inderjit Mehta, (2002) 5 S.C.C. 706 .....	1
Rishikesh Sharma v. Saroj Sharma, (2007) 2 S.C.C. 263 .....	4
S. Jaya Kumari v. S. Krishna Nair, A.I.R. 1995 Ker. 139 (D.B.).....	6
Sadhu Singh Balwant Singh v. Jagdish Kaur Sadhu Singh, A.I.R. 1969 Punj. 139.....	7
Sadhu Singh v. Jagdish Kaur, A.I.R. 1969 Punj. 139 .....	7
Samar Ghosh v. Jaya Ghosh, (2007) 4 S.C.C. 511 .....	1
Satya Devi v. Ajaib Singh, A.I.R. 1973 Raj. 20 .....	7
Savitri Pandey v. Prem Chandra Pandey, (2002) 2 S.C.C. 73.....	1
Shyamlal v. Saraswati Bai, A.I.R. 1967 M.P. 204.....	7
Smt. Vibha Shrivastava v. Dinesh Kr. Shrivastava, A.I.R. 1991 M.P. 346.....	4
Soonamma v. Varghese Abraham, A.I.R. 1957 Trav. Co. 277.....	7
Suman Kapur v. Sudhir Kapur, A.I.R. 2009 S.C. 589 .....	7
Timmins v. Timmins, (1953) 2 All. E.R. 187 .....	8
Tirath Kaur v. Kirpal Singh, A.I.R. 1964 Punj. 28.....	8
Triwa v. Savitri, A.I.R. 1972 All. 152.....	9
Usharani Lenka v. Panigrahi, A.I.R. 2005 Ori. 3 .....	4
Vinita Saxena v. Pankaj Pandit, (2006) 3 S.C.C. 778.....	2
Vivek Singh v. Romani Singh, (2017) 3 S.C.C. 231 .....	14

## Statutes

Hindu Adoption and Marriage Act, 1956, § 17, No. 78, Acts of Parliament, 1956 .....	22
Hindu Marriage Act, 1955, § 10(1)(b), No. 25, Acts of Parliament, 1955 .....	17
Hindu Marriage Act, 1955, § 13, No. 25, Acts of Parliament, 1955 .....	17
Hindu Marriage Act, 1955, § 23A, No. 25, Acts of Parliament, 1955 .....	18
Hindu Marriage Act, 1955, § 9(2), No. 25, Acts of Parliament, 1955.....	16
Hindu Minority and Guardianship Act, 1956, §6(b), No. 32, Acts of Parliament, 1956.....	23
Indian Contract Act, 1872, §2(d), No. 9, Acts of Parliament, 1872 .....	21
Indian Contract Act, 1872, §23, No. 9, Acts of Parliament, 1872.....	21
Indian Contract Act, 1872, §24, No. 9, Acts of Parliament, 1872.....	21
Indian Contract Act, 1872, §25, No. 9, Acts of Parliament, 1872.....	21

## Online Resources

<i>Public Policy, DUHAIME'S LAW DICTIONARY,</i> <a href="http://www.duhaime.org/LegalDictionary/P/PublicPolicy.aspx">http://www.duhaime.org/LegalDictionary/P/PublicPolicy.aspx</a> .....	22
--	----

## Books

Department-Related Parliamentary Standing Committee on Health and Family Welfare One Hundred Second Report The Surrogacy (Regulation) Bill, 2016, RS Secretariat, <a href="http://164.100.47.5/committee_web/ReportFile/14.pdf">http://164.100.47.5/committee_web/ReportFile/14.pdf</a> .....	11
DINSHAH FARDUNJI MULLA, PRINCIPLES OF HINDU LAW ( 14 <sup>th</sup> edn., 1974).....	4
LARRY GOSTIN, SURROGATE MOTHERHOOD – POLITICS & PRIVACY: POLITICS AND PRIVACY (1990) .....	11

## Moot Proposition

---

Moot Proposition ¶ 16.....	26
Moot Proposition Clarification I, Clarification no. 1 .....	25, 26
Moot Proposition, ¶ 18 .....	25
Moot Proposition, ¶ 7 .....	25
Moot Proposition, ¶ 9 .....	17
Moot Proposition, ¶15 .....	18, 25
Moot Proposition, ¶5 .....	13, 17
Moot Proposition, ¶6.....	17
Moot Proposition, ¶9.....	14
Moot Proposition, ¶ 3.....	17

---

**LIST OF ABBREVIATIONS**


---

<b>ABBREVIATION</b>	<b>MEANING</b>
<b>&amp;</b>	And
<b>§</b>	Section
<b>¶</b>	Paragraph
<b>AIR</b>	All India Reporter
<b>ART</b>	Assisted Reproductive Technology
<b>G&amp;W Act</b>	The Guardians and Wards Act, 1890
<b>HAMA</b>	Hindu Adoption and Maintenance Act, 1956
<b>HC</b>	High Court
<b>HMA</b>	Hindu Marriage Act, 1955
<b>HMGA</b>	Hindu Minority and Guardianship Act, 1956
<b>i.e.</b>	That is
<b>ICA</b>	Indian Contract Act, 1872
<b>RCR</b>	Restitution of Conjugal Rights
<b>SC</b>	Supreme Court
<b>SCC</b>	Supreme Court Cases
<b>U/s</b>	Under Section
<b>USA</b>	United States of America
<b>v</b>	Versus



---

**STATEMENT OF JURISDICTION**

---

The Hon'ble Family Court of Delhi has jurisdiction to hear the matters under Section 7 of Family Courts Act, 1984.

**7. Jurisdiction.-**

*(1) Subject to the other provisions of this Act, a Family Court shall- (1) Subject to the other provisions of this Act, a Family Court shall-*

*(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and*

*(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.*

*Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-*

*(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;*

.....

*(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.*

---

## STATEMENT OF FACTS

---

**Background-** Sandeep is an engineer, and Anjali was pursuing her MBBS. They got married in 2000 as per Hindu rites and rituals under Hindu Marriage Act 1955. However, Anjali wasn't mentally prepared for marriage and agreed to it to fulfil her father's last wish. Post marriage, Anjali continued her studies but was unable to balance it with her domestic duties which led to frequent arguments between the couple. Sandeep received an offer to move to USA for a better position which he accepted in order to strengthen the couple's financial position and career prospects. To avoid the strain of a long-distance relationship, Anjali moved to USA along with Sandeep and qualified the exam to practice in USA and got herself a job.

**Surrogacy-** Anjali insisted on trying for a baby which was opposed by Sandeep due being financially unsettled in a new country which led to constant fights between the couple. Years later, after having settled in properly, they tried for a baby but were unable to conceive. Thus, they came to India in 2013 to commission a surrogate mother. They found Priya as the suitable candidate and entered into verbal agreement with her for the surrogacy. In 2014, Priya gave birth to a girl. After a few days, Anjali flew back to USA as to resume her job

**Matrimonial Discord-** When Anjali flew back to USA, Sandeep started taking care of the baby by himself. Priya, the surrogate mother, was the primary care giver of the baby, because of which Sandeep and his family arranged for her to move in their home. When Anjali returned from USA, she engaged in quarrels with Sandeep regarding Priya. During this time, Sandeep realized his relationship with Anjali was over. Meanwhile, Priya denied to hand over the baby since she has become emotionally attached to the child. In 2015, Sandeep filed a divorce petition. Anjali filed for RCR and custody of her child. The case has been pending before the court since then.

---

**STATEMENT OF ISSUES**

---

**ISSUE 1-**

WHETHER THE COURT SHOULD GRANT DIVORCE?

**-ISSUE 2-**

WHETHER THE COURT SHOULD GRANT RESTITUTION OF CONJUGAL RIGHTS?

**-ISSUE 3-**

WHETHER THE COURT SHOULD GRANT CUSTODY OF THE CHILD TO SANDEEP OR  
ANJALI?

---

## SUMMARY OF ARGUMENTS

---

### **ISSUE 1: THAT THE DECREE OF DIVORCE SHOULD BE GRANTED.**

The decree of divorce should be granted in favour of Sandeep as the requirements for such a decree have been fulfilled. The conduct of Anjali since the beginning of marriage cumulatively amounts to cruelty on Sandeep, and the environment of the family had become a constant source of unhappiness. Further, the cruelty of Anjali continued even after the birth of their child, where she left the newborn with Sandeep and went to the US, prioritising her job over family.

### **ISSUE 2: THAT THE REMEDY OF RESTITUTION OF CONJUGAL MUST BE REJECTED**

The situations that amount to a 'reasonable excuse' to act as a defence in the petition for Restitution of Conjugal Rights have been met. There was existence of ground for relief in a matrimonial cause, that in arguendo there was a matrimonial misconduct sufficiently weighty and grave enough for rejection of RCR and lastly, there was such act, omission or conduct on behalf of the opposite party which made it impossible for Sandeep to live with Anjali.

### **ISSUE 3: THAT SANDEEP SHOULD HAVE CUSTODY OF THE CHILD**

Sandeep should get custody of the child. Anjali is not the natural mother of child, Priya is. Since both the mother and father are available, third persons cannot claim custody of the child, so Anjali has no right for custody of the child. Further, Sandeep is competent to ensure the physical, financial, emotional welfare of the child. Since the child is being taken good care of, the continuity of residence and environment, including custodial continuity should not be disrupted.

---

**ARGUMENTS ADVANCED**

---

**ISSUE 1: THAT THE DECREE OF DIVORCE SHOULD BE GRANTED.**

It is humbly submitted before the Hon'ble Court that the decree of divorce should be granted in favour of Sandeep (Petitioner for the present issue) as the requirements for such a decree have been fulfilled. [1.1] The conduct of Anjali (Respondent for the present issue) since the beginning of marriage cumulatively amounts to cruelty on Sandeep. [1.2] The cruelty of Anjali continued even after the birth of their child.

**[1.1] THE CONDUCT OF ANJALI SINCE THE BEGINNING OF MARRIAGE CUMULATIVELY AMOUNTS TO CRUELTY ON SANDEEP.**

It is submitted that an act shall be cruel if the cumulative conduct was sufficiently weighty that from a reasonable person's point of view, after a consideration of any excuse which respondent might have, the conduct is such that petitioner should not be expected to endure it.<sup>1</sup>

Mental cruelty is the conduct which causes mental suffering or a feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other.<sup>2</sup> Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe or healthy for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavioural pattern by the other.<sup>3</sup>

---

<sup>1</sup> Naveen Kohli v. Neelu Kohli, (2006) 4 S.C.C. 558.

<sup>2</sup> Samar Ghosh v. Jaya Ghosh, (2007) 4 S.C.C. 511; Parveen Mehta v. Inderjit Mehta, (2002) 5 S.C.C. 706.

<sup>3</sup> Savitri Pandey v. Prem Chandra Pandey, (2002) 2 S.C.C. 73 (India).

The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, prevailing circumstances, etc.<sup>4</sup> It is determined not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other.<sup>5</sup>

In the present case, Anjali understood that she had domestic responsibilities and she voluntarily chose to manage both household and educational responsibilities simultaneously, and in failure to do so, she frequently engaged in petty quarrels with Sandeep<sup>6</sup>, which is why since the beginning of marriage there was continuous unrest and unhappiness in the relationship.

If the complaints, taunts, fights are of ordinary nature only, their continuance or persistence over a period of time may render, what normally would, otherwise, not be so serious an act to be injurious mentally and making it difficult to maintain the matrimonial home.<sup>7</sup> The frequent fights between the couple strained Sandeep. Further, Sandeep was the breadwinner in the marriage and could not put anything over his job since Anjali was also studying at that time but Anjali was selfishly inclined towards building her own career and used most of her time for herself and this blatant lack of interest from her in the marriage contributed to the relationship being strained.

There were regular fights between the parties, some causes being Anjali's problematic handling of household and domestic work, her tendency to pick arguments without listening to reason. Even

---

<sup>4</sup> A. Jaychandra v. Aneel Kumar, (2005) 2 S.C.C. 22 (India).

<sup>5</sup> A. Jaychandra v. Aneel Kumar, (2005) 2 S.C.C. 22 (India).

<sup>6</sup> Moot Proposition, ¶5.

<sup>7</sup> Vinita Saxena v. Pankaj Pandit, (2006) 3 S.C.C. 778 (India).

when Anjali insisted on having a child, she would disregard Sandeeps's reasoning for not having a child at that point of time, and would constantly pick fights and arguments with him.<sup>8</sup>

While such contentions may seem trivial, it has been held by Hon'ble High Courts that even if problems may seem trivial in nature the court has to consider the overall cumulative effects of such continuous acts as a ground for divorce. Presently, it will be harmful for Sandeep to live a miserable life with day-to-day quarrels, arrogance, and the nagging attitude of Anjali.<sup>9</sup>

### **[1.2] THE CRUELTY OF ANJALI CONTINUED EVEN AFTER THE BIRTH OF THEIR CHILD.**

Anjali had left for the US to join back at her job soon after their daughter was born, or the pretext that her job required her to be present as it was not possible to work remotely. Anjali blatantly prioritized her job over her newborn child and her duties towards her family. The couple had sufficient financial stability to be able to afford a few months of Anjali taking a maternity leave, even if the leave may be unpaid. However, she chose to join back and go to the US, leaving the newborn child with only her husband. Such a callous attitude of the wife towards her family when they needed her most must be condemned.<sup>10</sup>

The attitude of the wife and her withdrawal from the society of the husband is an act of 'cruelty' justifying a decree of divorce. There have been cases wherein it was established that merely because the wife is serving at a different place, she cannot just leave her family behind.<sup>11</sup> Her employment in service at a different place was not justified as she was prioritizing her job over the

---

<sup>8</sup> Moot Proposition, ¶9.

<sup>9</sup> Chitra Sachin Mapara v. Sachin Kr. Mapara, (2017) 1 A.I.R. Bom. R. 582 (India).

<sup>10</sup> Gurcharan Singh v. Sukhdev Kaur, A.I.R. 1979 P. & H. 98 (India).

<sup>11</sup> Gaya Prasad v. Mst. Bhagwati, A.I.R. 1966 M.P. 212 (India).

well-being of her newborn baby. It is a known fact that the first few months are crucial for the care and welfare of a child and is a time when it needs the mother the most. It was extremely unreasonable on Anjali's part to choose to leave for US while leaving her family, even if the separation was to be temporary, and therefore, is a sufficient ground for divorce.<sup>12</sup> Leaving the child behind for going back to her job, where the assistance of the surrogate mother had to be taken to care for the child, was an act of blatant cruelty.

It was the duty of Anjali to be a dutiful wife and mother, which she consciously disregarded.<sup>13</sup> The relationship has deteriorated to such an extent that both parties see little good in each other; Matrimonial relationships require adjustments from both sides, and a willingness to stay together. The mere say of such willingness would not suffice.<sup>14</sup>

The marriage of the parties has completely broken down due to the incompatibility of the couple and their constant fights which have destroyed the environment of the family, and now expecting Sandeep to live together in such an atmosphere with such conditions would be cruel on his mental wellbeing. It will not be possible for the parties to live together and compelling them to do so would serve no purpose.<sup>15</sup> Parties have already been living separately for atleast 5 years now, with no fulfilment of any matrimonial duties towards each other, and now forcing either party to live

---

<sup>12</sup> DINSHAH FARDUNJI MULLA, PRINCIPLES OF HINDU LAW ( 14<sup>th</sup> edn., 1974).

<sup>13</sup> Smt. Vibha Shrivastava v. Dinesh Kr. Shrivastava, A.I.R. 1991 M.P. 346 (India).

<sup>14</sup> Munish Kakkar v. Nidhi Kakkar, (2020) 14 S.C.C. 657 (India).

<sup>15</sup> Rishikesh Sharma v. Saroj Sharma, (2007) 2 S.C.C. 263 (India).



with the other would be cruel.<sup>16</sup> Therefore, the decree of divorce should be granted in favour of Sandeep and provide him relief from his current situation.

**ISSUE 2: THAT RESTITUTION OF CONJUGAL RIGHTS CANNOT BE GRANTED TO ANJALI.**

It is humbly submitted before the Hon'ble court that explanation to section 9 of HMA suggests that initial burden of proof is still on the counsel for Anjali to establish the grounds of relief, but the “reasonable excuse” is then to be established by the respondent here i.e. Sandeep. The situations that amount to a ‘reasonable excuse’ to act as a defense in the petition for Restitution of Conjugal Rights have been met here. [2.1] There was existence of ground for relief in a matrimonial cause, [2.2] that in arguendo there was a matrimonial misconduct sufficiently weighty and grave enough for rejection of RCR and lastly [2.3] that there was such act, omission or conduct on behalf of the opposite party which made it impossible for Sandeep to live with Anjali. The act, omission and conduct on behalf of petitioner makes it impossible for the petitioner to live with the respondent.

**[2.1] EXISTENCE OF GROUND FOR CRUELTY ON WHICH THE RESPONDENT HAS FILED FOR A DIVORCE PROCEEDING ACCOUNTS FOR A VALID CONTENTION AGAINST THE RESTITUTION PROCEEDING.**

It is submitted that Section 9 of Hindu Marriage Act, 1955 provides for the Restitution of Conjugal Rights wherein it provides relief to the party if one spouse withdraws from the society of other.

---

<sup>16</sup> Usharani Lenka v. Panigrahi, A.I.R. 2005 Ori. 3 (India).

The argument raised here is that under sub-section (2) of section 9<sup>17</sup> of the Act, defense can be pleaded in answer to a petition of conjugal rights which shall be a ground for judicial separation or for nullity of marriage or for divorce. The counsel for Sandeep has previously contended above that there was cruelty on behalf of Anjali which forms one of the grounds for filing of divorce under section 13<sup>18</sup> of HMA and can be pleaded in answer to an RCR petition.

Section 10(1)(b)<sup>19</sup> of HMA prior to amendment of 1976 defines cruelty to be such “as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party”. This definition is still relied upon courts for establishing the act of cruelty.<sup>20</sup> This definition includes in its ambit mental cruelty and that RCR is refused if the spouse is guilty of it. It is not necessary that there should be a physical violence or torture.<sup>21</sup>

Since the beginning, Anjali was never ready for taking up the duties of a wife wholeheartedly and was more or less socially pressured into marrying Sandeep to honour her father’s last wish.<sup>22</sup> She consciously made the decision to manage both household chores and her educational responsibilities and when she was unable to balance both, she got herself involved in petty quarrels, leading to mental unrest and loss of peace.<sup>23</sup> Throughout these years, Anjali was solely focused in getting forward in her career, to the extent that it led to our relationship being strained.<sup>24</sup> In the

---

<sup>17</sup> Hindu Marriage Act, 1955, § 9(2), No. 25, Acts of Parliament, 1955.

<sup>18</sup> Hindu Marriage Act, 1955, § 13, No. 25, Acts of Parliament, 1955.

<sup>19</sup> Hindu Marriage Act, 1955, § 10(1)(b), No. 25, Acts of Parliament, 1955.

<sup>20</sup> Naveen Kohli v. Neelu Kohli, 2006 (4) Mh. L. J. (S.C.) 242 (India).

<sup>21</sup> S. Jaya Kumari v. S. Krishna Nair, A.I.R. 1995 Ker. 139 (D.B.) (India).

<sup>22</sup> Moot Proposition, ¶ 3.

<sup>23</sup> Moot Proposition, ¶ 5.

<sup>24</sup> Moot Proposition, ¶ 6.

initial days in USA, Anjali kept on insisting for having a child inspite of there being no financial security and stability.<sup>25</sup> The last straw was her leaving for work after the baby was born, despite knowing the importance of presence of mother during that time<sup>26</sup>, which left Sandeep in a lot of mental pain and agony. This conduct on behalf of wife wherein she gives importance to her career and not to her matrimonial obligations accounts for mental cruelty<sup>27</sup> on the basis of which the counsel for Sandeep argues for rejection of RCR.

This presence of mental cruelty makes the state of married life impossible to be endured and has led to a miserable state of existence for Sandeep. This is the kind of cruelty worse than physical violence is a valid defence to a petition for restitution.<sup>28</sup> Lastly, in pursuance of section 23A<sup>29</sup>, if the court is satisfied with the existence of cruelty met out by Anjali, then not only should the remedy of restitution be rejected but also the divorce be rightly granted to Sandeep.

**[2.2] EXISTENCE OF MATRIMONIAL MISCONDUCT SUFFICIENTLY WEIGHTY AND GRAVE ENOUGH FOR WITHDRAWING FROM THE SOCIETY OF THE PETITIONER.**

The scope of the word ‘excuse’ is not restricted to the grounds for judicial separation or divorce or nullity of marriage in answer to the petition for restitution.<sup>30</sup> A matrimonial misconduct not amounting to a ground of a matrimonial cause, if sufficiently weighty and grave enough can also

---

<sup>25</sup> Moot Proposition, ¶ 9.

<sup>26</sup> Moot Proposition, ¶ 15.

<sup>27</sup> Suman Kapur v. Sudhir Kapur, A.I.R. 2009 S.C. 589 (India).

<sup>28</sup> Soonamma v. Varghese Abraham, A.I.R. 1957 Trav. Co. 277 (India).

<sup>29</sup> Hindu Marriage Act, 1955, § 23A, No. 25, Acts of Parliament, 1955.

<sup>30</sup> Sadhu Singh v. Jagdish Kaur, A.I.R. 1969 Punj. 139 (India).

be a valid defence against RCR proceedings.<sup>31</sup> A reasonable excuse is something less than a justification and something more than a mere whim, a fad or a brain wave.<sup>32</sup> The Court must consider the entire conduct of the parties<sup>33</sup> since the beginning of the marriage until the birth of child so as to be able to judge whether the petitioner deserves at the hands of the court the relief which she seeks and whether such a relief is not unreasonable in the particular case against Sandeep. Justice Grover after quoting from Mulla<sup>34</sup> has stated that “A wife’s first matrimonial duty to her husband is to submit herself obediently to his authority”. Anjali clearly failed to do all of the above mentioned since she always prioritized her career over her marriage since the initial days and continued with this conduct even after the birth of their child when she flew back immediately to USA at a time when the presence of the mother is important for the newborn child.<sup>35</sup> Thus, in *arguendo* even if Anjali isn’t guilty of cruelty, the misconduct by her caused such deep and constant emotional pain to Sandeep that it can be considered grave and weighty enough to disentitle her from obtaining a decree for RCR.

On the basis of this, in *arguendo* even if the argument of cruelty is not accepted, even then Anjali’s conduct which can easily be classified as overbearing, domineering and at times dictatorial and cause of deep emotional pain to her husband<sup>36</sup>, falls directly under the ambit of matrimonial misconduct which is a valid defence against RCR.<sup>37</sup>

---

<sup>31</sup> Shyamlal v. Saraswati Bai, A.I.R. 1967 M.P. 204 (India); Satya Devi v. Ajaib Singh, A.I.R. 1973 Raj. 20 (India).

<sup>32</sup> Sadhu Singh Balwant Singh v. Jagdish Kaur Sadhu Singh, A.I.R. 1969 Punj. 139 (India).

<sup>33</sup> Bai Jivi v. Narsing Lalbhai, 29 Bom. L.R. 332 (India).

<sup>34</sup> DINSHAH FARDUNJI MULLA, PRINCIPLES OF HINDU LAW 597 (14<sup>th</sup> edn., 1974).

<sup>35</sup> Tirath Kaur v. Kirpal Singh, A.I.R. 1964 Punj. 28 (India).

<sup>36</sup> Timmins v. Timmins, (1953) 2 All. E.R. 187; Gurdev Kaur v. Swaran Singh, A.I.R. 1959 Punj. 162 (India).

<sup>37</sup> Timmins v. Timmins, (1953) 2 All. E.R. 187 (India).

**[2.3] THE ACT, OMISSION AND CONDUCT ON BEHALF OF PETITIONER MAKES IT IMPOSSIBLE FOR THE PETITIONER TO LIVE WITH THE RESPONDENT.**

In some cases coming under Hindu law,<sup>38</sup> Courts have expressed the view that any act or conduct of the petitioner which makes it impossible for the respondent to live with him or her amounts to reasonable cause.<sup>39</sup> The courts have the power to refuse to order restitution where it has become a practical impossibility for the parties to live together.<sup>40</sup> However, to give this decision, the Courts need to adjudge the facts and circumstances of the case and acts and conduct of the parties to conclude whether the couple can live in harmony and happiness or whether their conduct to each other would be sufficient to be a reasonable excuse.<sup>41</sup> The facts that have been stated in Issue 1 as well as Issue 2.1 clearly point towards how conduct of Anjali has broken down the spirit of marriage and the lack of affection and constant disagreements lead to unhappiness and lack of mental peace.

Thus, the counsel for Sandeep pleads that when home is broken beyond all possibilities of repair,<sup>42</sup> the remedy of RCR cannot help and must be rejected as well as requests that such a union should be broken with fairness and minimum bitterness, distress and humiliation.

---

<sup>38</sup> Kanna v. Krishnaswami, A.I.R. 1972 Mad. 247 (India).

<sup>39</sup> Gurdev v. Sarwan, 1966 P.L.R. 744; Triwa v. Savitri, A.I.R. 1972 All. 152; Gurdev Kaur v. Sarwan Singh, A.I.R. 1959 P. & H. 162 (India).

<sup>40</sup> Gurdev Kaur v. Swaran Singh, A.I.R. 1959 Punj. 162 (India).

<sup>41</sup> Baburao v. Sushila Bai, A.I.R. 1964 M.P. 73 (India).

<sup>42</sup> Madhukar Bhaskar Sheorev v. Saral Madhukar Sheodev, A.I.R. 1973 Bom. 55 (India).

### **ISSUE 3: THAT SANDEEP SHOULD HAVE CUSTODY OF THE CHILD.**

It is humbly submitted that Anjali is not the mother of the child, thus [3.1] has no legal standing to ask for custody of the child and [3.2] that the welfare of child is in Sandeep's custody.

#### **[3.1] ANJALI HAS NO LEGAL RIGHT TO CLAIM CUSTODY OF THE CHILD**

It is humbly submitted that [3.1.1] the surrogacy agreement does not have legal force and hence gives no legal right over the child to Anjali, [3.1.2] Anjali is not the natural mother of the child. Thus, [3.1.3] Anjali being a third party cannot contest the custody of the child.

#### ***[3.1.1] The surrogacy agreement is void and cannot give rise to legal right.***

The surrogacy agreement entered between the couple and surrogate mother is void as it is against public policy and it is without any consideration.

*a) without any consideration:* Any contract without consideration is void.<sup>43</sup> Consideration is defined as “*when at the desire of the promisor, promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something, such act or abstinence, or promise is called a consideration for the promise.*”<sup>44</sup> In the instant case, Priya although has agreed to become a surrogate mother, has not received any consideration in return. Therefore, the contract is without any consideration and is void. Requirement of consideration can be done away with if it is registered and in writing and made on account of natural love and affection between parties in a near relation

---

<sup>43</sup> Indian Contract Act, 1872, §25, No. 9, Acts of Parliament, 1872.

<sup>44</sup> Indian Contract Act, 1872, §2(d), No. 9, Acts of Parliament, 1872.

to each other or it is for a past consideration or it is to pay for a time barred-debt.<sup>45</sup> In the instant case none of these requirements have been met, therefore the agreement is void.

b) *object of agreement is against public policy of India*: the consideration or object of an agreement is unlawful if it is forbidden by law, or would defeat the provisions of law, or the court considers it immoral or opposed to public policy.<sup>46</sup> When the consideration or object is unlawful, the agreement is void.<sup>47</sup> The word ‘object’ is to mean ‘purpose’ or ‘design’. The object in this case is to rear a baby through IVF insemination and handover the baby to Anjali and Sandeep. This object of agreement is against public policy of India.

The Supreme Court has held that it connotes some matter which concerns public good and public interest<sup>48</sup>. A contract is said to be against public policy when it goes against the existing law or breaches it or negates the general interest, welfare or causes harm to the society at large.<sup>49</sup>

Both commercial and altruistic surrogacy is against public policy as they cause harm to society at large. Surrogacy when commercial, is akin to human trafficking, in the form of sale of children.<sup>50</sup> Further, in India a child born through surrogacy is taken by intending parents through adoption.<sup>51</sup>

---

<sup>45</sup> Indian Contract Act, 1872, §25, No. 9, Acts of Parliament, 1872.

<sup>46</sup> Indian Contract Act, 1872, §23, No. 9, Acts of Parliament, 1872.

<sup>47</sup> Indian Contract Act, 1872, §24, No. 9, Acts of Parliament, 1872.

<sup>48</sup> *Central Inland Water v. Brojo Nath Ganguly*, A.I.R. 1986 S.C. 1571 (India).

<sup>49</sup> *Public Policy*, DUHAIME'S LAW DICTIONARY, <http://www.duhaime.org/LegalDictionary/P/PublicPolicy.aspx> (last visited 25 Mar. 2021).

<sup>50</sup> LARRY GOSTIN, *SURROGATE MOTHERHOOD – POLITICS & PRIVACY: POLITICS AND PRIVACY* (1990).

<sup>51</sup> *Baby Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India); *Jan Balaz v. Anand Municipality*, A.I.R. 2010 Guj. 21 (India).

§17 HAMA also prohibits taking of any payment or consideration for adoption of child.<sup>52</sup> Since in the given case both parents are Hindu, they cannot adopt a child in return of consideration.

Altruistic surrogacy is itself an immoral bargain as it fails to serve the best interests of the child by separating it from the birth mother. Further, it is equivalent to unpaid labour thus violating Article 23 of the constitution of India.<sup>53</sup> Therefore, Surrogacy in general is against public policy of India and agreements relating to surrogacy cannot be enforced by law or give right to any rights by virtue of § 23 and § 24 of ICA.

### ***[3.1.2] Anjali is not the natural mother.***

In the absence of any legislation governing surrogacy, the gestational surrogate who has given birth to the child as the natural mother.<sup>54</sup> Even if the Surrogate Mother has not donated the ova she is still more deserving to be the natural mother of the child. Under §112 of IEA, no presumption can be drawn that child born out of a surrogate mother, is the child of the commissioning parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple.<sup>55</sup> Moreover, the ART guidelines on Surrogacy, which recommends that right of intending mother is same as that of a mother, do not have the force of law.<sup>56</sup> Therefore, in the light of the above, Anjali is not the natural mother of the child.

---

<sup>52</sup> Hindu Adoption and Marriage Act, 1956, § 17, No. 78, Acts of Parliament, 1956.

<sup>53</sup> *Department-Related Parliamentary Standing Committee on Health and Family Welfare One Hundred Second Report The Surrogacy (Regulation) Bill, 2016*, RS SECRETARIAT, [http://164.100.47.5/committee\\_web/ReportFile/14.pdf](http://164.100.47.5/committee_web/ReportFile/14.pdf) (last visited Mar. 22, 2021).

<sup>54</sup> *Jan Balaz v. Anand Municipality*, A.I.R. 2010 Guj. 21 (India).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



***[3.1.3] No legal standing to ask for custody of the child.***

Section 6 of HMGA<sup>57</sup> enlists the natural guardians of the child. In case of a child born out of wedlock it is mother and after her, the father. The word ‘after’ means ‘in the absence of.’<sup>58</sup> Hence, it is only when the father and mother are dead or not available then another person may, showing how it would be in the welfare of the child, claim to be his guardian and accept the responsibilities and the duties which would otherwise be of his parents without any such application and without making out a case for claiming simpliciter custody, or access or visitation rights.<sup>59</sup> When both parents are alive, fit and proper, and are available for the child, then intervention of any third party in the matter is barred.<sup>60</sup> In the present case, Anjali not being the mother or guardian of the child is not entitled to ask for custody of the child.

**[3.2] THAT GIVING CUSTODY OF CHILD TO SANDEEP WILL ENSURE HER WELFARE.**

It is humbly submitted that [3.2.1] Sandeep is in best position to look overall welfare of the child and [3.2.2] maintaining continuity of custody is in the best interest of the child.

***[3.2.1] Sandeep is in best position to look after overall welfare of the child.***

The prime consideration in deciding matters of custody has to be the welfare of child.<sup>61</sup> The word welfare must be taken in its widest sense consisting of both physical and emotional well-being. In terms of physical and financial and well-being the parent should be able to provide a pleasant home

---

<sup>57</sup> Hindu Minority and Guardianship Act, 1956, §6(b), No. 32, Acts of Parliament, 1956.

<sup>58</sup> J. Meena v. T. Manikandan, 2017 S.C.C. OnLine Mad. 10856 (India).

<sup>59</sup> Hindu Minority and Guardianship Act, 1956, §6(b), No. 32, Acts of Parliament, 1956.

<sup>60</sup> Akash v. State of Andhra Pradesh, A.I.R. 2000 A.P. 261 (India); Nirali Mehta v. Surendra Kr. Surana, A.I.R. 2013 Bom. 123 (India).

<sup>61</sup> Hindu Minority and Guardianship Act, 1956, § 13, No. 32, Acts of Parliament, 1956.

and comfortable standard of living,<sup>62</sup> ordinary contentment, health, education, intellectual development and favourable surroundings.<sup>63</sup> The parent should be able to ensure the child feels a sense of stability and security,<sup>64</sup> receives love, care and guidance,<sup>65</sup> and enjoys compassionate relationships with family.<sup>66</sup> Moreover, in custody matter it is not legal to assume that mother always has the best interest of her children.<sup>67</sup>

The child has always been in custody of Sandeep and has spent considerable amount of time with him.<sup>68</sup> He has always done what is in the best interest of child, i.e., he stayed back and started working from home, spent most of his time with the child, allowed Priya to move in so that she can take the best care of the child.<sup>69</sup> Sandeep also has a very lucrative job<sup>70</sup> and is in a position to fulfil all needs of child such as health, comfort, education etc. As Sandeep is working from home he will be able to provide better emotional and mental support. Priya's continued presence with the child is also ensuring motherly love and affection. Moreover, presence of Sandeep's parents in the child's life will give her better sense of love, care and guidance.

---

<sup>62</sup> N. Nirmala v. Nelson Jayakumar, 1995 S.C.C. OnLine Mad. 932 (India).

<sup>63</sup> Mausami Moitra Ganguli v. Jayant Ganguli, (2008) S.C.C. 673 (India).

<sup>64</sup> *Id.*

<sup>65</sup> Anjali Kapoor v. Rajiv Baijal, (2009) 7 S.C.C. 322 (India).

<sup>66</sup> *Id.*

<sup>67</sup> Murari Lal Sidana v. Anita, A.I.R. 2013 Raj. 100 (India).

<sup>68</sup> Moot Proposition Clarification I, Clarification no. 1.

<sup>69</sup> Moot Proposition, ¶18.

<sup>70</sup> Moot Proposition, ¶7.

Anjali, on the other hand had left the premature baby for her career pursuits.<sup>71</sup> She might in the future keep her career goals on a higher pedestal than the overall welfare of the child.

***[3.2.2] Maintaining continuity of custody with Sandeep is in the best interest of the child.***

In matter of custody, where the child is being taken good care of the continuity of residence and environment including custodial continuity of the parent should not be disturbed as that may militate against welfare of the child.<sup>72</sup> Even where there is a prolonged stay with one of the guardians due to delay in court proceedings, uprooting the child is not in its best interest.<sup>73</sup>

In the instant case the child has stayed for seven years, starting from birth with Sandeep and under his due care.<sup>74</sup> Moreover, he has ensured her full welfare emotionally as well as financially. Therefore, uprooting her from her usual residence and environment will be detrimental to her well-being. Therefore, the court is requested to maintain status quo by granting custody to Sandeep and visitation rights to Anjali and her mother.

---

<sup>71</sup> Moot Proposition, ¶15.

<sup>72</sup> Vivek Singh v. Romani Singh, (2017) 3 S.C.C. 231; Anjali Kapoor v. Rajiv Baijal, (2009) 7 S.C.C. 322 (India).

<sup>73</sup> Mausami Motra Ganguli v. Jayanti Ganguli, (2008) S.C.C. 673 (India).

<sup>74</sup> Moot Proposition ¶ 16; Moot Proposition Clarification I, Clarification no. 1.

**PRAYER**

---

Wherefore in light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Hon'ble Court may be pleased to hold, adjudge and declare that;

1. The divorce is granted in favour of Sandeep.
2. The petition for Restitution of Conjugal Rights is dismissed.
3. Custody of the child is granted to Sandeep.

and pass any other order or direction it may deem fit in the interest of justice, equity and good conscience.

All of which is humbly prayed,

FL9,

Counsel for the Petitioner/Respondent