

**2ND SURANA AND SURANA AND ARMY INSTITUTE OF LAW NATIONAL FAMILY
LAW MOOT COURT COMPETITION**

IN THE HONORABLE FAMILY COURT OF NEW DELHI

Petition No. ___ of 2015

Heard Along With

Petition No. ___ of 2015

IN THE MATTER OF

Sandeep Petitioner

v.

Anjali Respondent

MEMORIAL OF BEHALF OF THE PETITIONER

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LIST OF ABBREVIATIONS

Abbreviation	Full-Form
AIR	All India Reporter
AP	Andhra Pradesh
art.	Article
Bom	Bombay
Cal	Calcutta
Cr.	Criminal
Del	Delhi
All ER	All England Law Reports
Mad	Madras
MP	Madhya Pradesh
Para	Paragraph
P&H	Punjab and Haryana
Raj	Rajasthan
SC	Supreme Court
SCC	Supreme Court Cases

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STATEMENT OF JURISDICTION

The Hon'ble District Court of Delhi has the jurisdiction to try the present matter under Section 9, Section 13, Section 19, and Section 26 of the Hindu Marriage Act, 1955.

Section 9- Restitution of conjugal rights: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements 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.

Section 13- Divorce: Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party- (i) has, after the solemnization of the marriage, had voluntary sexual inter-course with any person other than his or her spouse; or (ia) has, after the solemnization of the marriage, treated the Petitioner with cruelty; or (ib) has deserted the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or (ii) has ceased to be a Hindu by conversion to another religion; or (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the Petitioner cannot reasonably be expected to live with the Respondent. (v) has been suffering from venereal disease in a communicable form; or (vi) has renounced the world by entering any religious order; or (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; (1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a

proceeding to which they were parties; or (ii) that there has been no restitution or conjugal rights as between the parties to the marriage for a period of 8[one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

Section 19- Court to which petition shall be presented: Petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction: (i) the marriage was solemnized, or (ii) the Respondent, at the time of the presentation of the petition, resides, or (iii) the parties to the marriage last resided together, or (iiia) in case the wife is the Petitioner, where she is residing on the date of presentation of the petition, or (iv) the Petitioner is residing at the time of the presentation of the petition, in a case where the Respondent is at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.

Section 26 - Custody of children: In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

STATEMENT OF FACTS

Backdrop: Sandeep and Anjali are both Hindus. They got married in 2000 when Anjali was still pursuing her MBBS. Eventually, she completed her studies and became a doctor. Sandeep received an offer to work in Silicon Valley, California, USA. Since a long-distance relationship was not acceptable to Sandeep's family, Anjali quit her job and went to USA to live with Sandeep. Subsequently, Anjali cleared the exam and joined a hospital. The couple obtained US citizenship in 2010. Sandeep and Anjali tried to start a family but failed. They sought medical help for the same, but it did not yield results. They then decided to opt for surrogacy in India. Following an extensive process of trying and failing to convince a relative to act as the surrogate mother, the couple approached Ms. Priya who agreed to be the surrogate mother.

Facts of the case: The couple traveled to India for the birth of the child in 2014. Following the birth, the baby was kept in India for a few weeks as per medical advice. Sandeep stayed in India while working from home to care for the child while Anjali had to travel to USA for work. There was little communication between Sandeep and Anjali during this period. As the communication further reduced, Anjali traveled to India where she discovered that Sandeep had started a romantic relationship with Priya in her absence. Priya had also moved in with Sandeep to care for the child. This led to arguments between Sandeep and Anjali. Sandeep decided that their marriage was over. He filed for divorce, while Anjali filed for restitution of conjugal rights and custody of the child. Both these petitions were filed in 2015 and were clubbed together to form the present case.

Present Day: Sandeep has been living with Priya for the last six years. Sandeep retains the custody of the child and cares for the child with Priya. Anjali has been living in Delhi pending the resolution of the case while maintaining a relationship with the child.

STATEMENT OF ISSUES

ISSUE 1: WHETHER DIVORCE SHOULD BE GRANTED

ISSUE 2: WHETHER AN ORDER FOR RESTITUTION OF CONJUGAL RIGHTS SHOULD BE

PASSED

ISSUE 3: WHETHER THE CUSTODY OF THE CHILD SHOULD BE ALTERED

SUMMARY OF ARGUMENTS

ISSUE 1: WHETHER DIVORCE SHOULD BE GRANTED

The essence of marriage is in the emotional bond that connects the husband and the wife. In the present case, the parties do not have any such connection left. They have been living separately for the past 7 years. The essence of marriage has died, and the marriage continues to exist only on paper. There has been an irretrievable breakdown of marriage. A divorce is in the best interest of the parties so that they can move past the unsuccessful marriage.

ISSUE 2: WHETHER AN ORDER FOR RESTITUTION OF CONJUGAL RIGHTS SHOULD BE

PASSED

The Petitioner does not have a society to go back to. The personal connection between the parties has tragically broken down with no hope of reconciliation. Forcing the Petitioner to live with the Respondent would only invite further pain and bitterness for the parties. Further, the demands of the Respondent in favor of restitution of conjugal rights are not sincere and are instead a façade to gain custody of their daughter.

ISSUE 3: WHETHER THE CUSTODY OF THE CHILD SHOULD BE ALTER

The father is considered the natural guardian of the child. The primary consideration while deciding the custody of a child should be the best interest of the child. The daughter has had always had a loving and caring household with the Petitioner. The marriage between the Petitioner and the Respondent is virtually dead with no hope for resumption of marital ties. The best interest of the child is the maintenance of status quo and the retention of custody with Sandeep.

ARGUMENTS ADVANCED**ISSUE 1: WHETHER DIVORCE SHOULD BE GRANTED**

Most humbly, the *Petitioner* submits that divorce be granted by the Hon'ble Court. This contention is sought to be proved by two-fold arguments: [1.1] *There has been an irretrievable breakdown of marriage; and [1.2] Parties have not co-habited for 7 years.* The marriage between the Petitioner Sandeep and the Respondent Anjali has broken down beyond repair. The parties had constant disagreements through the tenure of their co-habitation, and they have been living separately for a period of seven years. The marriage exists only on paper now and has, in spirit, broken down irretrievably.

[1.1] THERE HAS BEEN AN IRRETRIEVABLE BREAKDOWN OF MARRIAGE

Marriage is a sacrosanct relationship between two individuals that has been validated by centuries-old rituals that define it in society. This relationship is based on the commitment between husband and wife to each other. However, some marriages do not work out the way the parties might have imagined they would. The husband and the wife might disagree on major outlooks about what their future should look like. When the marriage stifles the people in it, and leads to pain and suffering, the marriage starts to exist exclusively in letter of the law. In truth, it has already broken down. Such is the tragic case in this instance.

The Petitioner submits that the marriage has broken down and cannot be salvaged. The Supreme Court in *K. Srinivas Rao v D.A. Deepa*¹ had held that in cases where the marriage had broken down beyond repair, on the possible basis of bitterness that is created by the acts of

¹ K. Srinivas Rao v. D.A. Deepa, AIR 2013 SC 2176.

either or both parties, the irretrievable breakdown of marriage is a factor that weighs heavily when deciding the severance of marital ties. The Court conceded that “*marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.*”²In the present case, Sandeep and Anjali had fundamental differences that led to frequent quarreling and differences in opinion from the beginning of their marriage. Differences existed between Sandeep and Anjali on the sharing of responsibility from the inception. The Respondent Anjali was studying at the time, and this led to disagreements between the members of the household regarding management of her share of domestic duties.³ Since the Petitioner was working hard at his job to provide for the family, and the Respondent was managing studying as well as domestic duties, they did not spend much time together at this nascent stage of the marriage.⁴ A few months after shifting base to USA, the couple had a disagreement on whether it was the appropriate time to have a child together.⁵ This led to a period of frequent quarreling between the parties. When the Petitioner and the Respondent did try to start a family after a couple of years, their attempts yielded no results, despite of them seeking medical advice.⁶

When it summarized the theoretical basis in favour of the concept of granting of divorce because of irretrievable breakdown of marriage, the Court noted in *Sanghamitra Ghosh v. Kajal Kumar Ghosh*⁷ that the marriage only had the external appearance of the marriage and none of

² K. Srinivas Rao v. D.A. Deepa, AIR 2013 SC 2176.

³ Moot Proposition, para 5.

⁴ Moot Proposition, para 6.

⁵ Moot Proposition, para 9.

⁶ Moot Proposition, para 11.

⁷ Sanghamitra Ghosh v. Kajal Kumar Ghosh, (2007) 2 SCC 220.

the reality. In such a case where the marriage is nothing but a shell out of which the substance has disappeared, there exists no utility in maintaining the façade of the marriage. It is for the parties to decide when the shared relationship stops to provide the fulfilment that one seeks from marriage.

If the parties to a marital dispute are unwilling, the Court cannot revive the marriage by merely passing a verdict.⁸ Such a marriage would continue to exist in law but not in spirit. It would merely serve to restrict the future of the parties by harming their chances of a happy life outside of the marriage.

When the Petitioner Sandeep and the Respondent Anjali did become parents through surrogacy, the Respondent had to fly back to the USA for her job.⁹ This left the Petitioner alone at a highly emotional time for every couple- the birth of a child. Over the duration of the next few months, the communication between the Petitioner and the Respondent broke down as well. When the Respondent realized that the Petitioner had grown close to the surrogate mother to whom he provided care post the birth of the child, the Petitioner and the Respondent had heated arguments.¹⁰ From that point of time in 2014, the Petitioner and the Respondent have not co-habited. Thus for 7 years, the Petitioner and the Respondent have been living separately.

In *Durga Prasanna Tripathy v. Arundhati Tripathy*¹¹, the Apex Court noted that it had in both *Anjana Kishore v Puneet Kishore*¹² and *Swati Verma (Smt.) v. Rajan Verma and Ors.*¹³ opined

⁸ K. Srinivas Rao v. D.A. Deepa, AIR 2013 SC 2176.

⁹ Moot Proposition, para 15.

¹⁰ Moot Proposition, para 19.

¹¹ *Durga Prasanna Tripathy v. Arundhati Tripathy*, (2005) 7 SCC 353.

¹² *Anjana Kishore v. Puneet Kishore*, (2002) 10 SCC 194.

¹³ *Swati Verma (Smt.) v. Rajan Verma and Ors.*, AIR 2004 SC 161.

that when the marriage had irretrievably broken down and become dead wood, the urgent need of the situation demands that the marriage should be put to an end to prevent further bitterness and pain.

The 217th Report of the Law Commission¹⁴ concluded that there was a need for inclusion of irretrievable breakdown of marriage as a ground for divorce under the Hindu Marriage Act, 1955. The report came about as the Commission had taken suo-moto cognizance of the Supreme Court's verdict in *Naveen Kohli v. Neelu Kohli*¹⁵ in which the Court had urged Union of India to consider adding irretrievable breakdown of marriage as a ground for divorce through an amendment to the Hindu Marriage Act, 1955. The Court in this landmark case had opined that in cases where the marriage has been wrecked beyond salvage, the interests of the parties as well as the public interest lay in recognizing the breakdown and not ignoring it. To declare such marriage over is "*to declare defunct de jure what is already defunct de facto*".¹⁶ In light of these facts, the Petitioner contends that the marriage is broken beyond repair, and that no hope exists of salvaging the relationship. The emotional bond between the Petitioner and the Respondent has become irretrievably damaged.

[1.2] PARTIES HAVE NOT CO-HABITED FOR 7 YEARS

Sandeep and Anjali have not lived together for a significantly long period of 7 years. When deciding if the marriage has broken down beyond salvage between the husband and the wife, the Law Commission¹⁷ and the Courts have suggested that the spectrum of continuous lack of co-habitation should be taken into consideration. A long and continuous separation is proof

¹⁴ 217th Report, LAW COMMISSION OF INDIA.

¹⁵ Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675.

¹⁶ Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675.

¹⁷ 71st Report, LAW COMMISSION OF INDIA.

that the emotional bond that is necessary for a successful marriage cannot be salvaged by the parties, neither by conciliation, nor by cutting the Gordian knot. The suggested reform in law would not require dwelling on which party was to blame for the breakdown; it would only see if the marriage had broken down beyond repair.

The 71st Report of the Law Commission¹⁸ recommended the inclusion of irretrievable breakdown of marriage as a distinct ground for divorce under the Hindu Marriage Act, 1955. The suggested reform in law would not require dwelling on which party was to blame for the breakdown; it would only see if the marriage had broken down beyond repair. Analyzing inclusion of irretrievable breakdown of marriage as a ground for divorce, it noted that the law has gained recognition in a number of legal systems around the world, and that *“Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years.”*

These observations of the Law Commission were also quoted by a Bench of the Supreme Court in *Sanghamitra Ghosh v. Kajal Kumar Ghosh*¹⁹, in which the Court also said *“Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage --“breakdown”- and if it continues for a fairly long period, it would indicate destruction of the essence of marriage - “irretrievable breakdown”.”*

The Petitioner and the Respondent in the present case had a strained relationship even during the period of co-habitation. The frequent quarreling, along with other factors such as the demanding nature of their jobs and other responsibilities, ensured that the couple enjoyed only a limited emotional bond. Over time, that limited bond broke down and the marriage became

¹⁸ 71st Report, LAW COMMISSION OF INDIA.

¹⁹ *Sanghamitra Ghosh v. Kajal Kumar Ghosh*, (2007) 2 SCC 220.

limp.

In *Naveen Kohli v. Neelu Kohli*²⁰ it was held that “a long period of continuous separation” would indicate the matrimonial bond had broken down beyond repair. The marriage would become fiction that is merely supported by a legal tie. Refusing to grant divorce in such cases would only show scant regard for the emotions of the parties, according to the Apex Court.

In the present case, the Petitioner and the Respondent have been living separately for a period of 7 years from 2014 to 2021. Based on the precedence discussed, and in light of this fact, it can be presumed that the marriage has broken down beyond salvage.

In *Munish Kakkar v. Nidhi Kakkar*²¹, the Supreme Court granted divorce to the parties as the marriage had broken down irretrievably, stating that the parties who had been living separately for a considerable period of time still had hope for a better life, if not together, then separately. Similarly, in *Sandhya Rani v. Kalyanram Narayanan*²², the Apex Court noted that in the case the Petitioner and the Respondent had been living separately for over three years. The Court remarked that the marriage had broken down irretrievably and granted divorce to the parties.

Today, after 7 years of living separately, the marriage between Sandeep and Anjali lives on only on paper. The reality is that the parties do not share any emotional connection, have lived separately for a very substantial duration of time, and that the marriage is irretrievably broken with no hope left for reconciliation.

ISSUE 2: WHETHER AN ORDER FOR RESTITUTION OF CONJUGAL RIGHTS SHOULD BE

PASSED

²⁰ Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675.

²¹ Munish Kakkar v. Nidhi Kakkar, AIR 2020 SC 111.

²² Sandhya Rani v. Kalyanram Narayanan, 1994 Supp (2) SCC 588.

It is humbly contended before this Hon'ble Court that a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 should not be passed by the Hon'ble Court. This contention is sought to be proved by way of three-fold arguments: [2.1] *There is an existence of reasonable excuse*, [2.2] *The claim for restitution is insincere*, and [2.3] *Restitution of Conjugal Rights Would Lead to Miscarriage of Justice*.

[2.1] THERE IS AN EXISTENCE OF REASONABLE EXCUSE

The requirements for restitution of conjugal rights are²³: a) the other spouse has withdrawn from the society of the Petitioner, b) There is no reasonable excuse for such withdrawal. Should the Respondent allege reasonable excuse, the burden of proof lies on him/her, c) the court's satisfaction as to the truth and sincerity of the statements made in the petition and d) No legal grounds exist for refusing the decree.

It is true that the Petitioner has withdrawn from the society of the Respondent. However, the Petitioner has a reasonable excuse for doing so. The present case is also one of divorce. This very fact proves that the Petitioner feels that the marriage between him and the Respondent has reached the unsalvageable point of no return.

Cases of restitution of conjugal rights greatly depend on the facts of each case.²⁴ A court can refuse execution of a decree for restitution, if, it is of the opinion, that there is a reasonable cause for the judgment-debtor to refuse to live with the decree holder.²⁵ In *Ganga Prasad Gupta v. Sheela Devi*²⁶, the petition for restitution of conjugal rights failed because the Court found

²³ 1 KUSUM & POONAM PRADHAN SAXENA, FAMILY LAW.

²⁴ Malathi Ravi v. B.V. Ravi, AIR 2014 SC 2881; Shobha Rani v. Madhukar Reddy, AIR 1988 SC 121.

²⁵ Shailendra Koshti v. Kavita Koshti, AIR 2007 MP 46.

²⁶ Ganga Prasad Gupta v. Sheela Devi, Cr.Rev./1071/2016, Jharkhand High Court.

that the Respondent had reasonable cause to leave her husband's society. Similar were the cases *Shanti v. Balbir*²⁷, *Timmns v. Timmns*²⁸, *Chandra v. Saroj*²⁹ in which the Court refused to grant a decree for restitution because the Respondent had reasonable excuse.

In the present case, the Petitioner, fed up with the innumerable heated arguments and quarrels that he has engaged in with the Respondent, came to the difficult conclusion that it was time to end the marriage. Conjugal rights can only be restored when there is a marriage pertaining to which rights can be enforced. However, in the present matter, the strain of relations between the Respondent and the Petitioner is so piercing, that there is no marriage left. Consequently, there is no society and comfort that is left to for the Petitioner to return to.

*Kanna v. Krishnaswami*³⁰ is a pragmatic judgment in which the Court held that the ambit of "reasonable excuse" as defense under Section 10(1)³¹ against the decree of restitution does not remain confined to cruelty causing apprehension of harm or injury under section 10(1) (b) (as was the requirement prior to the 1976 Amendment³²) but extends to "*a practical impossibility for the parties to live together*". In *Swaraj Garg v. K.M. Garg*³³, the Court rightly refused the decree on social grounds. Where two spouses are mentally and physically separated, they cannot be united by a mere decree of restitution of conjugal rights.³⁴

²⁷ *Shanti v. Balbir*, AIR 1971 Del 294.

²⁸ *Timmns v. Timmns*, (1953) 2 All ER 187.

²⁹ *Chandra v. Saroj*, AIR 1975 Raj 88.

³⁰ *Kanna v. Krishnaswami*, AIR 1972 Mad 247.

³¹ Hindu Marriage Act, 1955 Section 10(1).

³² Marriage Laws (Amendment) Act, 1976, No. 68, Acts of Parliament, 1976 (India).

³³ *Swaraj Garg v. K.M. Garg*, AIR 1978 Del 296.

³⁴ M. Gangadevi, *Restitution of Conjugal Rights: Constitutional Perspective*, 45 JOURNAL OF THE INDIAN LAW INSTITUTE, 453-454 (2003).

This is, indeed, the state of affairs between the Respondent and Petitioner. The Petitioner has absolutely no feelings of affection that normal spouses would have for one another.

[2.2] THE CLAIM FOR RESTITUTION IS INSINCERE

The court passes the decree of restitution of conjugal rights only on a sincere petition of either spouse for the same.³⁵ In *Lachman Utamchand Kirpalani v. Meena*³⁶, the Court observed that the petition for restitution of conjugal rights should be a sincere attempt made by the Petitioner to reconcile with the Respondent. In *Shyamal Samaddar v. Sampa Samaddar*³⁷, too, the petition for restitution of conjugal rights was allowed because it was sincere attempt on the Petitioner's behalf, to reconcile with the Respondent. In the present case, the facts clearly point to the disingenuity of the Respondent's claim. She has used this claim as a means to gain custody of the Respondent's daughter.

When the Respondent sensed something was wrong, she came all the way to India to meet her daughter and have a talk with the Respondent. However, she had conversations with her husband only after she saw that the surrogate mother was living with her husband; It was only when she realized that since her marriage was in trouble and there was a good possibility that she would lose custody over the child. If the Respondent's claim for restitution for conjugal rights was to succeed, then she would also get custody over the child. It can thus be concluded that there is no sincerity that exists in this petition for restitution of conjugal rights, it is a mere façade to be able to gain custody over the child.

[2.3] RESTITUTION OF CONJUGAL RIGHTS WOULD LEAD TO MISCARRIAGE OF JUSTICE

³⁵ *Shyamal Samaddar v. Sampa Samaddar*, AIR 2012 Cal 220.

³⁶ *Lachman Utamchand Kirpalani v. Meena*, AIR 1964 SC 40.

³⁷ *Shyamal Samaddar v. Sampa Samaddar*, AIR 2012 Cal 220.

The validity of Section 9 of the Hindu Marriage Act, 1955 has been a matter of debate. In *Shakila Banu v. Gulam Mustafa*³⁸, the Court observed “*The concept of restitution of conjugal rights is a relic of ancient times when slavery or quasi-slavery was regarded as natural.*” The provision of restitution has been termed as ‘uncivilized’, ‘barbarous’, ‘engine of oppression’ and violative of Articles 14³⁹, 19⁴⁰ and 21⁴¹ of the Indian Constitution.⁴² ‘*Sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights*’, the Court has observed.⁴³ Consequently, the decree holder gets a right not only to the company of the other, but also to have sexual intercourse with her/him. This would result in transferring the choice of whether to have or not such relations to the State and not to the individual. ‘*Nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long rope of the law to a positive sex act.*’

Article 21⁴⁴ of the Constitution of India guarantees the right to life and personal liberty. It also includes the right to privacy⁴⁵, which undoubtedly includes one’s body’s inviolability and integrity and intimacy of personal identity. Marital privacy, too, falls under its purview. Article 14 guarantees equal protection of law, and ‘*bare equality of treatment regardless of the inequalities of realities is neither justice nor homage to the constitutional principle*’, the Court

³⁸ *Shakila Banu v. Gulam Mustafa*, AIR 1971 Bom 166.

³⁹ INDIA CONST. art. 14.

⁴⁰ INDIA CONST. art. 19.

⁴¹ INDIA CONST. art. 21.

⁴² *T. Sareetha v. T. Venkatta Subbaiah*, AIR 1983 AP 356.

⁴³ *T. Sareetha v. T. Venkatta Subbaiah*, AIR 1983 AP 356.

⁴⁴ INDIA CONST. art. 21.

⁴⁵ *K. S. Puttaswamy (Retd.) and Anr. v. Union of India*, (2019) 1 SCC 1.

observed.⁴⁶ The Section⁴⁷ infringes the freedom of association or union⁴⁸ as it forces a spouse to have association with another against his/her will. In *Huhhram v. Misri Bafi*⁴⁹, even though the Petitioner was in danger of ill-treatment by her husband and father-in-law, the Court directed her to restore conjugal rights. In *Atma Ram v. Narbada Devi*⁵⁰, though the husband clearly indicated that he has absolutely no desire to live with his wife (as is being done in the present case), he was a decree for restitution of conjugal rights was passed.

Jurists opined that constitutional provisions should not govern the family affairs.⁵¹ In a case⁵², it was said that "*introduction of the constitutional law in the home is most inappropriate, it is like introducing a bull in a China shop*". *Saroj Rani v. Sudershan Kumar*⁵³ is a decision *sub-silentio*, as it was a divorce on the basis of non-compliance of the decree of restitution of conjugal rights. Thus, Supreme Court was neither bound to pass a judgment regarding the constitutionality of restitution of conjugal rights decree nor the matter could be examined or analysed completely before the Court. Law is dynamic, and it should change with changes in people's rights.⁵⁴ Hence, the Petitioner submits that the claim for restitution of conjugal rights should not be allowed as such a decree would lead to miscarriage of justice.

⁴⁶ T. Sareetha v. T. Venkatta Subbaiah, AIR 1983 AP 356.

⁴⁷ Hindu Marriage Act, 1955 Section 9.

⁴⁸ INDIA CONST. art. 19, cl. 1(c).

⁴⁹ Huhhram v. Misri Bafi, AIR 1979 MP 144.

⁵⁰ Atma Ram v. Narbada Devi, AIR 1980 Raj 35.

⁵¹ M. Gangadevi, *Restitution of Conjugal Rights: Constitutional Perspective*, 45 JOURNAL OF THE INDIAN LAW INSTITUTE, 453-454 (2003).

⁵² Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66.

⁵³ Saroj Rani v. Sudershan Kumar, AIR 1984 SC 1562.

⁵⁴ Raj Kumari Agarwala, *Restitution of Conjugal Rights Under Hindu Law: A Plea For The Abolition of The Remedy*, 12 Journal of the Indian Law Institute, 257-261 (1970).

ISSUE 3: WHETHER THE CUSTODY OF THE CHILD SHOULD BE ALTERED

It is humbly contended before the Hon'ble Court that the custody of the child should stay with Sandeep. This contention is sought to be proved by way of three-fold arguments: **[3.1]** As per Hindu laws, father is the natural guardian **[3.2]** Custody with Sandeep is in the best interests of the child, **[3.3]** Surrogacy agreements are unenforceable.

[3.1] AS PER HINDU LAWS, FATHER IS THE NATURAL GUARDIAN

Hindu Minority and Guardianship Act, 1956⁵⁵ considers the father to be the natural guardian of a minor son. Additionally, there is no occasion for appointing anyone else to be the guardian of a minor unless the father is, unfit to be the guardian of the person of the minor⁵⁶. It necessarily follows that there is no occasion for the father to be appointed as the guardian for, appointment or no appointment, he is the natural guardian of the minor and no one else can be appointed as guardian unless he is unfit⁵⁷. When the father is alive, he is the natural guardian, and it is only after him that the mother becomes the natural guardian⁵⁸.

In the present case, Sandeep is a successful engineer in the USA and therefore, is financially sound.⁵⁹ Hence, he can provide for the child's welfare. He also has good relations with the child's surrogate mother, Priya with whom the child has grown attached. There is nothing to show that the father does not care for the child and hence, cannot be deemed unfit.

[3.2] BEST INTEREST OF THE CHILD LIES WITH SANDEEP

⁵⁵ Hindu Minority and Guardianship Act, 1956 Section 6.

⁵⁶ Smt. Rasulan v. Dilawar, AIR 1971 All 248.

⁵⁷ Smt. Rasulan v. Dilawar, AIR 1971 All 248.

⁵⁸ Jijabai Vithalrao Gajre v. Pathankhan, (1970) 2 SCC 717.

⁵⁹ Moot Proposition, para 10.

While taking a decision regarding custody or other issues pertaining to a child, “welfare of the child” is of paramount consideration.⁶⁰ It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. It is the welfare of the minor and of the minor alone which is the paramount consideration.⁶¹ Therefore, the court has to look into whether the minor child’s interest and welfare lies with the Petitioner.⁶²

In the present case the minor girl’s welfare lies with Sandeep. This shall be proven by the way of a two-fold argument. [3.1.1] *Minor child has been living with Sandeep and Priya for a long time* and, [3.1.2] *Marriage between Sandeep and Anjali is over.*

[3.2.1] MINOR CHILD HAS BEEN LIVING WITH SANDEEP AND PRIYA FOR HER WHOLE LIFE

The court has to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development, and favorable surroundings⁶³. In a matter relating to the custody of a child, the Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life.⁶⁴ The natural bond of mother-child love is formed during the nine months the child stays in the mother's womb.⁶⁵ The mother develops natural love for the child and the child is replica of the mother’s love and affection.⁶⁶

⁶⁰ Sheoli Hati v. Somnath Das, (2019) 7 SCC 490.

⁶¹ Saraswatibai Shripad Vad v. Shripad Vasanji Vad, 1940 SCC Bom 77.

⁶² Arun Kumar, *Guardianship and Custody of the Person of a Minor Child- Conflicting Claims*, 17 JOURNAL OF THE INDIAN LAW INSTITUTE 299 (1975).

⁶³ Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413; Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42.

⁶⁴ Vikram Vir Vohra v. Shalini Bhalla, (2010) 4 SCC 409.

⁶⁵ Jonathan Montgomery, *Constructing a family after surrogate birth*, 49 MODERN LAW REVIEW 639.

⁶⁶ Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN’S LAW JOURNAL 279 (2009).

During the first year of life, a child develops an attachment with the person who engages in social interaction with him most often. Generally, this will be his mother.⁶⁷ In the present case, Priya has birthed, cared and nurtured the child since her birth.⁶⁸ Both, Priya and child are bound to have developed a sense of love, affection and comfort for each other. Priya is co-habilitating with Sandeep, who has had the custody of the child for the past 7 years. The psychological impact that might take place on the child due to a potential change of custody needs to be kept in mind.⁶⁹ It is not uncommon for courts to provide the primary custody of the child to the party that child has been staying with.⁷⁰ Therefore, it can be inferred that the child's ordinary comfort and well-being lies in the custody of her primary care givers i.e., Sandeep and Priya who have been taking care of her from 2014 to 2021 (7 years).

The principle of the 'best interest of the child' is one that has been internationally recognized. The 1989 Convention on the Rights of the Child lays out the definite principle in Article 3.⁷¹ Whichever action is taken regarding a child, including by courts of law, the primary consideration has to be the best interests of the child. India is a signatory to the Convention, after it ratified it in 1992. In the present case, since the child has been cared for and has lived with Sandeep and Priya all his life, for the past 7 years, it is in his best interest for the status quo to be maintained and for the custody to be retained by Sandeep.

[3.2.2] MARRIAGE BETWEEN SANDEEP AND ANJALI IS OVER

Apart from physical comforts of a child, even the moral and ethical considerations cannot be

⁶⁷ JOHN BOWLBY, ATTACHMENT, SEPARATION, ANXIETY, AND ANGER (1969).

⁶⁸ Moot Proposition, para 18.

⁶⁹ Mamta v. Ashok Jagannath Bharuka, (2005) 12 SCC 452.

⁷⁰ Harshita Bhasin v. State of West Bengal and Ors., (2017) 2 SCC 377.

⁷¹ CONVENTION ON THE RIGHTS OF THE CHILD art 3.

ignored⁷². They are equally important and essential considerations. It is essential that the child grows and develops in the best environment.⁷³ It would not be ethical to take a child from her area of comfort and put her in a broken home, considering that the marriage between the parties is virtually over in spirit. Research has found that a significant number of the children, because of the separation of their parents, suffered fear, worry, sadness, feelings of rejection, loneliness, anger and guilt.⁷⁴ Subjecting the minor child to leave the care and affection of Priya and Sandeep and live with a single parent i.e., Anjali would affect the health, welfare and upbringing of the minor.⁷⁵

There cannot exist any straight jacket formula when it comes to the custody of children⁷⁶. While deciding on the custody of a child the courts also adopt the “least detrimental alternative”.⁷⁷ Considering that the child is also attached to Sandeep and Priya and living in India with them, maintaining the status quo by granting Sandeep with the minor child’s custody would be the least detrimental option.

⁷² Nil Ratan Kundu v. Abhihit Kundu, (2008) 9 SCC 413.

⁷³ Vivek Singh v. Romani Singh, (2017) 3 SCC 231.

⁷⁴ J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 45-50 (1980).

⁷⁵ S. Bikramjit Singh v. Smt. Iqbal Kaur, AIR 1974 P&H 124.

⁷⁶ Vikram Vir Vohra v. Shalini Bhalla, (2010) 4 SCC 409.

⁷⁷ Selvan v. N. Punidha, 2007 SCC OnLine Mad 636.

PRAYER

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

1. **Grant** divorce and end the marriage between the parties
2. **Dismiss** the petition for restitution of conjugal rights
3. **Retain** the custody of the child with the Petitioner

And / Or pass any such order, direction or relief as it may deem fit in order to uphold the principles of justice, equity and good conscience.

And for this act of kindness, the Petitioner shall forever humbly pray.

Sd/-

Counsel for the Petitioner