
2ND SURANA & SURANA AND ARMY INSTITUTE OF LAW

NATIONAL FAMILY LAW MOOT COURT COMPETITION

8TH APRIL TO 10TH APRIL, 2021

Before

THE HON'BLE FAMILY COURT AT DELHI

DISPUTE RELATING TO RESITUTION OF CONJUGAL RIGHTS AND CUSTODY

CIVIL SUIT NO. ____ of 2015

In the matter of

MR. SANDEEP.....PETITIONER

v.

MRS. ANJALI.....RESPONDENT

MEMORIAL ON BEHALF OF THE RESPONDENT.

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2. Law Commission, The Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a Ground of Divorce, Report number 71, April 1978.
3. Ministry of Health and Family Welfare Government of India, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India*, Indian Council of Medical Research, 2005.

STATEMENT OF JURISDICTION

The counsels on the behalf of the respondent submit the memorandum under Section 7 of the Family Courts Act, 1984 r/w Section 1(2) of Hindu Marriage Act, 1955 to Hon'ble Family Court at Delhi.

S.7, Family Courts Act, 1984:

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

The marriage between Mr.Sandeep (petitioner) and Mrs. Anjali (respondent), a software engineer and MBBS student respectively was solemnized at Delhi under Hindu marriage Act, 1955. The respondent post marriage was criticized for being too busy with her studies and was not appreciated for the work she did at home and was also subjected to insults by her in-laws. Thereafter, the petitioner accepted a job offer from Silicon Valley, USA while respondent had landed a resident position at a local hospital. Due to the conservative mind set of petitioner's family, respondent was forced to quit her job. The respondent was required to clear US Medical Board Exam to be qualified to practice there. On petitioner's insistence, respondent had to secure the amount for the fee of the course from her mother who was herself not of a very financially sound status. After qualifying all examinations the respondent landed a job with a hospital in the city. With respondent's life getting settled, she felt it appropriate for them to have a child which the petitioner disagreed with. After couple of years, they began their attempts to start a family which did not work out for them and thus they travelled to India (2013) to find a surrogate candidate. In Feb 2014, artificial fertilization was carried out on the surrogate mother Ms.Priya. A baby girl was born to the couple prematurely and was advised not to be made to travel for few months. Owing to work obligations, respondent left for USA while petitioner was allowed to work from home. While acting as primary care giver the petitioner got involved in a romantic relationship with Ms.Priya. The respondent, sensing the indifferent behaviour of the petitioner, returns to India to clarify things and is shocked to find that Ms.Priya resides with him. After heated arguments the petitioner has filed for divorce while respondent seeks remedy of restitution of conjugal rights and custody of the child.

ISSUES RAISED

- I. Whether or not, the counter-claim filed by the respondent is maintainable?
- II. Whether or not, decree of divorce should be granted to the petitioner?
- C. Ordinary wear and tear does not amount to cruelty.*
- D. Irretrievable breakdown is conditional upon existence of fault grounds.*
- III. Whether or not, decree of restitution should be granted in favour of the respondent?
- IV. Whether or not, physical custody should be granted to the respondent?

SUMMARY OF PLEADINGS

I. Whether or not, the counter- claim filed by the respondent is maintainable?

Yes, the the counter- claim filed by the respondent is maintainable. The respondent submits to the jurisdiction of this Court as the petitioner has approached the Court u/s.19 (i), Hindu Marriage Act, 1955 which states that every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized, r/w S. 1 & 2 of the above mentioned Act. The respondent submits the written statement along with the counter-claim of restitution of conjugal rights by virtue of Order VIII Rule 1.

II. Whether or not, a decree of divorce should be granted to the petitioner?

No, because the fault ground of cruelty is not made out by the petitioner, resultantly also failing the invocation of irretrievable breakdown of marriage.

III. Whether or not, decree of restitution should be granted in favour of the respondent?

Yes, the decree of restitution of conjugal rights should be granted in favour of the respondent as the petitioner does not have a reasonable cause for withdrawing from the society of the respondent and for the welfare of the child.

IV. Whether or not, physical custody should be granted to the respondent?

Yes, the physical custody should be granted to the respondent as welfare of the child is the paramount consideration and she is the natural guardian who has the right to custody by virtue of S.6 r/w S. 7 of the Hindu Minority and guardianship Act, 1956 and has been deprived of the same since the very beginning.

ARGUMENTS ADVANCED

“What greater thing is there for two human souls than to feel that they are joined for life - to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting.”- George Eliot

I. Whether or not, the counter- claim filed by the respondent is maintainable?

1. The respondent submits to the jurisdiction of this Court as the petitioner has approached the Court u/s.19 (i), Hindu Marriage Act, 1955 which states that, every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized, r/w S. 1 & 2 of the above mentioned Act. The respondent submits the written statement along with the counter-claim of restitution of conjugal rights by virtue of Order VIII Rule 1.
2. A person carries with him the personal law applicable to him unless and until he adopts any other law. In the present case, the marriage between Mr. Sandeep and Mrs. Anjali was solemnized as per Hindu rites and rituals under Hindu Marriage Act at Delhi in the year 2000.
3. Domicile as a habitation is not for a mere temporary purpose but with the intention of making it a permanent home. In the present case, the respondent has decided to stay back in India owing to the significant changes that took place when she left for some time to USA, because of her work obligations. On returning back after a couple of months, she realised that Mr. Sandeep had developed a romantic relationship with Ms. Priya, who was cohabiting with him,

at the acquiescence of his family. Ever since, Mrs. Anjali has been residing at Delhi with her widowed mother and her domicile of origin has revived.

Intention is always lodged in the mind, which can be inferred from any act, event or circumstances in the life of a person. Residence, for a long period, is an evidence of such an intention, so also the change of nationality¹. The domicile of origin prevails not only until another domicile is acquired but till there is manifest intention of abandoning domicile of origin².

4. In the case of *Sondur Gopal v. Sondur Rajani*³, the husband had acquired the citizenship of Sweden but had abandoned that domicile when he shifted to Sydney, Australia. The Hon'ble Court held that the husband's domicile of origin (India) revived immediately on his abandoning the domicile of choice (Sweden). This is in the view of settled International Law that if the domicile of origin is displaced as a result of domicile of choice, domicile of origin remains in the background ready to be revived the moment he abandons his domicile of choice.
5. In the case of *Dr. Madhusudan Dalvi v. Dr. Rajlaxmi Walavalkar*⁴, the Court held that the rule is "once competent, always competent" and this will be so even if the party domiciled in India at the time of their marriage, has since changed his domicile, disassociated himself from the determination of his status by the Court in India. Once the provisions of Hindu Marriage Act apply, it would continue to apply as long as the marriage exists.

¹ Karan Goel v. Kanika Goel , MAT. APP. (F.C.) 101/2020.

² Sondur Gopal v. Sondur Rajani, (2013) 7 SCC 426.

³ Ibid.

⁴ 2 (2014) DMC 836 Bom.

I. Whether or not, a decree of divorce should be granted to the petitioner?**[A]. Ordinary wear and tear does not amount to cruelty.**

6. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case. A too technical and hyper-sensitive approach would be counter-productive to the institution of marriage.⁵
7. In *A. Jaychandra v. Aneel Kaur*⁶, a 3 judge bench of the Supreme Court held that first, the enquiry must begin as to the nature of cruel treatment, second, the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other.
8. In the case of *Parveen Mehta v. Inderjit Mehta*⁷, it was held that mental cruelty as interpreted in S. 13 (1) (ia) is a state of mind and feeling of one of the spouses due to the behaviour by the other. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other. The respondent, in the present case, was not only dutiful towards her husband but also her

⁵ Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558.

⁶ AIR 2005 SC 534.

⁷ (2002) 5 SCC 706.

in-laws from the very beginning of their marriage. Early on in the marriage she was subjected to harsh criticism and was never appreciated for all the work she did at home. Although she tried her best to win the hearts of the family she was often insulted in front of others. Due to the patriarchal mindset of the family she was forced to quit her job and move to USA. In the case of *R Prakash v. Sneh Lata*⁸, the court expressly emphasized on equality of the spouses. A wife's refusal to quit her job *per se* is not cruelty. The orthodox concept of wife and expectations from her to subject herself to husband's wishes has undergone revolutionary change with education and high literacy in women and with recognition of equal rights to women in the Constitution and abolition of sex distinction in all walks of life.

9. In *Bajranj Gangadhar Revdekar v. Pooja Bajrang Revdekar*⁹, it was observed that a husband's petition for divorce alleging cruelty by wife was dismissed as, instances alleged to establish her cruelty were day-to-day quarrels over trivial matters; the fact that the wife makes her grievance in a loud voice was not cruelty. The mere fact that, in the present matter, the couple had occasional arguments due to minor difference of opinions cannot be termed as cruelty by one spouse. Mere coldness or lack of affection cannot amount to cruelty. Mere trivial irritations, quarrels, normal wear and tear of married life would not be adequate for grant of divorce on the ground of mental cruelty.
10. According to doctrine of recrimination, no remedy can be granted to the party at fault. It is imperative to have one party as innocent and other party at fault to provide a matrimonial relief. A person who seeks matrimonial remedy must come to the

⁸ AIR 2001 Raj 269.

⁹ AIR 2010 Bom 8.

court with clean hands. In *Chetan Dass v. Kamla Devi*¹⁰, it was held that the institution of marriage and the matrimonial bond cannot be made so fragile so as to be easily broken and which may serve the purpose most welcome to the wrong-doer. Merely showing that the parties are unhappy because of unruly temper of a spouse or matrimonial wrangling, would fall considerably short of the conduct which can amount to cruel treatment. In *JL Nanda v. L Nanda*¹¹, as held by the Supreme Court, sometimes the temperament of the parties may not be conducive to each other and may result in petty quarrels and troubles which should not lead to divorce.

11. In *Dastane v. Dastane*¹², the court held that the party guilty of misconduct of cruelty must have persistently and repeatedly treated the petitioner with such cruelty so as to cause reasonable apprehension in the mind of petitioner. In any proceedings under the Act¹³, whether defended or not, the relief prayed for can be decreed only if the petitioner has not condoned the cruelty. Condonation of an act of the respondent by the petitioner has been given u/s 23(1) (b)¹⁴. Condonation constitutes two things- forgiveness of matrimonial offence and restoration of offending spouse to the same position as he or she occupied before the offence was committed. The evidence on condonation consists of the fact that spouses led a normal sexual life despite the various acts of cruelty.¹⁵ In the present case, even if the petitioner, at any point, has

¹⁰ 2001 (3) All M.R. 255.

¹¹ AIR 1988 SC 407.

¹² AIR 1975 SC 1534.

¹³ The Hindu Marriage Act, 1955.

¹⁴ Ibid.

¹⁵ Supra note 12.

perceived the regular wear and tear as cruelty, the same has been condoned while the couple was attempting to start a family.

12. The petitioner's contention that the respondent's absence for a few months amounts to cruelty is absurd and frivolous as it can be safely inferred that her departure was consensual. It is also pertinent to note that Mrs. Anjali's presence was constructive through Mr. Sandeep.
13. A reference can be made to S. 18 of Hindu Adoptions and Maintenance Act 1956 where a Hindu wife shall be entitled to be maintained by her husband during her lifetime r/w S.3 (b)¹⁶ which defines "Maintenance" to include provision for food, clothing, residence, education and medical attendance and treatment. Mr. Sandeep's insistence to the respondent to depend on her mother to pay for her course fee and his indifference in helping the respondent with the same shows that he has been negligent towards his duties as a husband. Ironically, he is alleging her departure as cruelty, when it is amply clear that she needs to fulfil her financial obligations towards her mother.

[B]. Irretrievable breakdown is conditional upon existence of fault grounds.

14. Breakdown of marriage may be defined as such failure in the matrimonial relationship that no reasonable probability remains of the spouses again living together as husband and wife for mutual comfort and support. Divorce is not hitherto a reward for marital virtue on one side and a penalty for marital delinquency, on the other, but a defect for both, a failure of marital two-in-oneship.¹⁷

¹⁶ Hindu Adoptions and Maintenance Act, 1956.

¹⁷ Harvinder Kaur v. Harmander Singh Choudhry AIR 1984 Del 66.

15. In *Harendra Nath Burman v. Suparva Burman*¹⁸, the court observed that mere breakdown of marriage however irretrievable, is not by itself and without more, any ground for dissolution of marriage as yet under matrimonial law. In the present matter, in the absence of the fault ground i.e. cruelty, which has been averred by the petitioner, the breakdown of marriage stands no ground. Divorce cannot be granted on the basis of irretrievable breakdown if one party's greatest and paramount desire is to rejoin the partner and live with them normally in a matrimonial relationship.¹⁹
16. In *Vishnu Dutt Sharma v. Manju Sharma*²⁰, the Supreme Court observed that granting divorce on the ground of irretrievable breakdown would mean adding a clause to S.13 of the Act through judicial verdict. It held that adding a new clause making irretrievable breakdown of marriage grounds for divorce could only be done by the legislature, not by the courts.
17. When the fault is of the husband, he cannot be permitted to seek divorce on the ground of irretrievable breakdown of marriage and to take benefit of his own wrong.²¹ The act of infidelity on the part of the petitioner disqualifies him to seek divorce on the fault ground of cruelty. In the case of *Hitesh Bhatnagar v. Deepa Bhatnagar*²², the respondent has stated that she wanted the marriage to continue,

¹⁸ AIR 1989 Cal 120.

¹⁹ *Vishnu Dutt Sharma v. Manju Sharma* (2009) 6 SCC 379 and *Gurbax Singh v. Harminder Kaur* (2010) 14 SCC 301.

²⁰ *ibid.*

²¹ *Ram Babu Babeley v. Sandhya*, AIR 2006 All 12.

²² 2011 (5) SCC 234.

especially in order to secure the future of their minor daughter, though her husband wanted it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. The court wanted the couple to give their union another chance for the future of their daughter.

18. In *Chetan Dass v. Kamla Devi*²³, the Court observed that matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for granting of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case." The Court uses its extraordinary power to dissolve a marriage as having irretrievably broken down only when it is impossible to save the marriage and all efforts made in that regard would, to the mind of the Court, be counterproductive²⁴.

19. In *V. Bhagat v. D. Bhagat*²⁵, the court observed, merely because there are allegations and counter allegations, a decree of divorce cannot follow. Nor is mere

²³ Ibid at 7.

²⁴ Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.

²⁵ AIR 1994 SC 710.

delay in disposal of the divorce proceedings by itself a ground. There must be really some extra- ordinary features to warrant grant of divorce on the basis of pleading (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself for divorce.

20. In the case of *Savitri Pandey v. Prem Chandra Pandey*²⁶, the Court took the view that the marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. In the present case, the Court does not have the jurisdiction to grant divorce solely on the ground of Irretrievable Breakdown of Marriage. The *sui generis* power to grant a decree of divorce on such ground lies with the Supreme Court under Art. 142 of the Constitution of India, 1950. The other Courts in the hierarchy can only grant a decree of divorce by reading irretrievable breakdown in one of the fault grounds mentioned under S. 13 of Hindu Marriage Act. The ground of cruelty is not made out in the present matter and thus no question arises as to the applicability of breakdown theory.

21. In *Manish Goel v. Rohini Goel*²⁷, while refusing to dissolve the marriage on the ground of irretrievable breakdown of marriage, held that the law in this regard can be summarized to the effect that in exercise of the power under Article 142 of the Constitution, the Apex Court generally does not pass an order in contravention of

²⁶ (2002) 2 SCC 73.

²⁷ (2010) 4 SCC 393.

or ignoring the statutory provisions nor is the power exercised merely on sympathy.

II. Whether or not, decree of restitution should be granted in favour of the respondent?

22. The idea of providing for restitution by a court decree is to preserve the marriage tie as far as possible, by enabling the court to intervene and enjoin upon the withdrawing party to join the other. This is by virtue of S.23 (2) where before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties.

23. As per the Explanation to S. 9 of Hindu Marriage Act, the burden of proving reasonable excuse is on the person who has withdrawn from the society.

A valid marriage between two persons imposes an obligation on both the spouses to cohabit and live with each other. The expression ‘withdrawal from the society’ means cessation of cohabitation or brings to an end consortium. The expression ‘withdrawal from the society of the other’ involves a mental process besides a physical separation. If one of the spouses does not fulfil the marital obligations it amounts to withdrawal from the society of the other as they cannot be said to be cohabiting with each other and a decree for restitution for conjugal rights can be passed.²⁸

24. In *Harvinder Kaur v. Harmander Singh Choudhry*²⁹ it was observed that Consortium means companionship, love, affection, comfort, sexual intercourse.

²⁸ S.R.MYNENI, HINDU LAW- FAMILY LAW-I, 212 Asia Law House (2014).

²⁹ AIR 1984 Del 66.

All these belong to the married state. Taken together they make consortium. S. 9, according to the Delhi High Court is in a way an extension of S. 23 (2) and (3) of the Act, which aims at stabilising a marriage and encouraging reconciliation. A restitution decree ‘acts an index of connubial felicity. It is a sort of litmus paper. If the decree is disobeyed it is an indication that the parties have reached a stage of no return’. It thus serves a useful purpose by giving a ‘cooling off’ period. Spouses live under a type of ‘legal armistice’³⁰. While Anjali went back to US there was an absence of social and conjugal relationship between the couple as Mr. Sandeep was ignoring her calls and messages and was not communicating with her. Only in a span of few months, he developed a romantic relationship with Ms. Priya. This is sufficient evidence to infer that Mr.Sandeep has withdrawn from the society without a reasonable cause. The infidelity or the second marriage of the husband has not been found to be a reasonable cause by the Courts and the spouse is not allowed to withdraw from the society of the other.³¹

24. The court’s satisfaction in such matters is not controlled by rules or quantum of evidence. In a given case the petitioner’s statement for restitution uncorroborated by any other evidence may be sufficient to satisfy the court. The matter depends on the conduct of the parties and strong common sense of the judge.³² As aforementioned, since there is no legal ground made out in the petition for divorce the petitioner has not withdrawn with a reasonable cause. Hence, it is

³⁰ PROF KUSUM, FAMILY LAW LECTURES, FAMILY LAW-I 47 (4th ed. , LexisNexis 2015).

³¹ S.R.MYNENI, HINDU LAW- FAMILY LAW-I, 215 Asia Law House (2014).

³² Kishore Sahu v. Snehabhabai Sahu AIR 1943 Nag. 185; Ratnaprabhabai v. Sheshrao AIR 1972 Bom 182.

submitted that the Court in the interests of the parties and the child should grant the decree of restitution in favour of the respondent.

III. Whether or not, physical custody should be granted to the respondent?

25. In the present case, there was a clear verbal agreement between the couple and the surrogate mother. A surrogate mother must relinquish all paternal rights concerning the offspring and vice-versa³³. In the present case, Ms. Priya has not only retained the custody of the child but is also residing in the respondent's patrilocal home. The demand for the custody by Ms. Priya via the petitioner is a breach of the aforesaid contract. The respondent in the present case, resultantly, has been deceitfully deprived of the custody of the child.

26. Where the minor child, a female of 9 years of age, was in the custody of the father and the wife during the pendency of divorce proceedings applied for custody of the child and the minor also expressed her desire to stay with her mother. The trial court found that it would be in the interest of the child to stay with her mother and the court order u/s.26 for handing over the child to the mother was confirmed by the High Court³⁴. In *Sardar Bhupendra Singh v. Smt. Jasbir Kour*³⁵, the custody of the child was given to the mother even when the child was more than 6 years old in preference to the father.

³³ National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, ICMR 2005, ¶ 3.5.5.

³⁴ Debiprasad v. Sandhya Debi, AIR 1985 Gau 97.

³⁵ AIR 2000 MP 330.

27. S.6 (a) of Hindu Minority and Guardianship Act, 1956 states that in case of a boy or an unmarried girl the father and after him the mother is the natural guardian, provided that the custody of the minor who has not completed the age of 5 years shall ordinarily be with the mother. The present petition was filed before this Court in 2015 when the child was below five years and accordingly, the preferential right of custody of minor girl child was with the mother, who had no reasons to be denied the same. According to S. 21B (2) of Hindu Marriage Act, every petition is to be concluded within six months from the date of service of notice of the petition on the respondent. Due to the pending status of the litigation, the respondent mother has been deprived of motherhood for a period of 7 years.

28. According to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, ICMR 2005, a child born through surrogacy must be adopted by the genetic (biological) parents, unless, they can establish through genetic fingerprinting that the child is theirs³⁶. A child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses, and with all the attendant rights of parentage, support and inheritance³⁷. Under the Hindu Minority and Guardianship Act, 1956, in case of a child who is below 5 years of age the mother has a preferential right to custody. S. 6 of the Hindu Minority and Guardianship Act, 1956 is

³⁶ ¶3.10.1

³⁷ ¶3.16.1

to be r/w S.7 of the same and S. 12 of the Hindu Adoptions and Maintenance Act, 1956. It is submitted that Ss. 7 and 12 must be read complementarily and cumulatively. S.12 of the Hindu Adoptions and Maintenance Act, states that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes. In S.7 of Hindu Minority and Guardianship Act, the “adoptive son” means both boy or girl and the male or female adopter would become the natural guardian of the adoptee minor. In the present case, the rights over the child have passed on to the couple by virtue of the surrogacy agreement. The natural guardianship is inherent and is not required to be sanctioned or recognised by the court³⁸. Therefore the respondent cannot be denied custody as she is the natural guardian.

29. In matrimony and custody, the law of the place which has the closest connection with the well-being of offspring must govern the dispute. A passing reference can be made to S.9 of Guardians and Wards Act, 1890 under which the application for guardianship of person of minor shall be made to the District court having jurisdiction in the place where the minor ordinarily resides.³⁹

30. By virtue of S.26 of Hindu Marriage Act, the respondent is seeking relief of interim custody of the child *lis pendens*. Under this section, the court may pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody of the child. The provision of S.6 of

³⁸ Radhika Konel Parekh v. Konel Parekh AIR 1993 Mad 90; Snehalata v. Mahendra Narain AIR 1980 Raj 64.

³⁹ Abraham G. Karimpanal & Ors v. Nil AIR 2004 Kant 321.

Hindu Minority and Guardianship Act, 1956 to the effect that in case of a child below 5 years, the custody shall be with the mother, would also apply while granting custody of the children u/s. 26 of this Act⁴⁰. In deciding the question of custody, the paramount consideration is the welfare of child as provided in S. 13 of Hindu Minority and Guardianship Act, 1956⁴¹. But in this case, the child has been deprived of motherly love and affection of the respondent and hence, without giving her an opportunity to parent the child a decision cannot be taken as to the paramount consideration.

31. Although the section provides that the mother has a right to the custody of child below 5 years of age and the father has a right to custody above 5 years, the question will be ultimately decided, in case of a dispute, from the point of view of the welfare of the child and not in terms of this section.⁴² In the case of *K.S Mohan v. Sandhya Mohan*⁴³, where the mother left the father of the child without any valid reason and was also found to have illicit relations with another man and then asked for the custody of the child, the father was allowed to keep the custody. In the present case, the petitioner is involved in a romantic relationship with the surrogate mother which is ethically and morally incorrect. Hence, the decree of restitution should be granted to restore the surrogacy agreement and uphold the rights of the natural guardians.

⁴⁰ Radhabai v. Surendra AIR 1971 Mys 69; Chander Prabha v. Premnath Kapur AIR 1969 Del 283.

⁴¹ Sheoli Hathi v. Somnath Das. (2019) 7 SCC 490; Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112; Sumedha Nagpal v. State of Delhi & Ors. (JT 2000 (7) SC 450); Saraswatibai Shripad Vad v. Shripad Vasanji Vad 1940 SCC OnLine Bom 77.

⁴² G.M. DIVEKAR, HINDU LAW A CRITICAL COMMENTARY, 2nd ed. Hind Law House (2002).

⁴³ AIR 1993 Mad 59.

32. In *Santha Kumari v. Natarajan*⁴⁴, the mother was held entitled to custody of daughter even when she was less than 5 years old, though she was serving and used to be away from home for long time every day. The Supreme Court in *Sarita Sharma v. Sushil Sharma*⁴⁵, has observed that ordinarily the female child should be allowed to remain with the mother so that she can be properly looked after.

⁴⁴ AIR 1973 Mad 359.

⁴⁵ 2000 1 SCR 915.

PRAYER

Wherefore, in light of the arguments given, issues raised and authorities cited, it is most humbly and respectfully prayed before this Hon'ble Court that it may be pleased to-

- (i) Pass a decree for the restitution of conjugal rights in favour of the respondent,
- (ii) Grant interim custody of the child to the respondent,
- (iii) Grant permanent custody of the child to the both the petitioner and respondent, and;
- (iv) Grant the costs in favour of the respondent.

And/Or

Pass any other order or grant any other relief in favour of the respondent, which this Hon'ble Court may deem fit in the ends of equity, justice and good conscience.

For this act of kindness, the counsel(s) for the respondent shall duty bound forever pray.

Date: 29th day of March, 2015.

Sd/- _____

Place: Delhi.

Counsel(s) for respondent.

MEMORIAL ON BEHALF OF THE RESPONDENT.