

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

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**IN THE HONORABLE FAMILY COURT OF NEW DELHI**

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**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 RESPONDENT**

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**LIST OF ABBREVIATIONS**

Abbreviation	Full-Form
AIR	All India Reporter
AP	Andhra Pradesh
art.	Article
Bom	Bombay
Cal	Calcutta
Chh	Chhattisgarh
Del	Delhi
DLR	Delhi Law Reporter
ed.	Edition
EWFC	England and Wales Family Court
Gau	Gauhati
HP	Himachal Pradesh
Mad	Madras
MLJ	Madras Law Journal
MP	Madhya Pradesh
Ori	Orissa
Para	Paragraph

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**Section 9- Restitution of conjugal rights:** When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being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

A marriage is a holy bond between two individuals that cannot be broken for trivial reasons or on the whims and fancies of an individual. Hindu Marriage Act, 1955 provides no grounds for divorce on the basis of irretrievable breakdown of marriage. The party at fault cannot claim the benefits of their own wrong. The Petitioner cannot claim a divorce on the basis of the break in co-habitation that was caused by the Petitioner in the first place. The Respondent has always shown a desire to resume normal marital ties with the Petitioner.

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

An essential element of marriage is enjoying the company of each other. Unreasonable withdrawal from the company of a spouse goes against the sanctimonious nature of a marriage. The Petitioner withdrew from the company of the Respondent without any reasonable excuse to do so. He started co-habitation with another individual outside of the marriage, even as the Respondent made bona fide attempts to fix the marriage and resume normal marital life.

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

The most important aspect of determining custody of a child is the best interest of the child. In the present instance, the best interest of the child is that the custody should be granted to the Respondent. The Petitioner is living immorally with another individual while his marriage subsists. Such an immoral household cannot ensure an ethical upbringing of the child. Further, since the marriage between the Petitioner and the Respondent subsists, the ideal scenario would be if the child was in their custody as they co-habited in a normal marital tie.

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

It is humbly contended before the Hon'ble Court that divorce should not be granted in the present case. This contention is sought to be proved by way of two-fold arguments: *[1.1] Irretrievable breakdown of marriage is not recognized under Hindu Marriage Act, 1955*, and *[1.2] Party at fault cannot claim breakdown*.

Marriage is a pious relationship shared by two individuals. It is a commitment that cannot be broken for trivial reasons. Religious scriptures and subsequent historical eras have placed utmost importance on the sacrosanct and permanent nature of marriage. Hindu scriptures envision the bond of marriage to be one that lasts multiple lifetimes. Such a sanctimonious pledge cannot be broken by trifling reasons.

**[1.1] IRRETRIEVABLE BREAKDOWN OF MARRIAGE IS NOT RECOGNIZED UNDER HINDU MARRIAGE ACT, 1955**

The Petitioner Sandeep lived together with Anjali for a period of 14 years, from the time of their marriage in 2000 to 2014. During this period, they went through major milestones in life. They faced familial pressures<sup>1</sup>, and still stood tall to maintain their marital bond. When Sandeep received a job offer that would require him to move to a different country, USA, Anjali readily left her job and moved with him to a foreign land because a long-distance marriage was not

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<sup>1</sup> Moot Proposition, para 5.

acceptable to Sandeep's family.<sup>2</sup>

In the case of *Vishnu Dutt Sharma v. Manju Sharma*<sup>3</sup>, the Supreme Court clearly observed that irretrievable breakdown of marriage is not a ground for divorce under Section 13 of Hindu Marriage Act, 1955.<sup>4</sup> Granting divorce on such a basis would amount to the Court adding a clause to Section 13 the Act, and an amendment could only be brought about by the legislature, and not the judiciary. It should be noted that even in the limited cases wherein the Supreme Court has granted divorce while declaring that the marriage was dead, it has done so via the powers granted to it under Article 142<sup>5</sup> of the Constitution and not under Section 13 of the Hindu Marriage Act<sup>6</sup>. Here, the Petitioner is invoking the plea of irretrievable breakdown of marriage without considering the fact that such a provision does not exist in the statute.

The fact that irretrievable breakdown is not available as a ground for divorce under Hindu Marriage Act, 1955 was noted in the case of *Pawan Kumar Dewangan v. Rama Dewangan*,<sup>7</sup> in which the Court also referred to the landmark Supreme Court judgement of *Naveen Kohli v. Neelu Kohli*<sup>8</sup> which concluded that Hindu Marriage Act. Such a plea should only be used in extreme cases. Irretrievable breakdown of marriage is not a ground for divorce in itself.<sup>9 10</sup>

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<sup>2</sup> Moot Proposition, para 8.

<sup>3</sup> *Vishnu Dutt Sharma v. Manju Sharma*, AIR 2009 SC 2254.

<sup>4</sup> Hindu Marriage Act, 1955 Section 13

<sup>5</sup> INDIAN CONST. art 142

<sup>6</sup> Hindu Marriage Act, 1955 Section 13

<sup>7</sup> *Pawan Kumar Dewangan v. Rama Dewangan*, AIR 2012 Chh 47.

<sup>8</sup> *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675.

<sup>9</sup> 19 FAMILY LAW I (2 ed. Halsbury's Laws of India).

<sup>10</sup> *Gurbux Singh v. Harminder Kaur*, AIR 2011 SC 114.

The Petitioner is presenting regular quarrels that are common in any relationship shared by two individuals in order to invoke the position that has been used by the Apex Court only in the most extreme cases with an abundance of caution. The Respondent rejects the averments made by the Petitioner that the marriage had only a limited emotional connect, and that connect has been irreparably broken. Even during the phase of their lives in which Anjali faced financial difficulty to complete her studies in USA to be able to practice medicine in the country, and Sandeep refused to help her, she somehow went through hardships to arrange the money from her mother who had to mortgage her house for the same.<sup>11</sup> In such difficult circumstances too, Anjali never imagined harming the matrimonial tie that she shares with the Petitioner.

In *Darshan Gupta v. Radhika Gupta*<sup>12</sup>, the Supreme Court dismissed the Petitioner's (husband's) petition for divorce on the basis of arguments of irretrievable breakdown of marriage by stating that the husband wouldn't have accepted the dissolution of marriage had the roles been reversed. If he had expressed a continuous and fervent desire to carry on marital relations and resume normal life in such an instance, it wouldn't be just to dissolve the marriage even if the said couple had been living separately for a duration of time.

The Respondent in the present case, Anjali, has always expressed the desire to co-habitate with the Petitioner. She, for no fault of her own, is being threatened with a divorce based on the ex parte assertion of the breakdown of marriage by the Petitioner. Such an assertion is vehemently rejected by the Respondent. In light of this, there is no statutory nor factual ground for the Petitioner to argue for irretrievable breakdown of marriage.

### **[1.2] PARTY AT FAULT CANNOT CLAIM BREAKDOWN**

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<sup>11</sup> Moot Proposition, para 9.

<sup>12</sup> *Darshan Gupta v. Radhika Gupta*, (2013) 9 SCC 1.



Since the Respondent Anjali has always been willing to restart co-habitation with Sandeep, it is Sandeep who is at fault for living separately from the Respondent.

The well-recognized legal maxim “*Nullus commodum capere potest de injuria sua propria*” means that no man should be able to take advantage of his own wrong. In *Kusheshwar Prasad Singh v. State of Bihar*<sup>13</sup>, the Supreme Court discussed this legal maxim and stated that “...*this maxim, which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.*” Similarly, *Kusheshwar Prasad Singh v. State of Bihar and Ors.*<sup>14</sup> also remarked on the principle by stating that “*It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law.*”

In a divorce petition in which the Petitioner was the party whose conduct led to the problems that persisted in the marriage, the Chhattisgarh High Court dismissed it while stating that “*a party cannot be permitted to take advantage of his own wrong.*”<sup>15</sup> In the present case, it was the Petitioner who left the company of the Respondent and started to co-habitate with another person with whom the Petitioner was romantically involved.<sup>16</sup> Because of this fact, the Petitioner and the Respondent have not been living together.

In *Neelam Kumar v. Dayarani*<sup>17</sup>, Petitioner sought divorce from the Respondent and pleaded irretrievable breakdown of marriage. The Supreme Court rejected the petition and stated that

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<sup>13</sup> *Kusheshwar Prasad Singh v. State of Bihar*, (2007) 11 SCC 447.

<sup>14</sup> *Kusheshwar Prasad Singh v. State of Bihar and Ors.*, (2007) 11 SCC 447.

<sup>15</sup> *Pawan Kumar Dewangan v. Rama Dewangan*, AIR 2012 Chh 47.

<sup>16</sup> Moot Proposition, para 16.

<sup>17</sup> *Neelam Kumar v. Dayarani*, AIR 2011 SC 193.

there was no proof to show that the Respondent contributed in any way to the alleged breakdown of the marriage. The Petitioner couldn't be allowed to, by his own conduct, bring the marriage the marriage to the point of breakdown and then seek a divorce on the said grounds, as it would simply imply giving him the benefits of his own misdeeds.

The Petitioner, in the present case, alleges that the marriage has irretrievably broken down due to the Petitioner Sandeep and the Respondent Anjali not living together for a period of time. It is clear that the Petitioner is trying to take advantage of his own wrong. The Petitioner violated the sanctity of marriage by leaving the company of the Respondent to live with another individual and is now attempting to use that wrong to get a decree of divorce from the Court. The Supreme Court in *Shyam Sunder Kohli v. Sushma Kohli*<sup>18</sup> dismissed the petition of divorce while stating that the Petitioner himself was liable for the problems in the marriage. It said that *"It can hardly lie in the mouth of a party who has been at fault and who has not allowed the marriage to work to claim that the marriage should be dissolved on the ground of irretrievable break down."* Various High Courts has also held that the mere fact that the parties lived separately for 11 years<sup>19</sup>, or 16-17 years<sup>20</sup>, does not mean that the marriage has broken down irretrievably.<sup>21</sup>

Thus, in the present instance, the Petitioner is trying to take advantage of his own wrong. He is ignoring the immense sacrifices made by the Respondent to sustain the marriage and is instead trying to use his own immoral conduct to bring about a formal end of the marriage. This is

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<sup>18</sup> *Shyam Sunder Kohli v. Sushma Kohli*, AIR 2004 SC 5111.

<sup>19</sup> *Narayan Roy v. Jamuna Dey*, AIR 2010 Gau 75; *Piyasa Ghosh v Somnath Ghosh*, AIR 2009 Cal 90.

<sup>20</sup> *Sunita Devi v. Shri Lala*, AIR 2009 HP 52.

<sup>21</sup> 19 FAMILY LAW I (2 ed. Halsbury's Laws of India).

despite the fact that the Respondent has always been willing to resume normal matrimonial life with the Petitioner. The Petitioner should not be allowed to take advantage of his own wrong in this manner.

**[1.2.1] THERE IS NO MUTUAL CONSENT TO END MARRIAGE**

In the present case, there is no mutual consent to bring about an end to the marriage. As illustrated above, the Respondent has always expressed her desire to resume a normal married life with the Petitioner. While laying down that the ground of irretrievable breakdown of marriage was not a part of Hindu Marriage Act, 1955 and the decision whether to amend it was one that was to be made by the legislature, the Supreme Court in *Vishnu Dutt Sharma v. Manju Sharma*<sup>22</sup> said that “*Had both parties been willing we could, of course, have granted a divorce by mutual consent as contemplated by Section 13B of the Act, but in this case the Respondent is not willing to agree to a divorce.*”

In case the husband alone wants divorce, while the wife is against such divorce, the Court cannot grant divorce on the basis of irretrievable breakdown of marriage. This has been held in *Usharani Lenka v. Panigrahi Subhash Chandra Dash*<sup>23</sup>, *Madhu Sood v. Anil Kumar*<sup>24</sup>, *Gauri Shanker Chakravarty v. Basana Roy*<sup>25</sup>, and *P Malleswaramma v. P Pratap Reddy*<sup>26</sup>.

In the present case as well, the Respondent rejects the path of divorce. The Apex Court has in the past granted divorce when the marriage has broken down and both the parties are ready to

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<sup>22</sup> Vishnu Dutt Sharma v. Manju Sharma, AIR 2009 SC 2254.

<sup>23</sup> Usharani Lenka v. Panigrahi Subhash Chandra Dash, AIR 2005 Ori. 3.

<sup>24</sup> Madhu Sood v. Anil Kumar, AIR 1999 HP 17.

<sup>25</sup> Gauri Shanker Chakravarty v. Basana Roy, AIR 1999 Gau 48.

<sup>26</sup> P Malleswaramma v. P Pratap Reddy, AIR 2006 AP 4.

move on with no hope of salvage. However, in the present case, the Respondent still wants to preserve this marriage and is confident that her marriage with the Petitioner can be saved. The Petitioner's claims that the marriage has broken down because of the time of living separately, when the separation was itself caused by the Petitioner's own actions, is immoral and goes against the sanctity of marriage.

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

**PASSED**

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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 be passed by the Hon'ble Court. This contention is sought to be proved by way of a two-fold argument: [2.1] *It is a sincere claim and there is an absence of reasonable excuse*, and [2.2] *Section 9 maintains the sanctity of marriage*.

**[2.1] IT IS A SINCERE CLAIM AND THERE IS AN ABSENCE OF REASONABLE EXCUSE**

Hindu marriages in India are considered to be a sacrament. It is a well-settled rule that after the solemnization of marriage, some rights and obligations between husband and wife are established.

In the present case, the Petitioner and Respondent have solemnized their marriage in 2000 at New Delhi, as per Hindu rites and rituals under Hindu Marriage Act 1955.<sup>27</sup>

A necessary implication of marriage is that the parties live together, sharing their society and comfort with each other. This requirement of a spouse's society and comfort in a holy union is

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<sup>27</sup> Moot Proposition, para 3.

so sacred that the Hindu Marriage Act<sup>28</sup> has a provision for a spouse to seek restitution of this conjugal right if a case arises in which the other spouse has withdrawn from the other's society.

The expression "withdrawal from the society of the other" involves a mental process besides physical separation too. In the present case, the Petitioner has physically, as well as mentally withdrawn from the Respondent's society. The Petitioner started ignoring the Respondent's phone calls and messages.<sup>29</sup> Sensing this, the Respondent travelled all the way to India to clarify things with the Petitioner. On her arrival, the Petitioner did not bother to come to pick her up.<sup>30</sup> Without informing the Respondent, the Petitioner had started living with the surrogate mother.<sup>31</sup> Still, eager to save her marriage, the Respondent tried to sort things out with the Petitioner, but is unable to reason with him.<sup>32</sup> In fact, the Petitioner single-handedly, without any reason, reaches the conclusion that their relationship had reached its end.<sup>33</sup> There were no warning signals that would have induced the Petitioner to withdraw himself from the Petitioner's society.

The explanation appended to the section further states that in case there is question as to whether the spouse withdrawing from the other spouse's society has a reasonable excuse for doing so, then the burden of proof of proving the existence of reasonable excuse is on the spouse who have withdrawn himself/herself. In the present case, it is clear that the Respondent is seeking restitution of conjugal rights against her husband, the Petitioner. Hence, the burden

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<sup>28</sup> Hindu Marriage Act, 1955 Section 9.

<sup>29</sup> Moot Proposition, para 17.

<sup>30</sup> Moot Proposition, para 18.

<sup>31</sup> Moot Proposition, para 18.

<sup>32</sup> Moot Proposition, para 19.

<sup>33</sup> Moot Proposition, para 20.

of proving reasonable excuse is on the Petitioner.

### **[2.1.1] ABSENCE OF REASONABLE EXCUSE**

The Hon'ble Court can reject a petition for restitution of conjugal rights if the Petitioner has had a reasonable excuse to withdraw from the Respondent's society. Reasonable excuse or cause in this context could be matrimonial misconduct by the Respondent on the Petitioner, an act or omission of a spouse which makes it impossible for the other spouse to live together, or any other fault ground of divorce.

In *Shailendra Koshti v. Kavita Koshti*<sup>34</sup>, the Court held that the parties cannot be forced to live together after passing of the restitution decree if there is a reasonable cause for refusal to reside together. However, in the present case, it is contended that the Petitioner had absolutely no reasonable excuse for deserting the Respondent. For there to be reasonable excuse, the matrimonial misconduct should be "weighty and grave"; mere temperamental incompatibilities, like mere quarrels and arguments, as is the case in the present matter, do not amount to reasonable excuse as a defense to restitution of conjugal rights.

The Petitioner has always dedicatedly performed her duties as a wife. She moved to the United States with her husband to further his career, even if it means restarting her own career. The Petitioner and the Respondent were so committed to each other that they even decided to have a baby together (through surrogacy).

When the Respondent had to return to the United States for her job, and the Petitioner stayed back in India to take care of the baby and started an immoral relationship out of wedlock with the surrogate mother. Sensing something wrong, the Respondent traveled all the way to India

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<sup>34</sup> *Shailendra Koshti v. Kavita Koshti*, AIR 2007 MP 46.

to try to reason with her husband. To her surprise, she found out he had entered into a romantic relation with the surrogate and wanted nothing to do with her.

### **[2.1.2] SINCERE CLAIM**

Cases of restitution of conjugal rights greatly depend on the facts of each case.<sup>35</sup> From the facts of the present case, it is clear from the Respondent's action of travelling across the world in an attempt to save her marriage, that her desire to restore her conjugal rights is sincere, genuine and not guided by any ulterior motive. It is not solely for the purpose of getting custody of her child, as the Petitioner desired to live in the society and comfort of her husband long before the issue of custody arose. Thus, it is clear that there is no reasonable excuse for the Petitioner to have withdrawn from the Respondent's society, and that the Respondent's desire to reunite with her husband is *bona fide*.

### **[2.2] SECTION 9 OF HINDU MARRIAGE ACT, 1955 MAINTAINS THE SANCTITY OF MARRIAGE**

In *T. Sareetha v. T. Venkatta Subbaiah*<sup>36</sup>, Choudary J. termed the provision of restitution of conjugal rights as 'uncivilised', 'barbarous', and 'engine of oppression'. He assailed Section 9<sup>37</sup> as being violative of Articles 14<sup>38</sup>, 19<sup>39</sup> and 21<sup>40</sup> of the Constitution of India.

Shortly after this, the Delhi High Court in *Harvinder Kaur v. Harmander Singh*<sup>41</sup>, not only

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<sup>35</sup> *Malathi Ravi v. B.V. Ravi*, AIR 2014 SC 2881; *Shobha Rani v. Madhukar Reddy*, AIR 1988 SC 121.

<sup>36</sup> *T. Sareetha v. T. Venkatta Subbaiah*, AIR 1983 AP 356.

<sup>37</sup> Hindu Marriage Act 1955 Section 9.

<sup>38</sup> INDIAN CONST. art 14.

<sup>39</sup> INDIAN CONST. art 19.

<sup>40</sup> INDIAN CONST. art 21.

<sup>41</sup> *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66.

upheld the validity of Section 9 but also discussed its advantages. Avadh Behari J. denounced the introduction of constitutional law in family law as ‘introducing a bull in a china shop.’ The Court discussed the meaning and idea of cohabitation and consortium, and the purpose behind restitution decree in great detail, and came to the conclusion that restitution aims at cohabitation and consortium and not merely sexual intercourse, and that there is nothing barbarous or coercive about it. ‘*A disproportionate emphasis on sex, almost bordering on obsession, has coloured the views of the learned judge*’ the Court observed.<sup>42</sup> The Court held that there is complete equality of the sexes and equal protection of the laws so far as the relief is concerned, and so it cannot be struck down as violative of Article 14 either.

The Supreme Court, in *Saroj Rani v. Sudershan Kumar*<sup>43</sup>, approving the *Harvinder Kaur*<sup>44</sup> judgement, observed that the financial sanction by way of attachment of properties which has been provided for disobedience of a restitution decree, is only an inducement for the parties to live together in order to give them an opportunity to settle their differences amicably. The Court noted that the right to the society of the partner is not a statutory creation but a right that is “*inherent in the very institution of marriage itself*,”<sup>45</sup> and that there exist necessary safeguards in Section 9 to prevent the same from being used erroneously.

Moreover, Section 9 is an extension of s. 23(2) and (3) of the Act, which aims at stabilizing a marriage and encouraging reconciliation. This is what the Respondent, aims to do.

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

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<sup>42</sup> Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66.

<sup>43</sup> Saroj Rani v. Sudershan Kumar, AIR 1984 SC 1562.

<sup>44</sup> Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66.

<sup>45</sup> Saroj Rani v. Sudershan Kumar, AIR 1984 SC 1562.



It is humbly contended that the custody of the child should be given to Anjali. This contention is sought to be proved by way of two-fold arguments: [3.1] *Welfare of The Child Lies with Anjali*, and [3.2] *Petitioner's Co-Habitation with Priya Is Inconsequential*.

### **[3.1] WELFARE OF THE CHILD LIES WITH ANJALI**

While taking a decision regarding custody or other issues pertaining to a child, “welfare of the child” is of paramount consideration.<sup>46</sup> 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.<sup>47</sup> Therefore, the court has to look into whether the minor child’s interest and welfare lies with the Petitioner.<sup>48</sup> The child’s best interests and welfare lie with Anjali. This shall be proven by the way of a two-fold argument: [3.1.1] Sandeep and Priya’s Co-Habitation is Immoral and, [3.1.2] *Anjali and Sandeep’s marriage subsists*.

#### **[3.1.1] SANDEEP AND PRIYA’S CO-HABITATION IS IMMORAL**

The justification behind principle is the public interest that stands served with the optimal growth of the children. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child.<sup>49</sup> The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, health, education, etc.<sup>50</sup> It is important to

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<sup>46</sup> Sheoli Hati v. Somnath Das, (2019) 7 SCC 490.

<sup>47</sup> Saraswatibai Shripad Vad v. Shripad VasANJI Vad, 1940 SCC Bom 77.

<sup>48</sup> Arun Kumar, *Guardianship and Custody of the Person of a Minor Child- Conflicting Claims*, 17 JOURNAL OF THE INDIAN LAW INSTITUTE 299 (1975).

<sup>49</sup> Vivek Singh v. Romani Singh, (2017) 3 SCC 231.

<sup>50</sup> Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42.

look at the maturity, mental stability, moral character as an individual.<sup>51</sup>

In the present case, Sandeep and Priya have been living together while his marriage with Anjali still exists. An immoral guardian does not have the same right to the custody of his children as a moral one has.<sup>52</sup> It was held in *S.K. Chowdhary v. Smt. Satirani Chowdhary*<sup>53</sup> that a person who has discarded his wife and is living with his mistress in his house cannot be considered to be a person fit to have the custody of the child of tender years<sup>54</sup>. The minor in question is merely 5-6 years of age. At such a stage the custody of the child should be provided to the guardian who has a moral high ground.<sup>55</sup> It is not beneficial for the welfare of the minor to be brought up in an unethical background.

### **[3.1.2] ANJALI AND SANDEEP'S MARRIAGE SUBSISTS**

For the reasons pleaded in the above two issues, the marriage between Anjali and Sandeep shall be deemed to be existing. The word "welfare" used in Section 13 of the Hindu Minority and Guardianship Act, 1956<sup>56</sup> has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being<sup>57</sup>. It cannot be ignored that a married couple provides a more ethically and morally healthy and appropriate environment for properly upbringing a child<sup>58</sup>.

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<sup>51</sup> Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311.

<sup>52</sup> Atchayya v. Kosarya Narahari, AIR 1929 Mad 810.

<sup>53</sup> S.K. Chowdhary v. Smt. Satirani Chowdhary, AIR 1969 Cal. 573.

<sup>54</sup> Reginald Daniel v. Sarojram., AIR 1969 Mad 365.

<sup>55</sup> Kaliappa Goundan v. Valliamal, (1949) 1 MLJ 248.

<sup>56</sup> Hindu Minority and Guardianship Act, 1956 Section 13.

<sup>57</sup> Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42.

<sup>58</sup> Gaytri Bajaj v. Jiten Bhalla, (2012) 12 SCC 471.

Therefore, since Anjali and Sandeep remain a legally married couple, they would be better suited to ethically bring up the child. Furthermore, considering that both the parents are financially sound, the means of the concerned parent to take care of the child is also a relevant factor that must be considered while deciding on the custody of the child.<sup>59</sup> Better financial resources of the parents or their love for the child is one of the considerations for determining factor for the custody of the child<sup>60</sup>. If we look at a comparative material welfare<sup>61</sup>, between Anjali and Priya with Sandeep, it can be concluded that Anjali and Sandeep live in the USA and are of sound financial situation and can therefore provide better economic well-being, health and education.

### **[3.2] PETITIONER'S CO-HABITATION WITH PRIYA IS INCONSEQUENTIAL**

Surrogacy means the process of carrying and delivering a child for another person.<sup>62</sup> Surrogacy is also defined as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth<sup>63</sup>. The surrogate mother despite being potentially genetically linked to the baby is merely a 'home for the embryo'.<sup>64</sup> Further, the guidelines provided by Indian Council for Medical Research in 2005 regulating Assisted Reproductive Technology procedures itself recognizes the child born through ART procedure be the legitimate child of the Intended Father and Intended Mother and that the surrogate

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<sup>59</sup> Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42.

<sup>60</sup> Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673.

<sup>61</sup> Mamta v. Ashok Jagannath Bharukha, (2005) 12 SCC 452.

<sup>62</sup> BRYAN A. GARNER, BLACK'S LAW DICTIONARY 4529 (8 Ed. 2004).

<sup>63</sup> Dame M. Warnock, *Report of the Committee of Inquiry into Human Fertilization and Embryology*, DEPARTMENT OF HEALTH AND SOCIAL SECURITY, 12 (1984).

<sup>64</sup> F. Johnson v. Calvert, 5 Cal 4<sup>th</sup> 84.

mother or sperm/oocyte donor shall have no parental right over the child<sup>65</sup> which essentially means that the surrogate mother is not considered to be the legal mother.

Even though only the father is genetically linked to the child, the commissioning mother also plays an active role in selecting the surrogate or the egg donor and from the very beginning intends to parent the child.<sup>66</sup> Furthermore, there is nothing that points towards the fact that Anjali is not committed to be a good mother.<sup>67</sup> It is in the interests of the child that the commissioning parents receive the custody of the child. Furthermore, the right of a commissioning mother in obtaining the custody of her child has been recognized by provision of maternity leave<sup>68</sup>. Priya was only the medium of bringing the child into the world whereas from the very beginning it was Anjali who was the intended mother. The fact that Sandeep is living with Priya in an immoral relationship should not be allowed to weigh in his favor.

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<sup>65</sup> *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics*, INDIAN COUNCIL OF MEDICAL RESEARCH (ICMR) (2005).

<sup>66</sup> *In Re X*, [2020] EWFC 39.

<sup>67</sup> *Re A and B (No 2 Parental Order)*, [2015] EWHC 2080 (Fam)

<sup>68</sup> *Rama Pandey v. Union of India and Ors.*, 221 (2015) DLT 756.

**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. **Reject** the petition for divorce
2. **Grant** the relief of restitution of conjugal rights
3. **Award** the custody of the child to the Respondent

**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 Respondent*