
**2ND SURANA & SURANA AND ARMY INSTITUTE OF LAW
NATIONAL FAMILY LAW MOOT COURT COMPETITION, 2021**

IN THE FAMILY COURT OF NEW DELHI
(Under Section 7 of the Family court Act, 1984)
PETITION No.OF ...2021

IN THE MATTER OF

MR. SANDEEP

PETITIONER

v.

MRS. ANJALI

RESPONDENT

Petition for dissolution of marriage by a decree of divorce under Section 13 of the Hindu
Marriage Act, 1955

**WRITTEN SUBMISSION ON BEHALF OF THE PETITIONER TO
THIS HONOURABLE FAMILY COURT OF NEW DELHI**

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LIST OF ABBREVIATIONS

&	And
¶	Paragraph
AIR	All India Reporter
AP	Andhra Pradesh
art.	Article
Assn.	Association
Bom	Bombay
Cal	Calcutta
Co.	Comapany
Ed.	Edition
ER	England Report
Govt.	Government
Hon'ble	Honourable
Hyd.	Hyderabad
<i>Id.</i>	Ibidium
In re:	In Reference
KA	Karnataka
Ker	Kerala
Ltd.	Limited
LJ	Law Journal
Mad	Madras
MANU	Manupatra

MPLJ	Madhya Pradesh Law Journal
No.	Number
Ori	Orissa
Ors.	Others
p.	Page
P.C	Privy Council
P & H	Punjab and Haryana
pp.	pages
Punj	Punjab
Pvt.	Private
SC	Supreme Court
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
SCR	Supreme Court Reporter
Sd/-	Signed
S.	Section
UOI	Union of India
UP	Uttar Pradesh
v.	Versus
Vol.	Volume

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STATEMENT OF JURISDICTION

The Petitioner has approached this Honourable Family Court of New Delhi under section 7 of Family Court Act 1984, for the dissolution of marriage under section 13 (1) (i-a) of Hindu Marriage Act, 1955.

SYNOPSIS OF FACTS

1. The Present case which lies here before the district court concerns a divorce petition filed by the Husband i.e., Sandeep, hereinafter also referred as Petitioner and application for restitution of conjugal rights filed by wife i.e., Anjali, hereinafter also referred as Respondent. Petitioner and Respondent's marriage was solemnized in the year 2000 at New Delhi, as per Hindu rites and rituals under Hindu Marriage Act 1955.
2. Petitioner a Hindu who hails from New Delhi, is a software engineer by profession in MNC. Respondent a Hindu born girl and brought up in New Delhi. She was pursuing her MBBS at the time of marriage and had expressed her desire to continue with her education after their marriage, to which no one from Sandeep family expressed any apprehension to, in that moment. After marriage Anjali continued her studies, it proved arduous for her to manage both her studies and her domestic responsibilities.
3. Meanwhile at work Sandeep gets a very lucrative job offer from the Silicon Valley in USA. Anjali had by that time had completed her education and landed a resident position at a local hospital. Due to the conservative mindset of Sandeep's family, Anjali is forced to quit her job and move to USA as their decision to maintain a long-distance relationship was not acceptable to Sandeep's family.
4. On reaching USA in 2003 Anjali becomes ineligible to practise in USA unless she studies and clears her US medical Board Exam. Anjali over the next few months studies hard and qualifies all pertinent examinations, allowing her to work and practise in USA. Having settled in properly, they begin their attempts at starting a family which somehow doesn't work out for them. They seek medical help, which yields no results for them. Upon prolonged consultation with the family, they finally have a conclusive plan which is to travel to India and get their child born through surrogacy and eventually bring him/her with them to USA.

5. In 2013 after arriving in India, in February, an artificial fertilization was carried out on the surrogate mother Ms Priya who was selected to carry the child. At the time the fertilization procedure was being executed it was decided verbally between Sandeep, Anjali and Priya that Priya would have no right over the child. Also, she would have no access to the child any time in the future.
6. In 2014, a baby girl was born to the surrogate mother in New Delhi, but the doctors advised the parents that the baby should not be made to travel for the first few months as the baby was few months premature. Anjali leaves back for USA as she is required to join back at work. Whereas Sandeep stayed back in New Delhi with Priya, as he is allowed to work from home.
7. While acting as a primary care giver for Priya and his daughter, Sandeep ends up in a romantic relationship. On arriving in India, Anjali upon reaching her in laws home finds out that Priya has moved into their home to provide the best care for the child. This revelation leaves Anjali very disturbed as she feels betrayed not only by Sandeep but by his entire family.
8. In the following days she tries to clarify things with Sandeep about the change in his behaviour. This leads to heated arguments and fights between them. Sandeep reaches the conclusion that the relationship he had with Anjali was now over.

STATEMENT OF ISSUES

ISSUE I

WHETHER THE PETITIONER IS ENTITLED TO GET DIVORCE UNDER SECTION 13 OF
HINDU MARRIAGE ACT, 1955.

ISSUE II

WHETHER APPLICATION FILED BY ANJALI, CLAIMING RESTITUTION OF
CONJUGAL RIGHTS UNDER SECTION 9 OF THE HINDU MARRIAGE ACT 1955
SHOULD BE GRANTED OR NOT.

ISSUE III

WHICH PARENT BETWEEN SANDEEP AND ANJALI IS ENTITLED TO HAVE THE
CUSTODY OF CHILD.

SUMMARY OF ARGUMENTS

(I) THAT THE PETITIONER IS ENTITLED TO GET DIVORCE UNDER SECTION 13 OF HINDU MARRIAGE ACT, 1955.

The Petitioner humbly submits before this court that that he has suffered from mental pain due to the acts of the respondent wife and thus, that the parties cannot reasonably be expected to live together. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. "Cruelty for the purpose of Section 13(1) (i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Hence, Petitioner is entitled to get divorce.

(II) THAT THE APPLICATION FILED BY ANJALI FOR RESTITUTION OF CONJUGAL RIGHTS SHOULD NOT BE ACCEPTED.

The counsel humbly submits before this court that either the husband or wife has sufficient reason to withdrew themselves from each other's conjugal company if any of the spouse affect the mental peace of another spouse. Therefore, the request of restitution of conjugal rights does not stand fit because she has affected the mental peace of Sandeep as she is more concerned for her studies and job rather than her "Consortium". She left for her work when she was required for the care and development of her baby girl.

(III) THAT SANDEEP IS ENTITLED TO HAVE THE CUSTODY OF CHILD.

The counsel on behalf of the Petitioner humbly submits before this Honourable court that Sandeep is Entitled to have the Custody of Child because of the factor The Paramount Consideration i.e., "welfare of the child". Sandeep being a father of the baby girl has always a natural right to the custody of child. Sandeep is the only parent acting as a primary care giver for Priya and his daughter.

BODY OF ARGUMENTS

(I) THAT THE PETITIONER IS ENTITLED TO GET DIVORCE UNDER SECTION 13 OF HINDU MARRIAGE ACT, 1955.

1. Presently, the petitioner shall establish that he has suffered from mental pain due to the acts of the respondent wife and thus, that the parties cannot reasonably be expected to live together.

The respondent i.e., wife has caused mental pain to the petitioner.

2. It is submitted before the Hon'ble court that the respondent wife has caused great mental pain and suffering to the petitioner during their matrimonial life.
3. According to Section 13(1) (i-a) of the Hindu Marriage Act, ¹ a mental cruelty is broadly defined as that moment when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and the husband and as a result of which it becomes impossible for the party who has suffered to live with the other party.
4. According to Black's Law Dictionary, the term 'Mental Cruelty' has been defined as, "Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."²
5. The Hon'ble Supreme Court had examined in detail the position of mental cruelty in the case of *N.G. Dastane v. S. Dastane*³ as: "The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent."

¹ The Hindu Marriage Act, 1955, S. 13(1) (i-a).

² Mental Cruelty, Black's Law Dictionary (10th Ed. 2014).

³ *N.G. Dastane v. S. Dastane*, (1975) 2 SCC 326, ¶30.

6. In the case of *V. Bhagat v. D. Bhagat (Mrs.)*⁴, the Court had an occasion to examine in great detail the concept of mental cruelty as: "16. Mental cruelty in Section 13(1) (i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."
7. In *Savitri Pandey v. Prem Chandra Pandey*⁵, the Court stated as under: "Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

⁴ *V. Bhagat v. D. Bhagat (Mrs.)*, (1994) 1 SCC 337, ¶16.

⁵ *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 SCC 73.

8. The mental cruelty has also been examined by the Hon'ble Supreme Court in *Parveen Mehta v. Inderjit Mehta*⁶, which reads as under: "Cruelty for the purpose of Section 13(1) (i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. 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."
9. The Court in *Vinita Saxena v. Pankaj Pandit*⁷ aptly observed as under: "As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home."

⁶ Parveen Mehta v. Inderjit Mehta, (2002) 5 SCC 706, ¶21.

⁷ Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778.

10. Supreme Court has observed that harm or injury to health, reputation, working career or the like would be an important consideration in determining whether there was cruelty.⁸
11. In *Ravi Kumar v. Julmidevi*⁹, the question that cropped up was whether the husband condoned all alleged acts of cruelty of wife. The court said that condonation is a question of fact, and looking to the facts as they stood, the court held that the husband had condoned all the cruel acts of his wife. In this case cruelty had been explained. In matrimonial behaviour, it defies any definition, and it can be of infinite variety. Its categories are never closed. Cruelty cannot be predetermined by any rigid formula. *“In matrimonial relationship, it means absence of mutual respect and understanding between spouses which embitters the relationship. Sometimes it may take the form of violence or at times it may just be an attitude or approach of silence”*.
12. The Apex court has observed that when the marriage is dead both emotionally and practically, and there is no chance of it being retrieved, continuance of it would only amount to cruelty.¹⁰
13. The Supreme Court in *Vijayakumar Ramachandra Bhate Vs Neela Vijayakumar Bhate*¹¹ wherein it was held that in Hindu society it is a pious obligation of the son to maintain the parents and that the wife must have a justifiable reason to attempt to deviate from the normal practice and custom of society. The court further went on to hold that *“no family is totally devoid of clashes among members constituting it. It is common for elders to scold and sometimes abuse youngsters. Making a daughter in law to do the household/domestic work is also not something unusual.”* In the present situation, the respondent found it very arduous to manage both, her studies for the medical course and her domestic responsibilities which she has to comply with as her in-laws were not in a capability to manage the domestic work. It

⁸ N.G. Dastane v S. Dastane, (1975) 2 SCC 326.

⁹ Ravikumar v. Julmidevi, (2010) 4 SCC 476.

¹⁰ Romesh Chander v. Savitri, (1995) 2 SCC 7.

¹¹ Vijayakumar Ramachandra Bhate v. Neela Vijayakumar Bhate, 2003 (6) SCC 334.

became very difficult for her to manage both of the things together, which ultimately caused regular serious arguments between the couple.¹²

14. This can be a very dominant reason for the mental pain and suffering which the petitioner has to go through, as he was working as a software engineer in a multi-national company, which is a very tedious job and then coming home to regular arguments with the respondent has severely caused mental suffering to him. *Suman Kapoor v Sudhir Kapoor*¹³ also highlights the fact that continuous cessation of marital intercourse or total indifference on the part of the wife towards marital obligations would lead to legal cruelty.
15. The Supreme Court in a case propounded that frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.¹⁴ In the present case, similar situation has arisen as the respondent wife has frequently been rude and there has been a lot of indifference between both of them which can be constituted as a degree that has proven to make the matrimonial relationship between both the spouses absolutely intolerable.
16. In the case of *Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr.*¹⁵, the Supreme Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the progression of our social conceptions, this aspect has gained legislative acceptance, with the understanding that a second marriage is appropriate ground for separate residence and maintenance. Furthermore, physical abuse does not have to be used to determine legal cruelty. Continuous ill-treatment, termination of sexual intercourse, deliberate negligence, the spouse's ignorance, and the husband's assertion that the wife is unchaste are all causes that contribute to mental or legal cruelty. Looking into

¹² MOOT PROPOSITION, ¶5.

¹³ *Suman Kapur v. Sudhir Kapur*, (2009) 1 SCC 422.

¹⁴ *Samar Gosh v. Jaya Gosh*, (2007) 4 SCC 511.

¹⁵ *Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr.*, (1981) 4 SCC 250.

the present situation, the petitioner is said to have dynamic leadership skills, due to which he was offered a very lucrative job offer in Silicon Valley in USA, which he himself believed would be a very crucial step in his career growth¹⁶. At such an important step of petitioner's life, the respondent wife should have supported him in his career endeavour but rather she chooses to argue with her in-laws that she would not join his husband causing great mental pain and affecting both the petitioner and his parents.

17. The Supreme Court in *Joydeep Majumdar V Bharti Jaiswal Majumdar*¹⁷ profoundly stated that, “When the reputation of the spouse is sullied amongst his colleagues, his superiors and the society at large, it would be difficult to expect condonation of such conduct by the affected party. In circumstances like this, the wronged party cannot be expected to continue with the matrimonial relationship and there is enough justification for him to seek separation.” In the current situation, it has been distinctly stated that the financial condition of the couple at the time of reaching USA in 2003 was not much substantial.¹⁸ But still the respondent on the other hand kept on insisting to pay her course fees which created a financial burden on the petitioner causing serious mental agony. Thereafter when the petitioner was not able to provide the requisite financial assistance required for the course fees, the respondent went on to ask financial help from her mother. Respondent's mother after mortgaging her property provided the said financial help to her daughter.¹⁹ Now this particular act of respondent's mother providing financial assistance to her daughter has indirectly caused a great amount of mental discomfort to the petitioner. Particularly in the Hindu society it is considered a social stigma to ask financial assistance from in-laws as it implicates that the husband is not competent enough or lacks the potential to take proper care of his family labelling a tag of socially incompetent

¹⁶ MOOT PROPOSITION, ¶7.

¹⁷ *Joydeep Majumdar v. Bharti Jaiswal Majumdar*, (2007) 4 SCC 511.

¹⁸ MOOT PREPOSITION, ¶8.

¹⁹ *Id.*, ¶9.

husband in the society at large. Therefore, it can be constituted that the petitioner was made to suffer from mental torment by the respondent.

18. Supreme Court judge G.P Mathur in the case of *Sujata Uday Patil v. Uday Madhukar Patil*²⁰ evidently elucidated “cruelty”. The word "cruelty" and the kind or degree of "cruelty" necessary which may amount to a matrimonial offence has not been defined in the Act. The law has no standard by which to measure the nature and degree of cruel treatment that may satisfy the test. It may consist of a display of temperament, emotion or perversion whereby one gives vent to his or her feelings, without intending to injure the other. It need not consist of direct action against the other but may be misconduct indirectly affecting the other spouse even though it is not aimed at that spouse. It is necessary to weigh all the incidents and quarrels between the parties keeping in view the impact of the personality and conduct of one spouse upon the mind of the other. Cruelty may be inferred from the facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence and inference on the said point can only be drawn after all the facts have been taken into consideration. Where there is proof of a deliberate course of conduct on the part of one, intended to hurt and humiliate the other spouse, and such a conduct is persisted, cruelty can easily be inferred. Neither actual nor presumed intention to hurt the other spouse is a necessary element in cruelty.
19. In the present case, it can be perceived that the respondent just after spending few months in a foreign country starts persuading the petitioner to have a child. The respondent without evaluating the financial condition, starts pressuring the petitioner to have a child, even when the petitioner is not yet ready as they are not quite financially stable. This ultimately leads to frequent quarrel among them.²¹

²⁰ *Sujata Uday Patil v. Uday Madhukar Patil*, (2006) 13 SCC 272.

²¹ MOOT PREPOSITION, ¶9.

20. Having a child leads to multiple responsibilities along with mental and physical burden on both the parents. To provide the child with best possible care, financial stability of the family is one of the most pertinent things among all. If the family is not financially sound, firstly the child will not be able to get proper facilities; secondly it will create a financial burden on the family which will directly lead to mental and physical agony. In the present situation, the respondent coercing the petitioner to have a child without even considering the financial aspect along with frequent quarrels has promptly caused mental suffering to the petitioner and hence can be considered as a proof of a deliberate course of conduct on the part of respondent, intended to hurt and humiliate the petitioner.
21. The Hon'ble Supreme Court of India in the case of *A. Jayachandra v. Aneel Kaur*²² concluded that when the respondent gives priority to her profession over her husband's freedom it points unerringly at disharmony, diffusion and disintegration of marital unity, from which the Court can deduce about irretrievable breaking of marriage.
22. In the current scenario, having been born a few weeks premature the doctors advised the parents that the baby should not be made to travel for the first few months.²³ It was the petitioner who took the initiative to take care of the child, giving less preference to his profession over his child which perspicuously shows that family matters to him the most. Whereas the respondent chose to join her work back in USA. This clearly implies that the respondent gave priority to her profession rather than thinking about her family. We all are aware that a premature child requires great care and attention at all point of time. Respondent being the mother of the child had the obligation to take care of the premature baby but she gave preference to her work over taking care of her child shifting the entire mental and physical burden over the petitioner. Hence all the work was done by petitioner alone, imposing a great

²² A. Jayachandra v. Aneel Kaur, (2015) 2 SCC 22.

²³ *Supra* note 22, ¶15.

amount of mental and physical suffering upon him. This suffering could have been somewhat reduced if the respondent had chosen to stay back in India and helped the petitioner in taking care of their premature child, but she deliberately chose to work, shifting all the burden upon petitioner causing great mental suffering.

23. Therefore, it is humbly requested from this court to dissolve this legal matrimonial relationship on the basis of the mental cruelty imposed on the petitioner by the respondent in the course of their marriage.

(II) THAT THE APPLICATION FILED BY ANJALI FOR RESTITUTION OF CONJUGAL RIGHTS SHOULD NOT BE ACCEPTED.

1. MARRIAGE GIVES rise to a very tender but complex interrelationship between the spouses from which a plethora of rights and obligations emanates. These rights and obligations cumulatively constitute 'conjugal rights' and can be termed as the essence of marital union.²⁴ It is a general rule that each spouse is entitled to the society and comfort of the other and if any spouse, without any reasonable cause, leaves any spouse, the latter can move the court for a decree of restitution of conjugal.²⁵

The husband has sufficient reason to withdrawn himself from her wife's conjugal company.

2. The counsel humbly submits before this court that either the husband or wife has sufficient reason to withdrew themselves from each other's conjugal company if²⁶: (a) any of the spouse affect the mental peace of other and (b) Leads to neglecton of the spouse.

²⁴ Gangadevi, M. *Restitution of Conjugal Rights: Constitutional Perspective*, 45(3/4), JOURNAL OF THE INDIAN LAW INSTITUTE, 453, 453 (2003).

²⁵ The Hindu Marriage Act, 1955, S. 9.

²⁶ BM Gandhi, *Family Law*, p. 165, Vol.1, 2nd Edition, 2019.

3. In the *Sushila Bai v. Prem Narayan*²⁷, the court passed an order of restitution of conjugal rights and ordained certain circumstances that could qualify for valid defences in a suit for restitution of conjugal rights.

- The respondent can claim a matrimonial relief against the suit.
- The facts shown are proven that the petitioner is guilty of misconduct.
- Due to certain acts or omissions, it becomes impossible for spouses to live together.

Only under these conditions, the suit for restitution of conjugal rights can be dismissed and the court gives a decree for a judicial separation or Divorce. In the present case also, Sandeep is not happy with his matrimonial life because Anjali is too possessive for her medical practice. She always bothers him to study medical without even taking care of her matrimonial duties. She even asked him to pay for her studies in USA that was out of Sandeep's financial ability. After all that she asked her widowed mother for money to pay her fees. This act of Anjali makes Sandeep feel pettier in his own eyes. The petitioner here submits that Anjali's such acts was affecting the Sandeep's mental peace.

4. The word "cruelty" used in Section 13(1) (i-a) of the Act is not defined under the Act. However, this expression was the subject-matter of interpretation in several cases of this Court. What amounts to "mental cruelty" was succinctly explained by this Court (three-Judge Bench) in *Samar Ghosh v. Jaya Ghosh*²⁸. Their Lordships speaking through Dalveer Bhandari, J. observed that no uniform standard can ever be laid down for guidance, and to constitute "mental cruelty" so as to attract the provisions of Section 13(1)(i)(a) of the Act for granting decree of divorce.

²⁷ Sushila Bai v. Prem Narayan, AIR 1986 MP 225.

²⁸ Samar Ghosh v Jaya Ghosh, (2007) 4 SCC 511.

5. In the present case also as explained above how Anjali was affecting Sandeep's Mental peace amounts to the "mental cruelty" which has no statutory standard. Anjali's affection towards husband started declining after her studies in USA, which leads to the complete neglect of Sandeep.
6. The language of Sec. 9 of Hindu Marriage Act²⁹ does not require any reasonable justification or even reasonable cause for a spouse to stay away from the company of the other spouse. Sec. 9 is satisfied if there is a reasonable excuse for staying away from the matrimonial home.³⁰
7. In *P.V.P. Sharma v. Seshalakshmi*³¹ case, where the spouses were posted at different places and the wife refused to resign the job, on the petition of the husband for restitution it was held: "The mere fact that the wife expressed her willingness to live with the husband by visiting him now and then would not amount to the wife performing her marital obligations to him. In the present case the conduct of wife in insisting upon her continuing in service at a distant, place away from her husband amounts to withdrawal from the society of the husband without just and sufficient cause."³²
8. In *Prem Lata v. Ramesh Kumar*³³, is another case in which wife's obligation to live in the matrimonial home has been given priority even against, her right to education. It has been held in this case that though the wife's object to receive education is laudable, but her object has to be achieved within the framework of matrimony.
9. Marriage implies that each spouse has the right to consortium and cohabitation. It is very difficult to define the term "**consortium**", It is possible to take a narrow as well as broader view

²⁹ The Hindu Marriage Act, 1955, S. 9.

³⁰ Pakala Radha Krishna Murthy v. Pakala Vijayalakshmi, (1983) 1 APLJ 145.

³¹ P.V.P. Sharma v. Seshalakshmi, AIR 1975 AP 239.

³² *Id.*, p. 241.

³³ Prem Lata v. Ramesh Kumar, 1986, II DliC, (P & H) 118.

relating to these concepts. Broadly speaking, 'Consortium' may be defined as "Living together as husband and wife with all the incidents that flow from that relationship".³⁴

10. The counsel submits that Mentally and physically separated husband and wife cannot be united by a decree of restitution of conjugal rights.

“A horse can be brought to the water pond but cannot be compelled to drink it”.³⁵

Marriage imposes a duty on both spouses to give company to each other. If a spouse declines to do his or her duty unto the life partner, it is a matrimonial wrong in itself and he or she must justify it.³⁶

11. In early common law 'Consortium' was the term used to designate the status and rights of the husband arising from the marriage relationship, and 'coverture' denoted the status and rights of the wife arising therefrom.³⁷ It was also true of the Indian Law. Therefore, at one time it would have been said that the husband had right to his wife's consortium while the latter has not such a reciprocal right to her husband's, as a correlative duty to give him her society and services.³⁸
12. The right to consortium has been generally identified with 'Matrimonial Home' therefore it appears to have been amply well settled that the husband had the right to choose the locus of matrimonial home³⁹ and it was obligatory on the wife to accept his decision by living in that home and even to follow the husband in case of a change of domicile made by him. However, now there is change in the old concept of Matrimonial Home as far as English Law is concerned.

³⁴ P.M. Bromley, Family Law, 7th Ed (1987), p. 105.

³⁵ *Supra* note 1.

³⁶ Manjit Kaur v. Jagdev Singh, AIR, 1979 43, P & H, Ompati v. Kartar Singh, AIR 1971 P&H. 35, Hardeep v. Dalip Singh, AIR, 1970 P&H. 284.

³⁷ American Jurisprudence, 2nd ed: Vol. 41 (1968) p. 23.

³⁸ *Id.*

³⁹ Mansey v. Mansey 1940 2 All. ER, 424, King v. King, 1941 2 All ER, 103.

13. In *Ram Parkash v Savitri Devi*⁴⁰ it was held "According to the Hindu Law, marriage is a holy union for the performance of religious duties. The relationship between husband and wife imposes upon each of them certain legal marital duties and gives each of them certain legal marital rights. The marital rights and duties are absolutely, fixed by law and include the husband's right to protect. his wife to give her a home. Their Lordship further observed "On the other hand, it .is the duty of the wife to live with her husband wherever he may choose to reside and to fulfil her duties in husband's home⁴¹ .
14. Hence based on the above-mentioned cases and facts it is clear that the request of restitution of conjugal rights does not stand fit because she has affected the mental peace of Sandeep as she is more concerned for her studies and job rather than her "Consortium". She left for her work when she was required for the care and development of her baby girl. This clearly implies that she is not eager to perform her matrimonial duties.

(III) THAT SANDEEP IS ENTITLED TO HAVE THE CUSTODY OF CHILD.

The counsel on behalf of the Petitioner humbly submits before this Honourable court that Sandeep is Entitled to have the Custody of Child because of the factor The Paramount Consideration i.e., "welfare of the child".

The Paramount Consideration

1. The Petitioner relies upon the decision of Apex court in case of *Sheoli Hati v. Somnath Das*⁴², in which it was held that- While taking a decision regarding custody or other issues pertaining to a child, "welfare of the child" is of paramount consideration. It is not the welfare of the

⁴⁰ Ram Parkash v Savitri Devi, AIR 1958 Pun. 87.

⁴¹ *Id.*, p. 89.

⁴² Sheoli Hati v. Somnath Das, (2019) 7 SCC 490.

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.⁴³

2. Welfare of the child is the only test in such litigation, and no law makes it incumbent upon the court to grant application for guardianship or custody. The welfare of the child is the major criterion in deciding whether a particular guardian should be appointed or not⁴⁴, or custody should or should not be granted to the petitioner.
3. The counsel would like to submit that the appointment of a guardian and the custody of minors are two different aspects. In *Ramesh Tukaram Gadhwe v. Sumanbai Wamanrao Gondkar*⁴⁵ it was observed that there is a subtle distinction between the expression “Custody” and “Guardianship”. The concept of custody is related to physical control over a person or property. The concept of guardianship is akin to trusteeship. A guardian is a trustee in relation to the person of whom he is so appointed. The position of a guardian is more onerous than of a mere custodian. The custody maybe for short duration and for a specific purpose.
4. Dealing, with the question of guardianship, it is submitted that the guardian is recognised to be the person having the care of the person of a minor or his property or both⁴⁶. So, the guardian is the person who is vitally concerned with the protection of the child. According to section 19(b) of the Guardians and Wards Act, the father is the first natural and legal guardian of his minor ward. In case of Hindus, section 6(a) of the Hindu Minority and Guardianship Act, further confirms this position. However, the Hindu Minority and Guardianship Act also declares the mother, after the father as the natural guardian of the minor.

⁴³ Saraswatibai Shripad Vad v. Shripad Vasanti Vad, 1940 SCC OnLine Bom 77.

⁴⁴ Khazana v. Lakhmi Das, 421, C, 191 (1917).

⁴⁵ Ramesh Tukaram Gadhwe v. Sumanbai Wamanrao Gondkar, 2007 SCC OnLine Bom 975.

⁴⁶ The Guardians and Wards Act, 1890, S. 4(2).

5. Similarly, the Allahabad High Court, in *Smt. Rasulan v. Dilawar*⁴⁷ has observed, Father being the natural guardian of an infant, 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 minor. 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 unfit.⁴⁸
6. In *Jijabai Vithalrao Gajre v. Pathankhan*⁴⁹ the Supreme Court has also observed:

***“When the father is alive, he is the natural guardian, and it is only after him that the mother becomes the natural guardian”*⁵⁰.**

It is undoubtedly clear from the above precedents that the father is the natural guardian of the property as well as the person of the minor. According to section 4(2) of the Guardians and Wards Act, the guardian is the person who has the care of the person or property of the minor or both and according to section 6(a) of the Hindu Minority and Guardianship Act⁵¹ and section 19(b) of the Guardians and Wards Act⁵², a “fit” father being the natural guardian is also the custodian of the person of the minor. It can safely be concluded that the existence of a “fit” father will bar the court from appointing any other person as the guardian of the minor.

7. The discussion made above clearly shows that while deciding the *question of custody the welfare of the minor is the paramount consideration*. There are certain tests and considerations which have been laid down under section 17 of the Guardians and Wards Act.

⁴⁷ Smt. Rasulan v. Dilawar, AIR 1971 All 248.

⁴⁸ *Id.* p 249-50.

⁴⁹ Jijabai Vithalrao Gajre v. Pathankhan, AIR 1971 SC 315.

⁵⁰ *Id.* p 319.

⁵¹ The Hindu Minority and Guardians Act, 1956, S 6(a).

⁵² The Guardian and Ward Act, 1890, S 19(b).

For ascertaining the welfare of the wards and the father's right for the custody of a minor child is not absolute, it is circumscribed by the considerations of the welfare of the minor⁵³. Further, the expression “subject to the provisions of this section” appearing in clause (1) of section 17 of the Guardians and Wards Act, and the decision in *S. Sunder Ali v. Chandbanu*⁵⁴ clearly establishes that section 17⁵⁵ has an overriding effect, and the age, sex, religion, wishes of the minor, circumstances, character, and capacity, *etc.*, form important indispensable factors in ascertaining the welfare, and so the question of the custody of the minor ward.

8. Elaborating the expression “circumstances” and “character” appearing in clause (1) and (2) of section 17 of the Guardians and Wards Act⁵⁶, it is submitted that “character” may initially be related to morality but it is equally wide enough to take cognizance of the behaviour of the person who asks for the custody of the child, and if, for instance where the mother-guardian leaves the ward weeping and cares only for her interests, then certainly the circumstances would justify to deprive her of the custody of the child.
9. As stated above the recognised principle, by reading, S 19 (b) of the Guardians and Wards Act and S. 6(a) of the Hindu Minority and Guardians Act⁵⁷, it is clear that a fit father is not only the natural guardian but has an inalienable right to the custody of his minor child unless there are overwhelming circumstances to the contrary.⁵⁸
10. Hence, on the question of custody it can safely be said, that unless there are strong reasons to the contrary, *the father being the natural guardian has always a preferential right to the*

⁵³ Appu Menon v. Janaki Amma, AIR 1957 TC 39; Raman Konderan v. Ayyappan Panchals, A.I.R. 1959 Ker. 396.

⁵⁴ S. Sunder Ali v. Chandbanu, A.I.R. 19734 Guj 103.

⁵⁵ The Guardian and Ward Act, 1890, S 17.

⁵⁶ *Id.*

⁵⁷ The Hindu Minority and Guardians Act, 1956, S. 6(a).

⁵⁸ Mt. Basant Kaur v. Gian Singh, AIR 1939 Lah 359; Shanti Devi v. Gian Chand A.I.R. 1956 Punj. 234.

custody of his children. This right arises from his obligation to maintain, educate, and protect his child.

11. In the present case also, Sandeep being a father of the baby girl has always a natural right to the custody of child. Sandeep is the only parent acting as a primary care giver for Priya and his daughter. Even Sandeep's family was too reasonable to provide a better care for her granddaughter. Since Anjali is medical practitioner who is required to be present physically at her work will not prove herself to be a good parent or guardian. Also, from the implication of the facts she is career-oriented women rather than a wife who performs her parental and matrimonial duties. Hence only Sandeep is entitled to have the custody of child.

PRAYER

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

- (I) Sandeep is entitled to get divorce under section 13 of Hindu Marriage Act 1955.
- (II) The Application for Restitution of Conjugal Rights filed by Anjali should not be accepted by this court.
- (III) Sandeep is entitled to have the Custody of Child.

And pass any such order, decree or judgment as this Honourable Court deems fit and proper in the light of justice, equity and good conscience; and for this the Petitioner shall duty bound pray.

All of which is humbly prayed,

Sd/-

Counsel for the Petitioner