
2ND SURANA & SURANA AND ARMY INSTITUTE OF LAW

NATIONAL FAMILY LAW MOOT COURT COMPETITION 2021

8TH APRIL TO 10TH APRIL, 2021

Before

THE HON'BLE FAMILY COURT AT DELHI

DISPUTE RELATING TO DIVORCE AND CUSTODY.

CIVIL SUIT NO. ____ of 2015

In the matter of

MR. SANDEEP.....PETITIONER

v.

MRS. ANJALI.....RESPONDENT

MEMORIAL ON BEHALF OF THE PETITIONER.

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*[B]. Absence of connubial felicity for the complete duration of 21 years
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5.	Sondur Gopal v. Sondur Rajani	(2013) 7 SCC 426
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4. GUARDIANS AND WARDS ACT, 1890
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6. THE CONSTITUTION OF INDIA, 1949

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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 petitioner submit the memorandum under Section 7 of the Family Courts Act, 1984 r/w Section 1(2) of Hindu Marriage Act, 1955 at the 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 and Mrs. Anjali, a software engineer and MBBS student respectively was solemnized in 2000 at New Delhi under Hindu marriage Act, 1955 on the last wish of Mrs. Anjali's ailing father. No one from Mr. Sandeep's family expressed any apprehension to Mrs. Anjali's desire to continue with her education. It proved arduous for Mrs. Anjali to manage both her studies and her domestic responsibilities. She kept too busy with her studies neglecting her in-laws which led to regular arguments between the couple. In spite of these circumstances, Mrs. Anjali remained unaffected and carried on with her studies. Mr. Sandeep engrossed himself in work to take his mind off the obnoxious situation back home. This proved un conducive to their relationship as they hardly had any time for reconciliation. Mr. Sandeep got a lucrative job offer from Silicon Valley in USA which was a very crucial for his career growth. Sandeep's family was apprehensive of a long distance relationship hence Mrs. Anjali quit her job. On reaching USA she was occupied in preparing for all the exams that would allow her to practice in USA. After securing a job at a hospital in the city she is insistent upon having a child disregarding her husband's belief that they are financially not stable in a new country. After settling down they begin their efforts of starting a family which doesn't work out for them. On a conclusive plan they arrive in India in 2013 to get their child born through surrogacy. An artificial fertilization is carried out on the surrogate mother, Ms. Priya. A premature baby girl is born in 2014. Irrespective of the baby's condition Anjali leaves for USA. In the meantime Mr. Sandeep who has been deprived of affection gets emotionally attached to Ms. Priya. On Anjali's arrival Mr. Sandeep concludes that the relationship was now over. Mr. Sandeep files for divorce.

STATEMENT OF ISSUES

- I. **Whether or not, the petition is maintainable in this Court?**
- II. **Whether or not, a decree of divorce should be granted to the petitioner?**

[A]. Acts of the respondent amount to cruelty.

[B]. Absence of connubial felicity for the complete duration of 21 years directs towards irretrievable breakdown.

- III. **Whether or not, a decree of restitution should be granted in favour of the respondent?**
- IV. **Whether or not, the permanent, sole, custody of the child should be granted to the petitioner?**

SUMMARY OF ARGUMENTS

I. Whether or not, the petition is maintainable in this Court?

Yes, the petition is maintainable. The petitioner in the present case has approached this court by virtue of 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. 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.

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

Yes, the decree of divorce should be granted in favour of the petitioner as acts of the respondent amount to mental cruelty under S. 13 (1) (ia) of Hindu Marriage Act, 1955 and that the absence of connubial felicity for the entire duration of marriage points towards breakdown.

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

No, a decree of restitution should not be granted as the petitioner has substantiated mental cruelty on the part of the respondent which is a reasonable excuse.

IV. Whether or not the permanent, sole, custody of the child should be granted to the petitioner?

Yes, the custody should be granted to the petitioner, in the paramount interest of the child, as the respondent has acted callously with respect to the care of the minor. Also, the minor has been in the care and custody of the petitioner since the last 7 years.

ARGUMENTS ADVANCED

“One, to buttress, rather than undermine, the stability of marriage, and to, when regrettably, a marriage has irretrievably broken down, to enable the empty shell to be broken down with the maximum fairness, and the minimum bitterness, distress and humiliation”. - 71st Law Commission Report.

I. Whether or not, the petition is maintainable in this Court?

1. The petitioner in the present case has approached this court by virtue of 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. 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.
2. Domicile and residence are different in the sense that domicile is not only residence but it is residence coupled with the intention to live permanently or independently in the place of domicile.¹ 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 families of the parties in dispute are permanent residents of Delhi and the petitioner moved to USA only for the lucrative job offer received by him.² Intention is always lodged in the mind, which can be inferred from any act, event or circumstances in the life of such person. Residence, for a

¹ CBI v. Ram Narain, AIR 1955 SC 36.

² Abdus Samad v. State of West Bengal, (1973) 1 SCC 451.

long period, is an evidence of such an intention so also the change of nationality.³ The circumstances in the present case significantly changed when Mr. Sandeep stayed back in India for almost a year, after the birth of the baby, and his relationship with Mrs. Anjali completely broke down. Following this, he turned towards his family for mental support and to provide the baby with a nurturing environment. Also, the fact that he has filed a divorce petition in India substantiates his intention to retain his domicile of origin. It is important to note that the provision of S.1 (2) of the Act does not provide specific time of domicile nor does it specify the nature of the domicile of the parties to a matrimonial dispute under the Act. In *Union of India v. Dudh Nath Prasad*⁴, the Supreme Court amply demonstrated that the question of domicile of parties depends on their intention.

3. In the case of *Sondur Gopal v. Sondur Rajani*⁵, the husband had acquired the citizenship of Sweden but had abandoned that domicile when he shifted to Sydney, Australia. The Apex 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.

³ Karan Goel v. Kanika Goel , MAT. APP. (F.C.) 101/2020.

⁴ (2002) 2 SCC 20.

⁵ (2013) 7 SCC 426.

4. In the case of *Y. Narasimharao v. Y. Venkatalakshmi*⁶ held that the marriages which take place in this country can only be under either the customary or statutory law in force. Hence, the only law that can be applicable to the matrimonial disputes is the one under which parties are married and no other law. The Supreme Court categorically observed that marriages performed under Hindu Marriage Act can be dissolved only under the said Act.

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

[A]. Acts of the respondent amount to cruelty.

1. The expression ‘cruelty’ has an inseparable nexus with human conduct or human behavior.⁷ Mental cruelty under S. 13(1) (ia) is a state of mind and feeling with one of the spouses due to the behaviour by the other. Infinite conduct comes under the scope of mental cruelty; no one dares to define it in a straitjacket manner.⁸ The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty.⁹ In the present case, the relationship between Mr. Sandeep and Mrs. Anjali, from the beginning of their marriage, lacked constructive management of disagreements, good communication, willful compromise and every ingredient which is pertinent to make a marriage successful. Mrs. Anjali kept too busy with her studies neglecting her marital obligations which led to regular arguments between the couple.

⁶ (1997) 3 SCC 451.

⁷ Vishwanath Agrawal v. Sarla Agrawal, AIR 2012 SC 2586.

⁸ Kiran Robinson v. Ajeet Robinson, AIR 2003 Del 44.

⁹ Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.

2. In matrimonial relationships cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitter the relationship and often leads to various outburst of behaviour which can be termed as cruelty. It defies any definition and its categories can never be closed.¹⁰
3. In the case of *Sbhoba Rani v. Madhukar Reddi*¹¹, the Apex Court observed that Section 13(1)(ia) of the Act is in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. If it is mental cruelty, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or willful ill-treatment. The Court went on to observe as follows, "In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for a standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case." In the present matter, although Mrs. Anjali was trying to keep up with domestic obligations that in no way implies that she was putting efforts in nurturing the relationship. This was evident from her quarrelsome behaviour and the lack of

¹⁰ Ravi Kumar v. Julmi Devi, Civil Appeal No. 1868 of 2007.

¹¹ (1988) 1 SCC 105.

consensus ad idem between the couple resulting in incompatibility of temperament.¹²

We submit that in contemporary times, the interpretation of the threshold of incompatibility and irreconcilable differences taken to mean only behavioral extremities would be antediluvian.

4. In *Munish Kakkar v. Nidhi Kakkar*¹³, the parties co-lived for a brief period, after which the wife went to Canada and came back only after obtaining the citizenship. Thereafter, there were continuous quarrels between the parties. This prompted the appellant (husband) to file for a divorce u/s 13 (1) (ia) of HMA, 1955. The husband contended that the loneliness and lack of cohabitation had caused him extreme physical and mental torture. The Supreme Court noted that “the relationship appears to have deteriorated to such an extent that both parties see little good in each other; though the respondent says that she wants to stay with the appellant, this insistence is only to somehow not let a decree of divorce be passed against the respondent.” In the present matter, there was no sign of any affection or bonding. The parties had only feeling of resentment owing to disaccord which existed from the very beginning of the marriage. The final nail in the coffin was struck when Mrs. Anjali chose to leave for USA abandoning behind the premature baby, causing emotional and physical deprivation in a crucial phase.
5. Since cruelty is to be inferred from the whole relations between the husband and wife, it would not be a proper approach to take up each alleged incident one by one and

¹² Madhavikutty Amma v. Bhaskar, Civil Revision Petition No. 539 of 1986.

¹³ Civil Appeal No. 9318 of 2014, SC.

hold that it is trivial or that it is not hurtful or cruel and then that cumulatively they do not amount to anything grave, weighty or serious.¹⁴

6. The concept and parameters of cruelty as matrimonial wrong have evolved and expanded over the years to fit into the needs and attitudes of changing times.¹⁵ In *Vishwanath Sitaram Agarwal v. Sarla*¹⁶ the Supreme Court observed that “cruelty” is always dependent on the social strata or milieu, to which parties belong, their ways of life, relationships, temperaments and emotions that have been conditioned by their social status.

[B]. Absence of connubial felicity for the complete duration of 21 years directs towards irretrievable breakdown.

7. In the present case, although the respondent consented to the marriage, she was not mentally prepared for the same. She tried to fulfill her domestic responsibilities but failed miserably in building a companionship with the petitioner. In *Naveen Kohli v. Neelu Kohli*¹⁷, the Apex Court pointed that the three pillars of the foundation of a sound marriage are tolerance, adjustment and respecting one another. The marriage which has been wrecked beyond the hope of salvage requires in the public interest and interest of all concerned in declaring defunct *de jure* what is already defunct *de facto*. To deal with those cases where marriage has been broken down beyond repair; under the breakdown theory, divorce should be seen as a solution and escape from a very difficult situation. Such divorce is unconcerned with the wrongs of the past but is concerned with the bringing of the parties and their children to the terms with the new

¹⁴ Vol. 2, MULLA, HINDU LAW, (Satyajeet A. Desai, 18th ed., LexisNexis, 2004).

¹⁵ PROF KUSUM, FAMILY LAW LECTURES, Family Law I, (4th ed, LexisNexis, 2015).

¹⁶ AIR 2012 SC 2586.

¹⁷ AIR 2006 SC 1675.

situation by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

8. In *Anurag Sharma v. Manushi Sharma*¹⁸, the Delhi High Court granted divorce by blending irretrievable breakdown of marriage with cruelty. The division bench of the Court observed, “where there is evidence that the husband and wife indulge in mutual bickering leading to remonstrations and wherefrom to the stage where they target each other mentally, insistence by one to retain matrimonial bond would be a relevant factor to decide on the issue of cruelty, for the reason that the obvious intention of the said spouse would be to continue with the marriage not to enjoy the bliss thereof, but to torment and traumatize the other¹⁹. In the present matter, the importuning for restitution by Mrs. Anjali despite of the long disgruntled marriage points towards the fact that she wants to further torment the life of the petitioner.²⁰
9. In contemporary society, the breakdown of marriage theory is recognized by the laws of many countries and a trend towards this theory becomes discernible through two methods, i) by enlarging the number on grounds based on fault theory ; ii) by giving the widest possible interpretation to the traditional fault grounds.²¹
10. Fast paced lifestyle, complexities of living, a breakdown of support systems and the challenges of economic instability takes a toll on both the parties.²² Although the respondent in the present case was a qualified doctor her absence during the fragile

¹⁸ 2016 SCC OnLine Del 5871.

¹⁹ Ibid.

²⁰ *Bhulu Rani Dey v. Rabi Dey*, AIR 2012 Gau 128.

²¹ Vijender Kumar, *Irretrievable Breakdown of Marriage: Right of a married couple*, Vol.5, No.1, NALSAR Law Review 15, 18 (2010).

²² *Supra* note 19.

condition of the child was callous, remorseless and not befitting the characteristics of a mother. The growing lack of emotional and material involvement of the respondent resulted in the petitioner turning towards Ms. Priya for emotional dependence. Ms. Priya finally filled the void left behind by the respondent not only as a partner but also as a co-parent.

11. In the present case, the petitioner and Ms. Priya have been cohabiting since the last 6 years and their relationship is in the nature of marriage. The already complex relationship of 15 years has become dysfunctional in the last 6 years due to the absence of cohabitation. In *Prakash Chand Sharma v. Vimlesh*²³, the wife expressed her will to go and live with the husband notwithstanding the presence of the other woman but the husband was not in a position to agree presumably because he has changed his position by remarriage. Be that as it may, reconciliation was not possible. When the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage.
12. Courts have on several occasions found themselves helpless to give effective relief to the parties where there is an evident breakdown of marriage because the technical evidence is not enough to prove a matrimonial fault ground within the framework of statutory provisions. Of late, courts are inclined to dissolve a marriage where there appears to be no chance of the parties living happily in the relationship.²⁴ A significant

²³1995 Supp (4) SCC 642.

²⁴ Vol. I, PROF KUSUM, FAMILY LAW LECTURES, (4th ed., LexisNexis, 2015).

example of practical and positive approach of Courts in such cases is by not insisting on technicalities.²⁵

13. In *Chetan Dass v. Kamla Devi*²⁶, the appellant husband wanted a divorce from his wife on the ground of mental cruelty. The wife came out with counter-claim and alleged that her husband had an extra marital affair with a nurse from his hospital. But even then the wife maintained that she would not like to be divorced if the husband cut relations with the said nurse. This was not accepted by the Court as the husband wanted to take divorce in the first place to be with the nurse, and hence, his deal would not work out despite further trials. Therefore, the only proper solution out of this deadlock would be to get the two parties divorced as it is a clear case of irretrievable breakdown of marriage.

14. It will not be wrong to draw an analogy between the expansive interpretation given by Dr. Winfield to tort law, which established that the category of tort never closes since it is a residuary law, and the evolving breakdown theory, it being the last resort to couples who have suffered throughout the marriage, which needs widest possible interpretation and to be accepted as an independent category apart from the fault grounds. In *V. Bhagat v. D. Bhagat*²⁷, the Supreme Court said, “There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents”.

15. In *Anita Kachba v. K.R. Kachba*²⁸, it was observed that even though husband’s cruelty against wife were not established, yet divorce was granted to him and one of the main

²⁵ Malathi Ravi v. B.V. Ravi, AIR 2014 SC 2881.

²⁶ AIR 2001 SC 1709.

²⁷ AIR 1994 SC 710.

²⁸ AIR 2003 Bom 273.

factors that weighed with the Court was that the husband had married again and this according to the court is a factor sufficient to indicate that some other lady has walked into the life of respondent husband. Under these circumstances one can fairly reach the conclusion that there is irretrievable breakdown of marriage.²⁹

16. The 71st Report of the Law Commission of India³⁰ briefly dealt with the concept of Irretrievable breakdown of marriage and defined a broken marriage as that which has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared.

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

17. What is “reasonable excuse” depends upon the facts and circumstances of each case. “Reasonable excuse” should be the “just excuse” or “rational excuse”³¹. Cruel and torture-some behavior, and misconduct bordering on cruelty but falling short of it are some of the valid grounds disentitling the other spouse to a restitution of conjugal rights³².As contended in the aforementioned submissions, Mrs. Anjali’s unrelentingly

²⁹ N. Shankar v. Saraswathi, (2010) 1 MLJ 959 (Mad); Gayatri Narayan Bhat(Dr.) v. Narayan Srinivas Bhat 1997 (1) HLR 644 Bom.

³⁰ Law Commission, The Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a Ground of Divorce, Report number 71, April 1978, ¶ 3.2.

³¹ Annie Thomas v. Pathrose, (1988) 2 KLT 237.

³² DR. S. R. MYNENI, HINDU LAW 214, (1ST ed. 2014).

dry attitude towards the marriage and towards the care of the newborn was the cause of the petitioner's withdrawal from the society of the respondent.

18. The Court's satisfaction as to the reasonable excuse is not controlled by rules or quantum of evidence.³³ S. 23 of Hindu Marriage Act 1955 provides that even if the petitioner is entitled to the relief asked for restitution, under the Act, he may become disentitled if there is a legal ground for refusing such relief.
19. Restitution order being in the nature of coercion, the Court has to be very careful and punctilios in appreciating the allegations and evidence, and must be fully and conscientiously satisfied that the spouse has withdrawn from the company of the other without any proper reason whatsoever.³⁴
20. Cruelty by one party even if it is short of cruelty required for divorce can be a reasonable cause.³⁵
21. In *Munish Kakkar v. Nidhi Kakkar*³⁶, the Supreme Court noted that "though the respondent says that she wants to stay with the appellant, this insistence is only to somehow not let a decree of divorce be passed against the respondent." The demand for restitution in the current matter is completely absurd and has been averred to cause further misery to the petitioner.
22. It is also a common fact that the young children will be better off with one loving parent rather than two perpetually quarrelling parents.³⁷

³³ G.M. DIVEKAR, HINDU LAW A CRITICAL COMMENTARY, 663 (2nd ed., 2002).

³⁴ Ibid.

³⁵ Gurudev Kaur v. Sarwan Singh AIR 1959 Punj 162.

³⁶ Civil Appeal No. 9318 of 2014.

³⁷ Harinder Boparai, *Reappraisal of Bars to Divorce: A Comparative Study*, 26 JILI (1984).

IV. Whether or not, the permanent, sole custody of the child should be granted to the petitioner?

23. In the present matter, the child has been brought up in a nourishing home under the care and protection of not only her father but also other family members. After the respondent abandoned the premature child, the vital motherly love and affection was provided to her by the surrogate mother. The respondent, being a doctor herself, never prioritized her responsibilities towards the child, even though the baby was delivered in a fragile condition. Despite of the fact that the respondent could have applied for a maternity leave, she was ignorant about the same. In the case of *Gurcharan Singh v. Sukhdev Kaur*³⁸, where a wife left her husband leaving behind a two-month old infant, and refused to either return or keep the child with her, and the child died soon after her leaving, the Court held that nothing could be crueller than the attitude of the wife in not taking the infant with her. The husband's petition for divorce was decreed in appeal.

24. 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 theirs.³⁹ 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 inheritance.⁴⁰

³⁸ AIR 1979 (P&H) 98.

³⁹ ¶ 3.10.1.

⁴⁰ ¶ 3.16.1.

25. The petitioner has approached this court under S.6 of the Hindu Minority and Guardianship Act, 1956 where the father, as natural guardian, is given a statutory right to have the custody of the child, which is to be r/w S.7 of Hindu Minority and Guardianship Act 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” refers to 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.
26. 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.⁴¹
27. By virtue of S.26 of Hindu Marriage Act, the petitioner 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.
28. The provision of S.6 of 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, otherwise with the father, would also apply while granting custody of the children u/s. 26 of this

⁴¹ Abraham G. Karimpanal & Ors v. Nil, AIR 2004 Kant 321.

Act.⁴² Where the child is not under the age of 5, the mother does not have preferential right. Presently, the girl child is 7 years of age and the petitioner has been the custodian of the minor since her birth. 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, 1956. The same has been laid down in a number of cases.⁴³ If the mother is not caring for the child then she can be deprived of the custody of the minor child even if the child is below 5 years.⁴⁴

Even if the mother has a right to the custody of her child below 5 years, still if the mother is not in a position to maintain the child and to bring it up properly, the father who is in a position to do so can be given custody of the minor.⁴⁵ A mother who neglects the infant child as she does not want to sacrifice the type of life she is leading can be deprived of custody.⁴⁶ Since the child is well-settled and comfortable with the present family there lies no reason for change in custody.

29. The welfare of the child includes factors like economic well-being of the guardian, child's ordinary comfort, health, contentment, education, etc.⁴⁷ It is pertinent to note that the respondent's current residence in Delhi is mortgaged which is a serious financial obligation. In considering the matter of custody of a child, it is not right to determine custody as if the child is a chattel; the main consideration is in whose hands

⁴² Radhabai v. Surendra, AIR 1971 Mys 69; Chander Prabha v. Premnath Kapur, AIR 1969 Del 283.

⁴³ 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.

⁴⁴ Chakki v. Ayyapan, AIR1989 Ker 89.

⁴⁵ Bhagyalakshmi v. K.Narayan Rao, Air 1983 Mad 9; Sanju v. Sobhanath, AIR1995 All 19.

⁴⁶ K.S Mohan v. Sandhya Mohan, AIR 1993 Mad 59.

⁴⁷ Tejaswini Guad v. Shekhar Jagdish Prasad Tewary, (2019) 7 SCC 42.

the welfare of the child lies.⁴⁸ In the case of *Sumedha Nagpal v. State of Delhi & Ors.*⁴⁹, it was contended that any disturbance by changing the custody would not be conducive to the welfare of the child. The court held that the trauma that the child is likely to experience in the event of change of such custody, pending proceedings before court of competent jurisdiction, will have to be borne in mind. The mother had abandoned the child and went to her parent's house and was in the custody of the husband to the exclusion of child for nearly 7 months. The court refused to interfere in the matter and the status quo was maintained.

⁴⁸ Sanjeev Malhotra v. Union Territory, 1998 (1) Hindu L.R. 307(P & H).

⁴⁹ JT 2000 (7) SC 450

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) Grant the decree of divorce in favour of the petitioner,
- (ii) Grant interim custody of the child in favour of the petitioner,
- (iii) Grant permanent custody of the child to the petitioner, and;
- (iv) Grant the costs in favour of the petitioner.

And/Or

Pass any other order or grant any other relief in favour of the petitioner, 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 petitioner shall duty bound forever pray.

Date: 29th day of March, 2021.

Sd/- _____

Place: Delhi.

Counsel(s) for petitioner.