
2ND SURANA AND SURANA AND ARMY INSTITUTE OF LAW NATIONAL FAMILY

LAW MOOT COURT COMPETITION 2020-21



BEFORE,

THE HON'BLE FAMILY COURT OF NEW DELHI

Petition under Section 13 of Hindu Marriage Act, 1956 for dissolution of marriage

SANDEEP

(PETITIONER)

v.

ANJALI

(RESPONDENT)

Clubbed with

Petition under Section 9 of Hindu Marriage Act, 1956 for Restitution of Conjugal Rights

and under Section 25 of Guardians and Wards Act, 1890 for custody of child

ANJALI

(PETITIONER)

v.

SANDEEP

(RESPONDENT)

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT/PETITIONER-

ANJALI

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PRAYER 1

LIST OF ABBREVIATIONS

ABBREVIATION	FULL FORM
&	And
§	Section
¶	Paragraph
AIR	All India Reporter
All	Allahabad
Anr	Another
Bom	Bombay
G&W Act	The Guardians and Wards Act, 1890
HAMA	Hindu Adoption and Maintenance Act, 1956
HC	High Court
HMA	Hindu Marriage Act, 1955
Hon'ble	Honourable
i.e.	That is
ICA	Indian Contract Act, 1872
No	Number
Ors	Others

RCR	Restitution of Conjugal Rights
SC	Supreme Court
SCC	Supreme Court Cases
SM	Surrogate Mother
U/s	Under Section
USA	United States of America
v	Versus
Vol	Volume

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STATEMENT OF JURISDICTION

The Hon'ble Family Court of Delhi has jurisdiction to hear the matters under Section 7 of Family Courts Act, 1984.

7. Jurisdiction.-

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

Background-Anjali, a doctor by profession marries Sandeep, an engineer by profession, in 2000. Both Sandeep and Anjali are Hindus and married each other as per Hindu rites and rituals under Hindu Marriage Act 1955. Anjali continued her studies after getting married. However, she found it difficult to manage her studies together with domestic duties due to her in-laws. She faced constant criticism by her in-laws. This led to frequent arguments between the couple.

Moving to USA-Sandeep received an offer to move to USA for a better position which he accepted. Sandeep and Anjali initially decided to stay in long-distance relationship which was unacceptable to her in-laws. So, they forced her to move to USA. Anjali left her job and moved to USA. Further, she was not qualified to practice in USA and needed to give a qualifying exam to practice in USA. Sandeep insisted her to take financial assistance from her Mother. Her mother, was not financially well-off and had to mortgage her house in order to help her. Anjali subsequently passes the exam and got a job.

Surrogacy-Anjali and Sandeep started trying for a baby in USA. However, they were unable to conceive a child naturally. So, they came to India in 2013 to commission a SM to bear their child. They found Priya as the suitable SM and entered into verbal agreement with her for the surrogacy. In 2014 Priya gave birth to a baby. Anjali after staying with baby for some time went back to USA as she could not work remotely.

Matrimonial Discord-When Anjali flew back to USA, Sandeep started taking care of the baby and SM. He then developed feelings for SM and stopped attending to Anjali's phone calls. Meanwhile, SM had moved in with Sandeep to Anjali's shock. SM denied to handover the baby.

Proceedings before the court-In 2015, Sandeep filed a divorce petition. Anjali filed a petition for RCR and custody of her child. The case has been pending before the court till 2021.

STATEMENT OF ISSUES

-ISSUE 1-

WHETHER THE COURT SHOULD GRANT DIVORCE?

-ISSUE 2-

WHETHER THE COURT SHOULD GRANT RESTITUTION OF CONJUGAL RIGHTS?

-ISSUE 3-

WHETHER THE COURT SHOULD GRANT CUSTODY OF THE CHILD TO SANDEEP OR
ANJALI?

SUMMARY OF ARGUMENTS

ISSUE 1- THAT DECREE OF DIVORCE SHOULD NOT BE GRANTED.

It is submitted before the Hon'ble Court that the decree of divorce should not be granted in favour of Sandeep as the requirements for such a decree have not been fulfilled. Ordinary wear and tear of marriage is not sufficient to justify divorce, and Anjali temporarily leaving the family for her job is not cruelty. Further, Sandeep cannot be allowed to take advantage of his own wrong to get a divorce decree in his favour. Lastly, the alleged acts are already been condoned and hence are not eligible for the relief claimed.

ISSUE 2- THAT RESTITUTION OF CONJUGAL RIGHTS BE GRANTED IN FAVOUR OF ANJALI.

It is humbly submitted before the Hon'ble court that the remedy of restitution be provided to Anjali since there was withdrawal by Sandeep from Anjali's society, that withdrawal was done without any reasonable cause or excuse or lawful ground from Sandeep's side, that there existed no legal ground as to why the relief should not be granted and that it is the duty of the court to initiate conciliation proceedings between both the parties.

[ISSUE III] THAT ANJALI SHOULD GET CUSTODY OF THE CHILD.

Anjali is the mother of the child and thus has the right to seek her custody. Further, giving custody of the child to Anjali will ensure maximum benefit to the child as she can look after her physical, financial and emotional welfare with competence. Change in custody from Sandeep to Anjali will not disrupt her well-being as she will be in the same city and with her mother.

ARGUMENTS ADVANCED

ISSUE 1: THAT DECREE OF DIVORCE SHOULD NOT BE GRANTED.

It is humbly submitted before the Hon'ble Court that the decree of divorce should not be granted in favour of Sandeep (Petitioner in the present issue) as the requirements for such a decree have not been fulfilled. [1.1] Ordinary wear and tear of marriage is not sufficient to justify divorce. [1.2] The respondent temporarily leaving the family for her job is not cruelty. [1.3] Sandeep cannot be allowed to take advantage of his own wrong to get a divorce decree in his favour. [1.4] The alleged acts already been condoned and hence are not eligible for the relief claimed.

[1.1] ORDINARY WEAR AND TEAR OF MARRIAGE IS NOT SUFFICIENT TO JUSTIFY DIVORCE.

In order to seek relief in the form of divorce under § 13¹ of the Hindu Marriage Act, there has to be some act done by the responding party that falls in this section, i.e., adultery, cruelty, desertion, insanity or unsoundness of mind, etc. In the present case, no action of the responding party, i.e. Anjali (Respondent in the present issue) falls under any of these clauses. The acts labelled as cruelty by Sandeep are merely acts displaying ordinary wear and tear of marriage.

When a conduct is to be considered for cruelty, it should be of such gravity that it gives rise to a reasonable apprehension in the mind of the petitioner spouse that it will be injurious for them to live with the respondent², or it would be impossible for them to live together without mental

¹ Hindu Marriage Act, 1955, § 13, No. 25, Acts of Parliament, 1955.

² Maya Devi v. Jagdish Prasad, A.I.R. 2007 S.C. 1426.

agony or torture.³ The ill-conduct must be preceded for a fairly lengthy period where the relationship has deteriorated⁴ to an extreme extent.⁵

Petty quarrels, small disagreements should not be exaggerated to destroy a bond as sacred as marriage.⁶ A hypersensitive approach would be counter-productive for the institution of marriage. In the present case, the incidents of the alleged misconduct are not intolerable.

Mere coldness or lack of affection cannot amount to cruelty⁷. In the present case, the day-to-day quarrels between spouses cannot be considered cruelty. Anjali pursued her studies after marriage with the consent of Sandeep's family⁸, and hence slight difficulty in adjustment between studies and matrimonial duties was expected. She in no manner harassed her in-laws or husband and persistently labored to discharge all of her duties well, despite criticisms.⁹ She in no manner neglected her husband. She has consistently made adjustments according to her husband's will, be it about moving to the US¹⁰, or about having a child. She has been a dutiful and committed spouse¹¹, and has taken all measures to not burden her husband in any manner. Even for her course in the US, she abided by her husband & instead took financial aid from her poor mother.¹²

³ Shobha Rani v. Madhukar Reddi, A.I.R. 1988 S.C. 121.

⁴ 13 HALSBURY'S LAWS OF ENGLAND (4thedn., 2006); V. Bhagat v. D. Bhagat, 1994 1 S.C.C. 337.

⁵ Sanjana Sandip Pednekar v. Sandip Sitaram Pednekar, (2014) 4 A.B.R. 465.

⁶ Naveen Kohli v. Neelu Kohli, A.I.R. 2006 S.C. 1675.

⁷ Samar Ghosh v. Jaya Ghosh, (2007) 4 S.C.C. 511.

⁸ Moot Proposition, ¶4.

⁹ Moot Proposition, ¶5.

¹⁰ Moot Proposition, ¶8.

¹¹ Tirath Kaur v. Kirpal Singh, A.I.R. 1964 Punj. 28.

¹² Moot Proposition, ¶9.

The subsequent small arguments, albeit frequent, were in no manner of such gravity as to be called cruelty. Such incidents may cause annoyance, but are not enough for a divorce.¹³ All the arguments between the spouses were merely due to differences in opinion. When the Respondent returned to India to clarify things with Sandeep¹⁴, the resultant fights were due to lack of communication and such differences cannot be sufficient for granting divorce.¹⁵

[1.2] TEMPORARILY LEAVING FAMILY FOR A JOB DOES NOT AMOUNT TO CRUELTY.

Anjali leaving for the US to re-join her work is not cruel to Sandeep as it was the most reasonable decision that could have been taken. The courts have observed that when the wife is working and in such case, if the work required her to go to another place for the time being, no fault can be found with her for going to away. Hence, going to a different place for work cannot be termed as an act of cruelty.¹⁶ Business or job obligations¹⁷ as a reason to stay away from the spouse may be sufficient to negate allegations of desertion.

If an arrangement is frustrated by the unreasonableness¹⁸ of one or the other and it separates them, then the party who has produced the separation by his/her unreasonable behaviour is guilty of desertion.¹⁹ In the present case, the respondent Anjali had left to go to her job in the US as

¹³ A. Jayachandra v. Aneel Kaur, (2005) 2 S.C.C. 22.

¹⁴ Moot Proposition, ¶17.

¹⁵ G. V. N. KameswaraRao v. G. Jabilli, (2002) 2 S.C.C. 296.

¹⁶ Sanjana Sandip Pednekar v. Sandip Sitaram Pednekar, (2014) 4 A.B.R. 465.

¹⁷ Walter v. Walter, 1949 (65) I.T.R. 680.

¹⁸ Dunn v. Dunn, (1948) 2 All. E.R. 822.

¹⁹ Smt. Vibha Shrivastava v. Dinesh Kr. Shrivastava, A.I.R. 1991 M.P. 346.

both parties understood the nature of her job.²⁰ Anjali could not compromise her job because now they had the additional duty to be financially sound for their child. Her in-laws have also always been involved in their lives and were present to support Sandeep and the child. There was no malafide intention on part of Anjali, and she never wished to permanently end cohabitation²¹ with Sandeep. Just the physical act of departure by one spouse does not make that spouse the deserting party.²² Therefore, no case of abandonment can be made against Anjali.

[1.3] SANDEEP CANNOT BE ALLOWED TO TAKE ADVANTAGE OF HIS OWN WRONG TO GET A DIVORCE.

Sandeep has attempted to take advantage of his own wrong and therefore should not be granted the relief sought by him. § 23(1)(a)²³ provides for the Court granting relief if it is satisfied that the grounds for granting relief exist and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief.

“Wrong” within the meaning of this section means the alleged conduct has to be something more than mere disinclination to agree to an offer of reunion²⁴, it must be misconduct serious enough to justify denial of the relief²⁵ which may otherwise be available to the husband or the wife.²⁶

²⁰ Moot Proposition, ¶15.

²¹ Bipin Chander Jaisinghbai v. Prabhawati, A.I.R. 1957 S.C. 176.

²² RAYDEN, PRACTICE AND LAW IN THE DIVORCE DIVISION (6th edn., Joseph Jackson ed., 1958).

²³ Hindu Marriage Act, 1955, § 23(1)(a), No. 25, Acts of Parliament, 1955.

²⁴ Dharmendra Kumar v. Usha Kumar, (1977) 4 S.C.C. 12.

²⁵ Sunita Rajendra Nikalje v. Rajendra Eknath Nikalje, 1996 (1) Mh.L.J. 572.

²⁶ Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 S.C.C. 90.

In the present case, Sandeep has an illegitimate relationship with Priya²⁷, the surrogate mother of the child of the parties. The respondent Anjali cannot possibly be expected to digest and accept the fact that her husband has a mistress, and the resultant fights and arguments between the parties is an expected consequence of the actions of Sandeep himself. The Apex Court has held²⁸ that a party should not be allowed to corner the other spouse with one's acts and then brazenly take a plea of cruelty or desertion on part of the party suffering at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that marriage has broken down.

In the case of *ChetanDass v. Kamla Devi*,²⁹ the Supreme Court stated, "In the present case, the allegations of adulterous conduct have been found to be correct, as the husband had been taking his food and sleeping with the mistress, against all norms and openly defying all matrimonial relationships. In such circumstances, the provisions contained under § 23³⁰ would be attracted and the appellant would not be allowed to take advantage of his own wrong." Therefore, it is submitted that Sandeep cannot claim a decree for divorce when he himself is in the wrong, and he must not be allowed to take advantage of it.

[1.4] THE ALLEGED ACTS HAVE ALREADY BEEN CONDONED, HENCE NO RELIEF CAN BE CLAIMED ON THEIR BASIS.

Arguendo, it is submitted that assuming, but not conceding, that the acts complained of were cruel, divorce cannot be granted on the basis of them as the acts have been condoned by

²⁷ Moot Proposition, ¶16.

²⁸ Moot Proposition, ¶16.

²⁹ Chetan Dass v. Kamla Devi, (2001) 4 S.C.C. 250.

³⁰ Hindu Marriage Act, 1955, § 23, No. 25, Acts of Parliament, 1955.

Sandeep. § 23(1)(b)³¹ says that if the petitioner has in any manner previously condoned the acts complained of, the court cannot grant the decree asked for.

In the present case, even after the fights and arguments that were allegedly cruel to Sandeep, the couple continued to cohabit in a matrimonial relation³², with no residual effect on their relationship. Not taking action for the previous misconducts and continuing to reside together as husband- wife implies condonation of the acts complained of.³³

The claim that the respondent had abandoned the husband and child for her job is also untenable since there was a mutual understanding between the parties that the respondent would be going as her job required her to go, while the husband would be staying behind to take care of the child, since his job allowed him to work remotely. It is a well-established position in matrimonial law that parties by mutual arrangement or agreement may agree to anything, as long as the matter is consensual between the spouses without in any way either jeopardizing their marriage.³⁴ Therefore, the alleged cruelty was condoned by Sandeep and cannot be a ground for the court granting a decree of divorce.

ISSUE 2: THAT RESTITUTION OF CONJUGAL RIGHTS BE GRANTED IN FAVOUR OF ANJALI.

It is humbly submitted before the Hon'ble Court that the remedy of restitution be provided to Anjali since there was withdrawal by Sandeep from Anjali's society **(2.1)**, that withdrawal was done without any reasonable cause or excuse or lawful ground from Sandeep's side **(2.2)**, that

³¹ Hindu Marriage Act, 1955, § 23(1)(b), No. 25, Acts of Parliament, 1955.

³² Neeraj Kumar v. Pooja Verma, 2016 S.C.C. OnLine Del. 4625.

³³ Vishesh Malhotra v. Alka Malhotra, 016 (5) All.M.R. 37.

³⁴ Kailash Wati v. Ayodhia Prakash, I.L.R. (1977) 1 P.&H. 642.

there existed no legal ground as to why the relief should not be granted (2.3) and that it is the duty of the court to initiate conciliation proceedings between both the parties (2.4).

[2.1] THE WITHDRAWAL BY THE RESPONDENT FROM THE SOCIETY OF THE PETITIONER.

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. For the purpose of marital relationship the term 'society' here means something that constitutes 'unionship' and 'consortium'. Now coming to the 'withdrawal' from the society of the other spouse, it means that it is withdrawal from the totality of conjugal relationship, such as refusal to live together, refusal to have marital intercourse, and refusal to give company and comfort. Even where the parties are living under the same roof, it would amount to withdrawal from the society, if the other spouse refuses to cohabit.³⁵ The intention not to cohabit needs to be clearly established.³⁶ The term 'co-habitation' here has been judicially interpreted a lot.³⁷ It includes the mutual rights to each other's society, companionship, and affection. It means living together as husband and wife.³⁸ The husband's unresponsiveness and indifference towards his wife has been held to be sufficient to show withdrawal from the society of the wife, and RCR being allowed.³⁹

³⁵ Smith v. Smith, (1939) 4 All. E.R. 533; Wilkies v. Wilkies, (1943) 1 All. E.R. 433.

³⁶ Venugopal Naidu v. Laxmi Ammal, A.I.R. 1936 Mad. 288.

³⁷ Saroj Rani v. Sudarshan Kumar Chadha, 1984 A.I.R. 1562.

³⁸ Thomas v. Thomas, (1948) 2 All. E.R. 98.

³⁹ Sushila Bai v. Prem Narayan, A.I.R. 1986 M.P. 225.

On the basis of all the above-mentioned principles, it can be concluded that the “withdrawal from the society” amounting to a ground for RCR under § 9⁴⁰ of the HMA is not a withdrawal from a place, but from a state of things.

In the present case at hand, Sandeep’s emotional dependence on Anjali has shifted, as evident through his conduct. He intentionally ignored calls and messages by Anjali⁴¹ and didn’t even bother to pick her up from the airport.⁴² All the efforts made by Anjali to clarify things with Sandeep were in vain and only caused more disagreements.⁴³ All these acts and omissions indicate how Sandeep was emotionally as well as physically absent from the role of husband with his intent of leaving Anjali being clear and specific. Thus, the counsel for Anjali submits that focusing on the above-mentioned definition of ‘withdrawal from society’ coupled up with an analysis of recent conduct of Sandeep leads to the obvious conclusion that Sandeep did indeed withdraw from Anjali’s society.

[2.2] THE WITHDRAWAL IS WITHOUT ANY REASONABLE CAUSE OR EXCUSE OR LAWFUL GROUND.

Courts have held that the ‘reasonable excuse contemplated here in § 9(i) must be one which would afford a ground either for judicial separation or for nullity of marriage, or for divorce’.⁴⁴ As has already been argued extensively in [Issue 1], there existed no mental cruelty from the side of Anjali which can be cited as a ground for divorce. She faithfully performed her domestic

⁴⁰ Hindu Marriage Act, 1955, § 9, No. 25, Acts of Parliament, 1955.

⁴¹ Moot Proposition, ¶17.

⁴² Moot Proposition, ¶18.

⁴³ Moot Proposition, ¶19.

⁴⁴ Annapurnamma v. Appa Rao, A.I.R. 1963 A.P. 312; Revanna v. Susselamma, A.I.R. 1967 Mys. 165; K. Ramopi v. K. Kameswari, A.I.R. 1975 A.P. 3.

duties while balancing her education and career and never once complained or burdened Sandeep in any manner. Even when situations got tough at times, she faithfully remained by Sandeep's side and made compromises on her part without any qualms.

Even if the court wishes to follow the line of thinking that what constitutes 'reasonable excuse' must not be only limited to grounds available against judicial separation, nullity of marriage or divorce and wishes to adopt a less strict approach,⁴⁵ even then the existence of reasonable excuse for withdrawal from society cannot be proved. The lesser degree of test of reasonability that would apply here then will depend on changed social conditions of today and not on the rigid background of the tenets of the old texts of Manu or other Hindu law givers.⁴⁶ Furthermore, what is reasonable excuse for withdrawal would depend on the facts and circumstances of each particular case, indicating that there's no universal common formula for determining reasonability and how it is a subjective issue.⁴⁷

In the present case, Anjali had tried to keep up with her matrimonial duties along with not giving up on her education and career aspirations, as is expected of a married working woman of modern times. She had the consent and support from Sandeep and his family for the same.⁴⁸ When required, she had even prioritized her role of being a wife over her career goals.⁴⁹ She had never financially burdened him⁵⁰ and had always cooperated with him on major decisions related

⁴⁵ Mahesh Kumar v. Smt. Anju, R.L.W. 2007 (1) Raj. 410.

⁴⁶ Gurdev Kaur v. Sarwan Singh, A.I.R. 1956 Punj. 162.

⁴⁷ Annie Thomas v. Pathrose, (1988) 2 K.L.T. 237.

⁴⁸ Moot Proposition, ¶4.

⁴⁹ Moot Proposition, ¶8.

⁵⁰ Moot Proposition, ¶9.

to the couple's life.⁵¹ After the birth of their child, when she had to secure the couple and child's future financially and knew that she couldn't afford to lose her job, Anjali returned back to USA with a heavy heart. In conclusion, Anjali never faltered in her matrimonial or motherly duties. Marital rights have been held to include within themselves the enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same habitation as well as sharing the intimacies of domestic relations,⁵² none of which was ever denied to Sandeep from Anjali's side. Furthermore, it is contended that insubstantial defence that the respondent does not like the petitioner⁵³ or does not want to live with her or that she is not a proper person to be a life companion cannot be taken in RCR. In the present case, Sandeep is guilty of giving flimsy grounds for his withdrawal which cannot be classified as reasonable.

Lastly, it is submitted that it is a well-established position in matrimonial law that parties by mutual arrangement may agree to anything, as long as the matter is consensual between the spouses without in any way either jeopardising their marriage or infringing their legal duties to each other.⁵⁴ In the present case, all the decisions regarding education and career was taken with mutual consensus between both Anjali and Sandeep, indicating how a single party never solely took decisions of that sort, and it was because of the couple's coordinated effort only that they had been able to enjoy such fruitful marriage.

⁵¹ Moot Proposition, ¶9.

⁵² Kailash Wati v. Ajodhia Parkash, (1971) Civ. L.J. 109.

⁵³ Anna Saheb v. Tarabai, A.I.R. 1970 M.P. 36.

⁵⁴ Kailash Wati v. Ayodhia Prakash, I.L.R. (1977) 1 P.&H. 642.

[2.3] THAT THERE IS NO LEGAL GROUND WHY THE RELIEF SHOULD NOT BE GRANTED.

There was no act or conduct on behalf of Anjali which can stand as a legal ground for divorce, judicial separation or for nullity of marriage, as has been proved in Issue 1 as well as Issue 2.2. The feeble and baseless contention put forward by the counsel for Sandeep regarding mental cruelty inflicted by Anjali holds no ground for constituting cruelty.⁵⁵ There was no such act/omission/ done by Anjali which can be presented as a legal bar against the remedy of RCR.

[2.4] DUTY OF THE COURT TO INITIATE CONCILIATION PROCEEDINGS.

§23(2)⁵⁶ of HMA states that, before proceeding to grant any relief under the Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of because, to make every endeavor to bring about reconciliation between the parties.⁵⁷ If court passes a decree without complying with the said requirement of law, the decree passed faces the risk of being set aside.⁵⁸ Herein, it is pleaded on behalf of counsel for Anjali that the court should make such endeavors to initiate peaceful conciliation between the parties in the form of RCR⁵⁹ before even considering extreme measures such as passing a divorce order.

ISSUE 3: THAT ANJALI SHOULD GET THE CUSTODY OF THE CHILD.

It is humbly submitted before the Hon'ble Court that Anjali being the mother of the child has right to seek her custody **[3.1]** & there will be maximum welfare of the child in her custody **[3.2]**.

⁵⁵ Pushpa Rani v. Vijay Pal Singh, A.I.R. 1994 All.216; Santana Banerjee v. Susant Kumar Banerjee, A.I.R. 2012 Cal. 16.

⁵⁶ Hindu Marriage Act, 1955, § 23(2), No. 25, Acts of Parliament, 1955.

⁵⁷ Alopbai v. Ramphal, A.I.R. 1962 M.P. 211.

⁵⁸ Balwinder Kaur v. Hardeep Singh, A.I.R. 1998 S.C. 764; Chhotelal v. Kamala Debi A.I.R. 1967 Pat. 269.

⁵⁹ Harvinder Kaur v. Harminder Singh, A.I.R. 1984 Del. 66.

[3.1] THAT ANJALI BEING THE MOTHER OF THE CHILD, HAS RIGHT TO SEEK HER CUSTODY.

In absence of any legislation governing surrogacy in India, surrogacy births are governed by ART Guidelines and the surrogacy contract.⁶⁰ As per ART guidelines child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with all the attendant rights of parentage, support and inheritance.⁶¹

The agreement between Priya, Sandeep and Anjali gives all parental rights to Anjali and Sandeep.⁶² The verbal agreement is valid and does not suffer any legal infirmities as it fulfils all the requirements of §10 of ICA, i.e. the contract should be made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void.

In the present case, Priya has contracted with couple on her own will and is competent to contract, the payment of medical expenses by the couple is equivalent to payment of lawful consideration.⁶³ Lastly, the object of the contract is lawful as surrogacy agreements has been recognized as legal by the apex court of India.⁶⁴ Therefore, Anjali being the mother has right to seek custody of her child. In *Arguendo*, assuming, but not conceding, that Anjali is not a natural guardian of child under § 6 HGMA, still courts have to give primacy to welfare of child and not rights of parties.⁶⁵

⁶⁰ 288th Rep. of the Law Commission, (2009).

⁶¹ ICMR, *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India* (2005), https://www.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf (last visited 21 Mar. 2021).

⁶² Moot Proposition, ¶ 13.

⁶³ *In re* Paternity of F.T.R, 2013 W.I. 66.

⁶⁴ P.Geetha Nagar v. Kerala Livestock Development Board, 2015 S.C.C. OnLine Ker. 71.

⁶⁵ Sumedha Nagpal v. State of Delhi, (2000) 9 S.C.C. 745; Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 S.C.C. 42.

[3.2] ANJALI SHOULD GET CUSTODY OF THE CHILD TO ENSURE WELFARE OF THE CHILD

It is submitted that Anjali is best suited to provide for physical, financial and mental welfare of the child [3.2.1], the custody of child is best suited with mother [3.2.2], change in custody will not uproot the child's life or hamper her welfare [3.2.3].

[3.2.1] Anjali is best suited to provide overall welfare to the child.

The prime consideration in deciding matters of custody has to be the welfare of child.⁶⁶The word welfare consists of both physical and emotional well-being. In terms of physical and financial and well-being the parent should be able to provide comfortable standard of living⁶⁷, ordinary contentment, health, education⁶⁸, intellectual development and favorable surroundings.⁶⁹ Over and above these, the parent should be able to ensure the child feels a sense of stability and security receives loving and understanding care and guidance and enjoys warm and compassionate relationships with family.⁷⁰The court should also keep in mind moral and ethical upbringing of the child, mental stability and continuing involvement in the community.⁷¹

Since Anjali is doctor, she will find no difficulty in making sure that the physical comfort of her child is ensured. Moreover, throughout the course of her marriage she has shown emotional maturity and capacity to sacrifice for her family. While Anjali has tried to manage her domestic

⁶⁶ The Hindu Minority and Guardianship Act, 1956, § 13, No. 32 Acts of Parliament, 1956.

⁶⁷ N. Nirmala v. Nelson Jayakumar, 1995 S.C.C. OnLine Mad. 932.

⁶⁸ Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 S.C.C. 42.

⁶⁹ Mausami Moitra Ganguli v. JayantGanguli, (2008) S.C.C. 673.

⁷⁰ Anjali Kapoor v. Rajiv Baijal, (2009) 7 S.C.C. 322.

⁷¹ Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 S.C.C. 31; Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 S.C.C. 42.

duties towards and career, Sandeep was too busy with his work to pay any attention to his domestic duties.⁷² Therefore, she is more competent to look after emotional needs of the child.

[3.2.2] Custody of child is better suited with the mother.

It cannot be concluded that custody should rest with father merely because there is no defect in his personal care and his attachment for his children or because the father is financially better off.⁷³ No amount of wealth and “mother-like-love” can take the place of mother’s care and love for the child.⁷⁴ Also, given the baby is a girl it will be more suitable if she stays in the company of her mother.⁷⁵ Courts have also rejected the contention that working mother, who might be unavailable for long hours, cannot take proper care of the child.⁷⁶ Thus, keeping in mind that the child is a girl, requiring her mother’s love the custody should be granted to Anjali.

[3.2.3] Change in custody will not hamper the child’s welfare.

The parent not having the custody of the child for several years, should not suffer merely because of delays caused by normal functioning of court.⁷⁷ In the present case the continued custody of the child with Sandeep was due to delays in court proceedings, therefore, she should not be made to suffer for reasons which are not in her control. Moreover, a change in household within Delhi will not result into uprooting the child’s life as she will still be in the same surroundings. Moreover, since, Anjali has always been concerned about her child and has tried to

⁷² Moot Proposition, ¶ 5, ¶ 6.

⁷³ Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 S.C.C. 42.

⁷⁴ Surabhal Ravi kumar Minawala v. State of Gujarat, A.I.R. 2005 Guj. 149.

⁷⁵ Mohan Kumar Rayana v. Komal Mohan Rayana, (2010) 5 S.C.C. 657.

⁷⁶ Smita v. Vinay Shankar Shetty, 2004 S.C.C. OnLine Bom.112; Thrity H. Dolikuka v. H.S. Dolikuka, A.I.R. 1982 S.C. 1276.

⁷⁷ Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 S.C.C. 42.

maintain a relationship with the child, the child will not even feel remotely alien in her new surroundings.⁷⁸

⁷⁸ Moot Proposition Clarification II, Clarification no. 3.

PRAYER

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

1. The divorce petition is dismissed
2. Restitution of Conjugal Rights is granted in favour of Anjali.
3. Custody of the child is granted to Anjali.

and pass any other order it may deem fit in the interest of justice, equity and good conscience.

All of which is humbly prayed,

FL9,

Counsel for the Respondent/Petitioner- Anjali