
**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

Application for claiming Restitution of Conjugal Rights of marriage under Section 9 of the
Hindu Marriage Act, 1955

**WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT 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 Respondent has approached this Honourable Family Court of New Delhi under section 7 of Family Court Act 1984, for claiming the Restitution of Conjugal Rights of marriage under section 9 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 filed by wife i.e., Anjali, hereinafter also referred as Respondent. Petitioner and Respondent's marriage was solemnized in 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 this 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 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, that 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 the doctors advise the parents that the baby should not be made to travel for the first few months. 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 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 AMONG 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 that neither of the grounds of the section 13 of the Hindu marriage Act is satisfied in the present case. The concept of cruelty and its effect varies from individual to individual. The enquiry therefore must be there 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. Hence the divorce petition should be dismissed.

(II) THAT THE APPLICATION FILED BY ANJALI CLAIMING RESTITUTION OF CONJUGAL RIGHTS SHOULD BE GRANTED.

It is submitted before this court that the respondent's marital rights should be restored as the neglecting behaviour of petitioner towards respondent is completely without any reasonable cause. In fact, the reason behind such behaviour of petitioner is the relationship which developed between petitioner and surrogate mother of his child i.e., Priya. Every ground of claiming or restoring restitution of conjugal rights is established in this case.

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

Custody of minor children is determined according to the welfare of the child. The Custody of child who is less than five-year-old will, therefore ordinarily be with the mother. This is so even though the father is the natural guardian of a minor child, considering the welfare of minor should be given to the mother considering the psychological and biological needs of a child from mother.

BODY OF ARGUMENTS

(I) THAT THE PETITIONER IS NOT ENTITLED TO GET DIVORCE UNDER SECTION 13 OF HINDU MARRIAGE ACT, 1955.

1. Presently the respondent shall establish that the plaintiff is not entitled to get a divorce.
 - (a) **No Grounds of Section 13 are Satisfied in the present case.**
2. It is submitted before the hon'ble court that the plaintiff is not entitled to get a divorce under the Hindu Marriage Act, 1955.
3. In the Hindu Marriage Act, 1955, divorce can be granted under section 13.
4. The provision related to the concept of divorce was introduced by the Hindu Marriage Act, 1955. The Hindu Marriage Act defines divorce as dissolution of the marriage. Divorce is permitted only for a grave reason otherwise given other alternative. The Hindu Marriage Act is based on the fault theory in which any one of the aggrieved spouses under Section 13(1) can approach the court of law and seek the remedy of divorce.
5. Grounds for divorce under the Hindu marriage Act, 1955 are as follows:
 - i. **Adultery**
 - ii. **Cruelty**
 - iii. **Desertion**
 - iv. **Conversion**
 - v. **Insanity**
 - vi. **Venereal Disease**
 - vii. **Renunciation**
 - viii. **Presumption of Death**

6. In the present situation, mental cruelty is the only potential ground on which the plaintiff can plead for divorce as no other ground is possible in the particular situation. So, let us now look into what is mental cruelty.
7. According to Section 13(1) (i-a) of the Hindu Marriage Act, 1955¹, 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 husband and as a result of which it becomes impossible for the party who has suffered to live with the other party.
8. 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
9. 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 charged 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."
10. 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: "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

¹ The Hindu Marriage Act, 1955, S. 13(I) (ia).

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

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

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

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."

11. The Apex Court in the case of *Gananath Patnaik v. State of Orissa*⁵ observed as under: "The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs." Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."
12. 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

⁵ *Gananath Patnaik v. State of Orissa*, (2002) 2 SCC 619

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

have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. 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."

13. 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."
14. The hon'ble Supreme Court in *Gurbux Singh v. Harminder Kaur*,⁸ distinctly ruled that making certain statements on the spur of the moment and expressing certain displeasure about the behaviour of elders may not be characterized as cruelty. Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day-to-day life in all families would not be adequate for grant of divorce on the ground of cruelty.
15. In *Sri B Gangadhara v Smt. M Nagarathnamma*, the Karnataka High court established that the wife is compelled to work, to take care of the family, has to cook food and leave the house for work and after coming back from work, again she has to cook food and serve her family. If there is any slightest deviation, which is found fault with, naturally in the aforesaid circumstances. If she loses her balance and quarrels with the husband that is quite natural. That

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

⁸ *Gurbux Singh v. Harminder Kaur*, (2010) 14 SCC 301

cannot become a ground for divorce. That is what the Supreme Court says the normal wear and tear of married life.

16. In the present situation the respondent was made to manage both her studies and the domestic responsibilities altogether which unequivocally put a lot of stress on her mind. She was even criticized and insulted by her in laws for being too busy with her studies and not performing her domestic duties, despite showing no apprehension of her desire to continue with her education at the time of marriage.⁹ Even after such circumstances, respondent was very passionate and was somehow able to manage both her studies and domestic work together. But sometimes due to such incidents, a bit of stress and anxiety was imposed on the respondent by the petitioner and his family members resulting in arguments between the couple which can be considered as quite natural in a matrimonial relationship and not a ground for divorce as stated by the Supreme Court of India.
17. The Supreme Court of India in the cases of *Naveen Kohli vs. Neelu Kohli*¹⁰ and *A. Jayachandra vs. Aneel Kaur*¹¹ stated that to constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law.
18. In *Savitri Pandey v. Prem Chandra Pandey*¹², the Supreme 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

⁹ MOOT PROPOSITION, ¶4

¹⁰ Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558.

¹¹ A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22.

¹² Savitri Pandey v. Prem Chandra Pandey, (2002) 2 SCC 73.

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."

19. In the current case, there has been no such situation where the respondent has caused any "grave and weighty" cruelty to the petitioner. The arguments which happened between the couple were of ordinary nature which is considered usual in a matrimonial relationship.
20. Further it was the plaintiff and his family that were criticizing and insulting the respondent in front of others causing a lot of stress. She was even forced to quit her job in India for which she had to work very arduously by managing both her studies and domestic work at the same time and move to USA with her husband, where she had to again study and pass the medical course as she was not qualified to be a doctor there. Thereafter the petitioner denied depositing the fees for the respondent's medical course and went on to insisting her to ask her widowed mother for the course fees, for which the respondent's mother had to mortgage her house so that she can send her the required money.
21. In spite of such harsh circumstances, respondent was very passionate about her career and she impassively handled her matrimonial relationship with her spouse and his family along with her carrier. This shows that the respondent despite of such circumstances is contentedly accommodating with the petitioner and his family. Hence there is no pertinent ground for divorce in this case. Mere arguments between the respondent and the petitioner cannot be considered as a valid ground for divorce.

22. Apex court in *Darshan Gupta v. Radhika Gupta*¹³ distinctly ruled that divorce on ground of cruelty can only be decreed if the other party is at no fault. In Neelam Kumar vs Dayarani¹⁴, the court asserted the same thing that if a party to a marriage, by his own conduct brings the relationship to a point of irretrievable breakdown; he/she cannot be allowed to seek divorce on the ground of breakdown of the marriage. That would simply mean giving someone the benefits of his/her own misdeeds.
23. In the present case, it can be contemplated that the petitioner is himself at fault. Firstly when the respondent was criticized and insulted by the plaintiff and his family members in front of others for focusing more on her studies rather than on her domestic responsibilities.¹⁵ Secondly she was forced to quit her job and move to USA where she had to again study for her medical course.¹⁶ Thirdly the petitioner insisted the respondent to ask her widowed mother to arrange for her medical course fees which she did by mortgaging her only property.¹⁷ Fourthly, frequent arguments erupted between the couple over having a child, where the petitioner was opposing to have a child (In *Samar Gosh v Jaya Gosh*¹⁸, Supreme Court stated that unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.) Fifthly, the petitioner had a romantic relationship with some other women named Priya while being in a legal matrimonial relationship with the respondent, whom the petitioner family has accepted and given place to live in their house with the petitioner. As soon as his relationship with the women develops, the emotional dependence on the respondent starts fading and he starts ignoring her.¹⁹

¹³ *Darshan Gupta v. Radhika Gupta*, (2013) 9 SCC 1.

¹⁴ *Neelam Kumar v. Dayarani*, (2010) DMC 198 SC.

¹⁵ MOOT PROPOSITION, ¶5.

¹⁶ *Id.* ¶8.

¹⁷ *Id.* ¶9.

¹⁸ *Samar Gosh v. Jaya Gosh*, (2007) 4 SCC 511, ¶74.

¹⁹ *Id.* ¶17.

24. All these situations clubbed together indicate that it was due to the wrongful actions of the petitioner that such circumstances arose, hence petitioner is not entitled to get a divorce as he is the one who is done wrong and not the respondent.
25. Apex court in Ajay Kumar Jain v Maya Jain²⁰, clearly declared that the doctrine of irretrievable break-down of marriage is not available neither to the High Courts nor to any civil court, which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Hence this court cannot dissolve the legal matrimonial relationship of the petitioner and the respondent on the basis of the doctrine of irretrievable break-down of marriage.
26. Therefore, it is humbly requested to this court to dismiss the petition for divorce filed by the petitioner. As it has been evidently elucidated by the Supreme Court in *Naveen Kohli v Neelu Kohli*²¹ that the foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status.

(II) THAT THE APPLICATION FILED BY ANJALI CLAIMING RESTITUTION OF CONJUGAL RIGHTS SHOULD BE GRANTED.

1. It is most humbly submitted before this court that the respondent's marital rights should be restored as the neglecting behaviour of petitioner towards respondent is completely without

²⁰ Ajay Kumar Jain v. Maya Jain, (2009) 10 SCC 415.

²¹ Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, ¶58.

any reasonable cause. In fact, the reason behind such behaviour of petitioner is the relationship which developed between petitioner and surrogate mother of his child i.e., Priya.

2. Under Hindu Law, marriage is considered as the most sacred ceremony. The ceremony of Saptapadi in a Hindu marriage imposes certain rights and duties upon both the husband and the wife that they have against each other. These rights and duties which are binding upon both the spouses under Hindu law are termed as Conjugal or Marital rights.
3. According to Section 9 of Hindu Marriage Act, 1955-when any spouse, without proper reason, withdrew from the society of the other. The aggrieved party may execute, by petition to the district court, for restitution of conjugal rights. On being satisfied with the efficiency of the statements made in such petition and there is no proper ground, the court may declare restitution of conjugal rights respectively. Thus, following are the essentials for filing suit of restitution which are satisfied in this case:

(a) That the spouse has withdrawn from the Conjugal company of another spouse

4. A lawful wedlock imposes some obligations on the spouses. "Rights to cohabitation", "Right to consortium" and "Right to conjugal society" are the legal expressions for denoting the partnership between the husband and the wife. The society here means conjugal society. So, the expression 'withdrawal from the society of the other' means withdrawal from the company or conjugal relationship. The expression involves a mental process besides physical separation.²²
5. It is evident from the facts of the case that it was Sandeep who withdrew himself mentally from the society of Anjali after she returned to U.S.A after the birth of their child. He ignored her calls and messages and when she returned to India to meet her daughter and clarify things with Sandeep, he didn't go to pick her up from the airport and only after the visit of Anjali he decided to divorce her and not before that.

²² Leela Sharma v. Keshav Kumar, AIR, 1980 HLR 171.

6. In *Suman Singh v Sanjay Singh*²³ it was held that when there is evidence that it was husband who withdrew from the wife's company without any reasonable cause, wife is entitled to decree for restitution of conjugal rights. Similarly, in *Sushila Bai v. Prem Narayan*²⁴, the husband deserted his wife and thereafter was totally unresponsive towards her. This behaviour was held sufficient to show that he had withdrawn from the society of his wife, and therefore the wife's petition for restitution of conjugal rights was allowed.

(b) That the withdrawn neither has a reasonable reason nor is legal

7. There is no valid or legal ground for such withdrawal. The court of appeal in *Timmins v. Timmins*²⁵ held that the reason for withdrawal from the society of the spouse must be "grave and weighty" or it is sometimes said "grave and convincing", though these reasons may be different from matrimonial offences. But in the present case there is no as such grave or convincing reason. The sole reason behind such behaviour of Sandeep towards Anjali was fading of his emotional dependence on Anjali since the time he gets involved in relationship with Priya. Thus, it is petitioner who is at fault and it is the duty of the court to see that the legal process may not be misused for some ulterior purposes.

8. Every matrimonial relationship comes up with normal wear and tear as well as disagreements resulting into arguments, but this cannot be considered as grave reasons for one spouse to leave other spouse. Since the time Sandeep and Anjali got settled in U.S.A there were hardly any reasons for quarrel or disagreement between them. They both mutually decided to have child through surrogacy, and both were happy about that. The things changed only after the birth of child when Sandeep was left with Priya and Anjali left for U.S.A due to her job and during that time both Sandeep and Priya came closer to each other.

²³ Suman Singh v Sanjay Singh (2017) 4 SCC 85.

²⁴ Sushila Bai v. Prem Narayan, AIR 1964 MP 225.

²⁵ Timmins v. Timmins, (1953), 2 ALL. ER. 187.

(c) That there was no other legal ground for the refusal of relief

9. It is most humbly submitted before this court that there exist no other legal grounds for which relief should not be given to the respondent. In fact, respondent is having a bona-fide intention to resume matrimonial co-habitation and to render her duties of matrimonial life. This court after satisfying itself about the respondent should pass a decree of restitution.²⁶
10. Remedy of restitution of conjugal rights is a matrimonial remedy which is guided by Indian tradition and custom of sanctity and purity of marriage. It is aimed at preserving the marriage. It tries in promoting reconciliation between the parties and maintenance of matrimonial. It tries to protect the society from denigrating and same should be applied by this court in order to prevent the breakup of this marriage. Also, it would be in the best interests of the child to save this marriage as for the proper upbringing the child should get love and care of both parents staying together harmoniously. Infancy is the crucial period of every child's life and this period should not be affected due to unnecessary litigation. So, after considering relevant facts along with relevant case laws and veracity of evidence on record it is requested to this court that the conjugal rights of the Respondent wife should be restored.

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

1. The Counsel on behalf of the Respondent humbly submits that Anjali is entitled to have the custody of child because the child is infant and mother 's preferential claim for the welfare of the minor.

(a) The child is infant.

2. **Section 13** of the Hindu Minority and Guardianship Act 1956 has brought about a material change, so far as Hindus are concerned. It makes it quite clear that, in all cases, irrespective of the status of the person, claiming the guardianship, the welfare of the minor would be the

²⁶ K. V. Revanna v. Susheelamma, AIR 1967 Mys 165.

paramount consideration". In an application read under Guardian and Ward act read with Hindu Marriage and Guardianship Act custody of minor children is determined according to the welfare of the child.²⁷ The Custody of child who is less than five-year-old will, therefore ordinarily be with the mother.²⁸ This is so even though the father is the natural guardian of a minor child²⁹, considering the welfare of minor.

3. The Hindu Minority and Guardianship Act *postulates that the custody of an infant or a tender-aged child should be given to his/her mother* unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. However, it is immediately clarified that Section 6(a)³⁰ or for that matter any other provision including those contained in the Guardians and Wards Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.³¹

(b) Mother 's always has a preferential claim for the welfare of the minor.

4. In *Chander Prabha v. Prem Nath Kapur*,³² it was held that a child under five years of age needs most the tender affection and care of the mother more than that of the father. The child under five years of age, in our opinion, needs most the tender affection, the caressing hand and the company of his natural mother and neither the father nor his female relations, however close, well-meaning, and affectionate towards the minor, can appropriately serve as a proper substitute for the minor's natural mother. It may also be borne in mind that physical needs and comforts alone are not enough for the proper healthy development of a human child. Parental

²⁷ The Hindu Minority and Guardianship Act, 1956, S. 13.

²⁸ The Hindu Minority and Guardianship Act, 1956, S. 6(a).

²⁹ Chandrakala Menon v. Vipin Menon, (1993) 2 SCC 6., Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698.

³⁰ *Supra* note 7.

³¹ Roxann Sharma v. Arun Sharma, (2015) 8 SCC 318.

³² Chander Prabha v. Prem Nath Kapur, AIR 1969 Del 283.

affection is indispensable for this purpose and in the case of a conflict between father and mother, when the child is under five years of age, the mother has been rightly endowed with a preferential claim in regard to the child's custody. This is consistent with the rule of nature and, in normal circumstances, deserves to be noticed and acted upon.

5. In ***Sunil Kumar Chowdhary vs Smt. Sati Ranf***³³ case held welfare of the minor was prime and sole consideration. In regard to other persons, claiming guardianship Section 17 of the said Act³⁴ puts the welfare of the minor in the forefront and makes it the paramount consideration". It was held in this case³⁵ that minor remains with his mother and the application of the father dismissed. This case depends upon the judgment of the *Bimla bala Dasi v. Bhagirathi Shau*³⁶, where it was observed by the judge that "in view of Section 19³⁷ the father's claim would be paramount consideration. But under present law by Section 13 of the Hindu Minority and Guardianship Act³⁸ it is quite clear that welfare of the minor would be the paramount consideration"

6. In **Mausami Moitra Ganguli's case**³⁹, the court has to give due weight age to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the other.

7. The period up to the age of 12 represents the formative years in the life of a child. It is in these formative years that a child develops such qualities as patience, modesty, honesty, readiness to help and respect for others. Now it cannot be disputed that it is the mother's influence which

³³ *Sunil Kumar Chowdhary v. Smt. Sati Ranf*, AIR 1969 Cal 573 (V56C99).

³⁴ The Guardian and Ward Act, 1890, S. 17.

³⁵ *Supra* note 12.

³⁶ *Bimla bala Dasi v. Bhagirathi Shau*, (1961) 2 Cal 406.

³⁷ The Guardian and Ward Act, 1890, S. 19.

³⁸ The Hindu Minority and Guardianship Act, 1956, S. 13.

³⁹ *Mausami Moitra Ganguli v. Jayant Gang*, (2008) 7 SCC 673.

moulds the character and qualities of a child. Men are what their mother makes them; no fondest father's fondest care can fashion the child's heart shape his life.

8. The position of the mother and welfare of the child through judicial pronouncements it is observed that Supreme Court has in most of the cases followed its earlier decision i.e., Smt. *Surender Kaur Sandhu vs Harbax Singh Kaur Sandhu*⁴⁰; and *Rosy Jacob v. Jacob A. Chakramakkal*⁴¹. These two judgments are very important in relation to the custody of the child, where the Supreme Court held that Section 6 of the Hindu Minority and Guardianship Act⁴² cannot supersede the paramount consideration i.e., the welfare of the child, judicial trend also support to mother rather than father.
9. The counsel further submits that a court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. The court should give due weight to a child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or even more important, essential, and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should *rest with the court as to what is conducive to the welfare of the minor.*⁴³
10. Hence, the counsel submits here that the welfare principle projected in Section 13 of the Hindu Minority and Guardianship Act⁴⁴ and Section 17 of the Guardian and Ward Act⁴⁵ needs to be amplified and spelt out so as to make it explicit that-In applying the welfare principle, the court should have due regard to the fact that the minor needs emotional support and warmth of the

⁴⁰ *Surender Kaur Sandhu v. Harbax Singh Kaur Sandhu*, AIR 1984 SC 1224.

⁴¹ *Rosy Jacob v. Jacob A. Chakramakkal*, (1984) 3 SCC 698.

⁴² The Hindu Minority and Guardianship Act, 1956, S. 6

⁴³ *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413.

⁴⁴ The Hindu Minority and Guardianship Act, 1956, S. 13.

⁴⁵ The Guardian and Ward Act, 1890, S. 17.

'mother' who is ordinarily better equipped than the 'father' to import such emotional support and warmth which are essential for building up a balanced personality.

11. For the better development of child both parents are important for every child, but it is also true that the mother is always the best and the most suitable custodian of the child and where the child is girl the mother would be in a better position to look after her as she would require special attention and guidance in her childhood for her psychological and biological needs.⁴⁶
12. Also, the respondent is herself a practising doctor in U.S.A and since the child was premature at the time of birth so it needs extra care up to certain age for better physical and mental development which can be best given by the respondent. Also, the petition of restitution of conjugal rights is also pending before this court so it is requested to this court to restore conjugal rights of respondent and along with custody of child as the utmost consideration of welfare of child lies in this when he will get love and care of both parents.

⁴⁶ Tarun Pullani v. Shilpa Pullani, MANU/DE/3455/2018.

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 not entitled to get divorce under section 13 of Hindu Marriage Act 1955.
- (II) The Application for claiming Restitution of Conjugal Rights filed by Anjali should be accepted by this Court, and the said rights should be restored.
- (III) Anjali 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 Respondent shall duty bound pray.

All of which is humbly prayed,

Sd/-

Counsel for the Respondent