Team Code – FL-08

BEFORE THE FAMILY COURT OF PUNJAB

CIVIL PETITION NO._____ OF 2019

In the case of

SIMRAN…….PETITIONER

v.

RAMAN……...RESPONDENT

MEMORIAL ON BEHALF OF PETITIONER

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STATEMENT OF JURISDICTION

THE PETITIONER INVOKES THE JURISDICTION OF THE FAMILY COURT OF PUNJAB UNDER SECTION 19(iii-a) AND SECTION 19(iv) OF THE HINDU MARRIAGE ACT 1955.

Section 19(iii-a) and Section 19(iv) of The Hindu Marriage Act reads as follows:-

19. Every petition under this Act shall be presented to the district Court within the local limits of whose ordinary original civil jurisdiction-

(iii-a). in case the wife is petitioner, where she is residing on the date of presentation of the petition, or

(iv). the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.

THE PARTIES SHALL ACCEPT ANY JUDGMENT OF THE COURT AS FINAL AND BINDING FOR THEM AND SHALL EXECUTE IT IN ITS ENTIRETY AND IN GOOD FAITH.

STATEMENT OF FACTS

1. Raman (hereinafter referred as respondent), a Hindu from Karnataka married Simran (hereinafter referred as petitioner), a Hindu from Punjab on 1st January 2005 at Bangalore.
2. Petitioner started a job in Bangalore after being supported by Respondent when his parents opposed her due to their conservative mindset. Respondent got promoted he went to US along with petitioner after she insisted him to take the offer.
3. In January 2010, they were blessed with a girl child named Riya who got US citizenship by birth. Afterwards due to increased workload, Respondent started expressing his frustrations on Petitioner and physically assaulted her.
4. Respondent was granted the citizenship of US in 2014 and was blessed with a daughter Prabha in 2017 but Respondent's parents wanted grandson which again deteriorated their relationship.
5. Petitioner with her daughters left for Punjab to attend her father's funeral. Petitioner narrated her whole story to her mother who advised not to end relationship with Respondent. There she met her school friend Suraj and developed emotional bonding with him.
6. On December 2018, respondent, infuriated by the intimate talks of petitioner and Suraj, violently abused petitioner. Next day, petitioner left for Punjab and enrolled her daughter to a primary school. Respondent and his parents were denied to meet Petitioner.
7. Respondent in January 2019, filed suit for custody of Prabha in Local New York Court on which the court passed order in favour of Respondent.
8. Petitioner filed a divorce petition claiming maintenance and custody of child. Respondent filed in reply filed of Restitution of Conjugal Rights under Hindu Marriage Act 1955.

STATEMENT OF ISSUES

I.

WHETHER PETITIONER IS ENTITLED FOR DIVORCE ON GROUND OF CRUELTY?

II.

WHETHER PETITIONER IS ENTITLED FOR MAINTENANCE AND CUSTODY OF HER DAUGHTERS?

III.

WHETHER RESPONDENT IS ENTITLED FOR A DECREE OF RESTITUTION OF CONJUGAL RIGHTS?

IV.

WHETHER THE ORDER OF US COURT PASSED IN FAVOR OF RAMAN REGARDING CUSTODY OF HIS DAUGHTER IS ENFORCEABLE IN INDIA?

SUMMARY OF ARGUMENTS

I. WHETHER PETITIONER IS ENTITLED FOR DIVORCE ON GROUND OF CRUELTY?

It is most humbly submitted before the court that the petitioner is not entitled to get divorce on the grounds of cruelty under Section 13(1)(i-a) of the Hindu Marriage Act 1955. The respondent has treated the petitioner with physical as well as mental cruelty which amounts to cruelty under the Hindu Marriage Act 1955.

II. WHETHER PETITIONER IS ENTITLED FOR MAINTENANCE AND CUSTODY OF HER DAUGHTERS?

It is most humbly submitted before the court that the petitioner should be entitled for Maintenance and Custody of her daughters. The respondent has a legal obligation to maintain and financially secure the petitioner which entitles the petitioner to get maintenance. Also, it is in the greater good and welfare of the children that their custody is given to petitioner.

III. WHETHER RESPONDENT IS ENTITLED FOR A DECREE OF RESTITUTION OF CONJUGAL RIGHTS?

It is most humbly submitted before court that as the petitioner has reasonable excuse to withdraw from the conjugal society of the respondent, therefore, respondent is not entitled for a decree of Restitution of Conjugal Rights under Section 9 of the Hindu Marriage Act 1955.

IV. WHETHER THE ORDER OF US COURT PASSED IN FAVOR OF RAMAN REGARDING CUSTODY OF HIS DAUGHTER IS ENFORCEABLE IN INDIA?

It is most humbly submitted before the Court that the US Court order is not enforceable as the custody of children is a sensitive issue, judgments regarding that cannot be made rigid.

ARGUMENTS ADVANCED

I. WHETHER PETITIONER IS ENTITLED FOR DIVORCE ON GROUND OF CRUELTY?

1. It is most humbly submitted before the court that the petitioner is entitled for divorce on the ground of cruelty under Section 13(1)(i-a) of the Hindu Marriage Act, 1955. The petitioner has been suffering from cruelty from the beginning of the marriage itself. Though the cruelty has not been defined in the Hindu Marriage Act, 1955, but its ambit is wide enough to include both the physical and mental cruelty. Cruelty may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger.[1] That means there can be a cruelty even in the absence of physical violence or causing bodily hurt or danger to the person of the petitioner.[2]

A. The petitioner has been abused, assaulted and has been the object of violence by respondent which amounts to cruelty.

2. Physical Cruelty for the purpose of this Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, suffering or to have injured health.[3] However, in the present case, the physical cruelty is committed on the petitioner by the respondent when respondent started expressing his frustrations over petitioner by physically assaulting her.

[1] A. Jayachandra v. Aneel Kaur AIR 2005 SC 534.

[2] Collins v. Collins, 48 Cal.2d 325.

[3] Savitri Pandey v. Prem Chandra Pandey. AIR 2002 SC 591, (2002) 2 SCC 73.

3. In the case of *A. Jayachandra v. Aneel Kaur*[4], it was held that if the act itself is unlawful, then its injurious effects on the petitioner need not be proved. The unlawful act in itself is cruelty on the petitioner and the divorce is granted. Similarly, in the present case, the respondent has physically assaulted and abused the petitioner which in itself is unlawful in nature.

4. Thus as held in the case of *A Jayachandra v. Aneel Kaur,*[5] there isn't any need to prove that the act of physical assault was having injurious effects on the petitioner as it being unlawful in nature. As a result the commission of physical assault on the petitioner amounted to physical cruelty being committed by respondent which forms a ground for divorce.

B. The petitioner has been treated with mental cruelty.

5. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. Cruelty means a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.[6]

6. In *Manisha Tyagi v. Deepak Kumar*[7], the Supreme Court held that the continued ill-treatment of petitioner is in itself a cruelty and no physical cruelty is needed to be proved. Similarly, in the present case there were various instances where petitioner was ill-treated by the respondent and his family members.

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[4] AIR 2005 SC 534.

[5] *Ibid*.

[6] Savitri Pandey v. Prem Chandra Pandey. AIR 2002 SC 591, (2002) 2 SCC 73; Vinita Saxena v. Pankaj Pandit. (2006) 3 SCC 778.

[7] (2010) 4 SCC 339.

7. In the year 2012, when the US government was going through economic depression, Respondent was so engrossed in his work, that he did not give sufficient time to the petitioner. Hence, the petitioner was denied the conjugal comforts by the respondent which resulted in discomfort, pain and agony. However in the case of the *Vibha Shrivastava v. Dinesh Kumar Shrivastava,*[8] it was stated that refusal to give conjugal company amounts to cruelty and is a good ground for grant of a decree of divorce. Thus the Respondent here was giving sufficient time to the petitioner which in turn resulted in denying of the conjugal rights by him and hence amounts to cruelty.

8. In *Devanti Devi v. Rupan Janty,* it was stated cruelty should not always be of such a character as to cause danger to life or health, but harm to or injury to health, reputation and mental pain will also amount to cruelty Respondent used to express his frustrations vocally and even used to consume alcohol resulting in the loud shouting episodes and was also held under observation for a night by police and also had received a show cause notice from the HR department of his office. Once he even got abusive and violent over the respondent in front of his daughters. All these instances show that the reputation of the petitioner being harmed causing her mental agony amounting to cruelty being committed on her.

9. The court in *G.V.N. Kameswara Rao v. G. Jabilli,*[9] while defining cruelty stated that the situation must be of such a nature that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party i.e. it must be of such a nature that the parties cannot reasonably be expected to live together. When the petitioner visited her parent's home it was known that her personality became of

[8] AIR 1991 Mp 346.

[9] (2002) SC 576.

subdued kind which reflects her relationship with Respondent and how she faced cruelty to such extent which changed her personality and she started feeling depressed. Moreover, their relationship was so fragile that the petitioner had to find her happiness and the need for emotional liberation from the person other than her spouse i.e. Suraj which states that she was just trapped in the knot of marriage but was not happy and also didn't want to live with the respondent. Thus all these instances show that petitioner who was the wronged party cannot reasonably be expected to live together with respondent amounting to cruelty.

10. Thus in regards to all the consequences faced by the petitioner after marriage it can be inferred that the petitioner had been victim to cruelty by the respondent which is the ground for divorce under section 13(1)(i-a) which talks about cruelty states that the marriage can be dissolved by a decree of divorce on the ground that the party has after solemnization of marriage treated the other party with cruelty.

II. WHETHER PETITIONER IS ENTITLED FOR MAINTENANCE AND CUSTODY OF HER DAUGHTERS?

11. It is most humbly submitted before the court that the petitioner should be entitled for Maintenance and Custody of her daughters. Section 6(c) of the Hindu Minority and Guardianship Act 1956 states that

A. The respondent has an obligation to take care for financial security of the petitioner and therefore the petitioner is entitled for Maintenance.

12. Section 23(1)(e) of the Hindu Marriage Act 1955 gives power to any court of law to provide any matrimonial relief to the applicant before the court if there is no legal ground as to why the relief should not be granted.

13. Section 25 of the Hindu Marriage Act 1955 gives jurisdiction to any Court of law to pass any decree to grant Maintenance to either spouse on the application of other spouse.

14. In Hindu law, the term Maintenance has been used in wide ambit. It not only includes food, clothing, residence, education, medical treatment and attendance[10] but also things necessary for the comfort and status.[11] Also, the obligation of the respondent to maintain the petitioner comes not out of any contract but out of the status of marriage and out of their jural relationship created through the performance of their marriage.[12]

15. In *Suvarnalata v. Mohan Anandrao Deshmukh,*[13] the court held that the list of assests owned by the respondent indicates whether he/she is sufficiently well off to provide for a suitable lump sum amount as maintenance to appellant.

16. Similarly, applying the same ratio, it can be said that the respondent is financially sound and sufficiently well off to pay for the maintenance for the petitioner. It can be inferred from the facts of the case that petitioner was not financially sound and also the facts of the case show that the respondent was financially sound and well.

17. Also, Section 6(c) of the Hindu Minority and Guardianship Act 1956 states that the husband of a married girl becomes the natural guardian of a wife after marriage which

[10] Thulsai v. Raghuvan, 1985 Ker. 20.

[11] Srinivas v. Lakshmi, 1928 Mad. 216.

[12] Lakshmi Devi v. Nagana, 1925 Mad. 757; Udayanath v. Siridei, 1973 Or. 196.

[13] (2010) 4 SCC 509.

makes the husband legally bound to provide maintenance to the wife. In the present case, as the petitioner is the wife and respondent is the husband, it is legal obligation on the part of respondent to provide maintenance to the petitioner.

B. The custody of children should be given to petitioner in the best interest and welfare of the children.

18. Section 26 of the Hindu Marriage Act 1955 confers power to Court to pass such orders which it may deem fit and just for the custody, maintenance and education of minor children. This Section also confers power to the Court to revoke, suspend or vary such orders from time to time.

19. In *Athar Hussain v. Syed Siraj Ahmed*, the Supreme Court held that Guardianship and Custody are two distinct terms. And though father is the natural guardian of a minor according to The Guardians and Wards Act, 1890 but the custody can be entrusted to another person who serves his/her interest better.

20. In *Manju Tiwari v. Rajendra Tiwari*,[14] the Supreme Court held that the custody of child should be immediately given to mother as the child is below 5 years of age. Similarly, in the present case also, as the second daughter, Prabha was below 5 years of age, her custody shall remain with the petitioner.

21. In *Sarita Sharma v. Sushil Sharma*,[15] the Supreme Court, where the custody of daughter was given to the mother as she was below 5 years of age, the Court also handed over the custody of the elder child to the mother as the Court was of the view that it was in the best interest of the children that they do not get separated.

[14] AIR 1990 SC 1156.

[15] (2000) 3 SCC 14.

22. Similarly, in the present case, the same ratio applies and as the child below 5 years of age should be given to the custody of mother, the elder child should also be given to the custody of mother in the best interest of children. It can also be inferred from the facts of the case that as the children were separated from each other, the elder daughter of the spouses started missing her sister and staying depressed and as a result her health and education degraded.

23. In *Tejaswini Gaud v. Shekhar Jagdish Prasad*,[16] the Supreme Court held that the welfare of the child is a paramount consideration over the right to whom his/her custody is given. In the present case, it can be inferred from the above-mentioned facts that it is in the best interest and welfare of the child that their custody be given to the mother.

III. WHETHER RESPONDENT IS ENTITLED FOR A DECREE OF RESTITUTION OF CONJUGAL RIGHTS?

24. It is most humbly submitted before court that the respondent is not entitled for a decree of Restitution of Conjugal Rights under Section 9 of the Hindu Marriage Act 1955. After the solemnization of marriage, the spouses becomes entitled to the conjugal society of each other. If either spouse unreasonably withdraws from the conjugal society of the other, then the aggrieved party can file petition for Restitution of conjugal rights under Section 9 of the Hindu Marriage Act 1955.

[16] (2019) 3 SCC 42.

A. The Respondent is not entitled for decree of Restitution of conjugal Rights as Petitioner had reasonable cause to withdraw from the conjugal society of Respondent.

25. Under The Hindu law the concept 'Restitution of Conjugal Rights' is stated in section 9 of The Hindu Marriage Act, 1955 which states *"when either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply, by petition to the district Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly."*

26. In *Whetherley v. Whetherly,*[17] the expression 'withdrawal from the society' is explained as cessation of cohabitation to bring to end consortium, wherein the word 'society' means same as that of 'cohabitation'.

27. In *Krishnamurthy v. Syamanthakamani*[18], it was stated that the words 'reasonable excuse' should be understood in their ordinary meaning. It would be sufficient if the court is satisfied that there was reasonable cause for the objecting spouse to withdraw from the society of the petitioning spouse.

28. In the case of *Joginder singh v. Smt Pushpa,*[19] section 23(A) of The Hindu Marriage Act 1955, was mentioned. Section 23(A) of the said Act states that the claim of 'Divorce' or 'Judicial Separation' or 'Restitution of Conjugal Rights' can be opposed on the grounds of 'Adultery' or 'Cruelty' or 'Desertion'. It shows that Cruelty is a reasonable excuse to oppose the claim of Restitution of Conjugal Rights. Therefore, cruelty forms a

[17] 469 So. 2d 653.

[18] ILR 1977 Kar 246.

[19] AIR 1969 P H 397.

reasonable excuse in claims of Restitution of Conjugal Rights. While coming to Section 9 of the same Act which talks about Restitution of Conjugal Rights. It is mentioned that Restitution of Conjugal Rights can only be sought if there is withdrawal from the conjugal society without any reasonable excuse.

29. In the present case, there is a reasonable excuse on the part of petitioner for withdrawal from the conjugal society of respondent according to Section 9 of the above-mentioned Act. Since the respondent has committed cruelty on the petitioner, which forms a reasonable excuse on part of the petitioner, therefore, petitioner has a valid ground and excuse for withdrawing from the conjugal society of the respondent. Thus the claim for Restitution of Conjugal Rights cannot be maintained.

IV. WHETHER THE ORDER OF US COURT PASSED IN FAVOR OF RAMAN REGARDING CUSTODY OF HIS DAUGHTER IS ENFORCEABLE IN INDIA?

30. It is most humbly submitted before the court that the order of the US court passed in favour of the respondent regarding the custody of the daughter is not enforceable in India. Considering the sensitive nature of issues dealing with the custody of children, it was stated in Section 13 of the Hindu Minority and Guardianship Act 1956 and also held in numerous judgments that welfare of the children is paramount consideration.

A. The sensitive nature of the issue cannot make the US Court order enforceable in India considering the welfare of the child.

31. In *Vikram Vir Vohra v. Shalini Bhalla*,[20] the Supreme Court held that as matters dealing with the care and custody of the child are very sensitive in nature, also, considering the

[20] AIR 2010 SC 1675, (2010) 4 SCC 409.

nature of care and affection that a child requires in the growing stages of his or her life, custody orders regarding the children cannot be made rigid and final. Also, they are very much capable of being altered and moulded keeping in mind the needs of child.

32. Similarly, the issue of this case regarding the custody of child is equally a sensitive issue in which the judgment of the case will decide the future of the child. Also, as the children are in growing stages of life, the judgment of the case will determine the care and affection which the children are going to get in their sensitive age. Accordingly, the custody orders cannot be made rigid and final as they are very sensitive in nature and at the same time they are capable of being altered and moulded keeping in mind the needs of child.

33. In *Sarita Sharma v. Sushil Sharma*,[21] the appellant had removed the minor children from the jurisdiction of US Court and respondent on the other hand got a decree order passed by the US Court. According to the order, the custody of children has to be given to the respondent. The Supreme Court in deciding the enforceability of the US order in India held that the decree order passed by the US Court cannot override the consideration of the welfare of the children and it will not be right to be guided by the fact that US Court has passed the decree in favour of respondent considering the welfare of the children.

34. Applying the similar ratio of the above mentioned case, it can be inferred that as the issue is about the custody of children, the decree order passed in favour of the respondent by the US Court cannot be enforceable in India as the decree order of the US Court cannot override the consideration of the welfare of the children.

35. Also, Section 13 of the Hindu Minority and Guardianship Act 1956 states that welfare of minor is of paramount consideration and no person is entitled to be the guardian of

[21] (2000) 3 SCC 14.

minor by virtue of any law relating to guardianship if the court thinks that it is not in the favour of the minor. The said Section clearly states that minor's welfare is paramount and it does not entitle any person any rights in relation to minor if it does not result in welfare of the minor.

36. Also, in the *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*,[22] the Supreme Court held that the court while deciding the custody cases is not bound by the mere legal right of parents as the welfare of the child is supreme consideration. And the court ought to decide in the best interest and welfare of the minor.

37. Similarly, in the present case, the same judgment and law applies where the court should look for the best interest and welfare of the children and should not be guided by the decree order of the US Court and should decide the case on the basis of welfare of the child.

[22] (2019) 3 SCC 42.

PRAYER

It is hereinafter most humbly prayed before the Family Court of Punjab that, in the light of the facts stated, issues raised, arguments advanced and authorities cited, the Court may be pleased to uphold the contentions of the Petitioner and hold that;

1. The petitioner is entitled for divorce on the ground of cruelty,
2. The petitioner is entitled for maintenance and the custody of children,
3. The respondent is not entitled for the decree of the Restitution of Conjugal Rights,
4. The US Court order regarding the custody of children is not enforceable in India,

And pass any other Order or Direction, that it may deem fit in the Best Interest of Justice, Fairness, Equity and Good Conscience. For this Act of Kindness, the Petitioner shall be duty bound for every pray.

Sd/-

(Counsel for the Petitioner)