

4TH SURANA & SURANA AND ARMY INSTITUTE OF LAW

NATIONAL FAMILY LAWMOOT COURT COMPETITION 2023

ARMY INSTITUTE OF LAW, MOHALI, PUNJAB

IN THE LEARNED DISTRICT COURT AT CHANDIGRAH

CIVIL PETITION UNDER SECTION 19 OF THE HINDU MARRIAGE ACT, 1955

CIVIL PETITION NO. XXX/2023

IN THE MATTER OF

MR. ANIL

..... PETITIONER

v.

MRS. FATIMA

..... RESPONDENT

UPON SUBMISSION TO THE LEARNED DISTRICT COURT AT CHANDIGARH

-MEMORIAL ON BEHALF OF THE PETITIONER-

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ABBREVIATIONS

ABBREVIATION	TERM
IEA	Indian Evidence Act
HMA	Hindu Marriage Act
RCR	Restitution of Conjugal Rights
HMGA	Hindu Marriage and Guardianship Act

STATEMENT OF JURISDICTION

The Petitioner has invoked the jurisdiction of the Learned District Court under Section 19 of The Hindu Marriage Act, 1955. Section 19 states:

Court to which petition shall be presented.—Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction:—

(i) the marriage was solemnized, or

(ii) the respondent, at the time of the presentation of the petition, resides, or

(iii) the parties to the marriage last resided together, or

(a) in case the wife is the 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.

STATEMENT OF FACTS

BACKGROUND AND THE TIMELINE OF THE EVENTS

Anil and Fatima met in college and soon fell in love, after several ups and downs, they decided to get married in a Hindu Temple according to Hindu rites and rituals on 23th August 2020. The parties then resided in a shared accommodation from then on. Fatima met Raza, who was her college friend and had come to India on 27th September 2021 and soon after she had an extra-marital affair with him and they shared several close moments. Raza returned to US in November 2021 and in the first week of December 2021, Fatima discovered that she was pregnant and reported the same to Anil.

CIRCUMSTANCES LEADING TO THE SCENARIO

The parties then moved to Anil's parents' house to stay, after there were skirmishes between the parties, Fatima left Anil on January 10th 2022 to stay with her parents in Ropar. Then, Fatima left for US and to be with Raza on 14th February 2022. She married Raza in US and cut off all contact with Anil. Fatima gave birth to a boy on 5th August 2022 and did not inform Anil. She then, visited India with Raza in October 2022 and that is when Anil tried to contact her and his child.

CURRENT SCENARIO

Anil has filed for Restitution of Conjugal Rights under Section 9 of the Hindu Marriage Act, 1955 and an application for the grant of a paternity test. And, in case, restitution is not granted, the custody of the child be given to him.

SUMMARY OF ARGUMENTS

- I. The District Court of Chandigarh has the jurisdiction to hear the matter as per Section 19 of HMA as the cause of action arose in Chandigarh itself. Moreover, the marriage between the parties is a valid one. Hence, the suit is maintainable.
- II. The marriage between Anil and Fatima is valid as Fatima has converted to Hinduism and they have undergone a valid Hindu marriage with all the rites and rituals as required. Hence the marriage between Anil and Fatima is not valid.
- III. The decree of RCR should be granted. Anil has certain rights by virtue of a valid marriage which includes conjugal rights, Fatema violated this right by discarding her corresponding duty and withdrawing from Anil's society. Moreover, Anil has expressed his intention to cohabit with Fatima. RCR doesn't violate any rights under Article 21. Hence the decree should be granted.
- IV. The application of a paternity test is justified as the presumption is not applicable in the current case. Furthermore, granting a paternity test would be in the best interest of the child. Moreover, not granting a paternity test would be in violation of Article 21. Hence, the application of a paternity test is justified.

STATEMENT OF ISSUES

- I. Whether the present suit is maintainable in the District Court Chandigarh?
- II. Whether the marriage between Anil and Fatima is valid?
- III. Whether Anil is entitled for a decree of Restitution of Conjugal Rights?
- IV. Whether the application for paternity test is justified?

ARGUMENTS ADVANCED

I. THE PRESENT SUIT IS MAINTAINABLE IN THE DISTRICT COURT OF CHANDIGARH.

1. The present suit is maintainable as the District Court of Chandigarh has subject-matter jurisdiction [A], the cause of action arose in Chandigarh [B] and the marriage is valid [C].

A. THE DISTRICT COURT OF CHANDIGARH HAS THE SUBJECT MATTER JURISDICTION.

2. Section 19 of the **HMA**, 1955¹ states that for the disputed under the act, the parties can approach the District Court, as defined under Section 3(b)² of the Act, for redressal. This is in case of absence of a family court.³ Since the governing act for this particular dispute is the **HMA**, as argued ahead and there is no family Court in Chandigarh, the suit is maintainable.

B. THE CAUSE OF ACTION AROSE IN CHANDIGARH.

3. Section 20 of the **CPC**, 1908 states that a civil suit can be instituted in the place where the cause of action arose. The court to bring in such a suit must have territorial jurisdiction over the place in question. Moreover, Sections 19(i)⁴ and 19(iii)⁵ of **HMA**, also provide for a court's original civil jurisdiction to include the place of marriage solemnisation or the parties' last residence together. Further, under Section 19(iv),⁶ it has been clarified that in case the respondent doesn't reside in a territory to which the act extends, the petition must be presented to court whose jurisdiction includes the limits where the petitioner resides.

¹ Section 19 HMA, 1955.

² Section 3(b) HMA,1955

³ Section 8 the Family Courts Act, 1984.

⁴ Section 19(i) HMA,1955.

⁵ Section 19(iii) HMA,1955.

⁶ Section 19(iv) HMA, 1955.

4. In the present case, the cause of action arose in Chandigarh. The marriage was solemnised in a local temple there,⁷ which is where the dispute of validity originates. The matrimonial home for the parties, whether it be the rented accommodation or Anil's parents' house, both are located in Chandigarh itself, where the parties last resided together. Further, the child was also conceived in Chandigarh as indicated from the dates. Fatema came to Chandigarh for a job and stayed there with Anil after the marriage.⁸ As per the factual matrix, she did not leave the city till 14th February 2022.⁹ *Hence, the suit is maintainable.*

C. THE MARRIAGE IS VALID.

5. For a suit for obtaining a decree of restitution to be maintainable, the marriage must be valid.¹⁰ The factum of marriage is essential to be established for a party to apply for a decree of restitution of conjugal rights.¹¹

6. In the present case, the factum of marriage has been established as mentioned in issue II, rendering the marriage valid. *Hence, the suit of restitution is maintainability.*

II. THE MARRIAGE BETWEEN ANIL AND FATIMA IS VALID.

7. The marriage between Anil and Fatima is valid since Fatema converted to Hinduism [A] and the marriage fulfils the prerequisites of a valid Hindu marriage [B].

A. FATIMA HAS CONVERTED TO HINDUISM.

8. Explanation (c) to Section 2 (1)(c) of the Act legally allows a conversion or re-conversion

⁷ Paragraph 8, Moot Proposition.

⁸ Paragraph 7 and 9, Moot Proposition.

⁹ Paragraph 15, Moot Proposition

¹⁰ Ranjana Kejriwal v Vinod Kumar Kejriwal AIR 1997 Bom 380.

¹¹ Ranveer Sharma v Neelam Sharma AIR 1998 MP 283.

to Hinduism.¹² A bona fide intention to be converted to the Hindu faith, which may be indicated by conduct unequivocally expressing that intention is sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate the conversion.¹³ Further, a convert must embrace Hinduism and follow the cultural system and tradition of the religion and should take the Hindu mode of life.¹⁴ A 'Hindu way of life' is not laid down anywhere, but would include observing or celebrating Hindu festivals and religious days.¹⁵ The marriage being solemnized in accordance with Hindu religious rites and ceremonies¹⁶ and after marriage living as a Hindu¹⁷ and worshipping Hindu gods¹⁸ are strong indicators of conversion.¹⁹ Furthermore, it is a presumption that the priest must not have performed the marriage without Shudhikaran ceremony and conversion to Hinduism.²⁰ Importantly, Evidentiary facts are to be used to determine the genuineness of the conversion²¹

9. Presently, both; Anil and Fatima decided to get married in a Hindu temple in accordance with Hindu ceremonies²² and after Anil's parents found out about her pregnancy, she went

¹² Hindu Marriage Act, 1955.

¹³ *Perumal Nadar v Ponnuswami*, (1970) 1 SCC 605.

¹⁴ *Sapna Jacob v State of Kerala*, (1992) SCC OnLine Ker 233.

¹⁵ Poonam Saxena, *Family Law Lectures - Family Law I* (1st edition, Lexis Nexis 2021) 45.

¹⁶ *Betsy and Sadanandan, In re*, (2009) SCC OnLine Ker 6525.

¹⁷ *Madhavi Ramesh Dudani v Ramesh K. Dudani*, (2000) 9 SCC 454.

¹⁸ *Betsy and Sadanandan, In re*, (2009) SCC OnLine Ker 6525.

¹⁹ *Perumal Nadar v Ponnuswami*, (1970) 1 SCC 605, *Betsy and Sadanandan, In re*, (2009) SCC OnLine Ker 6525.

²⁰ *Madhavi Ramesh Dudani v Ramesh K. Dudani*, (2000) 9 SCC 454.

²¹ Law Commission, *Conversion/reconversion to another religion - mode of proof* (Law Com No. 19, 2009-2012) para 7.

²² Paragraph 7, Moot proposition.

through all the Hindu rites and rituals for the well-being of her child,²³ she also accompanied her mother-in-law to the temple several times and participated in religious ceremonies at home.²⁴ Importantly, she was referred as ‘Aarti’ at home and was introduced to the relatives as ‘Aarti’²⁵. Fatima’s momentary visits to the mosque²⁶ and participating in the religious festivities of Islam were on Raza’s insistence to reconnect with her family.²⁷ *Therefore, Fatima’s code of conduct implies a conversion to Hinduism.*

B. ANIL AND FATIMA HAD A VALID HINDU MARRIAGE.

10. Explanation (c) to Section 2(1)(c) extends the application of the Act to converttee’s of Hinduism²⁸ and the validity of a Hindu Marriage is not affected on failure to register the same²⁹ also, Recognition by family or community is not a precondition to a valid Hindu marriage.³⁰
11. Solemnize in connection with a marriage is to celebrate the marriage with proper ceremonies and in due form³¹ and when the validity of a marriage is disputed, it is imperative to look into the ceremonies that took place.³² Section 7 of the Act allows a Hindu Marriage to be solemnized according to the customary rites and rituals of either party which

²³ Paragraph 14, Moot proposition.

²⁴ Paragraph 16, Moot proposition.

²⁵ Paragraph 16, Moot proposition.

²⁶ Paragraph 10, Moot proposition.

²⁷ Paragraph 11, Moot proposition.

²⁸ Hindu Marriage Act, 1955.

²⁹ Hindu Marriage Act, 1955.

³⁰ Valsamma Paul (Mrs) v Cochin University, (1996) 3 SCC 545.

³¹ John D Mayne, A Treatise On Hindu Law And Usage (17th edition, Alpha Editions, 2022) 100.

³² Lakshman Singh v Kesar Bai AIR 1966 MP 166.

may or may not include Saptapadi³³ which is held to be an essential ceremony for a valid marriage only in cases where it is admitted by the parties that as per the form of marriage applicable to them that it is an essential ceremony³⁴ and hence, a simple ceremony of exchanging garlands, tying a Mangal sutra or putting a ring upon the finger is sufficient to constitute a valid Hindu marriage.³⁵

12. Alternatively, where the factum of marriage is established, the Doctrine of Factum Valet³⁶ is applicable and it is presumed that in the absence of evidence to the contrary, all rites and ceremonies necessary to constitute a valid marriage have been gone through³⁷ and hence, where Saptapadi is not performed but the mangalsutra is tied according to custom, the doctrine applies.³⁸

13. In the instant case, The ceremony involved exchange of garlands, application of vermilion and the ceremony solemnized by a priest³⁹ in a Hindu Temple.⁴⁰ Saptapadi was not agreed by the parties as one of the essentials of the marriage and if the doctrine of Factum Valet is applied, the exchange of garlands and the application of vermilion would lead to a presumption that all rites and rituals necessary to constitute a valid marriage have been gone through. The fact that there were no witnesses and the marriage was not registered will not warrant an adverse inference to be drawn. *Therefore, Anil and Fatema had a valid*

³³ Hindu Marriage Act, 1955.

³⁴ Priya Bala Ghosh v Suresh Chandra Ghosh, (1971) 1 SCC 864.

³⁵ S. Nagalingam v Sivagami, (2001) 7 SCC 487.

³⁶ Indian Evidence Act, 1872.

³⁷ Lakshmappa v Ramava (1876) 12 Bom. H.C.R. 364 ;Santosh Kumari Lalchand Mehra v Chimanlal Munilal Kapur, (1949) SCC OnLine Bom ;Kastoori Devi v Chiranji Lal, (1959) SCC OnLine All 282.

³⁸ Parvathy Ammal v Gopala Gounder, (1956) SCC OnLine Mad 199.

³⁹ Paragraph 8, Moot proposition.

⁴⁰ Paragraph 7, Moot proposition.

marriage according to Hinduism.

III. ANIL IS ENTITLED TO A DECREE OF RESTITUION OF CONJUGAL RIGHTS.

14. Anil is entitled to a decree of restitution because Anil has certain rights arising out of marriage, (A) Fatema discarded Anil's rights and her duty by withdrawing from his environment, (B) Anil has a bonafide intention to resume co-habitation and, (C) Right to life and personal liberty is not violated under Article 21. (D)

A. ANIL HAS CERTAIN RIGHTS ARISING OUT OF MARRIAGE.

15. Marriage is concept which inherently vests the spouses with some rights and also the duty on them both to respect the other's rights.⁴¹ One aspect of these rights is conjugal rights. It refers to the right of a husband or a wife to the society and comfort, otherwise called "consortium" of the other,⁴² which has been held as an important aspect for the institution of marriage itself.⁴³ Living together and being the part of each other's society is essential since marriage is considered to be a spiritual bond between two people. Unless the circumstances are such that this requirement can in no way be executed i.e. the marriage has irretrievable broken down, the parties must ensure compliance.⁴⁴ Non-adherence will grant the aggrieved party a subsequent right to demand the fulfillment of the duty that the other party has towards the previous one.⁴⁵

⁴¹ Indra Sarma v V.K.V Sarma (2013) 15 SCC 755.

⁴² Mullah on Hindu Law 23rd ed, page 871.

⁴³ Saroj Rani v Sudarsan AIR 1984 SC 1562.

⁴⁴ Ramchander v Ananata (2015) 11 SCC 539.

⁴⁵ Tekait Monmohini v Basanta Kumar (1901) 28 Cal 751; Dadaji v Rukmabai (1886) 10 Bom 301.

16. Section 9⁴⁶ codifies the right discussed above and provides for a remedy to the spouse who is deprived of the access to the society of the other spouse. It states that the aggrieved party can apply for a decree of restitution of conjugal rights in front of the district court. The husband has the right to reside with the wife and this duty of the wife shall not be mitigated by the court.⁴⁷ By virtue of a valid marriage, Anil is vested with these rights. *Hence, he can obtain a decree for restitution.*

B. FATIMA DISCARDED ANIL'S RIGHTS AND HER DUTY BY WITHDRAWING FROM HIS ENVIRONMENT.

17. Restitution of conjugal rights is granted when one party withdraws from the society of other without a reasonable excuse.⁴⁸ This withdrawal can mean halt on co-habitation, cutting contact or any other refusal of a reasonable demand of a spouse pertaining to their modus vivendi.⁴⁹

18. Moreover, it has been held that establishing the factum of separation without proving Animus Deserendi is sufficient to constitute withdrawal, for the purpose of Section 9.⁵⁰ A unilateral decision to not cohabitates constitutes as a violation of marital obligations.⁵¹

19. Presently, Fatima left her matrimonial home on January 10th 2022⁵² and subsequently left

⁴⁶ Hindu Marriage Act, 1955.

⁴⁷ Veeriah v Nagiah, AIR 1959 AP 547; Venkatamma v Venkataswamy Reddy, AIR 1963 Mys 118; Mallappa v Neelawwa, AIR 1970 Mys 59.

⁴⁸ Hindu Marriage Act, 1955, s 9.

⁴⁹ Sushila Bai v aprem Narayan Rai, AIR 1985.

⁵⁰ Kailash Vati v Ayodhia Parkash, 1976 SCC OnLine P&H 208.

⁵¹ Gaya Prasad v Mst. Bhagwati AIR 1966 MP 212.

⁵² Paragraph 14, Moot Proposition.

for the US on 14th February, 2022⁵³ to stay with Raza. After leaving, she did not contact Anil nor did she answer to any of his numerous attempts of contacting her.⁵⁴ She even changed her contact number.⁵⁵

20. Fatima wanted for the both of them to live independently and for the same reason was pestering Anil continuously to start working.⁵⁶ She did not give sufficient consideration to the fact that Anil was preparing for UPSC. Anil wasn't refusing to work because he wanted them to stay in his parents' house and restrict Fatema's independence but for the simple reason of wanting to focus on his career. For this reason, his actions can't be a reasonable excuse for Fatima to leave.

21. The choice of future endeavors and the preparation for it in the present also constitutes as Anil's environment or an element of his society. It was her duty to support him in this regard, rather she gave little heed to it and continued stressing on her issues.

22. This conduct is sufficient to establish the factum of separation while also discarding the marital duties which will entitle Anil for a decree of restitution of conjugal rights.

C. ANIL HAS A BONAFIDE INTENTION TO RESUME CO-HABITATION

23. Section 23 imposes a duty on the court to look into the nature of circumstances to determine the conduct and intention of both the spouses.⁵⁷ When a spouse shows an imminent desire to resume cohabitation and assume all the matrimonial rights and duties, the court must

⁵³ Paragraph 15, Moot Proposition.

⁵⁴ Paragraph 16 and 18, Moot Proposition.

⁵⁵ Paragraph 17, Moot Proposition.

⁵⁶ Paragraph 16, Moot Proposition.

⁵⁷ Hindu Marriage Act, 1955.

grant a decree for restitution.⁵⁸

24. Presently, Anil made numerous efforts to contact Fatema. He called her when she left for her parents' house.⁵⁹ He continued messaging and calling even when she had left for US and eventually showed up at her maternal home only to be shunned out.⁶⁰ He again reached out to her when the baby was born.⁶¹ These attempts show that Anil had an intention to resume living with Fatema and that he did not want to let her go.

25. The fact that Anil filed for a restitution decree even after Fatema fled and married Raza himself shows that he is willing to forget and forgive her for what she did and wants to continue the marriage and co habitation in good faith. Hence, he must be entitled to a decree of restitution.

D. RIGHT TO LIFE AND PERSONAL LIBERTY IS NOT VIOLATED UNDER ARTICLE 21.

26. Article 21⁶² guarantees liberty over the choices that an individual makes. Although it is recognised that such freedom is extended to the matters of marriage as well but it must be kept in mind that a marriage is a two way deal, no issue can be dealt with unilaterally. This means that every exercisable choice of a spouse has some effect on the other party as well. This symbiotic relationship entails a corresponding duty to a spouse along with their rights.

27. Fatema cannot exercise her liberty without adhering to the duties she has towards Anil by virtue of their marriage.

⁵⁸ Syal v Syal, AIR 1968 P&H 489; Jogindra Kaur v Shivcharan Singh, AIR 1965 J&K 95; Shyamal Samaddar v Sampa Samaddar, AIR 2012 Cal 220.

⁵⁹ Paragraph 14, Moot Proposition.

⁶⁰ Paragraph 16, Moot Proposition.

⁶¹ Paragraph 19, Moot Proposition.

⁶² The Constitution of India, 1950, Art 21.

28. The Supreme court has held Section 9 to be non-violative of right to dignity and privacy under 21.⁶³ It was observed that the provision provides for sufficient safeguards to prevent any detrimental effect.⁶⁴ *Hence, her right under Article 21 is not violated and the restriction to it is a mere consequence of a marriage.*

IV. THE APPLICATION FOR A PATERNITY TEST IS JUSTIFIED.

29. A paternity test is justified in the current case since the presumption given under Section 112 is not applicable on both sides, (A) a paternity test is required for custody and, (B) not granting a paternity test would be in violation of Article 21 (C)

A. PRESUMPTION UNDER 112 IS NOT APPLICABLE.

30. The presumption under Article 112 is not applicable due to marriage being invalid, (a) and granting a paternity test will be in the child's best interest. (b)

i. Both marriages are disputed

31. Section 112 of the **IEA** states that when a child is born to a married couple, the child is presumed to be the legitimate child of the couple, and the husband is presumed to be the child's father unless there is evidence to the contrary.⁶⁵ The word “during” has two connotations, *One*, that if a woman marries another person while she is still married to her first husband, any child born during her subsequent marriage is presumed to be the child of her second husband, not her first husband⁶⁶ and *two*, to the period when the child is

⁶³ Saroj Rani v Sudarshan Kumar AIR 1984 SC 1562.

⁶⁴ Harvinder Kaur v Harmander Singh Choudhry AIR 1984 Delhi 66.

⁶⁵ Indian Evidence Act 1872, s 112.

⁶⁶ Smt. S. B. Varsha v M. T. Anjanamma, (2015) 1 SCC 209; Chandrakant J. Shah v State of Gujarat, (1995) 2 SCC 550; Bhabani Prasad Jena v Convenor Secretary, Orissa State Commission for Women and Another, (2010) 8 SCC 633; Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik, (2014) 2 SCC 576; Shyam Lal v Sanjeev Kumar, (2012) 5 SCC 532; Amarjit Kaur v Hazura Singh, AIR 1975 SC 2386.

conceived, carried to term, and born, which must be during the valid marriage.⁶⁷

32. The presumption under Section 112 would not apply if the validity of the marriage was disputed.⁶⁸ For example, A void ab intio marriage; When not applicable, the paternity has to be established the other way⁶⁹.

33. Presently, the child was conceived when Fatima was married and living with anil.⁷⁰ However, the child was born when Fatima was with Raza.⁷¹ The marriage is void ab into between Fatima and Raza; the presumption of section 112 of the **IEA** will not be applicable on the side of Raza pursuant to the principle that the presumption is with the second husband, if the child is born during the second marriage and the paternity should be established in some other way, for instance, the DNA test to establish the child's biological father. *Hence, he must be entitled to receive a decree for restitution.*

ii. *A Paternity Test Would be in the Best Interest of the Child.*

34. When the presumption under section 112 of the **IEA** is not applicable, the child is considered illegitimate; to make the child, a legitimate paternity test is essential.⁷² In granting the paternity test, the welfare of the child is paramount.⁷³ If the child is considered

⁶⁷ Ramesh Kumari v State of Punjab, AIR 1981 SC 1999; Goutam Kundu v State of West Bengal, (1993) 3 SCC 418; State of Haryana v Bhajan Lal, AIR 1992 SC 604; Bharatha Matha & Anr. v R. Vijaya Renganathan & Ors., (2010) 11 SCC 491; K. Prema S. Rao v Yadla Srinivasa Rao & Anr., (2003) 1 SCC 217; Madan Lal v Dharam Pal, AIR 2003 SC 2246.

⁶⁸ Lachman Utamchand Kirpalani v Meena Alias Mota, AIR 1964 SC 40; Koppiseti Subbanna v Koppiseti Lakshmi, AIR 1971 AP 110; Meera Sahni v Lt. Col. S.K. Sahni, AIR 2002 Delhi 355.

⁶⁹ Sham Lal v Sanjeev Kumar, AIR 1995 SC 945; S.P.S. Balasubramanyam v Suruttayan, AIR 1995 SC 1395; Ram Chandra Singh v Savitri Devi, AIR 2003 SC 2276.

⁷⁰ Moot proposition, Paragraph 14.

⁷¹ Moot proposition, Paragraph 20.

⁷² Mst. Muradan v Mst. Sohni and Ors., AIR 1991 All 151; Sharda v Dharmpal, AIR 2003 SC 3450; Lalita Toppo v State of Jharkhand, AIR 2010 SC 2774.

⁷³ Goutam Kundu v State of West Bengal, (1993) 3 SCC 418; Sunita v Rakesh Kumar, AIR 2001 Raj 66.

illegitimate, firstly, the child cannot inherit the ancestral property.⁷⁴ Secondly, the child has limited custody and visitation rights.⁷⁵ Thirdly, the child faces social stigma and discrimination,⁷⁶ which violates their right to privacy and dignity.⁷⁷ Fourthly, when it comes to marriage, a certificate of legitimacy is required.⁷⁸ In addition to this, it's the fundamental right of the child to know the identity of their biological father.⁷⁹ Furthermore, it is essential for the psychological well-being and social status to know this birth father.⁸⁰ Lastly, if the child knows the actual biological father, it prevents the bastardisation of the child,⁸¹ which is paramount in granting paternity tests.⁸²

35. Presently, as the paternity presumption is not applicable, it would lead to the child being declared illegitimate and it is in the best interest for the child to know his real biological father, which will prevent him from being called a bastard. Additionally, being declared legitimate will give grant him legal rights which he is deprived off currently. Furthermore, it is essential for his psychological well-being that he knows who is his biological which will prevent the social stigma and discrimination against him. *Therefore, the court granting*

⁷⁴ Shyam Narayan Prasad v Krishna Prasad, AIR 2018 SC 3694; Badri Prasad v Dy. Director of Consolidation, AIR 1978 SC 1557.

⁷⁵ Smt. Sunita Devi v Suresh Kumar, AIR 1998 SC 1355; Nithya Anand Raghavan v State (NCT of Delhi), (2017) 8 SCC 454; Ramesh Chandra Kaushik v Smt. Veena Kaushik, AIR 1990 Delhi 126.

⁷⁶ Mithun Kumar v State of Jharkhand, 2017 SCC OnLine Jhar 734; ABC v The State, 2015 SCC OnLine Del 13697.

⁷⁷ Suchitra Srivastava v Chandigarh Administration, (2010) 14 SCC 28; Dattatraya Eknath Shinde v State of Maharashtra, 2015 SCC OnLine Bom 2924; M. Subramani v District Collector, 2009 SCC OnLine Mad 1487.

⁷⁸ Prema v Suresh Kumar, 2013 SCC OnLine Ker 174; Kuldeep Singh v State of Haryana, 2003 SCC OnLine P&H 774.

⁷⁹ Githa Hariharan v Reserve Bank of India AIR 1999 SC 1149; Arumugam Servai v State of Tamil Nadu AIR 2011 SC 2639; Suchitra Srivastava v Chandigarh Administration is (2010) 14 SCC 262; ABC v State (NCT of Delhi) is (2015) 10 SCC 661; Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik citation is (2014) 2 SCC 576.

⁸⁰ Goutam Kundu vs. State of West Bengal (1993) 3 SCC 418.

⁸¹ Ibid.

⁸² Ibid.

a paternity test would be in the child's best interest. Thus, the application for the paternity test is justified.

B. A PATERNITY TEST IS REQUIRED FOR CUSTODY.

36. Section 6 of the **HMGA**, 1956 provides for the natural guardian of a minor Hindu child and includes the father and, in case of his absence, the mother.⁸³ DNA test helps to determine the most suitable parent to provide for the child's welfare ⁸⁴ as it provides conclusive evidence of the biological relationship, which helps determine the child's best interests.⁸⁵ In the case of *Mohd. Mushtaque vs State of U.P.*, the father wanted custody of his minor daughter, the court ordered a DNA test to establish paternity, and once it was confirmed, the father was granted custody of the child.⁸⁶ Similarly, in the case of *Suresh Kumar v. Madhu*, where Madhu had an extramarital affair with another man, resulting in the birth of a child. After their separation, Madhu refused to allow Suresh Kumar to see the child, claiming that the child was not his. The court then ordered a paternity test to grant custody.⁸⁷

37. Presently, for granting various legal benefits to the child, his natural guardian under section 6 of the HMGA should be established for a paternity test. *Therefore, for granting the custody of the child to Anil, among other things, for the welfare of the child, paternity test is required and so the application is justified.*

C. NOT GRANTING A PATERNITY TEST WOULD VIOLATE ARTICLE 21.

⁸³ Hindu Minority and Guardianship Act, 1956, s 6.

⁸⁴ Dr. Surajmani Stella Kujur v Durga Charan Hansdah & Ors (2003) 7 SCC 232.

⁸⁵ Ibid.

⁸⁶ Mohd. Mushtaque vs State of U.P is (2013) 7 SCC 789.

⁸⁷ Suresh Kumar v Madhu, (2011) 4 SCC 753.

38. Anil's actual or potential relationship with the child is an interest in the liberty which may not be destroyed without the due process of law because he has an interest in liberty (a) and the state measures are not adequate enough to protect the said liberty (b)

i. Anil's Interest in the Said Liberty.

39. The first step, is to delve into the nature of the interest in liberty for which Anil claims constitutional protection,⁸⁸ and then turn to a discussion of the adequacy of the state procedure that is provided for its protection.⁸⁹ The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. State intervention to hinder in such a natural relationship must be accomplished by procedures meeting the requisites of the Due Process Clause⁹⁰ and in corollary to this a natural father's biological relationship with his child receives protection under the Due Process Clause.⁹¹

ii. The State's Measures are not Adequate to Protect Said Liberty

40. The second prong is if the state measures are adequate enough to protect this liberty. Presently, the natural parent has never had the opportunity to form such a relationship and the state and legislative policy is preventing such an attempt to be made by the natural father.⁹² In other words, the Due Process Clause is being violated by the automatic exclusion of the natural father without giving the father any opportunity to present evidence

⁸⁸ Cafeteria Workers v McElroy, 367 U. S. 886, 367 U. S. 895-896 (1961).

⁸⁹ Morrissey v Brewer, 408 U. S. 471, 408 U. S. 482-483 (1972).

⁹⁰ Santosky v Kramer, 455 U. S. 745, 455 U. S. 753 (1982).

⁹¹ Stanley v Illinois, 405 U. S. 645 (1972), Quilloin v Walcott, 434 U. S. 246 (1978),; Caban v Mohammed, 441 U. S. 380 (1979).

⁹² Indian Evidence Act, s 112.

regarding his parentage.⁹³ Several cases have indicated a direction for a change with respect to 112 of IEA with the development in science and technology, In *Vasu v. Santha*,⁹⁴ it was held that, Medical science has developed very much and it is capable of determining whether the husband is the father or not with a blood test. Further, upheld in the case of *Subayya Counder v. Bhoopala*⁹⁵ wherein it was laid down that in a special case, it may be possible by the test to disprove the alleged paternity of a particular person.

41. The underlying rationale being that while the court must protect the interest of the infant, it is entitled to look at all the evidence available including that of a blood test to ensure the best interests of the child.⁹⁶
42. Additively, the 185th report of the Law Commission delves deep into the question of the inclusion of Blood and DNA tests as exceptions contemporaneous to non-access. DNA tests can result in proving definitely that a person is not the father, where the samples do not match and hence they are useful for Paternity Testing.⁹⁷
43. As established Anil's actual or potential relationship with the child is an interest in liberty which may not be destroyed without the due process of law and so he atleast has a right to do a paternity test to establish his parentage. Thus, the application for the paternity test is justified.

⁹³ *Stanley v Illinois*, 405 U. S. 645 (1972).

⁹⁴ *Vasu v Santha* 1975 KLT 533, *Kesavan v Krishnamma*, reported in 1981 KLTSN 75 (Case No. 137), *Mathew v Annamma Mathew*, 1993 (2) KLT 1016 (1995 AIHC 351), *P. Rajeevan v Kalliani*, 1998 (2) KLJ 522; *Sajitha v State of Kerala*, 2002 (3) KLT 762.

⁹⁵ *Subayya Counder v Bhoopala* AIR 1959 Mad 366 ; *Hargovind Soni v Ramdulari* AIR 1986 MP 57 : 1986 MPLJ 105 : (1986) 1 Hindu LR 543.

⁹⁶ *S v S* (1970 (3) All England Law Reports 107); *Vasu v Santha*, reported in 1975 KLT 533.

⁹⁷ Law Commission, *Review of the Indian Evidence Act, 1872* (Law Com No. 16, 2000-2003) para 45.

PRAYER FOR RELIEF

Wherefore in light of the facts stated, issues raised, arguments advanced and authorities cited, The Petitioner most humbly and respectfully request the Learned District Court to adjudge and declare that:

- I. The present Suit is maintainable in the District Court Chandigarh.
- II. The marriage between the petitioner and defendant is valid.
- III. The Petitioner is entitled for a decree of restitution of conjugal rights.
- IV. The application for paternity test is justified.

And pass any other order in the favour of the petitioner, that the court may deem fit in the ends of justice and good conscience.

All of which is most humbly and respectfully submitted before this Court.

Date: 21st March, 2023

Counsel No.: TC-30

Place: Chandigarh

(Counsel for the Petitioner)