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BEFORE THE DISTRICT COURT OF CHANDIGARH

SUIT UNDER S 19 OF THE HINDU MARRIAGE ACT, 1955

CASE NUMBER 01/2023

IN THE CASE CONCERNING S 9 OF THE ACT

AND

IN THE MATTER BETWEEN:

MR. ANIL — **APPLICANT**

versus

MRS. BEGUM FATIMA — **RESPONDENT**

MEMORANDUM ON BEHALF OF THE RESPONDENT

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STATEMENT OF JURISDICTION

The Applicant has approached this Court under s 19 of the Hindu Marriage Act, 1955 which reads as under:

S 19 - 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: —

the marriage was solemnized, or

the respondent, at the time of the presentation of the petition, resides, or

the parties to the marriage last resided together, or

(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition; or]

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

BEFORE THE MARRIAGE

1. Fatima, Anil, and Raza studied together in Chandigarh. Anil belongs to Chandigarh and Fatima is from Ropar. They developed fondness for each other. He belonged to an affluent Hindu family whereas Fatima belonged to a lower middle class Muslim family.
2. They tried to convince their families but to no avail. Anil brought Fatima to the temple and included her in Hindu festivities. He introduced her to his sister who would often meet Fatima and refer to her as Aarti. Fatima ignored hoping that it would enable her to win her heart.
3. Thereafter, she was introduced to Anil's parents as Aarti. She did not like it but remained quiet. Few months later, Fatima moved to Chandigarh for her job and met Anil. Due to feelings, they started to live together and subsequently, married in August 2020 at a temple in a ceremony involving garlands, application of vermillion and solemnization of a priest.

POST MARRIAGE

4. Anil did not earn as he prepared for Civil Services. Fatima felt overburdened due to the responsibilities and found peace in going to the Mosque. She also met Raza and her family where she vented out feelings. She visited them often and followed the Muslim customs.
5. Raza and Fatima shared several close moments. A fight ensued on this and Fatima left the home. However, she returned when she was expecting a child. She went through all Hindu rites in the pooja for child and was introduced as Aarti. Anil decided to shift with his parents however, Fatima agreed only till the birth however, the use of 'Aarti' and Anil's denial to do a job led to a huge fight between the two and she left him. She married Raza in the subsequent month and then, delivered the baby boy in the US with father's name as Raza. Anil has approached the District Court for relief in the instant matter.

STATEMENT OF ISSUES

ISSUE 1

I. WHETHER THE PRESENT SUIT FILED BY ANIL MAINTAINABLE IN THE DISTRICT COURT OF CHANDIGARH?

ISSUE 2

II. WHETHER THE MARRIAGE IN QUESTION BETWEEN THE PARTIES ANIL AND FATIMA VALID IN THE INSTANT CASE?

ISSUE 3

III. WHETHER ANIL IS ENTITLED FOR A DECREE OF RESTITUTION OF CONJUGAL RIGHTS IN THE INSTANT CASE?

ISSUE 4

IV. WHETHER THE APPLICATION BY ANIL FOR THE GRANT OF PATERNITY TEST JUSTIFIED IN THE INSTANT CASE?

SUMMARY OF ARGUMENTS

1. **WHETHER THE PRESENT SUIT IS MAINTAINABLE IN THE DISTRICT COURT CHANDIGARH?**

   It is *firstly* submitted that the place of jurisdiction is not Chandigarh as it was not the last common residence of the parties. *Secondly,* it is submitted that the Court of jurisdiction in the instant case is Family Court as the facts and circumstances fall under the purview of Family Courts Act, 1984.

2. **WHETHER THE MARRIAGE BETWEEN ANIL AND FATIMA IS VALID?**

   It is submitted that the marriage between the Applicant and the Respondent is not a valid marriage as *firstly,* the Respondent was not a Hindu at the time of the marriage and does not fulfill the mandate of Section 5 of the Hindu Marriage Act, and *secondly,* all the requisite ceremonies were not performed in instant case.

3. **WHETHER ANIL IS ENTITLED FOR A DECREE OF RESTITUTION OF CONJUGAL RIGHTS?**

   The petitioner is not entitled for a decree of Restitution of Conjugal Rights as *firstly,* there was no existence of a valid marriage. *Secondly,* there was reasonable excuse for the Respondent's withdrawal from the society of Anil due to the presence of mental and legal cruelty, breakdown of marriage and violation of Fatima's privacy. *Thirdly,* the request of petitioners for the custody of child cannot be accepted as the relied upon Hindu Marriage Act is inapplicable and *secondly,* the best interests and welfare of the child will not be met.

4. **WHETHER THE APPLICATION FOR PATERNITY TEST IS JUSTIFIED?**

   The paternity test application is not justified in the instant case as *firstly,* it violates the fundamental rights under Article 21. *Secondly,* the grant of test defeats the best interest and welfare of the child, and *lastly,* it does not satisfy the long-established test of "eminent need".

ARGUMENTS ADVANCED

I. WHETHER THE PRESENT SUIT IS MAINTAINABLE IN THE DISTRICT COURT, CHANDIGARH?

1. It is humbly submitted that the present suit is not maintainable before this Court, i.e. the District Court, Chandigarh, as **(A)** the place of jurisdiction is not Chandigarh, and **(B)** the Court of jurisdiction is not District Court, Chandigarh.

A. The place of jurisdiction is not Chandigarh.

2. Section 19 of the Hindu Marriage Act, 1955 (hereinafter "HMA") entails that a petition relating to any Hindu marriage shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized;[1] or where the Respondent, at the time of the presentation of the petition, resides;[2] or where the parties to the marriage last resided together.[3]
3. Residence of the individual, under the language of HMA, does not necessarily refer to its permanent place, but even a short residence may be sufficient to give the court jurisdiction to entertain a petition.[4] With respect to the common residency of the parties to the marriage, it is our submission that the place where the parties last stayed together shall be considered as their place of residence,[5] and it need not be their permanent place of residence.[6]
4. In the present case, the marriage between the Applicant and the Respondent was not solemnized as the necessary customs were not performed.[7] Additionally, the Respondent

[1] The Hindu Marriage Act, 1955 (25 of 1955) s 19.
[2] The Hindu Marriage Act, 1955 (25 of 1955) s 19(ii).
[3] The Hindu Marriage Act, 1955 (25 of 1955) s 19(iii).
[4] *Madhvi Sirothia v N.N. Sirothia* AIR 1974 All 36.
[5] *Pritima Sharma v Mohinder Bharadwaj* AIR 1984 P&H 305.
[6] *Tara v Jaipal* ILR (1946) 1 Cal 604; *Lalithamma v R Kannan* AIR 1966 Mys 178; *Jagan v Swaroop* (1972) 2 MLJ 71; *Madhvi Sirothia v N.N. Sirothia* AIR 1974 All 36.
[7] *Respondent Memorial* issue II.

currently is not residing in Chandigarh,[8] and the last common residence of the parties was also not Chandigarh.[9] With respect to the Respondent's residence outside the country,[10] it is submitted that even a short residence may be sufficient to give the Court the jurisdiction to entertain a petition,[11] and currently the Respondent is staying in India, though not in Chandigarh, for the purpose of a family marriage.[12] Therefore, applying the law provided in Section 19 of the HMA, Chandigarh shall not be the place of jurisdiction.

B. The Court of jurisdiction is not District Court, Chandigarh.

5. Section 7 of the Family Courts Act, 1984 (hereinafter "FCA") provides jurisdiction to Family Courts over any District Court or Civil Court to deal with all the suits relating to validity of marriage,[13] restitution of conjugal rights,[14] paternity of father[15] and custody of a child.[16] Under Section 3 of the FCA, there is a requirement to establish a Family Court for every area where the population exceeds one million.[17]

6. Moreover, Section 8 of the FCA excludes the jurisdiction of any District Court or Civil Court in relation to the said subject matter in those areas where a Family Court is established.[18] Section 20 of the FCA provides an overriding effect to the FCA over any other law.[19] Also, in cases where the Family Court has jurisdiction, the same will be exclusive, and it cannot be transferred to the District Court.[20]

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[8] *Moot Proposition* paras 17, 21.
[9] *Moot Proposition* para 16.
[10] The Hindu Marriage Act, 1955 (25 of 1955) s 19(iv).
[11] *Madhvi Sirothia v N.N. Sirothia* AIR 1974 All 36.
[12] *Moot Proposition* paras 17 and 21.
[13] The Family Courts Act, 1984 (66 of 1984), s 7 explanation (b).
[14] The Family Courts Act, 1984 (66 of 1984), s 7 explanation (a).
[15] The Family Courts Act, 1984 (66 of 1984), s 7 explanation (e).
[16] The Family Courts Act, 1984 (66 of 1984), s 7 explanation (g).
[17] The Family Courts Act, 1984 (66 of 1984), s 3(a).
[18] The Family Courts Act, 1984 (66 of 1984), s 8.
[19] The Family Courts Act, 1984 (66 of 1984) s 8.
[20] *Arjun Singhal v Pushpa Karwel* AIR 2003 MP 189.

7. In 2015, the Central Government notified 16th February 2015 as the date on which the FCA shall come into force in Chandigarh.[21] Moreover, in September 2016, the Chandigarh District Court officially designated an Additional District and Session Judge's court as the Family Court.[22] Additionally, both the Supreme Court and the Punjab and Haryana High Court on several occasions have acknowledged the existence of Family Court in Chandigarh.[23]

8. Considering that the subject matters of the current suit fall under the subject-matter jurisdiction of both District Court and Family Court,[24] and that Family Court has an overriding jurisdiction over the District Court,[25] the correct court of jurisdiction would be the Family Court of Chandigarh, and not District Court, Chandigarh.

II. WHETHER THE MARRIAGE BETWEEN ANIL AND FATIMA IS VALID?

9. It is submitted that the marriage between the Applicant and the Respondent is not a valid marriage as **(A)** the Respondent was not a Hindu at the time of the marriage, and **(B)** all the required ceremonies were not performed.

A. The Respondent was not a Hindu at the time of the marriage.

10. As per the Preamble and Section 5 of the HMA, a Hindu marriage under the HMA can take place only between two Hindus.[26] Hindu under the HMA also includes a person who has converted to Hinduism.[27] It has been laid down that a non-Hindu becomes a Hindu only if he

[21] Department of Justice, Ministry of Law and Justice 'Notification, F. No.12012/3/2014- JUS-II' (12 February 2015).
[22] Aneesha Bedi, 'Chandigarh: 95% matrimonial disputes resolved at preliminary stage' Hindustan Times (Chandigarh, 11 March 2018) < https://bit.ly/3JWo1oN> accessed 19 March 2023.
[23] *Sumati Gulhati v Prateek Bajaj* MANU/PH/0200/2021; *Jyotibala Nayak Biswal v Bharat Biswal* MANU/SCOR/00503/2019*; Sumati Gulhati v The State of Jammu and Kashmir and Anr.* MANU/SCOR/21313/2021; *Jasdeep Kaur v Harjaspreet Singh* MANU/SCOR/15053/2022*; Manjeet Kaur v Sandeep Bhatnagar* MANU/SCOR/106845/2022; *Preeti v Kishan Kunal* MANU/SCOR/121762/2022.
[24] The Hindu Marriage Act, 1955 (25 of 1955) s 19; The Family Courts Act, 1984 (66 of 1984), s 7.
[25] The Family Courts Act, 1984 (66 of 1984) s 20.
[26] The Hindu Marriage Act, 1955 (25 of 1955) s 5, preamble.
[27] The Hindu Marriage Act, 1955 (25 of 1955) s 2.

undergoes the ceremonies of conversion prescribed by the community the individual aims to become a part of.[28] The intention and conduct of the convert is the 'prime consideration' in determining whether conversion took place or not.[29]

11. Moreover, for conversion from Islam to Hinduism, it is held that it is the mental condition of an individual that constitutes its religion, and if it ceases to believe in them, it automatically ceases to profess that religion.[30] Courts have also held that if the conversion is not inspired by religious feeling, but resorted to merely to fulfil another objective, then such conversion is not said to be fructified.[31]

12. Here, although the Respondent participated in various Hindu festivities[32] and visited temple with the Applicant on several occasions,[33] the Respondent, regularly expressed her discomfort towards the religious practice of the Applicant.[34] The Respondent participated in the Applicant's religious practice only to become more acceptable to the Applicant's family.[35] Despite their marriage having taken place in a Hindu temple,[36] the Respondent wanted to conclude their marriage properly through a *Nikah*.[37] Moreover, whenever the Respondent needed relief and mental peace, she used to visit Mosque, as that made her feel happy.[38]

13. Furthermore, in relation to being referred as Aarti, the Respondent initially ignored it hoping to earn the Applicant's family's love and trust,[39] however, she had never wilfully accepted the

[28] *Kusum v Satya* (1903) 30 Cal 999.
[29] *Sethalakshmi v Poonuswami* (1966) 2 Mad 374.
[30] *Mst. Reshmi Bibi v Khuda Baksha* AIR 1938 Lah 277.
[31] *Rokeya Bibi v Anil Kumar* (1949) 2 Cal 119.
[32] *Moot Proposition* para 4.
[33] *Moot Proposition* para 4.
[34] *Moot Proposition.*
[35] *Moot Proposition* para 4.
[36] *Moot Proposition* para 8.
[37] *Moot Proposition* para 10.
[38] *Moot Proposition* para 10.
[39] *Moot Proposition* para 4.

same,[40] and she was annoyed to the extent that she even had a huge fight with the Applicant over this issue.[41]

14. In light of all these, the Respondent had not converted to Hindu religion at any point of time during her relationship with the Applicant, let alone during marriage, and hence clearly, the Respondent was not a Hindu at the time of the marriage. Hence, the marriage between the parties cannot be considered as a valid marriage under the HMA.

B. All the required ceremonies were not performed.

15. Section 5 of the HMA provides for conditions of marriage which contain prohibitory grounds that invalidates a marriage.[42] Additionally, Section 7 of the HMA entails that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies.[43] It is well established that where requisite ceremonies are not performed, marriage is considered as void.[44] It has been laid down that under the Hindu law, there are two essential ceremonies of marriage – invocation before the sacred fire and Saptapadi.[45]

16. In addition, it is necessary that all the customs and ceremonies performed in the community from ancient times should be practiced.[46] Moreover, a presumption of valid marriage is drawn only if there is prolonged and continuous cohabitation between the parties.[47]

17. In the case at hand, the marriage ceremony between the Applicant and the Respondent that took place in a temple in Chandigarh involved exchange of garlands and application of

[40] *Moot Proposition* para 4.
[41] *Moot Proposition* para 16.
[42] The Hindu Marriage Act, 1955 (25 of 1955) s 5.
[43] The Hindu Marriage Act, 1955 (25 of 1955) s 7; *Bhaurao Shnakar v State of Maharasthra* (1965) 2 SCR 837; *Kanwal Ram v HP Administration* AIR 1966 SC 614.
[44] *Suderson Karir v State* AIR 1988 Del 368.
[45] *Appibai v Khaimji* AIR 1936 Bom 138; Satyajeet Desai (ed), *Mulla Hindu Law* (21 edn 2010).
[46] *Surjit Kaur v Garja Kaur*, AIR 1994 SC 135.
[47] *Gokal Chand v Parvin Kumari* AIR 1952 SC 231.

vermillion.[48] The ceremony of Saptapadi cannot be presumed to have been performed in the marriage.[49] In addition to this, post the marriage, the cohabitation between the parties was neither continuous,[50] nor prolonged[51] to give a rise to the presumption of a valid marriage.

18. Additionally, the customs performed must also be the ones practiced in the community from ancient times, considering that the parties eloped and married without their family's consent,[52] several customary ceremonies such as 'Kanyadan' or parents' blessings could not be performed. Thus, it entails that community's rites and rituals were also not performed.
19. In light of all these, it is evident that the marriage between the Applicant and the Respondent is not a valid marriage.

III. WHETHER ANIL IS ENTITLED FOR A DECREE OF RCR?

20. It is humbly submitted that Anil is not entitled for a decree of Restitution of Conjugal Rights (hereinafter "RCR"). On the withdrawal of either of the spouses from the society of the other without a reasonable excuse, the aggrieved party may apply for RCR through a petition to the District Court.[53] Further, the Court, after being satisfied with the truth of the statements made in the petition, and on finding no legal ground as to why the application should not be granted, may decree RCR accordingly.
21. In the instant case, Anil is not entitled for a decree of RCR as **(A)** there was no existence of a valid marriage, and *even assuming the validity of the marriage*, **(B)** there was reasonable

[48] *Moot Proposition* para 8.
[49] *Kunta Devi v Siri Ram* AIR 1963 Punj 235.
[50] *Moot Proposition* paras 13, 16.
[51] *Moot Proposition* paras 12, 13, 16.
[52] *Moot Proposition* para 8.
[53] The Hindu Marriage Act, 1955 (25 of 1955) s 9.

excuse for the Respondent's withdrawal from the society of Anil. **(C)** *In any event*, the Applicant does not have the right to custody of the minor child**.**

A. The decree of RCR cannot be granted in the absence of proof of a valid marriage.

22. It is reverentially submitted that Section 9 of the HMA requires a marriage between the parties to be legal, valid, and existing, for the grant of decree of RCR. Hence, the Court has to determine a valid marriage first, and then proceed to find out if the case is fit for granting RCR.[54]

23. Moreover, suits for RCR have been dismissed in the absence of proof of a valid marriage.[55] In the instant case, there was no valid marriage between the parties, that is, marriage between the parties does not exist.[56] Hence, the pre-requisite for the grant of decree of RCR is not met.

B. Even if it is assumed that there was a valid marriage, there was reasonable excuse for the Respondent's withdrawal from the society of Anil.

24. Courts generally do not allow RCR when the conduct of one party makes it impossible for the other party to live with him/her under the same roof.[57] Further, the phrase 'reasonable excuse' has not been defined under the HMA or any other statute. It is a question of fact and can be determined with reference to the facts and circumstances of that case.[58]

25. However, 'reasonable excuse' cannot be equated with a matrimonial offence, nor it can be said that a reasonable excuse cannot exist *except* in the form of a ground recognised by the

[54] *Gurdial Kaur v Mukand Singh* MANU/PH/0118/1966.
[55] *Ashish Morya v Anamika Dhiman* MANU/UP/3990/2022; *Ranvir Kumar Choudhary v Sushmit Suman* MANU/BH/0324/2015.
[56] *Respondent Memorial* issue II.
[57] *Dipti Mohanty v Surya Prakash Mohanty* MANU/OR/0371/2014.
[58] *Dipti Mohanty v Surya Prakash Mohanty* MANU/OR/0371/2014; *Rita Prajapati v Sanjay Kumar* MANU/JH/1779/2016; *Krishnamurthy v Symanthakamani* (1977) ILR 1 Kant 246.

Act as valid for judicial separation or for nullity of marriage or for divorce.[59] Something less than such a ground may also amount to a 'reasonable excuse' within the meaning of Section 9.[60]

26. In the instant case, there was reasonable excuse for the Respondent to withdraw from the society of Anil as **(A)** there was cruelty. **(B)** *Furthermore,* the alleged marriage had broken down beyond repair, and **(C)** i*n any case,* the Respondent is entitled to her right to privacy.

(A) *There was cruelty on the part of Anil and his family members.*

27. It is humbly submitted that cruelty is the course of conduct of one, which is adversely affecting the other.[61] The cruelty may be mental or physical, intentional, or unintentional.[62]

(i) The Respondent's right to privacy was violated.

28. It is submitted that the enquiry has to be whether the conduct charged as cruelty is of such a character as to cause a reasonable apprehension that it will be harmful or injurious to live with the other person.[63] Ultimately, the inference is drawn by considering the nature of the conduct and its effect on the spouse.[64] In the instant case, the Respondent's privacy was violated by Anil's family, which led to constant fights and rift between the couple.[65]

29. The Respondent submits if the right to society and comfort of the husband stand the risk of being subverted due to provocations from other relations, the wife can insist for a separate home.[66] Furthermore, in the context of a marital home, the husband may have to choose

[59] *U. Sree v U. Srinivas* MANU/TN/4176/2011.
[60] *U. Sree v U. Srinivas* MANU/TN/4176/2011.
[61] *Shobha Rani v Madhukar Reddi* [1988] 1 SCR 1010.
[62] *Shobha Rani v Madhukar Reddi* [1988] 1 SCR 1010.
[63] *N.G.Dastane v S.Dastane* [1975] 3 SCR 967; *Parveen Mehta v Inderjit Mehta* AIR 2002 SC 2582.
[64] *Shobha Rani v Madhukar Reddi* [1988] 1 SCR 1010.
[65] *Moot Proposition* para 16.
[66] *Kamal Kumar Basu v Kalyani Basu* AIR 1988 Cal 111.

between parents and wife, and a wife is entitled to insist that she should not be exposed to the unpleasantness of the relatives of her husband and that suitable provisions should be made for her to live with her husband in privacy.[67] Here, Fatima felt 'stuck' in Anil's home due to her identity being lost and she being subjected to religious ceremonies,[68] but Anil paid no heed to her requests to move back to Chandigarh[69] or start earning, and this violated her privacy.

(ii) Even otherwise, cumulative facts and circumstances evidence cruelty.

30. It is submitted that misbehaviour cannot be taken in isolation to determine whether it is sufficient by itself to cause mental cruelty, and cumulative effect of the facts and circumstances is to be considered.[70] Moreover, it has been made clear that neglect and indifference by the husband are all factors which lead to mental or legal cruelty.[71] Further, the denial of financial support and the fact that husband did not work despite the chance to work has been brought under cruelty.[72]

31. As per the facts, there were multiple instances which led Fatima to leave Anil's home despite being pregnant. Firstly, it was beyond her capacity to manage the expenses and he paid no heed to her struggle. The atmosphere was always stressful, and despite this, she got no support.[73] Further, he was constantly unavailable and then, she vented out to Raza,[74] who reconnected her with her parents. Anil did not talk to the family, or understand the cause of her worry, and remained indifferent. Even after this, Anil started misunderstanding her, which

[67] *Ponnambalam v Saraswathi* AIR 1957 Mad 693.
[68] *Moot Proposition* para 16.
[69] *Moot Proposition* para 16.
[70] *Parveen Mehta v Inderjit Mehta* AIR 2002 SC 2582; *Rukmani Ammal and Ors. v T.R.S. Chari* (1935) 69 MLJ 210.
[71] *Sirajmohmed khan Janmohamad khan v Haizunnisa Yasin khan and Anr.* [1982] 1 SCR 695; *Manisha Tyagi v Deepak Kumar* (2010) DMC 451 (SC).
[72] *S. Michael Johnson v Smt. M. Nirmala* F.C.A. No. 249 of 2008 (Telangana HC).
[73] *Moot Proposition* para 10.
[74] *Moot Proposition* para 10.

pushed her to leave the house.[75] Even when she was pregnant, Anil paid no heed to her requests to start earning, or the fact that she was stuck at his parent's place.[76]

32. Cumulatively looking at all these, it becomes evident that she was constantly feeling 'stuck' with Anil, and was not happy. Hence, there was cruelty.

(B) Even otherwise, the alleged marriage between the parties had broken down beyond repair.

33. The Respondent submits that in any case, once the marriage has broken down beyond repair, it would be injurious to the interest of the parties.[77] Courts have observed that nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.[78] Furthermore, a marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing.[79]

34. In the present case, there is no acceptable way in which the parties can be compelled to resume life with each other as illustrated in para 31. She is happily married to Raza and lives in the US. Even Anil gave up trying Fatima's number when his exams were approaching and never inquired about the wellbeing of Fatima.[80] Thus, the decree of RCR would only be a dead letter.

(C) In any case, the Respondent is entitled to her right to privacy.

35. With regard to the Respondent being forced to resume conjugal relationship with Anil, it is our submission that individual autonomy should be respected.[81] Moreover, in case of a

[75] *Moot Proposition* para 13.
[76] *Moot Proposition* para 16.
[77] *Rajkumari v Sonu Vishwakarma* 2015 (1) MPLJ 182.
[78] *Naveen Kohli v Neelu Kohli* (2006) 4 SCC 558.
[79] *K. Srinivas Rao v D.A. Deepa* 2013 (5) SCC 226.
[80] *Moot Proposition* para 19.
[81] *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1; *Joseph Shine v Union of India* 2018 SCC OnLine SC 1676.

dilemma between marital privacy and a woman's autonomy, the court must side with the woman, since women's life and dignity cannot be compromised.[82]

36. In fact, the Supreme Court has emphasised the positive duty of the State to protect the dignity and autonomy of women from being trampled upon in unequal societal structures, including marriage. On the same lines, Courts also have a duty to ensure substantive gender equality in both 'public' and 'private' spheres.[83]

37. Hence, it is abundantly clear that there was reasonable excuse for the Respondent to withdraw from the society of Anil. In light of the same, the Respondent should not be compelled to resume society with Anil, against her autonomy.

C. In any event, the Applicant does not have the right to custody of the minor child.

38. The instant case does not warrant a grant of custody of the minor child to the Applicant as **(A)** the heavily relied upon Hindu Maintenance and Guardianship Act, 1956 (hereinafter the "HMG Act") does not apply and **(B)** the mother has to be treated as the natural guardian. **(C)** *In any event*, the best interests of the child warrant his custody to be given to the Respondent.

(A) *The heavily relied upon Hindu Maintenance and Guardianship Act, 1956 (hereinafter "HMGA") does not apply.*

39. It is submitted that the inapplicability of the HMGA arises due to the non-fulfilment of the conditions as laid down in the Section 3 of the Act. The Section 3(1)(c)[84] provides that the Act applies to a person who is not a Muslim. However, the Respondent is a Muslim in the present case which makes the HMGA inapplicable. Further, the Explanation to Section 3[85] prescribes

[82] 'Is RCR Really Positive? An Inquiry in the 21st Century 4.1' (2019) NLUO SLJ 58, 75.
[83] *Joseph Shine v Union of India* 2018 SCC OnLine SC 1676.
[84] The Hindu Minority and Guardianship Act, 1956 (32 of 1956) s 3(1)(c).
[85] The Hindu Minority and Guardianship Act, 1956 (32 of 1956) s 3, explanation.

the requirements for a child to be considered Hindu. Clause (a) of the Explanation requires both parents to be Hindu. However, this condition is not met. Additionally, Clause (b) provides for one parent as a Hindu, however, in such a case, the child must be brought up by the same parent. Fatima brought up the child and thus, this condition is not met.

(B) The mother has to be treated as the natural guardian of the minor child.

40. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child, but not the guardian of his person whilst the child is less than five years old.[86] Further, Courts have also upheld mother as a natural guardian of a child below 5 years.[87] Moreover, the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is *per se* best suited to care for the infant during his tender age.[88]

41. Even the HMG 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 indicate the livelihood of the welfare and interest of the child being undermined if the custody retained by the mother.[89] Here, there seem no cogent reasons which Anil can show, that could undermine the welfare of the child if the custody is retained by Fatima.

(C) In any event, the best interests and welfare of the child warrant his custody to be given to the Respondent.

[86] *Roxann Sharma v Arun Sharma* 2015 8 SCC 318.
[87] *Bimla v Anita* 2015 SCC OnLine P&H 2469; *Roxann Sharma v Arun Sharma* 2015 8 SCC 318.
[88] *Roxann Sharma v Arun Sharma* 2015 8 SCC 318.
[89] *Roxann Sharma v Arun Sharma* 2015 8 SCC 318.

42. The 'welfare' of the child is of paramount importance.[90] It cannot be measured by money or by physical comfort alone and must be taken in its widest sense.[91] Even Article 3 and 18 of the United Nations Convention on the Rights of the Child (hereinafter "CRC") also uphold the best interests of child.[92] This shall include factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, health, education, etc.[93] Considering all factors, the child would have a better life in a happy family rather than a conflicted one. Also, Anil has only cleared UPSC Mains and does not have a stable job. He would certainly not be able to pay attention as opposed to Raza and Fatima who are very happy as a family.[94]
43. In light of these, both the "best interests of the child" doctrine, as well as the "least detrimental alternative" as an alternative judicial presumption posted by Courts in custody matters[95] tilts in favour of custody 'not' being granted to the Applicant.

IV. WHETHER THE APPLICATION FOR PATERNITY TEST IS JUSTIFIED?

44. The application for paternity test by Anil is not justified as **(A)** it violates the fundamental rights guaranteed Under Article 21; **(B)** the test is not in the best interest of the child, and **(C)** it does not satisfy the test of "eminent need".

A. DNA test violates the fundamental rights guaranteed Under Article 21.

45. It is submitted that DNA test is contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India.[96] As genetic information is broadly understood as shedding light

[90] *Sarita Sharma v Sushil Sharma* (2000) 3 SCC 14; *Bimla v Anita*, (2015) SCC OnLine P&H 2469; *Shilpa Aggarwal v Aviral Mittal* (2010) 1 SCC 591; *Vikram Vir Vohra v Shalini Bhalla* AIR 2010 SC 1675.
[91] *Bimla v Anita*, (2015) SCC OnLine P&H 2469.
[92] The United Nations Convention on the Rights of the Child (20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 arts 3, 18.
[93] *Tejaswini Gaud v Shekhar Jagdish Prasad Tewari* (2019) 7 SCC 42.
[94] *Moot Proposition* paras 20, 21.
[95] *J. Selvan v N. Punidha* (2007) SCC OnLine Mad 636.
[96] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.

on a person's essence, as going to the very heart of who he/she is, the law protects the same in the right of privacy, which extends even to children.[97] Under the right of privacy, children also have the right not to have their legitimacy questioned frivolously before a Court of Law.[98] Further, children ought not become the focal point of the battle between spouses.[99]

46. Further, Article 8 of the Convention on the Rights of Child, children have an express right to preserve their identity[100] and details of parentage are an attribute of a child's identity, which must not be challenged frivolously.[101] Hence, the paternity test sought by the Applicant is not justified.

B. The test is not in the best interest of the child.

47. The Respondent submits that questions surrounding paternity have a significant impact on the identity of a child.[102] Routinely ordering DNA tests in some cases even contribute to a child suffering an identity crisis.[103] Further, Article 3 of the Convention on the Rights of Child states that the best interests of the child shall be a primary consideration in all actions concerning children, which are undertaken by institutions including courts of law.[104]

48. Not only this, proceedings which are in rem have a real impact on not only the child but also on the relationship between the mother and the child itself which is otherwise sublime, and hence, a parent may, in the best interests of the child, choose not to subject a child to a DNA

[97] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[98] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[99] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[100] The United Nations Convention on the Rights of the Child (20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 8.
[101] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[102] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[103] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[104] The United Nations Convention on the Rights of the Child (20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 3.

test.[105] Since Fatima and Raza are happily married[106] and Raza was also happy after the birth of the child, and further, since name of the parents in the hospital records is entered as Father- Raza Ahmed and Mother- Begum Fatima,[107] it is evident that the family is at peace. Hence, in the best interest of the child, which now has a stable family unlike Anil who still does not have a stable job, the paternity test should not be allowed, and is also not justified.

C. The test in the present case does not satisfy the test of "eminent need".

49. Furthermore, it is submitted that DNA test should be passed only after balancing the interests of the parties, including the rights of the child, and if such a test is eminently needed.[108] Merely because either of the parties have disputed a factum of paternity, it does not mean that the Court should direct DNA test, or such other test to resolve the controversy.[109]

50. The Applicant, in this case, does not have substantial grounds to satisfy the test This is a frivolous petition as Anil, seemingly in love, gave up trying her number, because of exams[110] despite Fatima being pregnant. He also did not try to visit her parents in her absence.[111] Now that Anil had come to know that Fatima was happily married to Raza,[112] Anil's ego got triggered and hence, he wants Fatima back. The fact that Fatima denied his paternity and warned him to stay away[113] further triggered him, which is why he seeks a paternity test.

51. By considering Anil's actions, it is concluded that the test is not in the child's best interests and there is no eminent need to order a paternity test.

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[105] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[106] *Moot Proposition* para 21.
[107] *Moot Proposition* para 20.
[108] *Goutam Kundu v State of West Bengal* (1993) 3 SCC 418.
[109] *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* MANU/SC/0148/2023.
[110] *Moot Proposition* para 19.
[111] *Moot Proposition* para 19.
[112] *Moot Proposition* para 21.
[113] *Moot Proposition* para 21.

PRAYER

*W*HEREFORE, IN LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, IT IS HUMBLY PRAYED THAT THIS COMMISSION MAY BE PLEASED TO:

I. ***HOLD*** **THAT THE PRESENT SUIT FILED BY ANIL IS NOT MAINTAINABLE IN THE DISTRICT COURT OF CHANDIGARH.**

II. ***HOLD*** **THAT THE MARRIAGE IN QUESTION BETWEEN THE PARTIES ANIL AND FATIMA IS NOT VALID IN THE INSTANT CASE.**

III. ***HOLD*** **THAT ANIL IS NOT ENTITLED FOR A DECREE OF RESTITUTION OF CONJUGAL RIGHTS IN THE INSTANT CASE.**

IV. ***HOLD*** **THAT THE APPLICATION BY ANIL FOR THE GRANT OF PATERNITY TEST IS NOT JUSTIFIED IN THE INSTANT CASE.**

*A*ND PASS ANY OTHER ORDER THAT THIS COURT MAY DEEM FIT IN THE INTERESTS OF JUSTICE, EQUITY AND GOOD CONSCIENCE.