TEAM CODE: FL-10

4TH SURANA & SURANA AND ARMY INSTITUTE OF LAW
NATIONAL FAMILY LAW MOOT COURT COMPETITION 2023

BEFORE THE HON'BLE DISTRICT COURT OF CHANDIGARGH

In HMA petition of 2023

IN THE MATTER BETWEEN

ANIL .....APPLICANT

V.

FATIMA… .....RESPONDENT

UPON SUBMISSION TO THE HON'BLE DISTRICT COURT OF CHANDIGARH

-MEMORIAL ON THE BEHALF OF THE RESPONDENT-

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LIST OF ABBREVIATIONS

&	And
AC	Appeal Cases
AIR	All India Reporter
Anr.	Another
Art.	Article
Del.	Delhi
Ed.	Edition
HC	High Court
HMA	Hindu Marriage Act, 1955
Hon'ble	Honourable
i.e.	That is
In Re	In Reference
Inc.	Incorporation
IT	Information Technology
Ltd.	Limited

Ors.	Others
r/w	Read with
S.	Section
SC	Supreme Court
SCC	Supreme Court Case
SCR	Supreme Court Reporter
SMA	Special Marriage Act, 1954
u/s	Under Section
V.	Versus
Vol.	Volume

INDEX OF AUTHORITIES

CASES REFERRED

19. K. Kamaraja Nadar v. Kunju Thevar AIR 1958 SC 687, (1958) IIMLJ 52 SC, (1958) 36 MysLJ SC, 1959 1 SCR 583

20. K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

21. M.P. Sharma v. Satish Chandra 1954 AIR 300, 1954 SCR 1077

22. Madan Mohan Singh v. Rajni Kant (2010) 9 SCC 209: (2010) 3 SCC (Civ) 655

23. Madhubala v. Jagdish Chandra Malik 1978 SCC OnLine All 55

24. Mst Gurdev Kaur v. Sarwan Singh(1959) 61 P.L.R 188.

25. Pallavi Bhardwaj v. Pratap Chauhan (2011) 15 SCC 531 : (2014) 2 SCC (Civ) 634.

26. Pathukala Sakkariya v. Salman Faris 2011 SCC OnLine Ker 3577

27. R v. Secretary of State for Foreign and Common Wealth Affairs [1995] 1 All ER 611

28. Santi Deb Berma v. Kanchan P.D AIR 1991 SC 816, 1991 CriLJ 660, 1991 Supp (2) SCC 616

29. Sarvesh Mohan Saxena v. Sanju Saxena, (2009) 2 HLR 234 (Utt)

30. Seema v. Ashwani Kumar MANU/SC/0996/2006

31. Sh. Ved Prakash v. S.H.O (2014) SCC OnLine Del 230

32. Shaikh Basid v. State of Maharashtra 2019 SCC OnLine Bom 220

33. Smt. Neeta Kirti Desai v. Bino Samuel George 1998 (1) Bom. C.R. 263

34. Teja Singh v. Sarjit Kaur AIR 1962 PH 195

35. Vinoy Kumar and State of U.P and Ors. MANU/SC/0252/2001

36. Viraf Phiroz Bharucha v. Manoshi Viraf Bharucha (2014) 6 Mah Lj 558 (Bom)

STATUES REFERRED:

1. Hindu Marriage Act, 1955.
2. Special Marriage Act, 1954.
3. Constitution of India, 1950.

BOOKS REFERRED:

1. Prof. Kusum, *Family Law Lectures, Family Law I* (4th Ed., Lexis Nexis, 2015).
2. Sumeet Malik, B.P. Beri's Law of Marriage and Divorce, (3rd Ed., Eastern Book Company, 2020).

STATEMENT OF JURISDICTION

It is humbly submitted that, the Respondent has appeared before this Hon'ble Court in response to the Notice sent to the Respondent with regard to the petition filed u/s 9 of the Hindu Marriage Act, 1955 by the Applicant.

STATEMENT OF FACTS

1. Fatima, Anil, and Raza joined an Engineering course at a college in Chandigarh in 2014. Anil and Fatima developed a fondness for each other. Despite their different backgrounds, they decided to convince their families for the relationship. In May 2017, Anil introduced Fatima to his sister and conveyed their intention to marry. In December 2018, Anil decided to meet Fatima's parents with the intention of asking her hand for marriage. Fatima's family did not take the news well and threatened Anil to stay away from their daughter.
2. Anil and Fatima decided not to meet but it was not easy for them. They continued to pursue their degrees. They decided to get married in a Hindu Temple and exchanged garlands, application of vermillion and ceremony solemnized by a priest on 23 August 2020. Fatima took care of the household expenses while Anil focused on qualifying for Civil Services. Fatima felt overburdened and started communicating with Raza, who had come to Chandigarh on 27th, September 2021, for two months.
3. Raza and Fatima liked the company of each other, visited his hotel several times and also shared some close moments. Anil noticed a change in Fatima's behaviour, but he kept quiet as he was unaware about Raza. But soon this incident came to his knowledge, which led to a fight between them and resulted in Fatima leaving the house. Fatima moved back with Anil in December 2021, when she discovered she was expecting a child and Anil shared the news with his parents. Anil wanted to shift with his parents for the well-being of their child. Fatima was unhappy but still moved into Anil's Family and participated in religious ceremonies. She tried to convince Anil to move back to Chandigarh but he paid no attention, so eventually she left for her parents' house on January 10th, 2022.
4. Fatima's parents contacted Raza and he made necessary arrangements for Fatima's visit to the US. Raza did not ask anything and proposed to her for marriage. On August 5th, 2022, Fatima was blessed with a baby boy and to take medical benefits, Fatima got the name of the parents in the hospital records as Father-Raza Ahmed and Mother-Begum Fatima.
5. In October 2022, Anil got to know and claimed his child back, to which Fatima denied his paternity. Anil has now reached the District Court, Chandigarh, asking for restitution of conjugal rights and for a Paternity Test. In his plaint, he also pleads that in case restitution is not granted, then custody of child be given to him. Fatima denies the existence of marriage and custody of the child.

STATEMENT OF ISSUES

-ISSUE I-
WHETHER THE PRESENT SUIT IS MAINTAINABLE IN THE DISTRICT COURT CHANDIGARH?

-ISSUE II-
WHETHER THE MARRIAGE BETWEEN ANIL AND FATIMA IS VALID?

-ISSUE III-
WHETHER THE ANIL IS ENTITLED FOR A DECREE OF RESTITUTION OF CONJUGAL RIGHTS?

-ISSUE IV-
WHETHER THE APPLICATION FOR PATERNITY TEST IS JUSTIFIED?

SUMMARY OF ARGUMENTS

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

It is humbly submitted that the present suit is not maintainable in the District Court of Chandigarh. As there is no Locus Standi and Restitution of Conjugal Right can only be demanded by husband.

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

It is humbly submitted to the Hon'ble District Court of Chandigarh that the marriage between Anil and Fatima is not valid under the Hindu Marriage Act, 1955. Further the marriage is also not valid under the Special Marriage Act.

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

It is humbly submitted that the Applicant is not entitled for a decree of restitution of conjugal rights since there exists no valid marriage between the two parties as the factum of marriage is disproved in Issue. Further there exists a reasonable excuse for the Respondent's withdrawal as under s.9 of the Hindu Marriage Act, 1955 and there exists no *bona fide* intention on part of the Applicant.

IV. WHETHER THE APPLICATION FOR PATERNITY TEST IS JUSTIFIED?

It is humbly submitted that the application for paternity test is not justified. As Paternity test is not in the best interest of child and as a child's genetic information is part of his Fundamental Right to Privacy.

ARGUMENTS ADVANCED

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

[1.1] THE PRESENT SUIT IS NOT MAINTAINABLE IN THE DISTRICT COURT CHANDIGARH

1. It is humbly submitted before the honorable court that the present suit filed by the applicant is not maintainable under the District court as there is no violation of the right of the Applicant and he has no ground to file this complaint.

[1.1.1] THERE IS NO LOCUS STANDI

2. In India, the concept of *locus standi* is mentioned under Order 7 Rule 11 of the Civil Procedure Code, 1908**.** For instituting any action, the plaintiff must prove his locus standi first and the trial will start thereafter. The court can dismiss the entire case, irrespective of its merit if the requirement of *locus standi* is not fulfilled. The necessity of *locus standi* is seen in case like "*Sh. Ved Prakash v. S.H.O*"[1] and "*Vinoy Kumar and State of U.P and ots*[2]"

3. Further, "*Locus standi*" refers to the legal right to file a lawsuit. It is a party's ability to show the court that the law or action challenged has a sufficient relation to and damage from it to justify the party's involvement in the case. No rights of Applicant have been violated because the Respondent does not have any obligation to him as there was no valid marriage.

[1] (2014) SCC OnLine Del 230
[2] MANU/SC/0252/2001

4. Further, the Respondent left Applicant's house to keep her mental peace, this has caused no injury to Applicant, she has not demanded anything from the applicant. Hence, the Applicant has no *locus standi*.

[1.2] RESTITUTION OF CONJUGAL RIGHT CAN ONLY BE DEMANDED BY HUSBAND.

5. It is humbly submitted that the Restitution of conjugal rights can only be demanded by a husband under the SMA, 1954 but as its going to be proved under issue II, Anil never was Fatima's husband as no marriage had taken place.

6. According to the s.22 of the SMA, 1954 ―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.[3]

7. As there was no marriage between the Applicant and the Respondent there is no right that can be availed by Applicant to bring this action to the court, "*Actio non datur non damnificato"* which means that an action is not given to one who is not injured. Therefore, making this suit non-maintainable in the District Court of Chandigarh.

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

[2.1] THE MARRIAGE BETWEEN RESPONDENT AND APPLICANT IS NOT VALID UNDER THE HINDU MARRIAGE ACT

8) It is humbly submitted before this honourable court that the marriage between Fatima and Anil was *void ab initio*. The rights that the Applicant seeks to claim, are rights provided by the law to a partner in a Hindu marriage, but no marriage has taken place under any Family

[3] §.22, Special Marriage Act,1954

or Personal law. In the case of *Smt. Neeta Desai v. Bino George*[4], it has been laid down that when both the spouses are Hindus, they are regulated under the Hindu Marriage Act. If one of the parties to such marriage is not Hindu the provisions of Hindu Marriage Act, 1955 cannot be invoked to seek the remedy under the said Act, this observation was shown in *Gullipilli Pavani v. Gullipilli Raj*[5] and in "*Viraf Bharucha v. Manoshi Viraf Bharucha*[6]"

9) In the case of *K. Hema Kumari v. D.P. Yadagiri*[7] it was held that compliance to section 5 of the HMA is not optional to parties but a mandate that needs to be fulfilled.

[2.1.1] *Respondent was not a Hindu at the time of marriage*

10) It is humbly submitted that the Marriage between the Applicant and Respondent does not come under the jurisdiction of the HMA as according to section 2 of the HMA which discusses the application of this act the act regulates marriage between Hindus and not Muslims.

11) We can observe that under s.2 sub section (c) it is mentioned in the bare act, that this act is not applicable to a person who is a Muslim. The Respondent was a devoted Muslim at the time of the attempted marriage between Anil and Fatima, she even went to the mosque in the duration of their marriage at her own will and sought comfort in her embracement of Islam .

12) Hence, there is no basis to this marriage under the HMA. In the case of Ga Arife @ Arti Sharma vs. Gopal D. Sharma[8] the court held that change of religion cannot be believed merely on vague oral allegations unsupported by any documentary or uncorroborated oral evidence. The respondent never pleaded her alleged conversion from Islam to Hinduism.

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[4] 1998 (1) Bom. C.R. 263
[5] (2009)1SCC714
[6] (2014) 6 Mah Lj 558 (Bom)
[7] 2012 ALT 3784
[8] MANU/DE/2329/2010

13) The Respondent also never converted into Hinduism properly, visiting temples and festivities just so you can be accepted by your in laws does not amount to conversion into another a religion and Islam allows the visitation of other religious institution it does not vicariously means that she has accepted another religion, when Fatima never even talked about renouncing her old religion or being an apostate from Islam.

14) In the case of *Betsy v. Nil*[9] , the Petitioner has no case that she was converted into Hindu. Further there is no valid solemnization of marriage according to Hindu rites. Even though the petitioner has lived as a Hindu after marriage and also got married according to Hindu rituals. The petition filed under Section 13(b) of the H was found not maintainable.

15) Therefore, there is no maintainable evidence that the Respondent had converted into Hinduism at the time of the attempted marriage which insinuates that *prima facie* the HMA is not applicable to the Respondent.

[2.1.2] *Proper ceremonies of Hindu rituals did not take place*

16) The essential to a Hindu marriage is that there must be proper compliance to its ceremonies and rituals to make it a valid marriage in Hinduism .The marriage was never even conducted properly in the temple , there was an no compliance with proper procedure of ceremonies and this marriage was not held according to Hindu rituals and rites.

17) The S.7 of the HMA provides guidelines for the ceremonies to be followed in a Hindu marriage

18) Ceremonies for a Hindu marriage*. —(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.*

(2) Where such rites and ceremonies include the Saptapadi, the marriage becomes complete

[9] 2009 SCC OnLine Ker 6525

and binding when the seventh step is taken.

19) In the case of *Santi Deb Berma v. Kanchan P.D*[10] the supreme court held the marriage between the parties as invalid as there was no 'Kanyadan' or 'Saptapadi' performed, it held that in the absence of proper Hindu rites and rituals a marriage cannot be considered a valid one. Referencing to the observations of Lord Denning, in *R v. Secretary of State for Foreign and Common Wealth Affairs*[11], that customary laws are not written down, but they are handed down by tradition from one generation to another and they are well established and have the force of law within the community. Considering a customary celebration of marriage there is no historical custom for inter faith marriages, so we have to rely on the HMA, according to which without "saptapadi" and other rites this marriage is invalid.

20) In v. *State of Maharashtra*[12], the Supreme Court held that only ceremonies prescribed by custom or usage will bind the parties into the matrimonial tie. Any ceremony with a mere intention of marriage is not enough.

21) Therefore, we can observe that no proper ritual or rites were followed according to Hinduism rendering this marriage an invalid one.

[2.2] THE MARRIAGE BETWEEN RESPONDENT AND APPLICANT IS NOT VALID UNDER THE SPECIAL MARRIAGE ACT, 1954

22) It is humbly submitted before the honourable court that this was an attempted interfaith marriage as the Respondent is a Muslim and the Applicant is a Hindu, so it can only be sought to come under the provisions of Special marriage act, 1954. The purpose of this act was to enable interfaith marriages in the eyes of law.

[10] AIR 1991 SC 816, 1991 CriLJ 660, 1991 Supp (2) SCC 616
[11] [1995] 1 All ER 611
[12] 1965 AIR 1564, 1965 SCR (2) 837

23) But for a marriage to be solemnized under the SMA,1954 there are certain provisions of the act that need to be met, which in this case have not been met. This marriage will be considered invalid under the SMA, 1954. There is no law which says that a woman loses religious identity after marrying a man from another faith. Moreover, the Special Marriage Act is there and allows that two persons can marry and maintain their respective religious identities.[13]

24) The provisions of this act also cover marriages which have been performed according to Personal laws but now the couple seeks legal registration under the SMA, this provision is covered under section 15 and 16, which sets guidelines for the same. Neither of the parties have complied with these rules rendering this marriage invalid.

[2.2.1] *No registration of marriage was done*

25) To legally register a marriage and avail benefits of this act it is necessary to make sure that the guidelines set out under section 15 and section 16 are complied with. s.15 sub section [14](a) lays down guidelines which say that a marriage performed in other forms shall be registered under these guidelines if ,

a. a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since

26) We have already proved in the sub issue (2.1.2) that the proper ceremonies were not held which means that the condition under s.15 has not been met due to lack of compliance with Hindu rites and rituals, Therefore, rendering this marriage *void ab inito.*

27) There also has been no attempt from either the Applicant or the Respondent to register this marriage as is set by section 16 of the SMA.[15] It is very evident by these mentioned cases

[13] Goolrokh Gupta v Burjor Pardiwala AIR 2012 CC 3266
[14] S.15 & s.16, Special Marriage Act, 1954
[15] Para 8, Moot Proposition.

that it may not be compulsory for couples under personal law to register their marriages as they are supported by their respective cultures and society , but same is not the case for interfaith marriages.

28) In the case of *Ajit Singh vs. Paramjit Kaur*[16] The husband's petition for restitution was resisted by a wife regarding the validity of marriage under the Special Marriage Act because a declaration under Section 12(2) was lacking in *Madhubala* v. *Jagdish Chandra Malik*[17], but the contention was rejected because the certificate of marriage was conclusiveproof. We can infer from this the legal power registration and a certificate of marriage holds

29) In the case of *K. Kamaraja Nadar v. Kunju Thevar*[18] I t was held by the respected court that the procedure laid down in Section 15 read with Rule 6(b) of the SMA , 1954 in our view, are mandatory in character, and are to be strictly followed, A similar opinion was held by the court in the case of *Deepak Krishna v. District Registrar, Ernakulam*[19], according to which there is no optional section 15 and 16 it is a must and should be followed. In the case of *Seema v. Ashwani Kumar*[20], the Supreme Court has seconded the fact that it is necessary for citizens to register their marriage, this intention is clearly portrayed in the SMA.

30) This attempted marriage cannot have any legal weight as according to section 18 of the SMA only when a marriage officer issues a marriage certificate can a marriage be deemed to solemnized under this act and it is evident that no registration of such nature has taken place. Therefore, this marriage is neither solemnized nor valid under this act.

[2.2.2] *Presumption of marriage cannot take place*

[16] 2010 SCC OnLine P&H 3517
[17] 1978 SCC OnLine All 55
[18] AIR 1958 SC 687, (1958) IIMLJ 52 SC, (1958) 36 MysLJ SC, 1959 1 SCR 583
[19] 2007 SCC OnLine Ker 71
[20] MANU/SC/0996/2006

31) The principle of presumption of marriage cannot be applied to this case as these principles can be applied to a couple who have been living together for a long period of time , The Supreme Court in *Badri Prasad* v. *Director of Consolidation*[21] has held that where partners have lived together for a long spell of 50 years, the presumption is that they lived as man and wife.

32) In the case of In *Madan Mohan Singh* v. *Rajni Kant*[22], the court noted that law presumes in favor of marriage and against concubinage. When a man and a woman have cohabited continuously for a long time, their relation cannot be termed as "walk in and walk out relationship". We refer to the facts of this case to observe that there has been no long cohabitation between the couple, they barely lived together for a duration of one and a half year with her leaving and returning again simultaneously.

33) Therefore it is crystal clear that the presumption of marriage cannot be invoked at any cost , there is no possibility that under any act prescribed by the law this marriage will become a valid one.

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

34) It is humbly submitted to the Hon'ble District Court of Chandigarh that the Applicant is not entitled for a decree of restitution of conjugal rights since *Firstly,* there exists no valid marriage between the two parties as the factum of marriage is disproved in Issue 2 **[3.1]**; *Secondly,* there exists a reasonable excuse for the Respondent's withdrawal as under s.9 of the Hindu Marriage Act, 1955 **[3.2]**; *Thirdly,* there exists no *bona fide* intention on part of the Applicant **[3.3].**

[21] 1978 AIR 1557, 1979 SCR (1) 1
[22] (2010) 9 SCC 209: (2010) 3 SCC (Civ) 655

[3.1] THERE EXISTS NO VALID MARRIAGE

35) Marriage is a legally and socially sanctioned contract via which the parties involved viz. husband and wife acquire certain conjugal rights, one of which is the right to a mutual consortium. However, under the Indian family laws, it is essential that a marriage must be valid in the eyes of law. An invalid marriage is no marriage in the eyes of law despite being socially valid and in such a case, there arise no rights and duties between the concerned parties.

36) The Hon'ble Supreme Court of India in *Pallavi Bhardwaj* v. *Pratap Chauhan*[23], has noted that evidence of a valid marriage is one of the foundational facts to be established for claiming restitution of conjugal rights under s.9 of the Hindu Marriage Act, 1955. Thus, establishing the factum of marriage is the sine qua non for claiming remedy under s.9.

37) The marriage between the Respondent and the Applicant is invalid on several grounds. Firstly, the Respondent was a practising Muslim, being a follower of Islamic religion, and the Applicant was a practising Hindu at the time of the marriage i.e., 23rd August 2023, thereby deeming the marriage void ab initio under s.5 of the Hindu Marriage Act, 1955 which clearly enumerates that both the parties to a marriage must be mandatorily Hindu.[24] This is substantiated by the Hon'ble Bombay High Court's judgement in *Chitralekha Kunju v. Shiba Kunju*[25] Secondly, the marriage is invalid under the Special Marriage Act, 1954 as s.5 mandates that the parties need to file a notice expressing their intention to marry each other to the Marriage Officer of the district prior to solemnization.[26] Thirdly, the marriage is also invalid under the Muslim Personal Laws. Thus, the factum of the

[23] (2011) 15 SCC 531 : (2014) 2 SCC (Civ) 634.
[24] S.5, The Hindu Marriage Act, 1955; Gullipilli Sowria Raj v. Bhandaru Pavani AIR 2009 SC 1085: (2009) 1 SCC 714.
[25] (1998) II DMC 454 (Bom-DB).
[26] §.5, The Special Marriage Act,1954

marriage stands disproved.

38) The only proof of marriage that is available with the Applicant are the photographs taken post marriage. However, such evidence is not enough to prove the factum of marriage as held in Sarvesh Mohan Saxena v. Sanju Saxena[27], where the Hon'ble Uttarakhand High Court observed: *"Simply because the parties knew each other, there were some photographs taken or maintenance was granted in some case in which marriage was not the issue in question or the parties visited various places together do not prove marriage*."

[3.1.1] *A relationship not in the nature of marriage*

39) S.114(a)(i) of the Indian Evidence Act, 1872 provides provision for presumption of marriage when two partners live for a long spell as husband and wife.[28] Moreover, the Hon'ble Supreme Court in *D.Velusamy v. D. Patchaiammal*[29] stated a few guidelines when a relationship between two people would be considered to be "a relationship in the nature of the marriage".

40) The relationship between the Respondent and the Applicant cannot be presumed to be akin to a marital relationship. Firstly, s.114 (a)(i) clearly states that the couple must be living together for a 'long spell'. The alleged marriage took place on 23rd August, 2020. The couple cohabited for less than two years, which any reasonable man would not infer to be a long period of time. Secondly, the marriage also does not meet a few guidelines stated by the Supreme Court. The Respondent clearly did not hold herself out to society as being a couple or that the Applicant and Respondent are akin to spouses. This is substantiated by the Respondent's internet activity on her Facebook account, where immediately after the alleged marriage, she changed her relationship status from "single" to "its complicated".

[27] Sarvesh Mohan Saxena v. Sanju Saxena, (2009) 2 HLR 234 (Utt)
[28] S.114(a)(i)
[29] (2010) 10 SCC 469

She never expressly professed to her friends or family that she was the Applicant's spouse.[30]

41) Thus, it is humbly submitted that the Applicant is not entitled to a decree of restitution of conjugal rights as there exists no valid marriage nor a relationship which is akin to a marriage.

[3.2] THERE EXISTS A REASONABLE EXCUSE FOR THE RESPONDENT'S WITHDRAWAL

42) S.9. of the Hindu Marriage Act, 1955 clearly provides that the remedy is available when one of the spouses withdraws from the society of the other without a reasonable excuse. When there exists a reasonable excuse, the spouse is justified in their withdrawal and the other would not be entitled to a decree. A reasonable excuse may be any excuse which is just and rational.[31] It is an excuse which would make it impossible for the withdrawing party to live with each other. Moreover, it is not necessary that the petitioner must have committed a matrimonial offence; even a conduct which may fall short of an offence but affords a reasonable excuse to the Respondent to withdraw would be enough to disentitle the Applicant any relief.[32]

43) The Respondent has a reasonable excuse to withdraw as the Petitioner meted out mental cruelty to her. The Respondent, being a practicing Muslim was at several instances forced to practice customs and rituals; made to respond to a Hindu name; and made to participate against her will in various Hindu religious practices. Furthermore, the Applicant also doubted the Respondent's chastity due to her platonic equation with a distant friend. The Applicant also faced severe stress throughout the marriage as the Applicant was the sole

[30] Para 8, moot proposition.
[31] Annie Thomas v. Pathrose (1988) 2 KLT 237 at Para 7.
[32] Mst Gurdev Kaur v. Sarwan Singh(1959) 61 P.L.R 188.

breadwinner of the family thereby carrying the burden of managing the entire house and expenses. Finally, the Respondent, despite the fact that the Applicant was the sole earning member and thus, was required to be at Chandigarh for her work, forced the Applicant to settle at his parent's place, which was far from her place of work. Furthermore, the Respondent was almost always cut off from her family and the Applicant never bothered to care about the interests and well-being of the Respondent, making her feel trapped in the household. These situations also led to constant marital discord between the partiesresulting in despair and mental agony for the Respondent. All of these instances suggest mental cruelty and made it impossible for the Respondent to cohabit with the Applicant.

44) In order to substantiate that the above-mentioned reasons fall under the ambit of "reasonable excuse", it is pertinent to mention a few relevant case laws. In *Dilip Kumar Dutta v. Regional Transport Authority*[33], it was held that when a wife's character is suspected by the husband, then in such case the wife's withdrawal cannot be called without reasonable excuse. The Hon'ble Bombay HC held in *Shaikh Basid v. State of Maharashtra*[34], "if the wife is not comfortable because of the approach and attitude of the parents of her husband and the treatment given to her by them, and if she resides with her parents because of the said reason, in my considered opinion, the wife has just cause to live separate and demand maintenance. The Hon'ble Kerala HC in *Annie Thomas v. Pathrose* held *"Cruelty in legal sense need not necessarily be physical violence and any conduct, behaviour which cause pain and injury in mind as well, and so renders the continuance in the matrimonial home an agonising ordeal and undermines the health which affects reasonable happiness of her life amounts to cruelty. Therefore, the ill treatment both physical or mental would constitute*

[33] (1970) 74 CWN 524.
[34] 2019 SCC OnLine Bom 220.

defences for restitution of conjugal rights" .[35]

45) Thus, it is humbly submitted that the Applicant is not entitled to a decree of restitution of conjugal rights as there exists a reasonable excuse on part of the Respondent for withdrawing from the society of the Respondent.

[3.3] THERE EXISTS NO BONA FIDE INTENTION ON PART OF THE APPLICANT

46) Under s.9 of the Hindu Marriage Act, 1955 it is also crucial to prove the sincerity or *bona fide* intention of the Applicant. The Punjab-Haryana High Court held in *Captain B.R. Syal vs Smt. Ram Syal* [36] that *"the petitioner must show that he is sincere, in the sense, that he has a bona fide desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation.***"** Thus, a petition for restitution is liable to be dismissed if it is not bona fide. A delay in instituting proceedings for restitution could be another ground for denying the relief. [37]

47) The Respondent withdrew from the Applicant's society on 23rd August, 2020. The Applicant filed for restitution of conjugal rights after an inordinate delay of 2 and a half years. This *prima facie* shows the Applicant does not possess a bona fide intention to resume cohabitation with the Respondent. Furthermore, the principal cause behind the Applicant's application for restitution of conjugal rights is to obtain custody of the Respondent's child. Throughout the period of the Respondent's withdrawal, the Applicant never persuaded or requested the Respondent to return and resume cohabitation. These instances unequivocally display that the Applicant has filed for restitution sans a *bona fide* intention and thus the Application is liable to be dismissed.

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[35] (1988) 2 KLT 237 at Para 8 Quoting Mayne's Hindu Law, pg 186, 12th Edn. (1986).
[36] AIR 1968 P H 489
[37] Teja Singh v. Sarjit Kaur AIR 1962 PH 195

48) Therefore, it is humbly submitted that the Applicant is not entitled to a decree of restitution of conjugal rights as Firstly, there exists no valid marriage; Secondly, there exists a reasonable excuse behind the Respondent's withdrawal and Thirdly, there exists no *bona fide* intention behind the Applicant's application.

IV. WHETHER THE APPLICATION FOR PATERNITY TEST IS JUSTIFIED

49) It is humbly submitted before the Honourable court that the application for paternity test is not Justified. *Firstly,* that the Paternity test is not in the best interest of the Child. *Secondly* without prejudice to the above contention it is also contended that a child's genetic information is part of his Fundamental Right to Privacy.

[4.1] THE PATERNITY TEST IS NOT IN THE BEST INTEREST OF THE CHILD.

50) It is humbly submitted that the use of DNA is an extremely delicate and sensitive aspect. In Aparna Ajinkya Firodia[38], Justice Ramasubramanian said Section 114(h) has no application to a case where a mother refuses to make the child undergo a DNA test. It is stated that

"*By refusing to subject the child to a DNA test, she is actually protecting the best interests of the child. For protecting the best interests of the child, the appellant-wife may be rewarded, but not punished with an adverse inference. By taking recourse to Section 114(h), the respondent cannot throw the appellant to a catch-22 situation,"*.

51) It is also submitted that in the case of *Pathukala Sakkariya v. Salman Faris*[39], the court held that only in exceptional and deserving cases, where DNA test becomes indispensable to

[38] Aparna Ajinkya Firodia v. Ajinkya Arun Firodia, 2021 SCC OnLine Bom 11774
[39] 2011 SCC OnLine Ker 3577

resolve the controversy, court can order DNA test. In the present case there is no such issue and this controversy can be resolved by going through the fact of the case.

52) Futhermore, it is also pertinent to note that the court in the case of Bhabani Prasad Jena [40]observed that scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child.

53) Also, Paternity test cannot be ordered as a "matter of course" merely because they are permissible in law. It would be invasive to physical autonomy of a person. [41]

54) Therefore in the present case approving the application for paternity test would not serve the best interest of a Child. Also recently the SC observed that DNA test occupy a grey area in the quest for justice, vacillating between the dangers of slipping into self-incrimination and encroachment of individual privacy and the 'eminent need' to unearth the truth, be in the form of evidence in a criminal case, a claim of marital infidelity or proving paternity.[42].

[4.2] A CHILD'S GENETIC INFORMATION IS PART OF HIS FUNDAMENTAL RIGHT TO PRIVACY.

55) It is Submitted that the Children have the Right not to have their legitimacy questioned frivolously before a Court of Law. This is an essential attribute of the Right to Privacy. A bench of Justices V. Ramasubramanian and B.V. Nagarathna [43]observed in a judgement that "Genetic information is personal and intimate". They further emphasized in the same judgement that "a child's genetic information is part of his fundamental right to privacy" .

[40] (2010) 8 SCC 633
[41] 2022 SCC OnLine SC 1867
[42] Krishnadas Rajagopal and Sreeparna Chakrabarty 'Demand grows, but DNA tests fall under a grey area'(30 October, 2022)
[43] Aparna Ajinkya Firodia v. Ajinkya Arun Firodia, 2021 SCC OnLine Bom 11774

56) It is also submitted that the Apex Court in its judgment in Justice K.S. *Puttaswamy v. Union of India*[44] (2017) 10 SCC 1 while holding that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution, overruled the decision in *M.P. Sharma v. Satish Chandra* [45] to the extent of its holding that the right to privacy was not protected by the constitution.

57) Furthermore, in the case of *Ashok Kumar v. Raj Gupta*[46], it is said that In circumstances where other evidence is available to prove or dispute the relationship, the court should ordinarily refrain from ordering blood tests. This is because such tests infringe upon the right of privacy of an individual and could also have major societal repercussions. Indian law leans towards legitimacy and frowns upon bastardy of the Child. The presumption in law of legitimacy of a child cannot be lightly repelled.

58) Also, the Right of Privacy, autonomy and identity are recognised under the United Nations' Convention on the Rights of the Child[47].

59) Therefore, in the present case if paternity test is allowed by the Court of Law, it would seriously infringe the right to Privacy of a Child. Courts are therefore required to acknowledge that children are not to be regarded like material objects, and subjected to forensic/DNA testing.

[44] (2017) 10 SCC 1
[45] 1954 AIR 300, 1954 SCR 1077
[46] (2022) 1 SCC 20
[47] Convention on the Rights of the Child (adopted 2 September, 1990 Res 44/25)

PRAYER

WHEREFORE, in light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully prayed and implored before the Hon‟ble Court, that it may be graciously pleased to adjudge and declare on behalf of the Respondent that:

I. That the present suit is not maintainable in the District Court Chandigarh.

II. That the marriage between Anil and Fatima is invalid.

III. That Anil is not entitled for a decree of Restitution of Conjugal Rights.

IV. That the application for paternity test is not justified.

And pass any other order, which this Hon'ble Court may deem fit in the interests of justice, equity and good conscience.

All of which is most humbly prayed

SD/-

PLACE: CHANDIGARH

COUNSEL FOR THE RESPONDENT