

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

C.R.P.No.5271 of 2011

Between:

K.Sugandha KumariPetitioner

and

Smt.K.Vijaya LaxmiRespondent

Judgment pronounced on : 13-11-2015

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers : --

may be allowed to see the judgments?

2. Whether the copies of judgment may be marked : Yes

to Law Reporters/Journals?

3. Whether their Lordship wish to see the fair copy : --

of the Judgment?

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CIVIL REVISION PETITION No.5271 of 2011

%13-11-2015

#K.Sugandha Kumar Petitioner.

Versus

\$Smt.K.Vijaya LaxmiRespondent.

< GIST:

> HEAD NOTE:

!Counsel for the petitioner : Sri M.Krishna Reddy

^ Counsel for the respondent : Sri K.Vinaya Kumar

? Cases referred

1. (2015) 1 SCC 365
2. (2012) 12 SCC 554
3. AIR 2007 A.P. 17
4. (2009) 12 SCC 454
5. (2010) 8 SCC 633
6. 2005(125) DLT 311
7. Manu/BH/1608/2011
8. Manu/TN/1868/2014

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CIVIL REVISION PETITION No.5271 of 2011

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ORDER:

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This Civil Revision Petition is filed challenging the order
dt.23-09-2011 in I.A.No.1115 of 2010 in O.P.No.750 of 2009 of the

Judge, Family Court at Hyderabad.

2. The petitioner is husband of respondent. The respondent had given birth to a female child on 03-12-2008. He filed the O.P. seeking dissolution of their marriage on the ground of cruelty and also on the ground that respondent had committed adultery.
3. Pending O.P., the petitioner filed I.A.No.1115 of 2010 before the Family Court to direct the petitioner, respondent and the child to undergo a D.N.A. Test at Center for Cellular and Molecular Biology, Hyderabad by giving blood samples for conducting scientific investigation so as to decide the paternity of the child and to submit a report.
4. In the affidavit filed in support of this application, the petitioner contended that ever since they got married, the respondent was reluctant to consummate the marriage, that she had been indifferent and had not evinced any interest to cohabit with him. According to him, when questioned, she replied that she did not like him on account of their difference in age and also on account of the fact that the petitioner was not looking smart and was having a bald head. He alleged that she also disclosed to him that her parents had forced her to marry the petitioner and so she did not want to cohabit with him. According to petitioner, in June, 2008 the respondent became pregnant and he was surprised about this fact because there was no cohabitation between himself and respondent. He alleged that respondent threatened him and then went away to her parents' house in October, 2008. He alleged that a person, who was neighbour of respondent's parents' house, was coming to petitioner's house during his absence in the after noon to meet the respondent and

she was spending more time with him. He therefore alleged that there was an illegal, immoral and adulterous relationship between the respondent and the said person, and to enable him to establish the said fact, a DNA Test is necessary.

5. Counter affidavit was filed by respondent opposing this application and denying these allegations. She contended that the child born to her was only on account of consummation of marriage between herself and petitioner and she had no illegal contact with any third party as alleged by petitioner. She alleged that only to harass her and her child, false allegations were being made by petitioner to get rid of her so that he can marry another woman and get additional dowry and other benefits.
6. By order dt.23-09-2011, the Court below dismissed the said application. The Court below observed that respondent had pleaded that during the delivery period of respondent till her discharge from the hospital, the petitioner daily visited the respondent and stayed with the respondent and the child, and after discharge also the petitioner accompanied the respondent to his in-laws house. If the allegations made by petitioner are correct, he would have taken objection at the time of delivery itself, and so the present allegation made by petitioner is only to harass the respondent without any basis. It also observed that there were no specific allegations against respondent and that the allegations made against her are vague and false and appear to be made only to get rid of her. It held that there is a presumption in law that the child born through lawful wedlock is legitimate and that access existed between the parents and this presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. It held

that the petitioner should prove non-access with the mother of child during the relevant time in order to dispel the presumption under Section 112 of the Evidence Act, 1872 (for short "the Act") and a mere bald allegation that she was having illegal intimacy with the neighbour of her parents' house, whose name and particulars are also not mentioned, cannot be a ground to direct the parties to undergo a D.N.A. Test.

7. Challenging the same, this Revision is filed.
8. Heard Sri M.Krishna Reddy, learned counsel for petitioner and Sri K.Vinay Kumar, learned counsel for respondent.
9. Learned counsel for petitioner contended that the Court below ought not to have expressed any opinion on the merits of the claim of petitioner while deciding whether or not to direct the parties to undergo a D.N.A. Test and that the Court below cannot accept as truth on the statement of respondent that during the delivery period till discharge of respondent from the hospital, petitioner daily used to visit the respondent and child and after discharge of respondent also, the petitioner had accompanied respondent to his in-laws house. He contended that in a situation where there is an allegation of adultery in the O.P., notwithstanding the fact Section 112 of the Evidence Act is also to be taken account, the petitioner should not be denied an opportunity to prove his allegation of adultery against respondent by taking recourse to the D.N.A. Test. He further contended that in her evidence recorded on 25-11-2010, the respondent admitted that she is ready to face a D.N.A. Test, and in the light of this evidence of respondent, the Court below had erred in dismissing I.A.No.1115 of 2010. He also relied upon the

judgments of Supreme Court in **Dipanwita Roy Vs. Ronobroto Roy, Narayan Dutt Tiwari Vs. Rohit Shekhar and another** and **Smt.B.Vandana Kumari Vs. P.Praveen Kumar and another**.

10. Learned counsel for respondent, on the other hand contended that compelling the respondent to undergo D.N.A. Test would violate her right to privacy. According to him, merely because a plea of adultery is raised by petitioner, as a matter of course, D.N.A. Test cannot be directed particularly when such a test would have an impact on the paternity of the child. He contended that the presumption under Section 112 of the Act that a child born during subsistence of a valid marriage was born out of consummation between the parties to the marriage needs to be rebutted by proving non-access to the wife by the husband and that in any event, even if the plea of adultery is not proved, the petitioner can still establish the allegation of cruelty and seek divorce. He relied upon the judgments of the Supreme Court in **Sham Lal alias Kuldip Vs. Sanjeev Kumar and others, Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and another, Sh Rajesh Chaudhary Vs. Nirmala Chaudhary, Brij Nandan Ram Vs. Smt.Rakhi Kumari @ Soni and another** and **P.K. Nagarajan Vs. N.Jeyarani** in support of his contentions.
11. The point for consideration is: “Whether in the facts and circumstances of the case, the Court below was correct in dismissing the application filed by petitioner to direct petitioner, respondent and the child to undergo a D.N.A. Test?”
12. In **Sham Lal alias Kuldip** (4 supra), which was decided in 2009, in a civil suit for declaration that a mutation made in favour of

defendants was illegal, null and void, a question arose whether the plaintiff and 4th defendant were sons of the deceased person, whose properties was the subject matter of the suit. The Supreme Court referred to Section 112 of the Act and opined that it is undesirable to inquire into the paternity of a child when the mother is a married woman and the husband had access to her. It held that adultery on her part will not in itself justify a finding of illegitimacy if husband has had access. It observed that when a particular relationship, such as marriage, is shown to exist, then its continuance must *prima facie* be preserved and the fact that a woman is living in notorious adultery, though of course it amounts to very strong evidence, is not, in itself quite sufficient to repel the presumption under Section 112 of the Act. It held that the presumption of legitimacy arises from birth in wedlock and not from conception, and it is undesirable to inquire into the paternity of a child whose parents have access to each other.

13. In the present case, the purpose for which the D.N.A. Test is sought is to establish the allegation of adultery of the respondent, which is a ground seeking divorce under the Hindu Marriage Act, 1955. May be incidentally the paternity of the child would also get decided if D.N.A. Test is done, but since the primary purpose for which the D.N.A. Test sought is not to question the legitimacy of the child, but to prove the adultery of respondent, the principle behind Section 112 of the Act cannot come in the way for petitioner seeking a direction to the parties to undergo a D.N.A. Test.

14. In **Bhabani Prasad Jena** (5 supra), which was decided in 2010,

the question before the Supreme Court was whether the State Commission for Women in Orissa constituted under Section 3 of the Orissa State Commission for Women Act, 1993 can issue a direction for D.N.A. Test of a child and the appellant, who according to the mother of the child was his father, *suo motu*. This was questioned in the High Court on the ground that the State Commission had no jurisdiction to issue such a direction. However, the High Court did not grant stay of conducting of D.N.A. Test. In that case also although the appellant and the mother of the child had been married, he had filed an application under the Special Marriage Act, 1954 for a declaration that their marriage was a nullity on the ground that it was not consummated. The lady approached the Orissa State Commission for Women seeking maintenance and also stated that she was pregnant. The Supreme Court held that the State Commission had no jurisdiction under the said Act to direct a D.N.A. Test. It further held, referring to its earlier decisions, that when there is an apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination, and the duty of the Court to reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and due consideration whether for a just decision in the matter, the D.N.A. Test is eminently needed. It observed that D.N.A. Test *in a matter relating to paternity of a child* should not be directed by a Court as a matter of course in a routine manner, whenever such a request is made and held that diverse aspects including the presumption under Section 112 of the Act, pros and cons of such order and the test of eminent need whether it is not possible for the Court to reach the truth without the use of such test, should be considered. It observed that if the party has

a strong *prima facie* case and there is sufficient material before the Court, then only a D.N.A. Test can be given.

15. The above observations also indicate that *in a matter where paternity of a child is in issue*, use of D.N.A. Test should not be ordered as a matter of course or in a routine manner since it would bastardise the innocent child even though his mother and her spouse are living together at the time of his conception. In the present case, the paternity of the child is not principally in issue. It is only incidentally in issue. The primary question to be decided is whether respondent can be said to have committed adultery, on the basis of which the petitioner can be awarded a decree of divorce.
16. In **Narayan Dutt Tiwari** (2 supra), decided in the year 2012, cited by the learned counsel for petitioner, a suit for declaration and permanent injunction was filed by 1st respondent that he is the child born to the appellant and 1st respondent's mother. The 1st respondent contended that although his mother was married to another person, she was estranged from her husband and she was staying with the appellant. The 1st respondent stated that he is willing to undergo D.N.A. Test and appellant should do likewise. He prayed that the decree for declaration be passed declaring that he is the naturally born son of the appellant, which the appellant should acknowledge. Pending the said suit, an application was filed to direct the appellant to submit himself for D.N.A. Test by 1st respondent in the Delhi High Court. That application was allowed and the appellant was directed to

furnish blood samples for enabling the D.N.A. Test to be carried out to ascertain whether 1st respondent was the biological son of appellant. The appellant then challenged the same in the Supreme Court. The Supreme Court held that Section 112 of the Act is not an insurmountable obstacle in the path of 1st respondent and that the accuracy of the D.N.A. Test was not even imagined when the law was formulated. The Court held that Section 112 of the Act was enacted to determine the legitimacy and not paternity. The intendment behind this section is safeguarding the interest of child by securing its legitimacy. It held that since there is a possibility of the appellant's death rendering the suit as infructuous, it is a fit case where the D.N.A. Test ought to be directed.

17. From the above decision it is clear that Section 112 of the Act is not always an impediment to direct a D.N.A. Test.
18. In **Dipanwita Roy** (1 supra), decided in 2015, cited by the learned counsel for petitioner also allegations of similar nature as in the present O.P. were made by respondent therein against petitioner and dissolution of marriage was sought on the ground of adultery by wife. There was specific allegation that the petitioner therein had not lived with respondent from 22-09-2007 and did not share the bed at all. This allegation was denied by petitioner therein. In that case also, a son was born to petitioner and respondent filed an application seeking D.N.A. Test of himself and the child born to respondent contending that the said Test would determine if the child born to petitioner was not the child of respondent/husband and would substantiate the allegations made against petitioner. The Family Court dismissed

the said application, but the Calcutta High Court reversed the said decision and directed the petitioner to submit blood samples of the child. This was questioned in the Supreme Court. The petitioner relied on Section 112 of the Act and the presumption thereunder. The Supreme Court dismissed the appeal of the petitioner stating that all the judgments relied upon by her counsel were on the pointed subject of legitimacy of child born during the subsistence of a valid marriage. It held that *since the question in the appeal before the Supreme Court pertains to the alleged infidelity of the wife (in order to establish the ingredients of Section 13(1) (ii) of the Hindu Marriage Act, 1955), and it is not the husband's desire to prove the legitimacy or illegitimacy of the child born to respondent, even if the issue of legitimacy was incidentally involved, Section 112 of the Act would not strictly come into play.* The Supreme Court referred to its decision in **Bhabani Prasad Jena** (5 supra) and held that should an issue arise before the Family Court concerning paternity of the child, obviously that Court will be competent to pass an appropriate order at the relevant time in accordance with law not withstanding the consequences of a D.N.A. Test. It held :

"17. The question that has to be answered in this case is in respect of the alleged infidelity of the appellant wife. The respondent husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person who was the father of the male child born to the appellant wife. It is in the process of substantiating his allegation of infidelity that the respondent husband had made an application before the Family Court for conducting a DNA test which would establish whether or not he had had fathered the male child born to the appellant wife. The respondent feels that it is only possible for him to substantiate the allegations leveled by him (of the appellant wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent husband to establish and confirm the assertions made in the

pleadings. We are therefore satisfied that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for here to rebut the assertions made by the respondent husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant wife is right, she shall be proved to be so.”(emphasis supplied)

19. In the present case like in the above decision, the marriage between petitioner and the respondent is sought to be dissolved on pleas of the respondent's adultery as well as cruelty. There is a specific plea that the respondent was not willing to consummate the marriage with the petitioner.
20. In view of the above facts similar to those in law laid down in **Dipanwita Roy** (1 supra) and having regard to the admission of respondent in her cross-examination that she was willing to undergo a D.N.A. Test, Sec.112 would not come in the way of a DNA test and the respondent cannot also plead violation of her right to privacy and object to undergoing it. So I am of the opinion that the Court below was not correct in refusing to direct the parties to undergo a D.N.A. Test.
21. No doubt the Delhi High Court in **Sh Rajesh Chaudhary** (6 supra), Patna High Court in **Brij Nandan Ram** (7 supra) and the Madras High Court in **P.K. Nagarajan** (8 supra) also dealt with cases where marriage was dissolved on the ground of adultery and the said Courts had declined to direct the D.N.A. Test. However, these decisions can at best be said to be decided on the facts of those cases and the principle laid down therein cannot be said to be of universal application having regard to the decision of the Supreme Court in **Dipanwita Roy** (1

supra). The decision of this Court in **Smt.B.Vandana Kumari** (3 supra) also supports the view that in a situation where a marriage is sought to be declared as a nullity on the ground of wife becoming pregnant by a third party at the time of marriage, the D.N.A. Test can be directed.

22. In this view of the matter, I am of the opinion that the order passed by the Court below cannot be sustained. It is accordingly set aside and I.A.No.1115 of 2010 is allowed. The respondent is directed to submit blood samples of herself as well as that of her child for a D.N.A. Test at C.C.M.B., Hyderabad for conducting scientific investigation to decide about the paternity of the child at the cost of petitioner. This exercise shall be completed within a period of eight (08) weeks from the date of receipt of a copy of this order.

23. The Civil Revision Petition is allowed accordingly. No costs.

24. As a sequel, miscellaneous petitions pending if any, in these Revisions shall stand disposed of.

JUSTICE M.S. RAMACHANDRA RAO

Date: 13-11-2015

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