

IN THE HIGH COURT OF PUNJAB AND HARYANA, AT
CHANDIGARH

CR No. 4765 of 2015

Date of Decision: 30.07.2015

Yakshi and another

.....Petitioners

Vs.

Sanjay Jangra

.....Respondent

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr. Anil Kumr Gahlawat, Advocate,
for the petitioners.

SABINA, J.

Petitioners have filed this petition challenging the order dated 18.05.2015, whereby application moved by the petitioners for conducting Deoxyribonucleic acid (DNA) test, was dismissed.

Learned counsel for the petitioners has submitted that the husband of mother of the petitioners was impotent. Consequently, at the instance of her mother-in-law, mother of the petitioners started residing with the defendant (brother of her husband). Petitioners were children of the defendant. Hence, in the facts and circumstances of the case, the controversy in question could only be resolved by conducting DNA test. In support of his arguments, learned counsel has placed reliance on the judgment of the Hon'ble Apex Court in case **Dipanwita Roy** vs. **Ronobroto Roy** 2014 (4) R.C.R. (Civil) 724, wherein it was held as under:-

*“We would, however, while upholding the order
passed by the High Court, consider it just and*

appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

“114. Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.”

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.”

Learned counsel has next placed reliance on the judgment of the Hon'ble Apex Court in case NandLal WASUDEO BADWAIK vs. LATA NANDLAL BADWAIK AND ANOTHER 2014 (2) SCC 576, wherein it was held as under:-

“We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence

Act does not create a legal fiction but provides for presumption.

The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

In the present case, petitioners have filed suit for declaration through their mother that defendant be declared their biological father. During the pendency of the suit, petitioners moved an application that DNA test be got conducted to ascertain the fact as to whether the petitioners were the children of the defendant.

The learned trial Court while dismissing the application has held as under:-

"Coming to the facts of the case the appellant Navita who is the mother of the plaintiffs is married to her husband Rupesh till date. Admittedly no annulment or divorce on the basis of impotency of her husband have been done. It is also an admitted fact that minor plaintiffs have been born during the subsistence of her married with her husband Rupesh Kumar. Moreover, the

respondent/defendant who is claimed to be biological father of the plaintiffs is a married man having his own wife and kids. Therefore, this Court after carefully examining as to what would be consequence of ordering DNA test and keeping in mind that it might result in branding the plaintiffs as Bastards and the applicant mother as an unchaste women has inclined towards not allowing the instant application. Moreover, only a vague plea of access and non-access have been taken by the applicant leading no credible evidence in this regard. Therefore, in the wake of above said discussion the instant application is hereby dismissed with the observation that such roving enquiry for blood test cannot be entertained in the instant case.”

The reasons given by the trial Court while dismissing the application are sound reasons. There is no quarrel with the proposition of law settled vide the judgements relied upon by the learned counsel for the petitioners but the same fail to advance the case of the petitioners, in view of the factual background of the present case.

Hence, no ground for interference is made out.

Dismissed.

**(SABINA)
JUDGE**

July 30, 2015
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