

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.2597 of 2015

ORDER:

The civil revision petition, under Article 227 of the Constitution of India, is filed by the unsuccessful petitioner/the husband assailing the orders dated 10.06.2015 of the learned Judge, Family Court-cum-III Additional District Judge, Vizianagaram passed in IA.No.131 of 2015 in FCOP.No.92 of 2013 filed under Section 45 of the Indian Evidence Act requesting to refer the petitioner, the respondent/his wife and her child to A.P. Forensic Science Laboratory at Visakhapatnam for DNA test (DNA profiling) for fair and proper adjudication of the *lis*.

2. I have heard the submissions of the learned counsel for the petitioner/husband and the learned counsel for the respondent/wife. I have perused the material record. The parties shall hereinafter be referred to as the petitioner/husband and the respondent/wife for convenience and clarity.

3. The case of the petitioner/husband, in brief, is this:

The petitioner/husband filed the Original Petition for grant of divorce by dissolution of the marriage between the spouses. The petitioner/husband is not responsible for the pregnancy, as the petitioner and his wife/the respondent lived at Kothavalasa only for a period of three months and twenty days. He had not fathered the child of the respondent. As the petitioner and the respondent are living separately during the period between 27.06.2002 and 10.02.2013 and they had not met each other physically, the petitioner strongly suspects that the respondent is living in adultery during the above said period. During the cross-examination of the petitioner by the respondent, when a question was put to him that the respondent/wife is ready to undergo DNA test on his expenditure, the petitioner/husband had stated that he is also ready for the same. Hence, the present application is filed.

4. The case of the respondent/wife, in brief, is this:

The petition is not maintainable. The material allegations in the affidavit of the husband and also in the original petition filed by him are all false. The parties lived only for a period of three months and twenty days and that the petitioner/husband has not fathered the child and that the respondent/wife is living in adultery during the period between 27.06.2012 and 10.02.2013 and that some unknown person is responsible for her pregnancy and that the petitioner/husband and respondent/wife lived separately during the above said period and that they did not meet physically during the said period are all utterly false allegations. Before asking the respondent/wife and her child to undergo DNA test for ascertaining the paternity of the child, the petitioner/husband has to establish that he had no access to lead conjugal life with the respondent/wife during the relevant period of conception of the child. Without leading any evidence in regard to non access, the petitioner/husband cannot seek the relief. The Supreme Court in a number of decisions had held that ordering DNA test causes prejudice to the interests of the child. The DNA test has to be avoided, as such a test puts the legitimacy of the child at peril. Hence, the petition may be dismissed.

5. On merits, and, by the order impugned, the trial Court had dismissed the petition *inter alia* holding that on mere oral assertions of non access and until the truth or otherwise of the oral assertions is decided after full-fledged enquiry, the contentions of the petitioner/husband cannot be accepted. Further, the Court below having regard to the provision of Section 112 of the Evidence Act and the decision of the Supreme Court in **Gowtham Kundu v. State of West Bengal**^[1] had dismissed the petition of the husband. Therefore, the aggrieved husband is before this Court.

6. At the hearing, the learned counsel for the petitioner/husband while reiterating the pleaded case, which is stated supra, had contended as follows:

The Court below in the order impugned has stated that on mere oral assertions of the husband and without deciding the veracity of the assertions

after full-fledged trial, the contentions of the husband cannot be accepted. The said observation is unjust and unfair. The Court below ought to have seen that in the cross-examination of the petitioner/husband, it was stated that the respondent/wife is ready to undergo the DNA profiling test provided the husband is prepared to meet the said expenditure and that on that the petitioner/husband had stated in his evidence that he is also ready for undergoing the said test and that thereafter he had filed the present application. The Court below ought to have seen that the petitioner/husband had explicitly urged that they had lived at Kothavalasa for a period of only three months and twenty days and that the parties lived separately during the period between 27.06.2012 and 10.06.2013 and that the parties have not met each other physically and that he had not fathered the child of the respondent. The Court below ought to have seen that the Original Petition is filed for dissolution of marriage and grant of divorce *inter alia* alleging infidelity of the wife as a ground for divorce and that, therefore, it is absolutely necessary to direct the parties to undergo DNA [profiling] test to enable the petitioner/husband to establish his case. The law is well settled that if DNA test is ordered, the truth will come out. In the facts and circumstances of the case, it is permissible to direct for holding DNA test to determine the veracity of the averments, which constitute one of the grounds for seeking divorce. The Court below ought to have seen that but for the DNA test it would be impossible for the husband to establish his assertions in the OP. The trial Court relied upon an earlier decision of the Supreme Court in Goutham Kundu (supra) ignoring the latest decisions, wherein it was laid down, after referring to section 112 of the Indian Evidence Act, that DNA test can be ordered. The order is unsustainable under facts and in law and is liable to be set aside.

7. On the contrary, the learned counsel for the respondent/wife while reiterating her pleaded case had contended as follows: - 'The spouses lived together during the period of conception of the child. The petitioner/husband is not entitled to request the Court to direct the parties to undergo DNA profiling test without first establishing non access during the relevant period

of conception of the child. No case much less a strong *prima facie* case is made out to direct the wife and the child to undergo DNA test. The petition is intended to malign her character and harass her. The husband had access to the wife. The child was born under a lawful wedlock. The petition is filed without naming the alleged adulterer; and, bald allegations were made regarding the adulterous life of the wife without pleading the details in regard to the dates and instances of adultery. When no *prima facie* case is made out, the parties need not be subjected to the trauma of undergoing a test. The petition is also intended for character assassination.’ Having so urged, the learned counsel has drawn the attention of this Court to Section 112 of the Indian Evidence Act, 1872 and also to a decision of the Supreme Court in *Goutham Kundu* (supra), wherein, the Apex Court had held that that there must be a strong *prima facie* case and that the husband must establish non access in order to dispel the presumption arising under Section 112 of the Evidence Act. He would also contend that in a matter where paternity of the child is in issue, the use of DNA test is extremely delicate and sensitive aspect and that subjection of the parties and the child to such a test would *prima facie* lead to bastardizing the child and that therefore, the Court must carefully examine as to what could be the consequences of ordering such a test.’ He finally prayed for dismissal of the Civil Revision Petition.

8. I have bestowed my attention to the facts and I have given earnest consideration to the submissions. I have gone through the decision in **Goutham Kundu** (supra) and the decisions in **Dipanwita Roy v. Ronobroto Roy**^[2] and **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another**^[3], which are relied upon by the parties.

9. Reverting to the facts of the case, it is to be noted that the husband, having filed the OP before the Court below for dissolution of marriage and grant of divorce had *inter alia* alleged infidelity of the wife as a ground for divorce. The petitioner/husband had explicitly urged that the he and the respondent/wife lived together only for three months twenty days and that he had not fathered the child of the respondent and that the respondent/wife

lived in adultery during the period between 27.06.2012 and 10.02.2003 and that some unknown person is responsible for the pregnancy of the wife and that during the relevant period the spouses lived separately and that during that time they did not meet physically. He now submits that if DNA test is ordered, the truth will come out and seeks a direction to the parties and the child to undergo the DNA test as it is absolutely necessary to establish his case that he had not fathered the child born to the respondent/wife. It is pertinent to note that as rightly contended by the learned counsel for the respondent/wife, the husband did not name the adulterer in the petition and also did not implead him; but he has given his own reasons for not doing so. According to him, the wife is leading an adulterous life. Therefore, as per the submissions on his behalf, it is not possible to name the adulterer. It is necessary to note that on the ground that the wife gave birth to a child who was not fathered by the petitioner, the divorce was being sought. The law is now well settled that depending upon the facts and circumstances of the case, it would be permissible for a Court to direct for holding of a DNA test to determine the veracity of the accusations which constitute one of the grounds on which the petitioner would either succeed or lose. In the decision in **Dipanwita Roy** (2nd cited), the Supreme Court having noted the provision of Section 112 of the Indian Evidence Act held as follows:

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. The 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.

In the present case, the husband had categorically pleaded that he is not responsible for the birth of the child and that there is no physical contact

between the spouses during the relevant period. The question for consideration in the Original Petition pertains to the alleged infidelity of the respondent/wife. Therefore, there is a likelihood that the husband's plea that he is not responsible for the birth of the child stands proved by the DNA test report; and, in the facts and circumstances of the case, it is possible to opine that the proof based on DNA test would be sufficient to dislodge the presumption under Section 112 of the Evidence Act. This Court is in agreement with the argument of the learned counsel for the petitioner/husband that, but for the DNA test, it would be impossible for the petitioner/husband to establish and confirm the assertions made in the pleadings. Be it noted that it is not the desire of the husband to prove the legitimacy or illegitimacy of the child born to the respondent. The purpose of the application appears to be to establish the ingredients of the provisions of the Hindu Marriage Act under which the relief of divorce was sought. In the determination of the said issue, undoubtedly, the issue of legitimacy or illegitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play. Further, in the aforementioned later decisions of the Apex Court, it is clearly opined that proof based on the DNA test would be sufficient to dislodge the presumption under Section 112 of the Indian Evidence Act. Therefore, this Court, for the aforesaid reasons, is satisfied that it is just and fair, in the facts and circumstances of the case, to give a direction as prayed for in the petition of the husband, so as to give an opportunity to the respondent/wife to either submit to the test or not before drawing an adverse inference against her in the matter. Having regard to the above analysis and the precedential guidance in the decision in **Dipanwita Roy** (2nd cited), which is binding on the parties, and as the facts of the case before the Supreme Court bear close similarity to the facts of the case, which this Court is dealing presently, this Court finds that the order impugned brooks interference.

10. In the result, the Civil Revision Petition is allowed and the order impugned is set aside and IA.No.131 of 2015 is allowed. The trial Court shall

first direct the petitioner/husband to deposit into Court as per procedure the required expenses and also the amount payable towards fee to the expert or the Laboratory/Centre. On such deposit, the trial Court shall accordingly direct the petitioner, the respondent and the child of the respondent to undergo DNA test by referring them to A.P. Forensic Science Laboratory at Visakhapatnam or any other institute like Centre for Cellular and Molecular Biology, Habsiguda, Hyderabad. However, it is made clear that in case the respondent/wife accepts the directions that the trial court may issue in pursuance of the orders of this court, the DNA report will determine the conclusiveness of the veracity of the accusation levelled by the petitioner against her; but, in case she declines to comply with such directions, the allegations of the husband would be determined by the court below by drawing an adverse inference or a presumption of the nature contemplated under section 114 of the Evidence Act especially in terms of illustration (h) thereof.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed.

M. SEETHARAMA MURTI, J

01st June 2016
Vjl

[\[1\]](#) AIR 1993(SC) 2295

[\[2\]](#) AIR 2015 SC 418

[\[3\]](#) (2014) 2 SCC 576