

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.67 of 2016

ORDER:

This is a wife's revision under Article 227 of the Constitution of India assailing the orders dated 21.11.2015 of the learned Judge, Family Court, Hyderabad, passed in IA.no.343 of 2015 in OP.no.1449 of 2011, filed under Section 151 of the Code of Civil Procedure, 1908, requesting the Court to order DNA test of the petitioner-husband, 1st respondent-wife and the child and direct them to appear before the Centre for DNA and Fingerprint Diagnostics, Abids, Hyderabad, and pass such other orders as the Court deems fit.

2. I have heard the submissions of Sri Deepak Misra, learned counsel representing Sri P. Vamsidhar Reddy, learned counsel for the revision petitioner-wife, and of Sri P. Ravi Kiran, learned counsel appearing for the 1st respondent-husband. 2nd respondent is stated to be a not necessary party. I have perused the material record.

3. The present controversy arises from the afore-stated Interlocutory Application filed in OP.no.1449 of 2011 which was filed by the husband under the relevant sub provisions of Section 13 of the Hindu Marriage Act, 1955, for dissolution of marriage and granting a decree of divorce on the grounds of cruelty and adultery. In-fact, in the said petition, the husband named the adulterer and impleaded him as 2nd respondent. The husband's application with the afore-stated prayer was resisted by the wife. However, on merits and by the orders impugned in this revision, the trial Court allowed the petition and directed the wife and husband along with the child to appear before the Director of Centre for DNA and Fingerprint Diagnostics, Abids, Hyderabad, on the date fixed by it to undergo DNA test. Aggrieved thereof, the wife preferred this revision.

4. The case of the respondent herein in support of his request to order DNA test, in brief, is as follows: -

The wife committed acts of adultery. She is having illicit relationship with the 2nd respondent in the OP. Out of the said relationship she gave birth to a male child on 22.08.2008. In the OP, the husband reserved a right for filing the application for directing the parties to undergo DNA test at the appropriate time. The 2nd respondent in the OP engaged an Advocate but failed to file his counter and remained *ex parte*. The wife did not specifically deny the allegations in the divorce petition particularly in regard to the illicit relationship between her and the 2nd respondent, which is averred in the petition of the husband. During stay of the wife with the husband in Mumbai, the 2nd respondent in the OP used to frequently visit their house and used to say that he is a cousin of the wife. Later, the wife deserted the husband. The husband came to know that both are having illicit relationship since a very long time and even prior to the marriage and therefore the wife intentionally used to deny conjugal bliss to the petitioner. One of the crucial issues in the OP to be determined is the adulterous life of the wife with the 2nd respondent and the birth of the child out of such illicit relationship between them. Therefore the application is filed with the aforesaid prayer.

5. The wife filed a detailed counter denying each and every allegation in the affidavit of the husband filed in support of the petition. Be it noted that before the trial Court and this Court the wife raised three sets of contentions. Firstly, the husband in his pleadings in other cases including the case for restitution of conjugal rights in OP.no.1369 of 2009 filed by the wife before the same Court admitted the birth of the child under lawful wedlock. Secondly, his earlier attempts seeking similar relief were negated by the Court and, therefore, the present application is barred by principles of constructive *res judicata*. Thirdly, Section 112 of the Indian Evidence Act, 1872, provides for a conclusive

presumption regarding birth of a child under lawful wedlock and continuation of a valid marriage between the mother and any man with whom there was access for the mother and that in view of the said presumption and in the absence of any circumstances to dislodge the presumption, which is conclusive, merely on the asking of the husband, the wife and the child cannot be directed to submit to DNA test and that the result of the DNA test will have far reaching conclusions as it will have the effect of branding the child as a bastard and the mother as an unchaste woman and, therefore, the DNA test shall not be ordered.

6. At the hearing, the learned counsel for the wife while reiterating the contentions which are stated supra would *inter alia* contend that the order of the trial court is not a speaking order and that in any view of the matter even if this Court comes to a conclusion that DNA test shall be ordered, the wife cannot be compelled to undergo the test along with the child and that at best the Court can draw an adverse inference or a presumption of the nature contemplated under illustration (h) of Section 114 of the Evidence Act and that therefore the order of the trial Court is unsustainable.

He relied upon the following decisions.

1. Goutam Kundu v. State of West Bengal and another¹
2. Sharda v. Dharmpal²
3. Ramkanya Bai v. Bharatram³
4. Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another⁴

7. Per contra, learned counsel for the husband would submit as follows:

The husband, in his pleadings in any case, admitted nowhere that the child was born under lawful wedlock. His specific case is that the child was born to the wife on account of the illicit intimacy she had from the beginning with the 2nd respondent in the OP. The contention that the present request in the present

¹ (1993) 3 SCC 418

² (2003) 4 SCC 493

³ (2010) 1 SCC 85

⁴ (2010) 8 SCC 633

application is barred by the principle of constructive *res judicata* is not correct. The application filed in the DV Case for the same relief was withdrawn as the Court observed that it is not appropriate to order such a test in a DV Case and that it is for the husband to move an appropriate application in the matrimonial proceedings. Therefore, no order disallowing the request of the husband to direct the parties to undergo DNA test was passed by any competent Court. As one of the grounds urged by the husband for grant of divorce is infidelity, such a contention cannot be established by mere oral evidence. It is only possible for the husband to substantiate the said allegation of infidelity through DNA test. The order of the trial Court is justified and is sustainable, in the light of the settled legal position. Therefore the revision is devoid of merit and is liable to be dismissed.

8. I have bestowed my attention and given detailed consideration to the facts, submissions and the legal aspect.

9. Coming to the first contention of the wife that the request in the subject application was once negated by competent Court and hence, the subject petition is barred by principles of constructive *res judicata*, it is to be noted that no documents are produced to substantiate the said contention inspite of the fact that the husband contends that his application filed in DV case for a similar relief was withdrawn pursuant to an observation of the Court concerned that it is not appropriate to order such a test in a DV Case and that it is for the husband to move an appropriate application in the matrimonial proceedings. Further, from the material on record and the documents, which are produced at the time of hearing, no averments from the pleadings of the husband were brought to the notice of the Court to come to a safe conclusion that the husband admitted that the child was born under lawful wedlock. Coming to the next contention that in view of the provision of Section 112 of the Evidence Act the request of the

husband cannot be considered, it is trite to note that the Supreme Court in *Dipanwita Roy v. Ronobroto Roy*⁵, having considered the legal aspect in extenso and having referred to its earlier decisions, summed up the legal position that the proof based on DNA test would be sufficient to dislodge the presumption under Section 112 of the Evidence Act. In the said decision, 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.

Coming lastly to the contention that if the wife and child are directed to undergo DNA test, the result of the test will have the effect of branding the child as a bastard and the mother as an unchaste woman, it is to be noted that the said aspect was also considered by the Supreme Court in *Dipanwita Roy* case (supra). All the decisions relied upon by the learned counsel for the wife were referred to in the latest decision in *Dipanwita Roy* case (supra) and the legal position was succinctly summed up in the said case. The question that is to be answered in the main OP filed by the husband against the wife is in respect of

⁵ AIR 2015 SC 418

the alleged infidelity of the revision petitioner-wife. The respondent-husband made categorical assertions in his petition filed under Section 13 of the Hindu Marriage Act and has gone to the extent of naming the person who was the father of the male child born to the revision petitioner-wife, who is said to be presently 8 years of age. It is in the process of substantiating the said aspect of infidelity that the respondent-husband has made the subject application before the Family Court for conducting DNA test, which if ordered would establish whether or not he had fathered the male child born to the revision petitioner-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 husband that, but for the DNA test, it would be impossible for the 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 revision petitioner-wife. 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 decision 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.

10. Having regard to the above analysis and the precedential guidance in the decision in Dipanwita Roy (supra), this Court is satisfied that the direction issued by the trial Court is fully justified.

11. For all the reasons stated, this Court is not impressed with the submissions of the learned counsel for the wife that the order of the trial Court is not a speaking order. Even otherwise when the conclusion is correct, this Court can always sustain the order by supplementing the reasons. DNA test according to the latest pronouncement of the Supreme Court is the most legitimate and scientific perfect means, which the husband can use to establish his assertion of infidelity and such a test is the most authentic, rightful and correct means also with the wife for her to rebut the assertions made by the husband and could establish that she had not been adulterous or disloyal. If the wife is right the test proves to be so. In that view of the matter, this Court finds that there is no merit in the revision.

12. Accordingly, the Civil Revision Petition is dismissed confirming the order of the trial Court subject to the caveat that the wife is given liberty to comply with the order of the trial Court or disregard the order requiring her to undergo DNA test. In case she accepts the direction issued by the trial Court, the DNA test will determine conclusively the veracity of the accusation levelled against her by the husband. However, in case she declines to comply with the direction issued by the trial Court in its orders, which are confirmed by this Court, the allegation 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. However, in case the parties are willing to undergo the test as ordered by the trial Court, the trial Court shall give a direction to the husband to deposit the necessary expenses for the said test

after ascertaining the same from the Centre for DNA and Fingerprint Diagnostics, Abids, Hyderabad.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed. There shall be no order as to costs.

M. SEETHARAMA MURTI, J

13th December, 2016
Vjl

