

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.5476 OF 2016

ORDER:

This petition is filed under Section 482 Cr.P.C. to quash the order, dated 10.03.2016, in CrI.M.P.No.85 of 2012 in M.C.No.52 of 2011 on the file of Judge, Family Court - cum - XII Additional District Judge, Guntur, whereby, the petition filed, under Sections 45 and 112 of the Evidence Act, to order for conducting D.N.A. Test to decide the paternity of second child born to petitioner No.1, Mangalagiri Lakshmi Prasanna, was allowed.

2. Petitioners filed the aforesaid Maintenance Case, under Section 125 Cr.P.C., claiming maintenance. Respondent No.2 herein, husband of petitioner No.1 and alleged father of petitioner No.3, while admitting his marital relationship with petitioner No.1, denied the paternity of petitioner No.3, contending that she was not born through him to petitioner No.1. In a petition filed in D.V.C.No.9 of 2011 on the file of Judicial Magistrate of First Class - cum - Special Mobile Court, Guntur, respondent No.2 straightaway asserted that petitioner No.3 was not born out of wedlock between him and petitioner No.1, and petitioner No.1 has been living in adultery and out of extra marital life only, second issue was born to petitioner No.1 and there was no consummation between him and petitioner No.1 at the relevant time. Thus, respondent No.2 denied the very birth of petitioner No.3 to petitioner No.1 due to sexual intercourse

with him. In the said D.V.C., petitioner No.1 filed counter denying the material allegations raising several contentions and alleging that a presumption is provided under Section 112 of the Evidence Act with regard to paternity of petitioner No.3, relied on several judgments of the Honourable Supreme Court, and asserted that petitioner No.3 born to her due to sexual intercourse by respondent No.2 with her and therefore, petitioner No.3 cannot be bastardised by conducting such D.N.A. Test to decide her paternity.

3. When a petition is filed under Section 125 Cr.P.C., the husband can raise pleas which are available under the said Section. According to Section 125 (4) Cr.P.C., when a wife is living in adultery, she is not entitled to claim maintenance and it is a disqualification to claim maintenance and similarly, if the child was not born through the husband, the child is not entitled to claim maintenance. In such a case, it is the duty of the husband to prove that his wife is living in adultery, which disqualifies her to claim maintenance under Section 125 Cr.P.C. Hence, it is left open to respondent No.2 – husband to raise such plea and substantiate such plea and he can file a petition to prove his contention.

4. The main contention of learned counsel for petitioners herein is that there is a presumption regarding paternity under Section 112 of the Evidence Act and when respondent No.2 applied for paternity leave and got sanction of the leave, he is not entitled to

raise such plea now. Even the Birth Report signed by the Medical Officer in-charge also disclose the father's name of petitioner No.3 as 'Mangalagiri Naga Bhushana Rao' – respondent No.2 herein and further, respondent No.2 gave consent letter to St. Joseph General Hospital, Guntur, being the husband of petitioner No.1. Taking advantage of these three documents, he contended that respondent No.2 himself acknowledged the paternity of petitioner No.3.

5. It is true that respondent No.2 availed paternity leave vide application, dated 12.03.2010, and proceedings, dated 13.04.2010. When the wife of respondent No.2 gave birth to a child, he is entitled to claim paternity leave, but it does not mean that he acknowledged paternity of the child. Even the consent letter for treatment, dated 16.11.2006, would go to show that he gave consent for administration of anaesthesia by Dr. Koteswar Rao and to use such anaesthetics as he may deem advisable in the case. Therefore, this could not amount to acceptance of paternity. The main contention of the learned counsel for petitioners before this Court is that in view of the presumption under Section 112 of the Evidence Act, until respondent No.2 proves that there was no access between him and petitioner No.1 at the relevant time, he cannot state that petitioner No.3 was not born due to access between him and petitioner No.1. In any view of the matter, the presumption under Section 112 of the Evidence Act is rebuttable and to dispel such presumption, respondent No.2 is entitled to elicit in the evidence of

the petitioners or by adducing independent evidence. Moreover, D.N.A. Test is a scientific test, which decides paternity of the child with more accuracy, but so far as legal presumption is concerned, it can be rebutted. Even in the judgment of the Honourable Supreme Court in **Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another**¹, which the learned counsel for petitioners relied upon, in paragraph No.17, the Honourable Supreme Court held as under:

“17. 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.”

¹ AIR 2014 SC 932

Even the law laid down by the Honourable Supreme Court in the aforesaid judgment is accepted, one of the modes of dispelling the presumption under Section 112 of the Evidence Act is D.N.A. Test and in view of more accuracy attached to such D.N.A. Test, the Court instead of banking upon a presumption under Section 112 of the Evidence Act can order for D.N.A. Test for more accurate result and the result in D.N.A. Test will prevail over the presumption under Section 112 of the Evidence Act, since it is a test of scientific investigation.

6. Learned counsel for the petitioners further drawn the attention of this Court to certain paragraphs in the same Judgement including the judgment in **Goutam Kundu v. State of West Bengal**², wherein the Honourable Supreme Court held as follows:

“24. This Section requires the party disputing the paternity to prove non-access in order to dispel the presumption. “access” and “non-access” mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual “co-habitation”.

In the same judgment, the Honourable Supreme Court relied on **Bhabani Prasad Jena v. Orissa State Commission for Women**³. In some of the Judgments, the Honourable Supreme Court held that a child cannot be bastardised by referring the child to D.N.A. Test, if ultimately he found to be the son of other than the father which he

² AIR 1993 SC 2295

³ AIR 2010 SC 2851

was claiming to be the son, but the later judgements, more particularly, in the judgment of the Honourable Supreme Court in **Nandlal**'s case (supra 1), it was held that reference of a child, whose paternity is in dispute, for D.N.A. Test no way affect the case of the petitioners. If, on scientific examination, it is found that petitioner No.3 was born due to sexual intercourse between petitioner No.1 and respondent No.2 herein, petitioners would be entitled to claim maintenance and that apart, reference of a child, whose paternity is in dispute, to D.N.A. Test is one of the grounds to dispel the presumption under Section 112 of the Evidence Act.

7. Learned counsel for respondent No.2 would draw my attention to the judgment of this Court in **K. Sugandha Kumar v. K. Vijaya Laxmi**⁴, where there was a dispute regarding the wife living in adultery in a petition filed under Section 13 (1) (ii) of Hindu Marriage Act, 1955, and the respondents therein wanted to take advantage of the presumption under Section 112 of the Evidence Act regarding paternity, subject to satisfying the requirements contained therein. But, this Court, by placing reliance on the judgment of the Honourable Supreme Court in **Dipanwita Roy v. Ronobroto Roy**⁵ concluded that 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 is sought is not to question the

⁴ 2016 (1) ALT 688

⁵ (2015) 1 SCC 365

legitimacy of the child, but to prove the adultery of the wife, and the presumption under Section 112 of the Evidence Act cannot come in the way for husband in seeking a direction to the parties to undergo D.N.A. Test.

8. No doubt, in the above judgment the question was that wife was living in adultery, which forms a ground to claim divorce under Section 13 (1) (ii) of the Hindu Marriage Act, but in such a case also, this Court referred the child, whose paternity is in dispute, to D.N.A. Test to prove the adulterous life being led by the wife. But, here, it is an extreme case where petitioner No.3 is claiming to be daughter of respondent No.2 and if for any reason, respondent No.2 is able to establish that petitioner No.3 was not born due to intercourse between him and petitioner No.1, she is disentitled to claim maintenance and similarly, it disentitles petitioner No.1 to claim maintenance, in view of the bar under Section 125 (4) Cr.P.C. Therefore, to rebut such legal presumption under Section 112 of the Evidence Act, referring the child for D.N.A. Test is the best method. Hence, I find no illegality in the order under challenge passed by the Judge, Family Court - cum - XII Additional District Judge, Guntur, in Crl.M.P.No.85 of 2012 in M.C.No.21 of 2011 warranting interference of this Court, while exercising power under Section 482 Cr.P.C. Hence, the petition is liable to be dismissed.

9. In the result, the Criminal Petition is dismissed.
Miscellaneous Petitions, if any, pending in this Criminal Petition,
shall stand closed.

M. SATYANARAYANA MURTHY, J

December 05, 2016.
MD

