

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.5290 of 2011

ORDER:

The unsuccessful petitioner/husband filed this civil revision petition under Article 227 of the Constitution of India assailing the orders dated 21.09.2011 of the learned Senior Civil Judge at Jagtial passed in IA.No.378 of 2011 in OP.No.18 of 2008 filed under Section 45 of the Indian Evidence Act requesting to refer the petitioner, the respondent/his wife and her son Shiva Kumar for DNA test at Centre for Cellular and Molecular Biology, Habsiguda, Hyderabad for determination of parentage of the said male child Shiva Kumar by the Centre.

2. I have heard the submissions of the learned counsel for the petitioner and the learned counsel for the respondent. I have perused the material record.

3. The facts, which are necessary for consideration, in brief, are as follows:

The petitioner and the respondent are man and wife. The petitioner filed the original petition before the trial Court for grant of divorce by dissolution of the marriage between the parties and in that original petition, he had taken a plea that he is not responsible for the birth of the male child-Shiva Kumar by the respondent and that he had no access to the respondent, who is the mother of the said male child-Shiva Kumar and that the respondent had conceived the male child on account of the illicit intimacy with one Mutyala Sathaiah and that, therefore, it is, in the interests of justice, to refer the parties and the male child of the respondent to the said Centre to undergo DNA test. The said application was resisted by the respondent/wife by denying the allegations and *inter alia* contending that no criminal case is filed on the grounds of adultery against the respondent and the alleged person, who is said to be the father of the male child; and, that the petition is filed to harass and defame the respondent and to create some ground to

avoid payment of maintenance to the respondent; and, that the respondent cannot be compelled to undergo DNA examination; and, that the son is aged 3 years and that after lapse of three years, for the first time, the false allegations are made. The trial Court, having considered the pleadings and submissions made before it and following the ratio in the decision of the Supreme Court in **Goutham Kundu v. State of West Bengal**^[1] had dismissed the application of the petitioner/husband.

4. Feeling aggrieved, the present revision petition is filed and it is *inter alia* contended that the child Shiva Kumar to whom the respondent gave birth is not the Son of the petitioner and that the respondent conceived the said child on account of her illicit intimacy with one Mutyala Sathaiah and that to substantiate the allegation of infidelity urged in the divorce OP, the petitioner had made an application before the Court below for directing the parties and the said child-Shiva Kumar to undergo DNA test and that such a direction to the parties is necessary to establish whether or not the petitioner had fathered the male child born to the respondent/wife and that the Court below, in the facts and circumstances of the case, ought to have ordered the petition as the petitioner has gone to the extent of even naming the person who was the father of the child born to the respondent/wife. So contending, the learned counsel for the petitioner had placed reliance on the decisions in **Dipanwita Roy v. Ronobroto Roy**^[2] and **Manjudari Neerada @ Radhi v. M.P. Narasimha Rao**^[3]. He would submit that the Supreme Court in the latest decision had also considered not only the decision which was followed by the trial Court but also the other decisions holding the field and that the Supreme Court had finally held that 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 that in the face of such a report, the Court cannot compel the husband to bare the fatherhood of a child, when the scientific report proves the contrary and that, therefore, in view of the latest decision, the order of the trial Court brooks interference. He had also pointed out from the decision cited, the following observations: '**We are conscious that an innocent child**

may not be bastardised 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.’

5. On the other hand, the learned counsel for the respondent/wife would submit that in the cited decision, which was followed by the trial Court, it was laid that Courts in India cannot order DNA test as a matter of course and 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 and that it is for the court to carefully examine what would be the consequence of ordering the blood test and that in the affidavit filed in support of the petition, the husband has baldly alleged non access but did not plead the details as to during which period he did not have access to his wife and that in the facts and circumstances of the case, the order impugned is sustainable and needs no interference.

6. I have bestowed my attention to the facts and the submissions. I have gone through the precedents cited.

7. Reverting to the facts of the case, it is to be noted that the petitioner/husband made categorical assertions regarding the infidelity of his wife in the petition filed by him for divorce and also in the affidavit filed in support of the instant petition. He has gone to the extent of naming the person, who was the father of the male child-Shiva Kumar born to the respondent/wife. On the ground that the wife gave birth to a child, who was not fathered by the petitioner, the divorce was 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 allegations 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.

Here in the present case, the husband has categorically pleaded that he has no access to the wife and that he had not fathered the child. Therefore, there is a likelihood that the husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report as, 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 that but for the DNA test it would be impossible for the petitioner/husband to establish and confirm the assertions made in the pleadings. Therefore, this court is satisfied that a direction can be issued as prayed for in the petition of the husband. Having regard to the above analysis and the precedential guidance in the decision in **Dipanwita Roy** (2nd cited), which is binding on the parties 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.

8. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. The trial Court shall accordingly direct the petitioner, the respondent and the child of the respondent by name Shiva Kumar to undergo DNA test by referring them to 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 the directions, the allegations of the husband would be determined by the court below by drawing 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

11th February 2016

NOTE: LR copy to be marked.

(B/o)

Vjl

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

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

[\[3\]](#) 2015(4) ALT 157