

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.4295 of 2015

ORDER:

This Civil Revision Petition, by the unsuccessful petitioner/ husband, under Article 227 of the Constitution of India, is directed against the orders dated 27.08.2015 of the learned Judge, Family Court, Hyderabad passed in I.A.no.443 of 2013 in O.P.No.813 of 2011 filed under Section 151 of the Code of Civil Procedure, 1908 requesting to order DNA test by referring the petitioner/husband and the respondent/wife and her daughter by name Akshaya to DNA test 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.

3. The preliminary and core facts necessary for consideration, in brief, are as follows:-

The petitioner/husband filed the Original Petition on the file of the learned Judge, Family Court, Hyderabad under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 read with Section 7 of the Family Courts Act, 1984 against the respondent/wife for a decree of divorce by dissolution of marriage between the spouses. The wife is resisting the said petition. In the OP, the petitioner/husband had *inter alia* averred that there is no consummation of the marriage between the spouses and that the wife had deserted his company on 21.10.2010 and that in spite of absence of consummation of the marriage, his wife had conceived and gave birth to a female child on 11.06.2011 in a hospital at Hyderabad and that she had kept the said fact as a secret and that the wife had indulged in infidelity and acts of sex with her co-adulterers. However, the husband did not state in his pleadings the name of the person responsible for the birth of the female child nor did he implead him as a party/respondent, but, had sought exemption for impleadment of such person on the ground that the name of the adulterer who had fathered the daughter of

the respondent/wife is not known. The wife, in her counter, refuted the allegations levelled against her in the petition of the husband. While the OP is pending, the aforementioned application is filed by the husband.

4. In support of the said request for ordering DNA test, the case of the petitioner/husband, apart from what is pleaded and stated in the OP, is that since the wife has denied the allegations in the petition, it has become necessary for him to prove that the child was not fathered by him and that therefore, the present application is filed.

5. The case of the wife in her counter in the present application is a repetition of her defence in the counter filed in the OP. She had further stated in her counter in the present interlocutory application that the allegations that there is no consummation of marriage and that she is leading adulterous life are all false and that the DNA Test cannot be ordered and the parties cannot be referred to undergo DNA test just for the mere asking and that a direction to undergo such a test cannot be forced upon her and that in view of the fact that she cannot be compelled to undergo the DNA Test, the petition is liable to be dismissed.

6. Having regard to the pleadings and the submissions of both the parties, the Court below, on merits, dismissed the petition of the husband insofar as the request to refer the parties and the daughter of the respondent to DNA Test, but, however, observed as follows: "The respondent/wife, who had refused to undergo the DNA Test, cannot be forced to do so, but, since she has not given a valid reason for such refusal, an adverse inference would be drawn against her.' Aggrieved of the said orders, the husband is before this Court.

7. 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 impugned order, has come to a correct conclusion that the DNA test is capable of providing conclusive evidence regarding the paternity of the child. But, the Court below had failed to direct

the parties to undergo the said test merely because the wife had stated in her defence that she is unwilling to undergo the said test and that she cannot be forced to undergo the said test. Nevertheless, since the respondent/wife has not given any valid reason for refusing to undergo the DNA test, the Court below had observed in its orders that an adverse inference would be drawn against her. Once the Court has come to the conclusions stated above regarding the conclusive nature of the DNA test, the Court below ought to have ordered the application filed by the husband and referred the parties and the child of the respondent to the Centre for Cellular and Molecular Biology, Habsiguda, Hyderabad for undergoing DNA test, instead of merely observing that on account of refusal of the wife to undergo the DNA test without valid reason, an adverse inference would be drawn against her. The Court below ought to have given an opportunity to the wife by directing her to first submit to the test and ought to have left the matter open regarding drawing an adverse inference only in case of her refusal to submit to such a test as directed by the Court. The order impugned which is unjust is liable to be set aside and the petition of the petitioner/husband may be allowed as prayed for.”

8. Per contra, the learned counsel for the respondent/wife had submitted as follows: ‘The wife, in her counter filed before the Court below, had categorically denied the allegations of the husband that there is no consummation of the marriage and that she is leading an adulterous life. The spouses lived together at the houses of the parties and the parents-in-law and also at the work places of the husband on various occasions. The husband had access to the wife. In fact, the child was born under lawful wedlock. In the petition filed by the husband, without naming the alleged adulterer, bald allegations were made regarding the adulterous life of the wife without pleading the details in regard to the dates and instances of adultery. No case, muchless a strong *prima facie* case, is made out to direct the wife to undergo the DNA test. The petition is intended to malign her character and harass her. When there is no *prima facie* case, by ordering the DNA test, the wife need not be subjected to the trauma of undergoing such 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 Vs. State of West Bengal**^[1], wherein, the Apex Court held 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. His further submission is 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. While thus supporting the order of the Court below, he had prayed for dismissal of the the Civil Revision Petition.

9. I have bestowed my attention to the facts and I have given earnest consideration to the submissions. I have gone through the decisions of the Apex Court in **Dipanwita Roy Vs. Ronobroto Roy**^[2] and **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another**^[3] relied upon by the learned counsel for the petitioner/husband.

10. 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. He had explicitly urged that there is no consummation of marriage and that the female child was not fathered by him. 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 female 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 and had sought exemption from the Court

below for not impleading the said adulterer by filing an appropriate application under the provisions of the Hindu Marriage Act, 1955. 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 there is no consummation of marriage and that he had not fathered the child. 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 there is no consummation of marriage 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. In the aforementioned 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. Further, as already noted, the Court below had also come to a conclusion that in the case on hand, if DNA test is ordered, it would be conclusive proof of the paternity of the child, but declined to further order the parties to undergo the said test, merely because the wife had refused to undergo the said test, but had added a rider that in the absence of any valid reason for the wife refusing the said test, adverse inference would be drawn against the respondent/wife at an appropriate stage. Therefore, this Court, for the aforesaid reasons, is satisfied that it is just and fair in the facts and circumstance 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.

11. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. Consequently, I.A.no.443 of 2013 in O.P.no.813 of 2011 on the file of the Court below stands allowed. The Court below shall accordingly direct the petitioner/husband, the respondent/wife and the child of the respondent by name Akshaya 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 Court below may issue in pursuance of this order, the DNA report will determine the conclusiveness of the veracity of the accusation levelled by the petitioner/husband against her; but, in case she declines to comply with the directions of the Court below that may be issued pursuant to this order, the allegations of the husband shall 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

17th March, 2016

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[\[1\]](#) (1993) 3 SCC 418

[\[2\]](#) (2015) 1 SCC 365

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