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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: August 24, 2016*

+ **MAT.APP. 47/2014**

KAVITA DEVI Appellant

Represented by: Mr.R.K. Sharma, Advocate

versus

ANIL KUMAR Respondent

Represented by: None.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (Oral)

1. The appellant/wife is aggrieved by the decree of dissolution of her marriage with the respondent/husband on the ground of cruelty. The divorce petition was filed by the respondent/husband on the allegation that the appellant/wife was living in adultery and he is not biological father of all the three children born out of the wedlock.

2. Section 13 of Hindu Marriage Act provides grounds on which marriage can be dissolved by a decree of divorce. Relevant provisions for us for the purpose of disposal of this appeal are Section 13(1)(i) and Section 13(1)(ia) which read as under:-

'13.Divorce – (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

1(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

1(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or'

3. On September 10, 2009, the respondent/husband filed a petition under Section 13(1)(ia) of the Hindu Marriage Act pleading that his marriage with the appellant/wife was solemnized on February 05, 2000 and at that time his status was of widower and the respondent/wife was virgin. The marriage was consummated and three children-one female and two male were born.

4. On June 05, 2009, his wife disclosed to him and his family that she had entered into illicit relationship with Rajesh, younger brother of the respondent/husband and that Rajesh is biological father of all the three children. She also claimed that her husband was impotent and this compelled her to develop physical relation with Rajesh.

5. When the above fact was revealed by his wife, he was shocked and depressed. He has broken marriage ties with his wife. He also informed the family of his wife about her conduct but instead of saying anything to her they assaulted him and his family. His wife did not spare even his father blaming him that (his father) wanted to keep her as his wife. This lowered the prestige of his family. Feeling humiliated, insulted and insecure due to immoral conduct of his wife, which amounts to mental cruelty, he filed the petition for dissolution of marriage on account of cruelty.

6. Written statement was filed by the appellant/wife denying all the allegations of living in adultery or that her husband was not biological father of her three children. She, however, claimed the date of marriage to be January 29, 2001 and not February 05, 2000 as pleaded by her husband. She also pleaded that she had been residing in the same house and has not

committed any act of adultery.

7. In the replication we find averment on page 3 to the following effect:-

'It is submitted that after the disclosure of the respondent for illicit relationship and the children born out of the relationship with the younger brother, the petitioner was compelled to get the DNA test of the youngest child and finally the facts got strength when the younger brother Rajesh at the instance of the respondent was called by the counsellor Ms.Nidhi Jha in the Dwarka Court where the same admitted the illicit relationship and liabilities of the children born out of the relationship and gave an affidavit dated 4.3.2010 in support of accepting the illicit relationship with the respondent. Thus, the allegations of the petitioner have been confirmed by the DNA report as well as from the affidavit of said Rajesh and his admission before the counsellor, hence the petition is liable to be decreed.'

8. After filing the petition, without there being any order by any Court/Competent Authority, the DNA test has been got conducted by the respondent/husband on October 31, 2009 on his child aged about 3¼ years

9. The learned Judge Family Court in the impugned judgment has relied on the testimony of PW-1 - the husband and PW-2 - his younger brother Rajesh to record the finding that his wife was in illicit relationship with PW-2 her brother-in-law. The DNA report was treated as corroborative piece of evidence to the oral testimony of the husband and his younger brother Rajesh. The relevant observation by the learned Judge Family Court in para No.23 to 25 of the impugned judgment are as under:-

'23. Though, the respondent in her testimony has denied having illicit relationship with Rajesh or her three children being born from Rajesh, but the over whelming evidence led on behalf of the petitioner sufficiently proves that the respondent has been having illicit relationship outside the marriage. Her conduct has continued even after filing of present petition. There cannot be any act of cruelty more humiliating and gross, than the present circumstances.'

24. Though, it was argued on behalf of the respondent that the DNA test of Gautam has not been successfully proved, yet, it must be observed that it is the petition for divorce in which allegations of counter allegations have to be proved on the principal of pre-ponderous of evidence and not beyond reasonable doubt.

25. The petitioner has successfully proved the adulterous conduct of the respondent which is the act of utmost mental cruelty for any self respecting husband. Thus, it is held that the petitioner has been subjected to cruelty of the kind which entitled him to divorce under Section 13(ia) HMA, 1955.'

10. We have heard learned counsel for the appellant and perused the Trial Court Record.

11. Irrespective of the date of marriage whether it was January 29, 2001, or February 05, 2000 it is admitted case of the parties that after marriage they were residing under the same roof and the respondent had access to his wife when the three children were born. As per the husband their matrimonial life was smooth till June 05, 2009 i.e. when his wife disclosed that he was not the biological father of the three children and she was having physical relations with his younger brother Rajesh. As per averment made in the petition in para No.5, on June 05, 2009 his wife disclosed to him and the family that she had entered into illicit relationship with Rajesh his younger brother from the very beginning and all the three children were of Rajesh explaining that he (husband) was impotent which made her to develop above relationship.

12. In his examination-in-chief by way of affidavit in para No.10 he deposed that the DNA test was got conducted on the youngest child Gautam and the DNA report Ex.PW-1/1 prove that he was not biological father of child Gautam.

13. PW-1 Anil Kumar – the respondent/husband during his cross

examination was unable to tell the reason why his wife disclosed to him about her illicit relationship after about nine years of their marriage and birth of three children. He further stated **that his wife also told him that she was having relation with his younger brother since the day of their marriage.** This is at total variance with the version of PW-2 Rajesh with whom she is alleged to have adulterous relations.

14. PW-2 Rajesh has made statement to the following effect:-

*'PW2 Sh. Rajesh Sharma aged about 31 year S/o Sh.Ram Kishan Sharma, R/o ER-6R, Inder puri, New Delhi-110012.
On SA*

Petitioner is my brother. Petitioner was married with the respondent. After about one and half month of the marriage the respondent started approaching me and starting complaining that my brother/petitioner was not according to her liking and did not earn sufficiently and she wanted a husband of a different type. She also tried to woe (Sic.woo) me by her conduct which was not acceptable to me. She even tried to establish physical contact with me but I kept quiet for a day or two. Thereafter, the respondent became very sad and quiet. I became apprehensive that she may commit suicide and thus agreed to establish physical relationship with her. We used to have sexual intercourse once or twice in a month and it continued for about 6-7 years.

*PW2 Sh. Rajesh Sharma aged about 31 year S/o Sh.Ram Kishan Sharma, R/o ER-6R, Inder puri, New Delhi-110012.
(Recalled for examination in chief in continuation from 09.05.2013).
On SA*

Because of my relationship with the respondent we had three children. I had assured the respondent that till such time either of us disclose nobody in the family would come to know about our relationship.

About 4 years back, while teaching the daughter Nikita I started scolding her on which my father intervened and told me

that I need not worry about the child on which the respondent who was working in the kitchen, said that why should I not worry as they were my children and I have no right to leave them after giving birth to them. Because of this, my father came to know that all the children were mine and that according to the respondent I should take their responsibility. My father confronted me on which I confirmed about my relationship with the respondent and also that the three children were fathered by me.'

15. Above statement of PW-2 Rajesh falsify the version of PW-1 that illicit relations between her and Rajesh was disclosed to him by his wife in the presence of other family members. In the petition, the petitioner mentioned himself as widower aged 28 years at the time of getting married to the Kavita Devi, the appellant herein, who was virgin at that time, without disclosing the circumstances under which his first wife died at a young age. He claimed that his first wife died due to 'brain haemorrhage'. But it is falsified from the statement of PW-2 his own younger brother Rajesh who stated that since first wife of his brother Anil Kumar committed 'suicide' he did not want the same to be repeated. His brother was stated to be impotent. He entered into physical relationship to save the marriage.

16. The respondent/husband has not disputed the birth of three children during the subsistence of a valid marriage between the parties and his access to his wife during the period the three children could have been begotten. Section 112 of Indian Evidence Act raises a presumption about legitimacy of a child born during subsistence of a valid marriage. The same is extracted hereunder:-

'112. Birth during marriage, conclusive proof of legitimacy-The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the

legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.'

17. The word 'access' used in Section 112 of Indian Evidence Act has been considered by the Privy Council in AIR 1934 PC 49 Karapaya Servai vs. Mayandi to mean the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by a fiction of law, accepted the same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child.

18. The determination by the Privy Council in Karapaya Servai's case (Supra) was followed by the Supreme Court in the decision reported as 1954 SCR 424 Chilukuri Venkateshwarly vs. Chilukuri Venkatanarayana.

19. In the case reported as (2009) 12 SCC 454 Sham Lal @ Kuldeep vs. Sanjeev Kumar the Supreme Court has held as under:

'Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access.'

20. In the petition seeking dissolution of marriage filed by the respondent/husband, infidelity of the wife was in question and not the paternity of the child Gautam aged about 3¼ years at that time. The purpose of the respondent/husband was to establish that after the solemnisation of the marriage with the appellant/wife she has voluntarily engaged in sexual intercourse with a person other than her husband. Thus, the paternity of the

three children was not an issue before the Family Court. The respondent/husband had got the DNA test conducted after filing a petition seeking dissolution of his marriage but he never approached the Family Court with a request to get the DNA test conducted on the three children born out of the wedlock. Getting a DNA test is not something as if he was going for routine blood test of his child which he could have got done of his own without any medical prescription or order of the Court.

21. In the decision reported as (1993) 3 SCC 418 Goutam Kundu vs. State of West Bengal the Apex Court has laid down guidelines when DNA test can be ordered:

'(1) That Courts in India cannot order blood test as a matter of course.

(2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising Under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.'

22. Though a matrimonial Court is vested with the power to order a person to undergo a DNA test, it has been reiterated in various decisions of Supreme Court that the Court should exercise such a power only if there is sufficient material before the Court and a strong prima facie case is made out for issuing such direction.

23. This issue has also been examined by the Supreme Court in the

decision reported as (2015) 1 SCC 365 Dipanwita Roy Vs. Ronobroto Roy. In the said case the husband filed a petition under Section 13 of Hindu Marriage Act against his wife on the ground of infidelity. While taking a plea that the child born to the wife was due to her adulterous relationship with one Deven Shah, he filed an application for seeking a DNA test of himself and the male child born to the wife.

24. While the prayer for conducting the DNA test was declined by the Family Court, High Court at Calcutta permitted the test directing the DNA test of the son of the wife to be conducted at CFSL and the samples of the child and the husband to be taken in the presence of both husband and wife.

25. Aggrieved by the order passed by the High Court of Calcutta, the wife challenged it before the Supreme Court by filing Special Leave Petition (Civil) No.5694/2013. After considering the earlier decisions on the subject, while upholding the order passed by the High Court at Calcutta, in the peculiar circumstances of the case noted in para 11 of the decision, the wife was directed to comply with or disregard the order passed by the High Court requiring holding a DNA test.

26. When the case of the respondent/husband is examined in the light of above legal position, we notice the following facts:-

- (i) DNA test has been conducted without any order from the Court and no expert was examined to prove the said report.
- (ii) The husband did not get himself medically examined to prove his potency/impotency;
- (iii) He did not get the DNA test of his brother Rajesh conducted who was claimed to be biological father of the three children born to Kavita Devi;
- (iv) Consent of Kavita for the DNA test was never obtained.

27. Examination of an employee of Truth Lab to prove the DNA report

could not have been considered by the Family Court to return a finding about the adulterous relationship of the parties thereby raising question mark on the legitimacy of the three children born out of the said wedlock. It has a devastating effect on the life of the three children who are innocent in this litigation between the husband and wife.

28. Though the DNA report has not been proved by the expert who conducted the test but it is on Trial Court Record exhibited as PW-1/1. The manner in which this test has been conducted at Truth Lab has shocked the conscience of this Court. We find that on October 31, 2009 the husband Anil Kumar submitted a written application in Hindi (Exhibit PW-3/4) for getting DNA test of his child Gautam aged 3¼ years as he suspected the child not to be fathered by him. He specifically mentioned therein that the test be conducted being consented by the mother and father.

29. While Ex.PW3/3 dated October 31, 2009 is signed by Anil Kumar only wherein he has mentioned that this test is being conducted with the consent of mother and father both, it does not bear the signature of mother. The written request Ex.PW3/4 bears the name Kavita written in Hindi to make it appear that it has been signed by both parents of the child Gautam.

30. Along with this application there is an affidavit given under Section 139 of Civil Procedure Code on a stamp paper of ₹10 bearing the photographs of the respondent/husband and a small child whose name is mentioned as Gautam aged about 3 ¼ years. The affidavit reads as under:-

*“AFFIDAVIT GIVEN UNDER SECTION 139 OF CIVIL
PROCEDURE CODE*

While Requesting DNA Profiling Services from Truth Labs

1. We the following

a) Anil Kumar Aged 33 yrs.

Residing at WZ-24/1, Village Dasgarha, New Delhi-110012.

*b) **Gautam Aged 3 & ¼***

Residing at WZ-24/1, Village Dasgarha, New Delhi-110012.

2. We have approached Truth Labs to voluntarily give blood samples and also sign the Declaration and Identification form affixing photographs in the presence of witnesses.

3. We are fully aware of the consequences of the report and hereby solemnly affirm and declare that the DNA test sought by us is purely for personal use.

4. We also solemnly affirm that the particulars furnished above are to the best of our knowledge and belief and request Truth Labs to examine the samples and provide us the report with no legal obligations to Truth Labs or its members/experts.

Seal of notary

*1. s/d-
Anil Kumar*

*2. s/d-
Gautam s/o Anil Kumar*

Sworn and signed before me

On this 29th day of October 2009.

Deponents'

31. It is attested by Notary Public on October 29, 2009. The question is can a child aged about 3 years is competent to swear an affidavit and sign the affidavit. The concerned Notary, namely, C.M.Baweja having registration No.592, before attestation was under a legal obligation to examine these aspects before attesting the same. The manner in which it has been signed by writing Gautam s/o Anil Kumar, it could not have been written by such a small child who at the age of three, may not even be able to hold pen to write 'ABC' in capital letters whereas the signature of child Gautam

appears in capital and small alphabets. It can be inferred that it was a one man show by the respondent/husband who had been signing the documents for his wife and son both.

32. Just to satisfy ourselves about the genuineness of the joint written request under their respective signatures by Anil Kumar and Kavita i.e. the parents of child Gautam, her signature on the written statement and her deposition before the Court were checked. We notice that she had been signing in English only. Ex.PW3/4 bearing alleged signature of Kavita were not even confronted to her to prove her consent for the DNA test.

33. The fact that the appellant Kavita was not present at the time of taking of blood sample is not only admitted by the husband Anil Kumar himself but also by PW-3 Ramakant Tiwari, designated Assistant Director of Truth Lab who stated that he had taken a letter from Anil signed by Kavita as stated by Anil. He (PW-3) was informed that mother of the child was not interested in coming to the lab.

34. PW-1 Anil Kumar has stated that he has gone to the lab along with the child and his brother Sunil for the DNA test. Since the elder two children must be fully grown up so as to refuse to accompany the respondent/husband for DNA test, the youngest one aged 3 years was found an easy prey by the respondent/husband for getting his blood sample for the DNA test.

35. The manner in which DNA test was got conducted by the respondent/husband by taking the three years old child, projecting the consent of both the parents for the test, though there was none. The DNA test report which was neither conducted as per law nor proved by the expert could not have been relied upon by the learned Judge Family Court to return a finding which has the effect on legitimacy of the children born out of the

wedlock.

36. It is a case where admittedly two newly wedded brothers were residing on the same floor (first floor), which was a two room set only, with parents and youngest brother Rajesh residing on the ground floor and top floor being occupied by the tenant. In such a situation it is highly improbable that a newly wedded wife will have physical relations with PW-2 Rajesh, who was still in his teenage, from the first day of her marriage. PW-2 Rajesh claimed that it started after some passage of time when he came to know from his Bhabi Kavita that his brother Anil Kumar was impotent. Impotency is a fact which could have been in personal knowledge of the respondent/husband from the very beginning. What made him to make a wrong statement before the Court about the cause of death of his first wife to be due to 'brain haemorrhage' is not known to us. As per PW-2 Rajesh, first wife of the respondent Anil Kumar committed 'suicide'.

37. Now we are left with the testimony of the husband and his younger brother Rajesh and have already noted down different versions given by them as to when and how the appellant/wife disclosed about her adulterous relationship with PW-2 Rajesh. It is admitted case of the respondent/husband that till June 05, 2009 when his wife disclosed about her physical relationship with Rajesh (PW-2) everything was normal in their life. Thus, there was no question mark on the paternity of their children. The parties to this litigation are residents of a village in Delhi. It has come in the statement of PW-2 that the house is a three storey building built on a 50 sq.yards plot with two rooms on each floor. Sunil and Anil both brothers got married on the same day and were living on first floor. PW-2 Rajesh along with parents was living on the ground floor and third floor was on rent.

38. We would have found some substance in the claim of the

respondent/husband about the adulterous life of his wife had he brought on record his medical examination report to prove his potency or otherwise.

39. Despite ground of adultery being available to the respondent/husband to seek dissolution of marriage he preferred not to seek divorce on that ground but sought on the ground of cruelty. We do not find any cruelty being proved by him. Rather it is other way round that by making such accusation against the wife in connivance with his brother Rajesh he might be causing mental cruelty to his wife and his children by questioning their paternity. We leave it here.

40. The learned Judge Family Court failed to appreciate the evidence in correct legal perspective. The impugned judgment and decree dissolving the marriage of the appellant/wife is set aside.

41. The appeal is allowed.

42. LCR be sent back alongwith copy of this order.

PRATIBHA RANI
(JUDGE)

PRADEEP NANDRAJOG
(JUDGE)

AUGUST 24, 2016
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