

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.524 of 1998

Against the Judgment and Decree dated 13.07.1998 passed by 6th Additional District Judge, Gaya in Title Suit(Divorce) Case No.20 of 1990/1 of 1996.

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Ashok Kumar

.....Plaintiff - Appellant

Versus

Smt. Kumari Bachchi Devi @ Bina Roy

.....Defendant-Respondent

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Appearance :

For the Appellant/s : Mr. Shashi Shekhar Dvivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey, Advocate
Mr. Parth Gaurav, Advocate
Mr. Projesh, Advocate

For the Respondent/s : Mr. Alok Kumar Choudhary, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 19-05-2017

1. The plaintiff has filed this First Appeal challenging the impugned judgment and decree dated 13.07.1998 passed by the learned 6th Additional District Judge, Gaya in Title Suit(Divorce) Case No. 20 of 1990/1 of 1996 whereby the learned trial court dismissed the plaintiff's suit for divorce.

2. The plaintiff-appellant filed the aforesaid divorce case under Section 13 of the Hindu Marriage Act praying for a decree for divorce against the respondent. The plaintiff claimed the aforesaid relief



on the facts inter alia that they were married on 18.05.1981. The respondent is of immoral character and has been living in adultery since the marriage and it continued after marriage also. She had sexual intercourse with different persons other than the applicant. When the applicant learnt about the character he had no sexual intercourse with the opposite party since 1982. The applicant was not taking any steps against the opposite party hoping that she would refrain in future from committing the offences. However, she continued with the immoral act and ultimately she gave birth to a male child on 13.04.1990. The birth of this male child is conclusive proof of the fact that the opposite party-wife is indulged in sexual co-habitation with different persons. The applicant does not know the names of those persons with whom the wife is indulged in sexual co-habitation.

3. After notice, the respondent-wife appeared and filed contesting written statement denying all the allegations of the husband. In the written statement, she described the periods when she was living with the applicant-appellant and clearly stated that since 1987 to 1989 she was residing with the appellant and had co-habited with him and became pregnant. As a result of this, the male child was born to the wife-respondent who is the son of the applicant-appellant.

4. The further case is that there was some differences between both the families because of demand of Rs.20,000/- by the husband for



purchasing “Hero Honda” motorcycle which was refused by father, therefore, this false case has been filed. It is not necessary to deal with the detail pleading of the opposite party. Only those facts which are necessary are being stated above.

5. On the basis of the aforesaid pleadings of the parties, the learned trial court framed the following issues:

- I. Is the suit maintainable as it has been framed and filed?
- II. Has the applicant got any cause of action for the suit?
- III. Is the O.P. living in adultery since marriage?
- IV. Has the applicant no sexual intercourse with the O.P. since 1982?
- V. Is the child given birth to by the O.P. result of adultery or is born out of the holy wedlock with the applicant?
- VI. Has the applicant ever demanded Rs.20,000/-(twenty thousand) for purchase of Hero Honda Motorcycle from the father of the O.P.?
- VII. Is the applicant entitled to a decree of divorce?

6. After hearing the parties and considering the evidences, the learned trial court recorded finding that the applicant failed to prove adultery and further held that the male child born to the wife-respondent is of the husband. Accordingly, dismissed the divorce suit.

7. The learned senior counsel, Mr. Dvivedi raised two grounds only. According to the learned senior counsel, D.N.A. test was conducted by reputed laboratory at Hyderabad and report was submitted to the effect that male child is not the son of the applicant-appellant but the learned trial court discarded the same and himself came to the



conclusion that the report is wrong which the learned court below could not have done. The learned senior counsel further submitted that the evidences produced by the wife are not reliable and moreover, whatever presumption was available under Section 4 and 112 of the Evidence Act has been rebutted by the D.N.A. report but the learned court below rejected the report on untenable grounds for the purpose of dismissing the divorce case and the reason assigned for discarding D.N.A. test cannot be accepted by court of law.

8. Secondly, the learned senior counsel, Mr. Dvivedi submitted that the parties are living separately since more than about 27 years, which clearly proves that the marriage between them has irretrievably broken and, therefore, on this ground also, the appellant is entitled to the grant of a decree for divorce. The learned counsel for the appellants relied upon various decisions on both the points. The same shall be considered subsequently.

9. On the other hand, the learned counsel, Mr. Choudhary for the respondent submitted that in view of Section 4 and 112 of the Evidence Act, the presumption of parentage is conclusive proof, therefore, this conclusive proof cannot be dislodged by D.N.A. report. There may be mistakes in the report, therefore, it is not safe to rely on the D.N.A. report. The learned trial court, therefore, has given sufficient reason for not relying on the D.N.A. report and in view of Section 112 of



the Evidence Act held that conclusively it is proved that male child is son of the appellant. Since the D.N.A. report has got a serious consequence the same should be so much so authentic that 100% reliance can be placed on it but the author of the report in his evidence stated that there is possibility of error upto 0.02% and this is sufficient to discard the D.N.A. report and if D.N.A. report is discarded then there is no proof of the fact of adultery because according to the husband, the wife is indulged in physical relationship with others since the marriage is took place in 1981. However, the husband did not take any step upto the year 1990 when the son was born which speaks that this is a cooked up story. The learned counsel for the respondent relied upon the decision relating to D.N.A. test. I shall consider these decisions thereafter.

10. So far irretrievably breakdown of the marriage is concerned, the learned counsel submitted that no doubt the parties are residing separately from each other for more than 27 years and now it will not be possible to reside together but if divorce is granted on this ground, then permanent alimony be provided to the wife.

11. On the basis of the arguments advanced by the learned counsel for the parties, the following points arises for consideration in this First Appeal:



I. Whether the husband applicant-appellant has been able to prove the ground of adultery and whether the son born in the year 1990 is the son of the appellant or not?

II. Whether on the ground of irretrievably breakdown of marriage, the husband-appellant is entitled for the grant of decree of divorce?

Point No.I

12. The applicant-appellant besides other evidences examined the scientist A.W.2, Dr. G.V. Rao of Centre for D.N.A. Fingerprinting and Diagnostics, C.C.M.D. Campus, Uppal Road, Hyderabad 500007. On the other hand, the O.P. has examined five witnesses only. The report of the Scientist A.W.2 has been marked as Exhibit 2 with objection. It may be mentioned here that the husband and wife both expressed their willingness to undergo the paternity test i.e. D.N.A. test. The expert produced the report, Ext. 2 and the enclosure along with Ext. 2 has been marked as Ext. 3 and this report, clearly proves that Ashok Kumar, the appellant is not the biological father of the son born to respondent herein namely, Master Rahul Kumar.

13. The learned senior counsel relied upon a decision of the Supreme Court, **2014(2) Supreme Court Cases 576(Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another)** and submitted that the D.N.A. test report is scientifically accurate but the learned trial court



in the present case scrutinized the report and then on flimsy ground, discarded the report.

14. From perusal of this decision, it appears that the Supreme Court in that case also was considering the report of D.N.A. test and at paragraph 13 has held relying on the decision of Kamti Devi v. Poshi Ram, 2001(5) Supreme Court Cases 311 that it has been recognized by the Supreme Court in Kamti Devi (supra) that result of a D.N.A. test is scientifically accurate. In the present case, it will not be out of place to mention here that it is not the case of any party that the D.N.A. test, Ext. 2 is not a genuine report. No objection to the report has been filed by the wife nor the wife-respondent ever prayed for another D.N.A. test report. In other words, the genuineness of the report is not challenged.

15. In the same decision, the Hon'ble Supreme Court at paragraph 16 and 17 held as follows:

“16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological



father. In such circumstance, which would give way to the other is a complex question posed before us.

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.

16. It appears that in the aforesaid decision, the D.N.A. report was received from Regional Forensic Science Laboratory, Nagpur and, therefore, an application was filed by the wife for a re-test and then the High Court directed for D.N.A. test to be conducted at the Central Forensic Laboratory, Ministry of Home Affairs, Govt. of India at Hyderabad. In the present case also, the report has been received from the said laboratory at Hyderabad and this laboratory is considered to be the most advance laboratory in the matter.



17. The Hon'ble Supreme Court in the case of **Dipanwita Roy v. Ronobroto Roy, 2015(1) Supreme Court Cases 365** has held at paragraph 17 as follows:

“17. The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity that the respondent-husband had made an application before the Family Court for conducting a DNA test which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.”

18. On the contrary, the learned counsel, Mr. Choudhary for the respondent relied upon a decision of Calcutta High Court passed in First Appeal No.13 of 2011 dated 20.08.2013 which deals with about the condonation of delay on the ground of adultery. It has been held that the



prolonged silence would suggest condonation of the alleged offence.

This decision is not on the point of D.N.A. report.

19. The other decision is the decision of the Supreme Court AIR 1988 Supreme Court 2089. This decision also does not deal with the D.N.A. test.

20. From perusal of the trial court judgment, it appears that the trial court gave much emphasis on the evidence of the wife in view of the provision as contained in Section 112 of the Evidence Act and has not considered at all the settled principles of law laid down by the Supreme Court. Moreover, the reason assigned by the trial court for not relying on the D.N.A. test report from reputed Forensic Science Laboratory, Hyderabad is not acceptable particularly when the Hon'ble Supreme Court repeatedly, as quoted above, held that this report is scientifically accurate and correct. Therefore, when the accurate and correct evidence i.e. scientific evidence is available, the court is not required to investigate further the accuracy or otherwise of the report itself which is always held to be accurate even by the Supreme Court. The scientific report regarding writings of a person can be examined by the court but so far D.N.A. test is concerned, science is now developed and in that matter, the court cannot have a different opinion. The scientific report of D.N.A. report from a reputed laboratory is to be



accepted as correct in view of the decision of the Supreme Court referred to above.

21. The learned trial court wrongly found fault in the report and tested the same in terms of Section 4 and 112 of the Evidence Act which he could not have done. Thus, I find that the D.N.A. test i.e. paternity test is genuine, valid and acceptable report and I also find that the son born to the wife-respondent is not the son of the appellant.

22. So far condonation is concerned, it is specifically pleaded by the husband that he was thinking that the wife respondent may come to him leaving adulterous life. No doubt, he condoned the adulterous life of the wife but there is a limit. When he found that now a child has been born he then filed the present divorce case. Now therefore, it cannot be said that because he earlier condoned, the wife has got opportunity to live the same life in future. Here, the husband has been able to prove conclusively by scientific paternity test that the child is not his son. Thus, the finding of the trial court is hereby reversed and this point no. I is answered in favour of the appellant and against the wife-respondent.

Point No.II

23. So far this point is concerned, both the parties admitted that they are living separately since 27 years and it is not possible for them to live together. In such circumstances, the court cannot force them to live



together. Moreover, the ground on which the divorce suit was filed by the husband has been proved. Now therefore, on this ground also, the appellant is entitled for the grant of decree of divorce.

24. So far permanent alimony is concerned, no evidence is available before this court, therefore, if law permits, the wife may approach appropriate forum for permanent alimony as provided under Section 25 of the Hindu Marriage Act.

25. In the result, this First Appeal is allowed. The impugned judgment and decree passed by the trial court is set aside and the plaintiff's suit for divorce is decreed and the decree of divorce is granted. The parties shall bear their own cost.

(Mungeshwar Sahoo, J)

Saurabh/-

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