

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.3.2017

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

C.R.P.(PD) No.3796 of 2012 &
M.P.No.1 of 2012

Selvi Vijayalakshmi .. Petitioner/2nd Respondent

Vs.

1. A.Sankaran
2. Sumathy .. Respondents/Petitioner &
Respondent No.1

This Civil revision is filed under Article 227 of the Constitution of India, against the order dated 3.08.2012 passed in I.A.No.32 of 2008 in H.M.O.P.No.2 of 2008 on the file of the Subordinate Judge, Arni.

For Petitioner : Mr.P.Seshadri
For Respondent No.1 : Mr.R.Thirugnanam for
Mr.S.Umapathi

ORDER

This revision is by the second respondent in I.A.No.32 of 2008 in H.M.O.P.No.2 of 2008 on the file of the learned Subordinate Judge, Arni, Tiruvannamalai District.

2 1st respondent married the 2nd respondent on 9.2.1981 according to Hindu rites and customs. 1st respondent (husband) was an S.I. of Police. On 13.4.86, a daughter (revision petitioner) was born. She is the revision petitioner.

3 In 2008, 1st respondent was 53 years old, while 2nd respondent, was 43 years old. Revision Petitioner was 22 years old. She was to be married. Difference of opinion arose between the respondents (spouses). 1st respondent/husband alleged that the 2nd respondent/wife had crossed the fence. 2nd respondent filed counter denouncing his allegation.

4 1st respondent filed I.A.No.32 of 2008 that as he has doubted the very birth of the revision petitioner to him, he wanted to subject his wife, and the revision petitioner to undergo DNA test, in other words, paternity test. The 2nd respondent and the revision petitioner were shocked by this bombshell. They have resented on the move of the 1st respondent.

5 Upon hearing both sides, the Sub Court, Arni allowed the petition and ordered the conducting of DNA test. It necessarily

involves the taking of blood samples from the respondents and the revision petitioner.

6 The reasoning of the learned Subordinate Judge in ordering the D.N.A. test could be found from the following passage in the impugned order passed by the trial Court:

"Now the petitioner is suspect the legality and biological birth of the second respondent. If the doubt is arises it would be detected by the scientific method to save the integrity and trustworthy in the matrimonial home. No one bear the thorn in his chest throughout her life regarding the paternity of the second respondent. The legal steps is alone is sufficient to satisfy the requirement of conscience of the petitioner. If the petition is allowed there is no prejudice will be caused to the respondent. Because, the result is stands with truth it is good for the parties, and averment to the harmonious life in future. Therefore, the petition is allowed for D.N.A test. The petitioner, first respondent, and second respondent are directed to submit for the test to find out truth".

(emphasis supplied by me)

7 Aggrieved, the revision petitioner, has directed this revision.

8 The learned counsel for the revision petitioner would contend that the revision petitioner is the daughter of the respondents. She was born to them during the period they lived as husband and wife. In such circumstances, the conclusive proof prescribed in Section 112 of the Evidence Act shuts the mouth of the 1st respondent from speaking otherwise, as to the birth of the revision petitioner to him.

9 The learned counsel for the revision petitioner would further contend that it is too atrocious to ask the revision petitioner, now a married woman and a mother to undergo DNA test.

10 The learned counsel for the revision petitioner would also submit that it will be in violation of her right to privacy. It is as against her right to live with human dignity and decency.

11 The learned counsel for the revision petitioner would also contend that no Court could violate the human right of a woman.

12 To carry home his point of view, the learned counsel for the revision petitioner would cite **Bhabani Prasad Jena vs.**

Convenor Secretary, Orissa State Commission for Women and another (2010(8) SCC 633).

13 The learned counsel for the revision petitioner would further contend that the revision petitioner is not a party to the matrimonial dispute between her parents. She has been unnecessarily dragged into their fight. The impugned order will result in causing incalculable damage to her and it will also affect her family life.

14 On the other hand, the learned counsel for the 1st respondent would contend that the 1st respondent is asking divorce also on the ground of adulterous conduct of the revision petitioner's mother(2nd respondent). Incidentally, the very birth of the revision petitioner to the 1st respondent itself is in issue. This issue is to be resolved through a scientific test.

15 The learned counsel for the 1st respondent would further contend that DNA test is a modern scientific method to establish one's paternity. It is a gift of science. Such a test is permissible under Section 45 of the Indian Evidence Act. Medicine will

not always taste sweet. Sometimes it tastes bitter. But it is good for health. Taking of blood sample from the revision petitioner will not be to her liking. If the 2nd respondent passes the scientific test successfully, there ends the matter. Consequently, the very legal status of the revision petitioner also will be confirmed. In these circumstances, considering all the above aspects, the trial Court has adopted a right course.

16 The learned counsel for the 1st respondent contended that ordering of DNA test is not impermissible in law.

17 In this connection, the learned counsel for the 1st respondent cited **Bommi and another vs. Munirathinam (2004(5) CTC 182)**.

18 The learned counsel for the 1st respondent also contended that in her counter 2nd respondent expressed her willingness to undergo D.N.A test.

19 I have anxiously considered the rival submissions, perused the impugned order, materials on record and the decisions cited.

20 In Ramayana, Lord Rama asked Seetha Devi to walk over the fire to prove her chastity. Then there was no DNA test. But, now scientific development pervades all fields. Scientific development is such that one day even human beings itself will be produced by cloning. But, for the sake of scientific development, we cannot give up our hoary past, culture, tradition which is unique and has become our pride to be envied by the westerners. For the sake of scientific development, we cannot disrespect womanhood.

21 As early as in 1872, Sir James Fitz James Stephen, in his Magnum Opus, the great Indian Evidence Act, introduced a form of paternity test in Section 112 of the Act.

22 The said section 112 runs as under:

"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."

23 The essential features of the said section is that during the matrimonial life between a man and a woman as spouses, if a child is born to them it is conclusively presumed that it is their child. However, the Draftsman of the said adjective law focusing the possibility of an absurdity has added a rider. He introduced the 'principle of no access'. If the disputant is able to establish that there was no opportunity for him to have link (access) with his wife/woman, then the conclusive presumption introduced in the first part of Section 112 of the Evidence Act will go away. This section is also based on common sense.

24 To understand the nature of the said presumption, let us refer to Section 4 of the Evidence Act which runs as under:

"4 "May presume" - Whenever, it is provided by this Act that Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.

"Shall presume"- Whenever, it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof" - When, one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

(emphasis supplied by me)

25 Presumptions are legal fictions. They are all creations of law. Whether one like it or not, whether it actually exists or not, on the proof of a particular fact, the existence of another fact shall be presumed, in other words, it shall be taken, deemed that it exists.

26 Presumptions are of three kinds. 'May' presume, 'Shall' presume, and 'Conclusive' proof. Conclusive proofs are 'irrebuttable'. It is impermissible to refute such a presumption, because it is a presumption in law. There are several instances of such type of presumptions. One such presumption is the presumption as to paternity prescribed in Section 112 of the Evidence Act.

27 The concept of DNA test is much more vogue in USA and U.K. and now, it has been accepted as a scientific mode all over the world. DNA (Deoxyribonucleic Acid) test is not a novice to modern

lawyers. But it is to be remembered that the result of D.N.A. test is not analogous to the result of a Dactylography test (finger print). The result of finger print comparison test is 100%, however, it is not so in the case of D.N.A. test. It is a mystery in science.

28 A question as to DNA test cropped up before the Hon'ble Supreme Court in **Goutam Kundu vs. State of West Bengal (1993)3 SCC 418**) wherein the father of a child disputed his paternity to the child.

29 In **Goutam Kundu** (supra) the Hon'ble Supreme Court quoted the following passage from **Rayden's Law and Practice in Divorce and Family matters (1983), Vol. I 1054**),

"Medical science is able to analyse the blood of individuals into definite groups, and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves most valuable in determining paternity, that is, the exclusion aspect, for once it is determined that a man could not be the

father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher, between two given men who have had sexual intercourse with the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father".

30 In **Goutam Kundu** (supra), the Hon'ble Supreme Court cautioned the Courts that for mere asking DNA test cannot be ordered. And the Hon'ble Supreme Court laid down the following guidelines:

" 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. ”

31 The Two Judge Bench decision in **Goutam Kundu** (supra) has been reviewed by a Three-Judge Bench of the Hon'ble Supreme Court in **Sharda vs. Dharmpal [(2003) 4 SCC 493]**. Referring to **Goutam Kundu** (supra), the three Judge Bench observed as under:

"39. Goutam Kundu is, therefore, not an authority for the proposition that under no circumstances the court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child".

32 There was a feeling that **Sharda** (supra), overrun

Goutam Kundu (supra). This was clarified by the Hon'ble Supreme Court in **Bhapani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another (2010)8 SCC 633** in the following words:

"23. There is no conflict in the two decisions of this Court, namely, **Goutam Kundu** and **Sharda**. In **Goutam Kundu** it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In **Sharda** while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course".

33 Now, what follows from the above analysis of the ratios laid down in **Goutam Kuntu** (supra) and in **Sharda** (supra) is that it is not that the Courts have no power to order DNA test. It can order, but

it cannot be a routine matter because it involves personal freedom of an individual. Only in rare cases and real cases such a test can be ordered, provided there is a prima facie case for ordering such a test. (See **Bommi and another vs. Manirathanam (2004(5) CTC 182)**).

34 In the light of the above elucidation, we shall revert back to our case.

35 The 2nd respondent might be ready for such a test but she cannot bind her daughter/ revision petitioner also for such a test. Each individual has got liberty, feelings and passion of his own.

36 We must alive to certain aspects in this case. 1st respondent had lived with the 2nd respondent happily at the nascent stage of their matrimonial life. They were happy couples as it is in most of the cases. Sometimes, ego clash crept in in their matrimonial life. It may be mainly due to lack of understanding between them.

37 The reason that propelled the 1st respondent to raise his eyebrows as to the very birth of the revision petitioner is laconic. It is that somebody told him that the revision petitioner does not resemble him. It is sheer absurdity. If this is accepted, many

children will be stranded in the street without legal parentage. It will be promoting of bastardy. The 1st respondent lived with the 2nd respondent. If his ideology is accepted then there will be more casualties in society. This revelation came to him after he had lived a full matrimonial life with the 2nd respondent. It is too big a pill to swallow.

38 We have seen the contours of Section 112 of the Evidence Act. Revision petitioner was born many years ago, at a time when the respondents/spouses led their happy married life. Onus is upon the 1st respondent to show that he had no access to the revision petitioner's mother. In this case, he did not do so.

39 The alleged behaviour of the 2nd respondent, who is the mother of the revision petitioner is different from the revision petitioner. The revision petitioner is not a party to the matrimonial dispute between the respondents. Dragging the revision petitioner also into a murky affair at the cost of her personal life is very difficult to digest.

40 The revision petitioner will have her own ideology, perception of life. She revolted against giving of her blood sample for DNA test for the sake of a crude thinking of her biological father. She is not for a dangerous test. Absolutely, there is no prima facie case in this case to order for D.N.A. Test.

41 We are not subscribing to the view of the trial Court that such a test will be beneficial to the couples and the view of the Trial Court that no prejudice will be caused to the parties in undergoing such a test is absurd and it is a poor view.

42 Judges must also alive to the sensitiveness involved in the cases coming before them. Certain cases/issues must be handled with much care and caution like handling explosive substances.

43 In view of the foregoing analysis, I hold that the order of the trial court is flawed.

44. Ordered as under:

(i) This revision succeeds.

(ii) The impugned order passed by the learned Sub Judge, Arni, Tiruvannamalai District in I.A.No.32 of 2008 in HMOP No.2 of 2008 is set aside.

(iii) I.A.No.32/2008 is dismissed.

(iv) Consequently, connected miscellaneous petition is closed. However, there is no order as to costs.

(v) Uninfluenced by any observations in this order, the learned Sub Judge, Arni is directed to dispose of H.M.O.P.No.2 of 2008 expeditiously, preferably within four months from the date of receipt of a copy of this order.

24.3.2017

Speaking/Non Speaking order

Index : Yes / No

Internet : Yes / No

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Note: As this order deals with an important aspect in gender justice, the Registry is directed to place this order before My Lord, the Hon'ble Acting Chief Justice for orders to circulate the same among the Judicial Officers in this State and in Union Territory of Puducherry for their guidance.

To

1.The Principal District Judge,

Tiruvannamalai.

2. The Sub Judge,

Arni,
Tiruvannamalai District.

DR.P.DEVADASS, J.,

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Copy to:

1. The Registrar (Judicial)
2. The Assistant Registrar,
(Appellate Side)
High Court, Madras.

3. The Director,
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