

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.673 OF 2015

ORDER:

This criminal petition is filed under Section 482 of Cr.P.C to quash the order in CrI.M.P.No.388 of 2012 in M.C.No.98 of 2013 pending on the file of the Judge, Family Court-cum-IV Additional District and Sessions Judge's Court at Vijayawada.

For the sake of convenience, the parties will hereafter be referred as arrayed in CrI.M.P.No.388 of 2014 in M.C.No.98 of 2013. Petitioners 1 & 2 respectively are none other than the wife and son of the respondent.

The petitioners 1 & 2 filed M.C.No.98 of 2013 before the Judge, Family Court claiming maintenance against the respondent raising a specific contention that the petitioners have no means to maintain themselves and that the respondent failed to provide any maintenance while neglecting and refusing to maintain the petitioners.

The respondent raised a specific contention in the counter affidavit that the first petitioner is leading adulterous life and the second petitioner was not born to him due to sexual intercourse with the respondent. Therefore, the respondent questioned his paternity and denied maintenance.

M.C.No.398 of 2013 was filed by the petitioners. The petitioners filed a petition under Sections 126(2) and 254(2) of Cr.P.C read with Section 45 of the Indian Evidence Act to refer the respondent for DNA test to decide his paternity.

The respondent filed counter raising several contentions regarding maintainability of the petition, as well as the marital relationship between the first petitioner and the respondent is subsisting, there is no possibility of access of the petitioner and a presumption would arise under Section 112 of Indian Evidence Act and by drawing such presumption the Court cannot conclude that the second petitioner is a son born during wedlock between the first petitioner and the respondent. It is contended that the respondent is entitled to deny the paternity of child and cannot compel him to undergo DNA test against his wish, since it affects the right of privacy and the child cannot be bastardized, prayed to dismiss the petition.

Upon hearing the argument of the both the counsel, the Judge, Family Court-cum-IV Additional District and Sessions Judge, Vijayawada allowed the petition filed by the petitioners directing the respondent to give blood samples before the Superintendent, Government Hospital, Vijayawada on or before 16.12.2015 for DNA medical test to decide the paternity of the respondent, failing which the petitioners are provided with liberty to take steps.

The respondent in CrI.M.P.No.388 of 2014 in M.C.No.98 of 2013 being aggrieved by the order passed by the Judge, Family Court, preferred the present criminal petition.

During hearing, learned counsel for the petitioner herein Sri Challa Ajay Kumar contended that a child cannot be bastardized referring him to DNA medical test along with respondent on the ground that the third respondent herein is not

born to the petitioner herein and the second respondent, since it would seriously affect the future of the third petitioner herein. It is also contended that the proceedings under Section 125 are summary in nature and in such summary proceedings, the paternity cannot be decided.

It is further contended by the learned counsel for the petitioner herein that the Judge, Family Court on erroneous appreciation of law allowed the application without properly appreciating the legal position and failed to consider the subsisting marital relationship between the petitioner and the second respondent herein and the statutory presumption under Section 112 of Indian Evidence Act and prayed to set-aside the order under challenge.

Learned counsel for the petitioner placed reliance on the judgments of the Supreme Court in **Dipanwita Roy v. Ronobroto Roy¹**, **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another²**, **Banarsi Dass v. Teeku Dutta (Mrs) and another³**.

On the strength of those principles, learned counsel for the petitioner herein Sri Challa Jaya Kumar sought to allow the petition by setting aside the impugned order under challenge.

Per contra, learned counsel for the second respondent herein Sri P. Nagendra Reddy would contend that living in adultery is not a ground for disentitlement to claim maintenance by the wife. Similarly, the third respondent herein is a son born to the second respondent herein through sexual intercourse with the petitioner

¹ (2015) 1 Supreme Court Cases 365

² (2010) 8 Supreme Court Cases 633

³ (2005) 4 Supreme Court Cases 449

herein. In such a case, the third respondent herein is entitled to claim maintenance from the petitioner herein. When there is any amount of doubt about the paternity of the petitioner herein, scientific evidence which accurately proves the paternity is only DNA test. Even otherwise, the presumption under Section 112 is only rebuttable presumption and instead of resorting to draw inferences due to possibilities of access between the wife and husband, it is better to rely on scientific evidence which accurately decides the paternity. That apart, the petitioner herein is entitled to rebut the presumption under Section 112 of Indian Evidence Act, referring the petitioner herein and third respondent herein to undergo DNA test is one of the modes to rebut or dispel the presumption under Section 112 of Indian Evidence Act, since oral evidence would not suffice to dispel such statutory presumption under Section 112 of Indian Evidence Act. Therefore, referring the petitioner herein and third respondent herein to DNA test would not affect the right of the petitioner and it would not incriminate him violating constitutional right under Article 20(3) of Constitution of India. It is also contended by the learned counsel for the second respondent herein that the order passed by the Family Court is free from any legal infirmity.

Learned counsel for the second respondent placed reliance on the judgment of the Apex Court **Dipanwita Roy**¹ case, **Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another**⁴ and finally prayed to dismiss the petition affirming the order passed by the Judge, Family Court, Vijayawada in CrI.M.P.No. 388 of 2014 in M.C.No.98 of 2013.

⁴ (2014) 2 Supreme Court Cases 576

In view of rival contentions, the point that arose for consideration is

“whether referring the second petitioner and the respondent to DNA test to determine the paternity of the child in a proceeding under Section 125 of Cr.P.C which is summary in nature is sustainable. If not, the order under challenge is liable to be set-aside”.

Undisputedly, the first petitioner and the respondent are legally married wife and husband and on the ground that the petitioners were neglected and refused for grant of maintenance by the respondent, the petitioners filed M.C.No.98 of 2013 on the file of the Judge, Family Court, claiming maintenance. There is also matrimonial litigation pending before the Judge, Family Court in O.P.No.426 of 2013 filed under Section 9 of Hindu Marriage Act by the first petitioner for restitution of conjugal rights and it is being contested by the respondent.

In the M.C.No.98 of 2013, the respondent specifically contended that the first petitioner is leading adulterous life and the second petitioner was not the son born due to sexual intercourse with the first petitioner and the respondent, thereby they are not entitled to claim maintenance under Section 125 of Cr.P.C.

Further, in M.C.No.98 of 2013, the petitioners filed CrI.M.P.No.388 of 2014 under Sections 126(2) & 254(2) of Cr.P.C and Section 45 of Indian Evidence Act to direct the respondent to give blood samples and direct the Superintendent, Government Hospital, Vijaywada to take blood sample of the 2nd petitioner and the respondent and to send those blood samples to Forensic

Science Laboratory, Hyderabad for conducting DNA test to decide the issue that the respondent is biological father of the second petitioner. The said petition was resisted by the respondent by raising various contentions which I referred in the earlier paragraphs. However, the Judge, Family Court allowed the application filed by the petitioners.

The main contention of the learned counsel for the petitioner herein Sri Challa Ajay Kumar is that, in case the third respondent herein is declared as not a son born through the petitioner herein to the second respondent herein, it amounts to bastardizing the third respondent herein, which is impermissible under law. Apart from that, the proceedings in M.C.No.98 of 2013 are summary in nature, thereby the paternity of a child cannot be vested in a maintenance case filed under Section 125 of Cr.P.C. Added to that, there is a legal presumption under Section 112 of Indian Evidence Act to draw presumption that the child born to the second respondent herein was due to sexual intercourse between the petitioner herein and the second respondent hereon only, until it is proved that there is no access between them. Consequently, the petitioner herein can rebut the presumption by adducing independent evidence or by eliciting something in the cross-examination of the witnesses examined on behalf of the respondents 2 & 3 herein during trial, but cannot resort to extreme step of referring both the second petitioner and respondent to DNA test, in violation of right of privacy of the petitioner herein.

In view of the specific contention, it is necessary to advert to the law laid down by the Apex Court in various judgments.

Learned counsel for the respondent relied on the judgment of the Apex Court in **Nandlal** case, where in paragraph 17 of the judgment, the Supreme Court 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 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.”

If the law laid down by the Apex Court in the aforesaid judgment is accepted, one of the modes of dispelling presumption under Section 112 of Indian Evidence Act is DNA Test and in view of more accuracy attached to the said DNA Test, the Court instead of banking upon presumption under Section 112 of Evidence Act, can order for DNA Test for more accurate result, the result in DNA Test will prevail over presumption under Section 112, since it is based on scientific investigation.

In **Goutam Kundu v. State of West Bengal**⁵, the Apex Court held that Section 112 of Indian Evidence Act requires the party disputing the paternity to prove non-access in order to dispel the presumption. ‘Access’ and ‘Non-Access’ mean the existence of opportunities for sexual intercourse; it does not mean actual ‘cohabitation’.

⁵ (1993) 3 SCC 418

In the **Goutam Kundu**⁵ case, the Supreme Court relied on the judgments of **Nandlal**⁴ and **Bhabani Prasad Jena**² cases and held that if the child is referred to DNA Test and if ultimately found to be son who is not born to the same father, then he would be bastardized. But in the later judgments, more particularly, in the judgment of **Nandlal**⁴ case, the Apex Court is of the view that reference of a child to DNA Test is no way effect the case of the petitioners. If the scientific examination proves that the child is born due to sexual intercourse between the first petitioner and the respondent, the child would be entitled to claim maintenance and that apart, references of the child whose paternity is in dispute to DNA Test is one of the modes to dispel the presumption under Section 112 of the Act.

Where there is a dispute regarding the wife living in adulteration filed under Section 13(1)(2) of Hindu Marriage Act, the respondent therein wanted to take advantage of the presumption under Section 112 of the Indian Evidence Act regarding paternity, subject to satisfying the requirements contained therein.

In **Banarsi Dass**³ case, the Supreme Court highlighted the main object of a succession certificate is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of the deceased persons. The Apex Court also held that it is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in **Goutam Kundu**⁵ case. Even in the judgment of the Apex Court,

the Court did not conclude that the parties cannot be referred to DNA test in any deserving cases as extreme step of referring the parties to DNA test is permissible, but not as a matter of routine.

The Apex Court in **Dukhtar Jahan v. Mohd. Farooq**⁶, discussed about the presumption under Section 112 and held that Section 112 lays down that if a 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 and the mother remains unmarried, it shall be taken as 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. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman.

Thus, in view of the law laid down by the Apex Court in the judgment referred supra, the presumption under Section 112 is not rebuttable presumption, though a conclusive proof is lead to presumption, still such presumption can be dispelled by the parties who is disputing the paternity by any modes of proof that

⁶ (1987) 1 SCC 624

there was no access between the first petitioner and the respondent.

One of the contentions of the learned counsel for the petitioner herein is that, in a maintenance case, such extreme step to refer the second respondent herein and the petitioner herein to undergo DNA Test cannot be ordered, since the proceedings are summary in nature under Section 125 of Cr.P.C.

No doubt, the proceedings under Section 125 of Cr.P.C are summary in nature and incorporated with a view to provide immediate relief to the starving wife and children and it is intended to provide a speedy remedy to such persons. But, at the same time, certain safeguards are provided, more particularly, under Section 125(4) of Cr.P.C. According to it, when the wife is living in adulterous life, she is disentitled to claim maintenance from her husband. When the husband raised a specific plea, question of paternity of the second petitioner and so also leading of adulterous life by the first petitioner would deny maintenance, though he is under obligation to prove both these contentions by any legal means. In such a case, ordering the petitioners to undergo DNA Test cannot have any effect.

In a **Madharapu Prashu Ram v. Shaik Jainbhee**⁷, this Court in a petition filed under Section 125 of Cr.P.C upheld the order passed by the Trial Court referring the parties to undergo medical test and relied on **Goutam Kundu**⁵ case, where the following conclusions are arrived:

⁷ 2013 CrI.L.J. 1077

“80. So viewed, the implicit power of a court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy.

81. To sum up, our conclusions are:-

(1) A matrimonial court has the power to order a person to undergo medical test.

(2) Passing of such an order by the court would not be in violation of the right to personal liberty under Article [21](#) of the Indian Constitution.

(3) However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

A detailed discussion of earlier decisions, which are of smaller Benches, will only lead to prolixity, which should be zealously avoided. However, in *Sham Lal*, a Two-Judge Bench has held that once the validity of marriage is proved and parents have access to each other, adultery of wife which though amounts to very strong evidence, is, by itself, not quite sufficient to repel the presumption of legitimacy of children born from such wedlock and that is undesirable to enquire into paternity of a child in such cases.

Hence, in **Goutam Kundu**⁵ case the Apex Court concluded that in matrimonial cases, the Court has power to order in person to undergo medical test.

Similarly, in **Syed Mohd. Ghouse v. Norunnisa Begum**⁸ this Court discussed **Gautam Kundu**⁵ case and observed that the marital tie between the parties, *inter se*, was not in dispute in that case and only the paternity of the child was every much in dispute. Taking the recourse to the presumption under Section 112 of the Evidence Act, the Apex Court was of the view that it is for the appellant to prove non-access so as to dispel the presumption of legitimacy that could be drawn under Section 112 of the Evidence Act.

⁸ 2001 (1) ALD (CrI.) 590 (AP)

That was a position prior to the advent of the DNA Test. DNA Test is now a developed, which conclusively determines, with reference to the gene characteristics, the paternity of a child. The Apex Court expressed its concern about the ramifications of such a blood test in the interest of the child. However, the decision does not say that such blood test cannot be ordered at all. It all depends upon the facts of a particular case. Nonetheless, the Apex Court was so emphatic on one aspect that no one can be compelled to give sample of blood for analysis.

It is thus obvious that before ordering the blood test, either for DNA or other test the Court has to consider the facts and circumstances of the given case and the ramifications of such an order. But the Court cannot compel a person to give the sample of blood. However, if that person refuses to give blood sample without any valid reason the Court is at liberty to draw the inference as a necessary corollary in sequel thereof.

In **Soma Rama Chandram v. The State of Andhra Pradesh represented by its Public Prosecutor, A.P. High Court and ors⁹**, a similar issue in maintenance case filed under Section 125 came up before this Court, where the child and mother claimed maintenance and father disputed the paternity of the child and this Court after reviewing various judgments of the Apex Court and other High Courts, considered the testimonial compulsion and held that it is applicable to criminal cases by virtue of Article 20(3) of Constitution and when there is a paternity dispute, it is the duty of the party to raise such paternity dispute to prove his contention by

⁹ 2013 CrI. L.J. 1351

placing necessary evidence. But when scientific evidence is available, the Court can order for DNA test and the Court may also compel the parties to undergo such test.

DNA test in a matter relating to paternity of a child should not be directed by the Court as a matter of course or in routine manner, whenever such a request is made. The Court has to consider diverse aspects including presumption under Section 112 of Indian Evidence Act; pros and cons of such order and test of 'eminent need' whether it is not possible for the Court to reach the truth without use of such test. The result of genuine DNA test may not be enough to escape from the conclusiveness of Section 112 of Indian Evidence Act. Where there is apparent conflict between right of privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach truth, the Court must exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter DNA test is eminently needed.

Similarly, in a matter where paternity of a child is in issue before the Court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the Court must be reluctant in the use of such scientific advances and tools which result in invasion of right of privacy of an individual and may not only prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes, the result of such scientific test may bastardize an

innocent child even though his mother and spouse were living together during the time of conception. Any order for DNA test can be given by the Court only if a strong *prima facie* case is made out for such case (vide **Bhabani Prasad Jena**²).

On the same lines, this Court in **Daru Gopal Lunani v. Sira Gopal Lunani and others**¹⁰ single Judge of this Court opined that DNA test should not be directed as a matter of routine and such direction can be given only in deserving cases where it is not possible to reach the truth of paternity without use of test and where strong *prima facie* material about marriage between the parties and husband gaining access to wife has been produced before the Court by the person claiming paternity relying on **Goutham Kundu**⁵, **Sharda v. Dharmpal**¹¹, **Banarsi Dass**², **Ramkanya Bai v. Bharatram**¹².

Recently, in **Govindula Sathaiah v. Govindula Manjula**¹³, following **Dipanvita Roy**¹ case, held that in case it is impossible to dispel the presumption under Section 112 of Indian Evidence Act, the Court can order DNA test to rebut the presumption by scientific evidence.

Long ago in **B. Vandana Kumari v. P. Praveen Kumar**¹⁴, this Court held that to dislodge the conclusiveness of legitimacy of the child declared under Section 112 of the Evidence Act, the onus of proof is on the husband to establish that his wife concerned prior to marriage (from the facts of the decision) and DNA test is

¹⁰ 2014 (1) ALT 396

¹¹ AIR 2003 SC 3450

¹² 2010 (1) SCC 85

¹³ 2016 (3) ALD 572

¹⁴ 2007 (1) ALT 193

one of the modes to prove that the child was not born due to sexual intercourse, even if test reveals that the child was not born due to sexual intercourse with husband, would not decide the core issue in the main O.P. However, it is only opinion evidence; it is a piece of evidence to establish the case of the husband to dispel the presumption under Section 112 of Indian Evidence Act, thereby reference to DNA test is justified.

The law is consistent on power of the Court to order DNA test, but, certain restraint must be maintained to glass over or protect the innocent child from the stigma of bastardizing. On the date of enacting Indian Evidence Act, scientific methods with accuracy were not available and even the legislature might not visualize such accurate scientific methods to decide the paternity of a child, so the presumption based on inferences under Section 112 of the Act was incorporated. The presumptions are based on necessity but due to passage of time, advanced scientific methods are available to decide paternity with more accuracy, when accurate scientific tests are available, drawing presumption based on oral evidence or inferences based on circumstances may some times difficult. When advanced scientific method with accuracy is readily available, placing reliance on oral evidence of a witness who can easily tell lies depending on circumstances, again it depends on credibility of a witness.

Overall view of the Courts is that stigma cannot be attached to an innocent child by restoring to scientific methods to decide paternity. Yet, it is the duty of the Courts to protect the rights of father also. If father is not provided an opportunity to dispel the

presumption under Section 112 of Indian Evidence Act by scientific evidence, it amounts to denial of opportunity to bring on record the truth. When no other accurate mode to dispel the presumption is available, husband can seek a direction to undergo DNA test which is accurate, but wife and child being requested by notice filed petition for such relief, without hesitating to stigma.

In **Maria Margarida Sequeira Fernandes v. Erasmo Jack De Sequeira**¹⁵, the Supreme Court in paragraphs 52, 41, 52, 38 and 51 held as under:

“Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth which is the foundation of justice. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and Judges.

It must be the endeavour of all the judicial officers and Judges to ascertain truth in every matter. A Judge in the Indian system has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that “every trial is a voyage of discovery in which truth is the quest”. In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law. In the administration of justice, Judges and lawyers play equal roles. Like Judges, lawyers also must ensure that truth triumphs in the administration of justice.”

(vide *Mohanlal Shamji Soni v. Union of India* [1991 SCC (Cri) 595], *Ritesh Tewari v. State of U.P.* [(2010) 10 SCC 677], *Jones v. National Coal Board* [(1957) 2 QB 55], *Chandra Shashi v. Anil Kumar Verma* [(1995) 1 SCC 421]

The whole idea of voyage of trial is to find out truth when wife want to disprove adulterous life, who allegedly gave birth to a child in the course of adulterous, by resorting to more accurate and scientific method, the Courts may lean towards ordering DNA test to do justice to both parties. But, in the interest of child, the

¹⁵ (2012) 5 Supreme Court Cases 370

Courts must be slow in passing such orders; however, it is the duty of Court to strike balance between the rights of both parties who approached the Court. In most of the decisions referred above, the law declared is consistent and leaning towards innocent child, but the Courts did not consider the liability of innocent husband to pay maintenance to his wife. Who is allegedly leading adulterous life and payment of maintenance to a child not born due to sexual intercourse with his wife, sometimes, if paternity of a child is accepted in maintenance case though its scope of enquiry is limited, it will have devastating effect in future, such child may claim right in the property and it is painful to any husband to pay maintenance to such wife leading adulterous life and to a child not born through him; in such case who will palliate the pang of such misfortune husband is again a question. Fortunately, wife and child allegedly born due to sexual intercourse between the petitioner and the second respondent, foreseeing serious consequences, more particularly, stigma on the child, filed the petition to prove her chastity, to claim maintenance and to wipe out the stigma on the child by more accurate and scientific evidence atleast to lead future life from such stigma and to enable the second petitioner herein to make all legitimate legal claim against the petitioner herein, in future. Therefore, the Courts have to strike balance between the rights of both parties and weigh the evidence and decide the matter without giving undue preference to any of the parties. In addition to the guidelines laid down by the Apex Court in **Goutam Kundu**⁵ case, the following may also be taken into consideration:

- (a) strike balance between rights of both parties;
- (b) exercise such power without giving undue preference to any of the parties before the Court;
- (c) Exercise such power to unearth truth by accurate suitable scientific evidence instead of relying on presumption based inferences.

Turning to the facts of the present case, respondent denied maintenance to both the petitioners on the ground of first petitioner leading adulterous life and second petitioner is not the son born to first petitioner due to sexual intercourse with respondent. In those circumstances, the petitioners filed petition to issue direction to the respondent to undergo DNA test to rebut the presumption under Section 112 of Indian Evidence Act, which is more accurate than inference, which is the best mode of proof of paternity of child and except this method, no other accurate method is available. Hence, direction issued by the Trial Court cannot be found fault, consequently the order of Trial Court is liable to be confirmed, as I find no ground to interfere with the findings of Trial Court while exercising power under Section 482 of Cr.P.C which is limited.

In the result, the criminal petition is dismissed confirming the order in CrI.M.P.No.388 of 2012 in M.C.No.98 of 2013 pending on the file of the Judge, Family Court-cum-IV Additional District and Sessions Judge's Court at Vijayawada.

JUSTICE M. SATYANARAYANA MURTHY

Date:02.01.2017
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