

SMT JUSTICE T. RAJANI

CRIMINAL PETITION No.5536 of 2013

ORDER:

The criminal petition is filed seeking for quash of the order in CRLP.No.21 of 2012 dated 16.04.2013 passed by the IV Additional Sessions Judge, Khammam.

2. Heard the counsel for the petitioner, learned counsel for respondents 2 and 3 and the learned Public Prosecutor, who takes notice for the first respondent.

3. The aforesaid petition was filed impugning the orders in CRLMP.No.1640 of 2009 in MC.No.2 of 2008 dated 17.02.2012, which was an order in a petition filed by the petitioner seeking the Court to send the second respondent for DNA test, for ascertaining parentage. When the same was carried in revision, the said order was confirmed. The Court observed that the Legislature has provided presumption of paternity under Section 112 of the Evidence Act, which is to prevent the innocent child from being bastardised. This Court is also on the same reasoning.

4. But the counsel for the petitioner relies on certain decisions of the Supreme Court and this Court which are as under:

NIRMALJIT KAUR v. STATE OF PUNJAB¹ wherein by considering that the dispute between the parties relate to the identity to the child, the Supreme Court allowed DNA test to be conducted.

¹ (2006) 9 SCC 363

NANDLAL WASUDEO BADWAIK v. LATA NANDLAL

BADWAIK² wherein it was held as under:

“10. ... this Court not only once, but twice gave directions for DNA test. The respondents, in fact, had not opposed the prayer of DNA test when such a prayer was being considered. It is only after the reports of the DNA test had been received, which was adverse to the respondents, that they are challenging it on the ground that such a test ought not to have been directed. We cannot go into the validity of the orders passed by a coordinate Bench of this Court at this stage. It has attained finality. Hence, we do not find any merit in the submission of the learned counsel for the respondents.

11. As regards the decision of this Court in the cases of *Goutam Kundu v. State of W.B* [(1993) 3 SCC 418], *Banarsi Dass v. Teeku Dutta* [(2005) 4 SCC 449] and *Bhabani Prasad Jena v. Orissa Sate Commision for Women* [(2010) 8 SCC 633], the same have no bearing in the facts and circumstances of the case. In all these cases, the court was considering as to whether facts of those cases justify passing of an order for DNA test. When the order for DNA test has already been passed, at this stage, we are not concerned with this issue and we have to proceed on an assumption that a valid direction for DNA test was given.”

It was observed that when Section 112 of the Evidence Act was enacted, the scientific advancement, to the extent of conducting DNA test was not even in contemplation of the legislature and the result of DNA test is said to be scientifically accurate and although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. It was observed that the presumption may afford a legitimate means of arriving at an affirmative legal conclusion, while the truth or fact is

² (2014) 2 SCC 576

known, there is no need or room for any presumption; When there is evidence 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.

DIPANWITA ROY v. RONOOTO ROY³ wherein it was held that the prayer of the husband for conducting DNA test was aimed at to establish the alleged adulterous behaviour of wife and the issue of legitimacy of son was accidentally involved therein. Hence, Section 112 of the Evidence Act is not strictly attracted to the case; Without DNA test it would be impossible for husband to establish the alleged infidelity of wife. The case in *Kamti Devi V. Poshi Ram* [(2001) 5 SCC 311] was also referred to by the Supreme Court wherein Section 112 presumption was held to be as strong as not to be rebutted by the result of DNA test.

MOTHYUKURI SHIVAKUMAR v. MOTHUKURI NARAYANMMA⁴ wherein this Court held that the Court can ask the husband to undergo the test when there is denial of marriage between the petitioner and the respondent and the paternity of the child. The said judgment was rendered in a maintenance claim.

5. Though this Court is initially disinclined to accept plea of the counsel for the petitioner to send the second respondent for DNA test, by considering that the same would affect the psyche of the child and

³ (2015) 1 SCC 365

⁴ 2008 CRI,L.J. 4183

also as the facts of the case would show that the parties were married long back, the counsel for the petitioner, however, convinces this Court by stating that though the marriage took place in the year 1995, the respondent left him and did not return after the birth of the child and that there was a divorce petition filed by the respondent, which was dismissed for default and in the divorce petition, filed by the petitioner herein, she remained *ex parte* thereby allowing the Court to grant a decree of divorce and hence, the claim of the maintenance by her for the child, whom he alleges to be not that of his, is not sustainable.

Hence, following the law laid down by the Supreme Court, the criminal petition is allowed setting aside the order in CRLP.No.21 of 2012 dated 16.04.2013 passed by the IV Additional Sessions Judge, Khammam. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

December 14, 2017
DSK

T. RAJANI, J

