

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.184 of 2018

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1. Aftab Alam, S/o Mohamad Kayamuddin, Resident of Village-Saran, P.S. Doriganj, District-Saran at Chapra.

.... Appellant/s

Versus

1. Sitara Khatoon Daughter of Mohamad Tahir Hussain, Resident of Village-Mohan Sekhpura, P.S. Amnour, District saran.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Dharmendra Kumar Sinha

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR
JHA
ORAL ORDER

6 21-08-2018 Heard the learned counsel for the petitioner.

Nobody appears on behalf of the respondent in spite of service of notice.

2. The petitioner has filed this Civil Misc. petition against the order dated 06.09.2017 passed by the learned Principal Judge, Family Court, Saran at Chapra in Divorce Case No. 179 of 2015 (Annexure-9) by which the petition of the petitioner for D.N.A. test of the female baby has been rejected.

3. The factual matrix of the case is that the petitioner filed a divorce case under Section 307 of Mohammadan law against respondent stating that petitioner and respondent were married on 06.04.2015 according to Mohammandan rites and customs. When the respondent came to the house of petitioner



after marriage the family members of the petitioner noticed that the respondent is pregnant from before her marriage with the petitioner. The petitioner took his wife to Dr. Madhu Rai on 23.06.2015 and the doctor after sonography found that respondent was carrying pregnancy of 16-17 weeks. The father of the respondent was informed who came on 24.07.2015 and took the respondent to Dr. Sabiha Naseem at Chapra. Again the doctor examined the respondent and found that she was carrying pregnancy of 20 weeks. The father of respondent took her with him in presence of Officer-in-Charge, Bhagwan Bazar P.S. on 09.08.2015. The petitioner divorced the respondent by uttering Talak three times in presence of witnesses and Mehar was also returned. Consequently, the petitioner filed divorce case. Thereafter, the petitioner filed petition for D.N.A test of the baby of the respondent.

4. The respondent/wife filed written statement as well as rejoinder to the petition denying the allegation that the respondent has got any extra marital relation. The respondent stated that the marriage was solemnized on 06.03.2015 and on account of co-habitation with her husband she conceived. The learned Principal Judge after hearing both sides rejected the petition of the petitioner for D.N.A test of the female child



declaring Talla pronouncement by him as valid and he has to prove the pronouncement of triple Talak and, therefore, there is no necessity for D.N.A. test of the female child borne out of the wedlock of the petitioner and respondent. After hearing both sides the Principal Judge, Saran dismissed the petition of the petitioner for DNA test of the child.

5. The learned counsel for the petitioner submits that petitioner has categorically stated that he pronounced triple Talak only because his wife was carrying pregnancy from before her marriage with him. Dr. Madhu Rai and Dr. Sabiha Naseem after holding sonography of the abdomen of respondent came to a definite finding that respondent was carrying pregnancy of 16-17 weeks and 20 weeks respectively in their report dated 23.06.2015 and 24.07.2015. Therefore, the opinion of doctors is essential in order to prove that the respondent was carrying pregnancy before her marriage on account of her illicit relation with someone else but the learned Principal Judge has illegally rejected the petition of the petitioner.

6. The only question arises for consideration whether the learned Principal Judge, Family Court is justified in rejecting the petition of the petitioner for D.N.A. test of female child borne out from the wedlock of the petitioner and respondent?



7. The petitioner claims that his marriage was solemnized on 06.04.2015 and immediately after marriage his wife went to his house but family members of his house noticed that his wife was carrying pregnancy. On such, he took his wife to Dr. Madhu Rai who held sonography on 23.06.2015 and came to a finding that the respondent was carrying pregnancy of 16-17 weeks and on such finding the petitioner inferred that his wife was having sexual relation with someone else from before her marriage with the petitioner. This inference lead to pronouncement of triple Talak and petitioner filed the petition for declaration of triple Talak as valid.

8. It is evident from the rejoinder and written statement filed on behalf of the respondent in the court of Principal Judge, Family Court, Saran that respondent stated that her marriage was solemnized on 06.03.2015 and she disclosed that she conceived immediately after her marriage with the petitioner. The doctor in her medical report on the basis of sonography came to the finding that respondent was carrying pregnancy of 16-17 weeks on 23.06.2015. When another sonography was done by Dr. Sabiha Naseem on 24.07.2015 she opined that respondent was carrying pregnancy of about 20 weeks. Even if the report of the doctors are taken to be true, although the reports are speculative in



nature and show that the same are not for the medico legal purpose, the reports only show estimated age of foetus in the womb. It is the definite case of the respondent that she conceived on account of co-habitation with her husband immediately after marriage. For the first time sonography was done on 23.06.2015 and if she conceived immediately after marriage the age of foetus may be about 13-14 weeks and on such estimated age of foetus no definite inference can be drawn that the respondent has any sexual relation with a person other than her husband from before her marriage. There is presumption under Section 112 of the Evidence Act about the legitimacy of the child during the survival of marriage and unless conclusive presumption is rebutted as provided under Section 112 of the Evidence Act, the order for DNA test is not required. In the case of **Goutam Kundu v. the State of West Bengal, (1993) 3 SCC 418** the Apex Court laid down the condition to order for D.N.A. test in paragraph 26 of the judgement which reads thus:-

"(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."

9. The Apex Court in the case of **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Woman and others** reported in **(2010) 8 SCC 633** considered the desirability of D.N.A. test and held in paragraph 23 of aforesaid judgement that when there is apparent conflict between the right to privacy of a person not to submit himself/herself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on the consideration whether for a just decision in the matter, DNA test is eminently needed. DNA is a matter relating to paternity of a child and should not be directed by the Court as a matter of course or in a routine manner whenever such a request is made, the court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of



such test. The result of DNA test may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

10. In the present case, the petitioner only seeks pronouncement of triple Talak valid and, therefore, on the facts and circumstances stated above, I find that the petition for DNA test of the female child has rightly been rejected by the learned Principal Judge, Family Court. Thus, I find no merit in this Civil Misc. petition and the same is, accordingly, dismissed.

(Prabhat Kumar Jha, J)

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