

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1266 of 2016

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1. Indu Kumari W/o Durganand Yadav & D/o Laxmi Prasad Yadav
Resident of Ward No.-4, Gauravgarh, Police Station- Supaul, District-
Supaul (Bihar).

.... Appellant/s

Versus

1. Durganand Yadav S/o late Ishwar Yadav, Resident of Village- Kumhait,
Post Office- Laudh, Police Station & District- Supaul (Bihar).

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sunil Kumar Singh

For the Respondent/s : Mr. Shashi Bhushan Prasad

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR

JHA

ORAL ORDER

9 05-07-2018

Heard both sides.

2. The petitioner has filed this Civil Misc. petition for setting aside the order dated 17.08.2016 passed by the learned Principal Judge, Family Court, Supaul in Matrimonial Case No. 46 of 2013 whereby the learned Principal Judge ordered for D.N.A. test of the children borne out of the wedlock of the petitioner and her spouse and by the same impugned order also allowed the amendment petition of the respondent/ husband dated 09.02.2016.

Two questions arise for consideration:-

(i) Whether the learned Principal Judge, Family Court is justified in ordering for D.N.A. test of the children borne out of the wedlock of the petitioner/wife and respondent/husband without pleading for non-access to his wife during the time of conception and they were not living together and the D.N.A. test can be ordered when the respondent/ husband is not making out a prima facie case of adultery against his wife/



petitioner?

(ii) Whether the Principal Judge, Family Court is justified in allowing the amendment petition filed by the husband even though that clearly amounts to withdrawal of admission of the husband that the husband and wife live together till the year 2009?

3. The petitioner is opposite party in the court below. The marriage of Durganand Yadav/ respondent-husband with Indu Kumari/petitioner-wife was solemnized in the year 1993. The husband asserts that the wife lived with him for 15 days and thereafter she returned to her parents' house. The wife persuaded her husband to settle in his Sasural but the husband continued to visit his Sasural. The wife was always looking down at him and she got a Government job. The husband further asserted that the wife always threatened him to re-marry. The husband came to know about the extra marital relation of his wife, who gave birth to a daughter. The wife lodged Supaul P.S. case No. 177 of 2009 under Section 498A and other Sections of the IPC. Indu Kumari and her brothers also lodged Supaul P.S. case No. 214 of 2009 and implicated the husband in G.R. case No. 773 and 777 of 2009. The husband filed Matrimonial case No. 80 of 2009 under Section 9 of the Hindu Marriage Act for restitution of conjugal rights and the same is still pending. The husband also filed divorce case being Matrimonial Case No. 46 of 2013. The husband asserted that he has been living separately for last 18 years and his wife gave birth to a child.

4. The wife filed written statement denying the assertions made by her husband in the divorce case and she



asserted that from the date of her marriage her husband and his family members subjected her to different sorts of torture. She got job and even thereafter her husband and his family members used to snatch her salary and subjected her to physical and mental torture, only then she filed Supaul P.S. case No. 177 of 2009 under Section 498A and other Sections of the IPC. Supaul P.S. case No. 214 of 2009 was instituted against her husband only because her husband, who was living with her, in the house situated in Ward No. 4, Supaul town forcibly took away her all belongings and put lock in the house and only thereafter the husband filed Matrimonial case No. 80 of 2009 in order get bail but still husband and wife lived together in the house situated in RBT road in Supaul town. The wife asserted that husband and wife lived together. She further asserted that husband in the matrimonial case filed for restitution of conjugal rights admitted that wife gave birth to a female child out of their wedlock.

5. During the pendency of matrimonial suit the husband filed a petition on 06.09.2014 for conducting D.N.A. test of the child and the father. The husband filed another petition on 09.02.2016 for amendment of plaint. The wife/ opposite party in the matrimonial suit filed rejoinder asserting the facts stated by the husband himself in the petition for restitution of conjugal rights in which the husband admitted that children borne out of their wedlock and the husband also prayed for custody of the children but when wife along with her children filed suit to get share in the immovable property of the husband, the husband filed the petition for D.N.A. test of the children as well as a petition for amendment of the plaint taking the grounds of illicit relation of the wife with someone else. By the order dated 17.08.2016 the learned Principal



Judge, Family Court allowed both the petitions of husband and directed for D.N.A. test of the children as well as allowed the amendment petition.

6. The learned counsel for the petitioner submits that the husband in his petition for restitution of conjugal rights as well as in the matrimonial suit has stated that he was on visiting term with his wife and a female child was borne out of the wedlock. The husband filed Matrimonial Suit No. 80 of 2009 for restitution of conjugal rights and the same is still pending for disposal. In the year 2013 the husband filed present matrimonial suit for divorce. The husband has not pleaded anywhere that he got no access to his wife rather the husband admitted that he was on visiting term with his wife till 2009. In the petition for restitution of conjugal rights the husband gave the same address of the wife on which the husband was living. In the case of **Goutam Kundu vs. the State of West Bengal, (1993) 3 SCC 418** the Apex Court has clearly laid down parameters for D.N.A. test. It is submitted that there is a presumption under Section 112 of the Evidence Act about the legitimacy of the child during the survival of the marriage and unless conclusive presumption is rebutted as provided under Section 112 of the Evidence Act, the order for D.N.A. test is not required. The order of D.N.A. test is made only when the facts require eminent need. The order for D.N.A. test is clearly in violation of right of privacy of woman and also has the effect of branding a child as a bastard and the mother as an unchaste woman. It is further submitted that the learned Principal Judge has also erred in allowing the amendment petition which clearly amounts to withdrawal of admission made on oath in the petition for restitution of conjugal rights and thus, the orders suffer from



illegality and cannot be allowed to sustain.

7. On the other hand, while contesting the submission of learned counsel for the petitioner, the learned counsel for the respondent/ husband contended that on the facts and in the circumstances of the case the learned Principal Judge has rightly allowed the amendment petition and also ordered for D.N.A. test in order to arrive at correct conclusion of the wife having extra marital relation.

8. Admittedly, the marriage of the petitioner with the respondent was solemnized in the year 1993. The husband filed petition being Matrimonial Suit No. 80 of 2009 for restitution of conjugal rights asserting therein that his wife always neglected him and behaved cruelly with him. Most of the time his wife was living in her parents' house and the applicant was on visiting terms. She also gave birth to a child. The husband admitted that out of wedlock his wife gave birth to a female child. It is also admitted that the husband filed Matrimonial Suit for restitution of conjugal rights when the wife filed Supaul P.S. case No. 177 of 2009 under Section 498A and other Sections of the IPC making allegation of demand of dowry and torture. There is a series of litigation between two sides before filing of the suit for restitution of conjugal rights. The husband/ respondent has nowhere alleged about the extra marital relation of his wife and illegitimacy of the child. The husband has nowhere stated that he had no access to his wife but even thereafter in the matrimonial case the husband sought for divorce on the ground of cruelty and desertion and also stated about illegitimacy of his first child and prayed for D.N.A. test. By filing a petition on 09.02.2016 the husband also prayed for amendment of the plaint by inserting many sentences and virtually



substituting the original plaint with another plaint stating about the illicit relation of his wife.

9. In the case of *Goutam Kundu vs State of West Bengal* (supra) the Apex Court held in paragraph 26 about the condition to order for D.N.A. test which reads as follows:-

"(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."

10. The Apex Court in the case of ***Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Woman and other reported in (2010) 8 SCC 633*** considered the law laid down in the case of *Goutam Kundu v. State of West Bengal (supra)*, *Sharda v. Dharmpal, (2003) 4 SCC 493*, *Bnarsi Dass v. Teeku Dutta & Anr, (2005) 4 SCC 449*, and held in paragraphs 22 and 23 of the judgement which read thus:-

"22. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and



sensitive aspect. One view is that when modern science gives 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 use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but 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.

23. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself 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 due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child 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".

11. In so far as the present case is concerned, I find that the husband himself in his petition of restitution of conjugal rights admitted the legitimacy of his child borne out of the wedlock and also made prayer for custody of the child but during the pendency of the suit for restitution of conjugal rights he filed



another suit for divorce in the year 2013 only when the wife and her children filed Title Suit for share in the immovable property of the husband and he sought divorce on the ground of cruelty and desertion but later on he prayed for amendment of plaint inserting the grounds of extra marital relation of his wife and illegitimacy of the children but the court ordered for D.N.A. test and allowed the amendment petition without looking into the criteria to order for D.N.A test laid down in the case of *Goutam Kundu v. State of West Bengal* (supra) and also allowed the amendment petition which amounts to withdrawal of admission. The Principal Judge has not taken into consideration the relevant facts and sensitivity of the matter and without taking into presumption of Section 112 of Evidence Act, and the effect of D.N.A. test on the children and on the wife and the conceited intention of the husband in declaring his wife unchaste and bastardizing the children, although admitted the legitimacy of the children and access to his wife till the year 2009 when he file suit for institution of conjugal rights, passed the order in very perfunctory manner.

12. Thus, I find that the impugned order is illegal and not sustainable. Accordingly, the order dated 17.08.2016 passed in Matrimonial Case No. 46 of 2013 is set aside. This Civil Misc. petition is allowed.

(Prabhat Kumar Jha, J)

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