

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

C.R.P. No.6472 of 2017

ORDER:

This Civil Revision Petition is filed by the petitioner aggrieved by the order dated 13.08.2017 in I.A.No.275 of 2017 in HMOP No.51 of 2016 passed by the Senior Civil Judge, Wanaparthy, dismissing the petition filed by the petitioner seeking to order for DNA test with regard to parentage of the boy Rishi Sharan Reddy.

2) Petitioner's case is that the marriage between petitioner and respondent was held on 12.06.2011 at Gopalpet Village as per Hindu rites and customs. Thereafter, respondent stayed at her mother's house at Gopalpet and petitioner also stayed with her, but there was no consummation of marriage and the respondent always exhibited hostile attitude towards the petitioner. Hence, the petitioner left the village on 27.06.2011 and since then he was not in contact with respondent. Thereafter, respondent and her mother shifted their residence to Nagarkurnool without informing the petitioner claiming that she intends to prosecute her TTC Course. Petitioner and his elders tried to convince her to lead marital life but in vain. Meanwhile, petitioner came to know that respondent has begotten a male child at Wanaparthy on 03.03.2012. While the matter stood thus, respondent made a complaint against the petitioner and his family members for the offences under Section 498A IPC and Sections 3 and 4 of Dowry Prohibition Act. Since the respondent was guilty of cruelty and desertion and became mother of a male child without consummation of marriage, petitioner was constrained to file

HMOP No.51 of 2016 for dissolution of marriage wherein he filed I.A.No.275 of 2017 seeking for DNA Test with regard to the parentage of the boy.

- 3) The respondent filed counter and opposed the said petition.
- 4) The Trial Court dismissed the said petition on the observation that consummation or co-habitation is a secret act between husband and wife and it cannot be revealed to anybody except both of them.

Aggrieved, the petitioner filed the present revision petition.

- 5) Heard both sides.
- 6) The point for determination is:

“Whether there are merits in this CRP to allow?”

- 7) **POINT**: The main ground on which the petitioner sought for DNA test to the male child born to respondent is that though his marriage with respondent was held on 12.06.2011, no consummation took place for whatever reason and thereafter himself and respondent lived separately due to some disputes and surprisingly respondent gave birth to a male child on 03.03.2012. He therefore strongly contends, he is not the author of her pregnancy. However, the contention of respondent is that the consummation took place immediately after marriage and the child born is their legitimate son.

- 8) The law on presumptive legitimacy is available under Section 112 of Indian Evidence Act which reads thus:

“Section 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.

The above section propounds the presumption on the aspect of legitimacy of a child who was born during the continuation of a valid marriage between his mother and father. However, with the availability of new technical know how in the form of DNA test to decide the paternity of a child, the Courts started inclining towards the scientific tool in the legal domain. During the course of time, several decisions were delivered on the aspect as to whether or not the parties can be referred to DNA test for deciding the legitimacy of a child.

9) In ***Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another***¹, the Apex Court observed thus:

“Para-13. 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.

¹ 2010 (8) SCC 633

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."

10) In ***Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another***² the Apex Court observed thus:

“Para-15: Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

Para-16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the Appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent No. 2 is the daughter of the Appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the Appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.

² (2014) 2 SCC 576

Para-17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of 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. 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.

Para-18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

Para-19. The husband's plea that he *had* no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the Appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

11) Referring the above two decisions and also other decisions, the Apex Court of late delivered its judgment in **Dipanwita Roy vs. Ronobroto Roy**³ as under:

³ AIR 2015 SC 418

*“Para-10. It is borne from the decisions rendered by this Court in **Bhabani Prasad Jena** (supra), and **Nandlal Wasudeo Badwaik** (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.”*

12) So, from the above precedential jurisprudence, what is pertinent is that by referring the parties to DNA test, since there is a possibility of child being bastardised in a given case though he was born during the continuation of a valid marriage between his mother and another man, the Supreme Court was of the view that reference to DNA test is a delicate and sensitive issue and therefore, depending upon the facts and circumstances of the case, it would be permissible for the Court to direct holding a DNA examination. The Apex Court gave a note of exhortation that if a direction to hold such test can be avoided, it should be avoided. In other words, the parties can be directed to undergo DNA test only when the contentious issue cannot be established by other mode of evidence.

13) Applying the above principle, in the instant case, the contention of the petitioner is that though his marriage was performed with the second defendant on 16.06.2011, there was no consummation at all but surprisingly his wife begot a son on 03.03.2012. That being his case it is difficult for him to establish by positive evidence that there was no consummation of marriage between 12.06.2011 and the period when the

child could have been conceived by the respondent. Therefore, in the instant case, it is extremely difficult for the petitioner to prove that he was not the author of pregnancy of his wife by other evidence except by DNA test. There may be instances where a petitioner in a given case may have other evidence to prove his or her contention. For instance, the husband who resides in abroad disputes the paternity of a child born to his wife who resides in India though the child was born during the subsistence of valid marriage between them. It may be his contention that since long prior to his wife conceived the child, he was in abroad and his wife also did not visit him and therefore there was no access between each other. Such a fact can be proved by other evidence. He can produce evidence that he did not visit India during the relevant period and so also his wife did not visit him in abroad. In such circumstances, the DNA test can be avoided by virtue of other available evidence. That is not the case here. Therefore, the impugned order cannot be sustained.

14) In view of the above discussion, this C.R.P. is allowed by setting aside the order in I.A.No.275 of 2017 and consequently the trial Court is directed to refer the parties to DNA test through CFSL, Hyderabad. The expenses for such test shall be borne by the petitioner.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 12.06.2018

Murthy