

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.R 2039 of 2022

Auup Kumar Maity

Vs.

The State of West Bengal & Anr.

For the Petitioner:	Mr. Kausik Gupta, Adv., Mr. Pranab Halder, Adv., Mr. Aniket Mitra, Adv., Mr. Swarvanu Saha, Adv.
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For the Opposite Party No.2:	Mr. Avik Ghatak. Adv., Ms. Afreen Begum, Adv.
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For the State:	Mr. Imran Ali, Adv., Ms. Debjani Sahu, Adv.
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Heard on: 15 September, 2022.

Judgment on: 22 September, 2022.

BIBEK CHAUDHURI, J. : –

1. The petitioner is the husband of the opposite party No.2. In the year 2018 the opposite party No.2 filed an application under Section 125 of the Code of Criminal Procedure before the learned Chief Judicial Magistrate, Purba Medinipur at Tamluk. The said application for maintenance was registered as Misc Case No.463 of 2018 and was transferred to the 3rd Court of the Learned Judicial Magistrate at Tamluk for disposal. In the

said proceeding the opposite party No.2 filed an application praying for interim maintenance and the trial court allowed the said application directing the petitioner to make payment of Rs.5500/- per month in favour of the opposite party No.2. The petitioner has been going on paying the said amount of interim maintenance in favour of the opposite party No.2. Subsequently, on 12th January, 2021 the private opposite party filed another application for interim maintenance for her child, namely, Priyankshu Maity. It was pleaded by the opposite party No.2 that the said child was born in the wedlock between the petitioner and the opposite party No.2 on 30th June, 2019 in a private nursing home. The petitioner filed a written objection in the aforesaid proceeding denying paternity of the child on the ground that the petitioner had no access to the opposite party No.2 during the period when the opposite party No.2 might be conceived for giving birth to the said child. That on 20th January, 2021 the petitioner filed an application praying for a direction upon opposite party No.2 for conducting DNA test of the said child for scientific decision as to the paternity of the said child. The learned Judicial Magistrate, 3rd Court at Tamluk rejected the petitioner's application for conducting DNA test of the said child of the opposite party No.2.

2. Being aggrieved the petitioner preferred a revision before the learned Sessions Judge, Purba Medinipur at Tamluk assailing the order dated 3rd February, 2021. The learned Sessions Judge rejected the prayer for DNA test vide order dated 28th April, 2022 while disposing of the said

revisional application. The said order dated 28th April, 2022 is under challenge in the instant application.

3. Learned Advocate for the petitioner submits that the specific case of the petitioner is that the opposite party No.2 left her matrimonial home voluntarily with all her belongings on 1st October, 2014. Subsequently, on 12th October, 2018 the petitioner as plaintiff filed a suit for dissolution of marriage by a decree of divorce against the opposite party No.2. Therefore, the opposite party No.2 filed a complaint under Section 498A of the IPC against the petitioner and other matrimonial relations of the private opposite party, vide Marishda P.S Case No.188/2018 dated 24th November, 2018. On 28th November, 2018 she filed two applications against the petitioner, one under Section 12 of the Protection of Women from Domestic Violence Act and the other under Sections 125 of the Cr.P.C.

4. On the contrary, it is the case of the opposite party No.2 that she was driven out from her matrimonial home on 12th November, 2018. On 2nd December, 2018 she was medically examined and she came to know that she became pregnant. On 30th June, 2019 she gave birth to a male child in a private nursing home. During her pregnancy, her husband accompanied her to doctor's chamber for her medical treatment. She gave birth to a male child on 30th June, 2019.

5. It is submitted by Mr. Kousik Gupta, learned Advocate for the petitioner that in **Dipanwita Roy vs. Ronobroto Roy** reported in **(2015) 1 SCC 365**, the husband filed a suit for divorce on the ground of

adulterous behaviour of wife, alleging therein that wife was having extra-marital relationship with another person and given birth to a son as a result of cohabitation with the said third person. The husband prayed for DNA test of himself and the son born to the wife. The Hon'ble Supreme Court taking into consideration the fact that the prayer of the husband for conducting DNA test was aimed to establish the alleged adulterous behaviour of wife and the issue of legitimacy of the son was incidentally involved therein, Section 112 of Evidence Act was held not to be attracted strictly. Under such circumstances, the Hon'ble Supreme Court held High Court's order directing holding of DNA test of the husband and the son fully justified. It is further held by the Hon'ble Supreme Court that if the wife declines to comply with the High Court's direction, for DNA test of the son, it is open for the court to draw an adverse inference against her in terms of Section 114, illustration (h) of the Evidence Act.

6. The learned Advocate for the petitioner also refers to another decision of the Hon'ble Supreme Court in the case of **Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik & Anr.** reported in **(2014) 2 SCC 576**, in order to substantiate his argument that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements 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, 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. It is also pointed out by the learned Advocate for the petitioner that the aforesaid ratio was laid down by the Hon'ble Supreme Court under the fact that the wife preferred a claim for maintenance for her daughter. The appellant/husband denied paternity of the daughter and apply for DNA test on the ground that he have no access to the wife when the child was begotten. The Hon'ble Supreme Court under the said fact was pleased to hold as hereunder:-

“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.”

7. Mr. Gupta also refers to a Division Bench decision of this Court in the case of **Swapan Mondal vs. State** reported in **2021 SCC OnLine Cal 2007**. This was a case where the appellant was convicted for committing offence under Section 376 of the IPC and Section 5/6 of the Protection of

the Children from sexual offences act. The order of conviction and sentence was challenged in appeal. It was the prosecution case that the minor victim girl was violated by the accused as a result of which she became pregnant and subsequently gave birth to a child. On accused person's denial to plead guilty, the prosecution came up with an application for DNA test of the child of the victim girl and the accused. The victim girl denied to submit her child for DNA test. Under such circumstances, the Appellate Court reversed the order of conviction and sentence and passed an order of acquittal in favour of the petitioner on the ground that on denial by the victim from submitting her child for DNA test, the defence is entitled to get an adverse inference and benefit of doubt.

8. Coming to the instant case, it is submitted by Mr. Gupta that the factual circumstances of this case is similar to the case in *Nandlal Wasudeo Badwaik* (supra). If the opposite party No.2 refuses to get her son's DNA test done with the sample of the petitioner, the court is entitled to draw an adverse presumption against the opposite party No.2.

9. Mr. Avik Ghatak, learned Counsel on behalf of the opposite party No.2, on the other hand submits that Section 112 of the Indian Evidence Act states that birth of a child during subsistence of marriage is conclusive proof of legitimacy of the child. Section 112 of the Evidence Act runs Thus:-

“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.”

10. It is submitted by Mr. Ghatak that the legislative intent and spirit behind Section 112 appears to be that once the validity of marriage is proved, then there is strong presumption about the legitimacy of the child born in that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. It is also submitted by Mr. Ghatak that in the trial court the opposite party No.2 has produced sufficient evidence to prove that the petitioner had access during the period when the child might have been begotten. In view of such circumstances, the onus shifts upon the petitioner to rebut such presumption of law. The petitioner cannot take advantage putting the burden upon the opposite party No.2 to submit her child for DNA Profile Test.

11. In support of his contention Mr. Ghatak refers to **Banarsi Dass vs. Teeku Dutta (Mrs) & Anr.** reported in **(2005) 4 SCC 449**. In the said report the Hon’ble Supreme Court was graciously pleased to observe in paragraph 13 as hereunder:-

13. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific

advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above. (See *Kamti Devi v. Poshni Ram.*)

12. Mr. Ghatak next refers to another decision of the Hon'ble Supreme Court in **Goutam Kundu vs. State of West Bengal & Anr.** reported in **(1993) 3 SCC 418**. In this regard it is held by the Hon'ble Supreme Court that blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by Courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, no person can be compelled to give sample of blood for analysis against his/her will and no adverse inference can be drawn against him/her for this refusal. Courts in India cannot order blood test as a matter of course. Wherever applications are made for such prayers in

order to have roving inquiry, the prayer for blood test cannot be entertained.

13. I have duly considered submissions made by the learned Counsels for the petitioner and the opposite party No.2.

14. Section 112 of the Indian Evidence Act finds place in the statute in Part-III of the Act under the heading “protection and effect of evidence”. This Section is based on the well-known maxim *pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates). Section 112 states that birth of a person during marriage between the mother and any man shall be conclusive proof of legitimacy. In **Shamlal @ Kuldip vs. Sanjeev Kumar & Ors.** reported in **(2009) AIR SCW 5006**, it is held by the Hon’ble Supreme Court that in a civilized society, it is imperative to presume legitimacy of a child born during continuation of a valid marriage and whose parents had “access” to each other. It is undesirable to enquire into paternity of a child whose parents "have access" to each other. Section 112 is based on presumption of public morality and public policy. It is also been held that “access” does not mean actual causes but particular of access.

15. The entire issue as regards rebuttable presumption contained in Section 112 of the Evidence Act and the discretion of the court in directing DNA test are dealt with referring to all previous pronouncements in a very recent judgment of **Ashok Kumar vs. Raj Gupta & Ors.** reported in **(2022) 1 SCC 20**.

16. The factual background of the said report is as follows:-

In a declaratory suit the defendants prayed for DNA test of the plaintiff with the blood sample of the defendants who happened to be the so-called sisters of the plaintiff. The said issue fell for decision by the Hon'ble Supreme Court. The said application was made after closure of evidence on behalf of the plaintiff.

17. The Hon'ble Supreme Court was pleased to hold that DNA test is not to be directed as a matter of routine but only in deserving cases. The discretion of the court must be exercised after balancing the interests of the parties and whether a DNA test is needed for a just decision in the matter and such a direction satisfies the test of "eminent need". It is further held by the Hon'ble Supreme Court that the normal rule of evidence is that the burden is on the party who asserts the positive. But in instances where that is challenged, the burden shifts to its adversary who pleads the negative.

18. Keeping in mind the issue of burden of proof, it would be safe to conclude that in a case, like, the present one, the Court's decision should be rendered only after balancing the interests of the parties, i.e, the quest for truth, and the social and cultural implications involved therein. The possibility of stigmatizing a person as a bastard, the ignominy that attaches to an adult who, in the mature years of his life is shown to be not the biological son of his parents, may not only be a heavy cross to bear but would also intrude upon his right of privacy. No person can be compelled to provide a sample for DNA.

19. The issue as to whether the opposite party is entitled to get adverse inference for denial of the wife to submit his minor son for DNA test is to be decided by the trial court on the basis of the evidence that may be adduced by the parties with all attending circumstances.

20. In view of the above discussion and relying on the ratio laid down by the Hon'ble Apex Court in the above mentioned reports, I can safely conclude that the learned Judge in the first revisional court did not commit any error or illegality in affirming the order passed by the learned Magistrate rejecting the petitioner's application dated 20th January, 2021 for directing the opposite party No.2 to submit her child for DNA test.

21. The instant criminal revision is accordingly dismissed on contest.

22. Parties are at liberty to act on the server copy of the order.

(Bibek Chaudhuri, J.)