



said wedlock on 20.06.2005. According to the petition filed by respondent No.1 (Annexure P-1) under Section 125 Cr.P.C., the couple cohabited in Gurgaon for one year after which they moved to Mumbai where respondent No.1 got pregnant, however, due to persistent fights between them, respondent No.1 also suffered a miscarriage. On 20.06.2005, respondent No.2 was born to the couple in Hisar. Respondent No.1 requested the petitioner to inform his parents about the birth of respondent No.2. The petitioner not only refused the same but also gave her severe beatings and shunned her out. Thereafter, the respondents began residing at the paternal house of respondent No.1 at Hisar.

3. Subsequently, the petitioner began avoiding the respondents and was nowhere to be found. Respondent No.1 got hold of the petitioner in the year 2008 at his parents' house in Panipat, post which they began cohabiting. However, the petitioner deserted the respondents in the year 2011. Left with no other option, respondent No.1 moved to Bahrain in January, 2012 to earn a livelihood. She returned to India in January, 2014 and has been living at her paternal house, at their mercy, along with respondent No.2.

4. Pertinently, the petitioner filed a reply categorically denies any relationship with the respondents. The petitioner has denied solemnisation of marriage with respondent No.1 and maintains that respondent No.2 was not born out of their alleged wedlock. He had also flagged that there is no specific provision in law that requires DNA sample to be collected mandatorily in this context.

CONTENTIONS

5. Learned Senior counsel for the petitioner *inter alia* contended that the learned Family Court has erred in directing DNA analysis to be conducted to establish paternity test of respondent No.2 as the same would not establish



the factum of marriage between the petitioner and respondent No.1. Moreover, respondent No.2 has already attained the age of majority on the date of the impugned order and has not pursued any litigation regarding the same. Moreover, the civil litigation pending between the parties stood concluded prior to passing of the impugned order, therefore, the factum of abandonment of the civil proceedings cannot be overlooked. Interestingly, in her statement recorded under Section 164 Cr.P.C. dated 07.06.2004 (Annexure P-5), in a separate case titled "*State vs. Jitender etc.*," respondent No.1, categorically stated that she is married to one Raj Shetty, a resident of Mangalore, Karnataka.

6. Learned Senior counsel further contended that the essential elements to prove marriage between the parties are conspicuously absent. No evidence, including marriage certificate and photographs, to support the factum of marriage has been brought on the record by respondent No.1. Even if the DNA reports indicate the petitioner to be the father of respondent No.2, it would only ascertain existence of a physical relationship and not a marriage. Also, the presumption under Section 112 of the Indian Evidence Act, 1872 (hereinafter 'Evidence Act') will only be attracted if the factum of marriage stands established. As such, respondent No.1 has been unable to discharge the onus shouldered by her to prove the marriage. Furthermore, a complaint bearing no. 221-5-W-SP (I) dated 01.07.2015 was moved by respondent No.1 before SSP, S.A.S. Nagar (Mohali), however, nothing incriminating was found against the petitioner and the complaint was consigned to the record room. Finally, the petitioner has been married to Kapila Godara since 22.11.2004 and has two children with her. Learned Senior counsel relies upon the following judgments in support of his arguments:



Sr. No.	Case Title	Citation
Hon’ble Supreme Court		
1.	Goutam Kundu vs. State of West Bengal	(1993) 3 SCC 418
2.	Nandlal Wasudeo Badwaik vs. Lata Nanadlal Badwaik and another	(2014) 2 SCC 567
3.	R. Shaji vs. State of Kerala	(2014) 4 SCC(Cri.) 185
4.	Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia	2023(2) R.C.R(Civil) 147
5.	Ashok Kumar vs. Raj Gupta	(2022) 1 SCC 20
Punjab and Haryana High Court		
1.	Smt. Satya Roopa Sinha vs. Sarwan Kumar Mehto	CRR(F)-117-2019 decided on 02.06.2022
Calcutta High Court		
1.	Manik Chandra Ankure vs. State of West Bengal and another	2004 (3) R.C.R.(Criminal) 124

Further strong reliance was placed upon para 26 of *Goutam Kundu vs. State of West Bengal (supra)* which states as follos:

- “26. From the above discussion it emerges :-
- (1) that courts in India cannot order blood test as 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”

Learned senior counsel emphasized on para 16 of *Ashok Kumar vs. Raj Gupta (supra)*, which reads as follows:

“16. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating party to prove his case adducing



evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.”

7. Per contra, learned counsel for the respondents avers that all the judgments relied upon by the petitioner do not advance his cause as the validity of the marriage was not in question in these judgments. However, in the present case, the petitioner has totally denied to have ever met respondent No.1. The impugned order is a well-reasoned order made in view of the peculiar facts of the case. In light of the complete denial on the part of the petitioner qua existence of any sort of a relationship between the petitioner and the respondents, the learned Court below has rightly concluded that the parties are liable to undergo a DNA test. Learned counsel also relies upon the judgment of the Hon’ble Supreme Court rendered in ***Sharda vs. Dharampal 2003(4) SCC 493***, to contend that the Court exercising authority under Section 125 Cr.P.C. has implicit power to order a person to undergo medical test, including a DNA test and the same would not be a violation of the right to personal liberty as enshrined under Article 21 of the Constitution of India.

8. It was contended that since the petitioner has pleaded complete denial qua existence of relationship of any kind with respondent No.1, the recourse to DNA testing becomes all the more imperative, in order to vindicate the truth and the cause of justice. It was further submitted that even a live-in partner has been declared to be eligible for maintenance under Section 125 Cr.P.C. by this Court in ***Ajay Bharadwaj (infra)***. Lastly, since the documents produced by respondent No.1 with regard to her marriage with the petitioner and the consequent paternity of respondent No.2 have been specifically denied by the petitioner, a DNA test would be the only way to prove cohabitation between the petitioner and respondent No.1 and denial of the same would



rather suffocate the right of the respondents to a free and fair trial. He further relied upon the following judgments to strengthen his case:

Sr. No.	Case Title	Citation
Hon’ble Supreme Court		
1.	Dipanwita Roy vs. Ronobroto Roy	(2015) 1 SCC 365
2.	Nandlal Wasudeo Badwaik vs. Lata Nanadlal Badwaik and another	(2014) 2 SCC 567
Punjab and Haryana High Court		
1.	Sudhir Kumar Rehani vs. Indu Bala and others	2011(2) R.C.R.(Criminal) 389
2.	Ajay Bharadwaj vs. Jyotsana and others	2017 (1) R.C.R.(Criminal) 1
Andhra Pradesh High Court		
1.	Madharpu Prashu Ram vs. Shaik Janibhee	2013(7) R.C.R. (Criminal) 313
Delhi High Court		
1.	Narayan Dutt Tiwari vs. Rohit Shekhar	FAO(OS) No. 335 of 2012 decided on 27.07.2012.
Madras High Court		
1.	Senthil Andavar vs. Muthumari and others	CrI.R.C.(MD) No. 111 of 2015 decided on 17.06.2015

9. Learned counsel gave prominence to para 16 of *Nandlal Wasudeo Badwaik (supra)* wherein the following was opined:

“16. 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.”

**OBSERVATIONS AND ANALYSIS**

10. Having heard learned counsel for the parties and perused the paper book with their able assistance, it transpires that the very relationship between the petitioner and respondent No.1 stands contested. It appears that, in a different case, in her statement dated 07.06.2004, recorded under Section 164 Cr.P.C., respondent No.1 had mentioned that she was married to one Raj Shetty. However, in the matter at hand, during her cross-examination, respondent No.1 has categorically denied making any such statement. Further, the learned Court below, while granting interim maintenance to the respondents, has made a specific observation that the said statement is neither legible nor signed by respondent No.1 on every page and as such, it was found insufficient to conclude that she was married to Raj Shetty.

11. As far as the direction to conduct a DNA test is concerned, it is pertinent to note that a two Judge bench of the Hon'ble Supreme Court in ***Dipanwita Roy vs. Ronobroto Roy (supra)*** reiterated that the Court must decide whether there is an eminent need to conduct a DNA test so as to justly adjudicate the matter at hand. Speaking through Justice J.S. Khehar, the following was opined:

“ All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behaviour of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the



present controversy is concerned, section 112 of the Indian Evidence Act would not strictly come into play. A similar issue came to be adjudicated upon by this Court in **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another, 2010(4) RCR (Civil) 53 : 2010(4) Recent Apex Judgments (R.A.J.) 681 : (2010) 8 SCC 633**, wherein this Court held as under:

"21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the 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 the 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.

22. 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 test is eminently needed.** DNA test 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.

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It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties."(emphasis added)

12. The Hon'ble Supreme Court in **Goutam Kundu vs. State of West Bengal (supra)** opined that that no one can be forced to provide a blood sample per force, for the purpose of a DNA test, however, it was clarified that the same can be ordered if a strong *prima facie* case exists. A three Judge bench of the Hon'ble Supreme Court in **Sharda (supra)**, speaking through Justice S.B. Sinha, made the following observations:



“41. Goutam Kundu (supra) is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child.” (emphasis added)

13. In fact, a two Judge bench of the Hon’ble Supreme Court in *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another*(2010) 8 SCC 633 has harmoniously read the holdings in *Goutam Kundu (supra)* and *Sharda (supra)* and speaking through Justice R.M. Lodha, the following was opined:

*“14. There is no conflict in the two decisions of this Court, namely, **Goutam Kundu** and **Sharda**. In **Goutam Kundu**, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; **there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test**. In the case of **Sharda** while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. **Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course**. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court over-looked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. **Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law.***



In any view of the matter, it is not possible to sustain the order passed by the High Court.” (emphasis added)

14. Further, Section 112 of the Evidence Act provides for a presumption that a child being born during the continuance of a valid marriage would be a conclusive proof, in terms of Section 4 of the Evidence Act, of his legitimacy. This presumption exists to protect the interest of the wife and the child. However, the respondents themselves have moved the said application as nothing is available on the record to prove the factum of marriage between the petitioner and respondent No.1. In the absence of proof of the subsistence of a valid marriage, the presumptions stands diluted, necessitating the conduction of a DNA test. As palpable from the decision rendered in ***Dipanwita Roy(supra)***, the presumption under Section 112 of the Evidence Act is rebuttable in nature and would not act as an impediment for conducting a DNA test to ascertain paternity. Once the respondents have proved certain documents with regard to their relationship with the petitioner, the test of existence of strong *prima facie* case as laid down in ***Goutam Kundu(supra)*** for conducting a DNA test, stands satisfied. Therefore, the present case being one of complete denial qua existence of any kind of relationship between the petitioner and the respondents, the eminent need test, as culled out in ***Dipanwita Roy(supra)*** stands adequately satisfied as it would not be possible for the Court to ascertain the facts without a DNA test. Since existence of a relationship is *sine qua non* for grant of maintenance under Section 125 Cr.P.C., it becomes all the more pertinent to establish the same. Further still, while the present controversy does not pertain to ascertaining the paternity of respondent No.2, the tools provided in the statute books must be used in a manner that assists the Courts in arriving to the truth of the matter.



15. Moreover, any evidence put forward by either party that would allow the Court to arrive at a proper decision by bringing truth to the fore, would be relevant to the cause of fair trial. While right to privacy forms a part of the fundamental right to life as enshrined under Article 21 of the Constitution of India, it must also be noted that a Constitution Bench of the Hon'ble Supreme Court in ***Justice K.S. Puttaswamy (Retd.) vs. Union of India (2019) 1 SCC 1***, has opined the same is not absolute in nature and any curtailment of the said right must be made by a fair, just and reasonable procedure established by law. In this regard, arguments qua privacy or the mental toll taken on a child by revelations regarding legitimacy cannot be grounds to put a blanket ban on directing DNA tests.

16. In the present case, the application seeking DNA test was moved by the respondents. In fact, respondent No.2 was a major at the time of moving the said application. Even before this Court, respondent No.2 was duly represented in his own capacity. Therefore, it can be safely assumed that they must have pursued this application being aware of the consequences, which includes respondent No.2 being labelled illegitimate. Reliance in this regard can be place upon the judgment of the Delhi High Court in ***Narayan Dutt Tiwari vs. Rohit Shekhar (supra)***.

17. The object and purpose behind granting maintenance is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of failure of marriage. At the same time, a just and careful balance must be struck to ensure that this provision does not degenerate into a weapon to punish the other spouse. The Courts are required to conduct the maintenance proceedings while being alive to the legislative intent behind the provision under Section 125 Cr.P.C in its true spirit, which is to provide speedy



assistance and social justice to women, children and infirm parents. The provisions of Section 125 Cr.P.C. were enacted as a measure to further social justice and protect dependent women, children and parents, which also fall within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. Reliance in this regard can be placed on ***Vimala (K.) vs. Veeraswamy (K.)***(1991) 2 SCC 375 and ***Kirtikant D. Vadodaria vs. State of Gujarat*** (1996) 4 SCC 47.

18. The Courts must endeavour to realise the purpose behind Section 125 Cr.P.C. by being conscious of the practical realities of society. A hypertechnical view regarding the same would allow the avoidant partner to twist the law to their benefit and leave the less affluent partner to unjustly suffer. At this junction, it would be apposite to refer to judgment rendered by a two Judge bench of the Hon'ble Supreme Court in ***Chanmuniya vs. Virendra Kumar Singh Kushwaha*** (2011) 1 SCC 141, wherein, speaking through Justice A.K. Ganguly, the following was held:

“43. We are thus of the opinion that if the abovementioned monetary relief and compensation can be awarded in cases of live-in relationships under the Act of 2005, they should also be allowed in a proceedings under Section 125 of Criminal Procedure Code It seems to us that the same view is confirmed by Section 26 of the said Act of 2005.

44. We believe that in light of the constant change in social attitudes and values, which have been incorporated into the forward-looking Act of 2005, the same needs to be considered with respect to Section 125 of Criminal Procedure Code and accordingly, a broad interpretation of the same should be taken.

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46. We are of the opinion that a broad and expansive interpretation should be given to the term 'wife' to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance



under Section 125 of the Criminal Procedure Code, so as to fulfil the true spirit and essence of the beneficial provision of maintenance under Section 125.”

19. Additionally, this Court is of the considered opinion that strict proof of marriage cannot be made a condition precedent for claiming maintenance under the provision of Section 125 Cr.P.C., as it would be antithetical to the legislative intent behind the same. In ***Dwarika Parsad Satpathy vs. Bidyut Prava Dixit (1999) 7 SCC 675***, a two Judge bench of the Hon’ble Supreme Court, speaking through Justice M.B. Shah, has made the following observations:

“13. Hence, in our view from the evidence which is led if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under Section 125 Criminal Procedure Code, 1973 which are of summary nature, strict proof of performance of essential rites is not required. Either of the parties aggrieved by the order of maintenance under Section 125, Criminal Procedure Code, 1973 can approach the civil court for declaration of status as the order passed under Section 125 does not finally determine the rights and obligations of the parties.”

CONCLUSION

20. Any evidence that could illuminate the truth would be relevant to adjudication of the present controversy as it would assist the Court in ascertaining the truth and provide fair trial to both the parties. Denial of an opportunity to either party to present the best available evidence in support of their respective claims, would be in direct violation of the right to free and fair trial enshrined under Article 21 of the Constitution of India as well as the principles of natural justice.

21. While it is trite that the result of the paternity test in the instant case would be of little value in establishing the existence of marriage between



the petitioner and respondent No.1, however, the same would greatly assist the learned Court below in at least assessing whether an intimate relationship, in the nature of marriage, existed between the petitioner and respondent No.1, which would negate the principal claim of the petitioner. The result of the paternity test would also be of immense value in ascertaining whether respondent No.2 is entitled to maintenance under Section 125 Cr.P.C. The respondents have placed on record the Aadhar Card and Passport of respondent No.2, which reflects the name of the petitioner as his father. This factum coupled with a positive finding of the DNA test would conclusively establish the liability of the petitioner to maintain respondent No.2 and also strengthen the case of respondent No.1.

22. In the same vein, this Court is of the considered view that where being labelled as illegitimate or unchaste is not a concern, there is no reason for the Courts not to rely on dependable and accurate science in order to arrive at the truth and do complete justice instead of taking recourse to presumptions. At the time of making of statutes such as the Evidence Act, the science and the technology were not as advanced as they are today. For the law to be relevant and maintain its dynamic nature, it must keep up with the times and reflect the contemporary social realities. Therefore, proof based on accurate scientific testing must take precedence over conclusive proof as envisaged under law.

23. In view of the discussion above, the present petition is dismissed and the impugned order dated 21.11.2023 passed by the learned Principal Judge, Family Court, S.A.S. Nagar (Mohali) is upheld.



24. However, nothing observed herein shall be construed as an expression of an opinion by this Court. The learned Court below is directed to move ahead with the trial on its own merits, strictly in accordance with law.

25. Pending miscellaneous application(s), if any, shall also stand disposed of.

Reserved on : 21.08.2024
Pronounced on : 27.08.2024
manisha

(HARPREET SINGH BRAR)
JUDGE

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|------|---------------------------|--------|
| (i) | Whether speaking/reasoned | Yes/No |
| (ii) | Whether reportable | Yes/No |