HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Writ Petition No. 7839/2019

Mahendra Son Of Prahlad, Aged About 30 Years, By Caste Meena, Resident Of Bhotwada, Tehsil Todabheem, District Karauli (Rajasthan) Presently Resident Of Shrimahaveerji, Tehsil Hindaun, District Karauli (Rajasthan)

----Petitioner

Versus

Smt. Mamta @ Guddi Daughter Of Govind Sahay Meena, Aged About 34 Years, By-Caste Meena, Resident Of Meena Mohallan, Nasiya Colony, Gangapur City, District Sawai Madhopur (Rajasthan)

----Respondent

For Petitioner(s) : Mr.Rajneesh Gupta
For Respondent(s) :

HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA

Judgment / Order

JUDGMENT RESERVED ON : 03/05/2019
JUDGMENT PRONOUNCED ON: 23/05/2019

REPORTABLE

1. The petitioner assails the order dated 15.3.2019 whereby the Civil Judge has rejected his application for demanding DNA test to be conducted of the son Jasdeep born to his wife on the ground that he got sonography examination done of his wife during pregnancy from one Sir Ivan Stedeford Hospital, Ambattur, Chennai which reports that his wife was pregnant for 35 weeks and 06 days as on 13.9.2017 and accordingly he calculated the period of conceiving to be before the date when he got married on 5.2.2017. It is thus his submission that his wife was pregnant prior to getting marriage and therefore, child born is not his child.

The respondent denied the averments made in the application while admitting that the marriage was performed on 5.2.2017. She has stated that the petitioner has caused great physical and mental harassment and the application contains false averments. It was asserted by respondent that the pregnancy and birth of her son were on account of marriage and relationship with her husband. There is no report from the hospital where she had been undertaking her treatment and the report obtained from Sir Ivan Stedeford Hospital, Ambattur, Chennai is fictitious report. It was also stated that inspite of above, if the petitioner wants, he can get DNA test done and she does not have any objection in this regard.

2. Counsel for the petitioner has relied on the judgment passed by Coordinate Bench of this court reported in **2017(2) DNJ (Raj.) 607** (**Dalip Singh and ors. Vs. Ramesh and ors.**) and submits that the learned trial court has wrongly rejected the application.

3. I have considered the submissions and find that the trial court has proceeded to reject the application for demanding DNA test. The court below has also observed that as the petitioner was living as husband with his wife during the period of pregnancy and the marriage is still subsisting, child born from his wife would be presumed to be his son in terms of Sec.112 of the Indian Evidence Act. It has further observed that a child has to be given the status of a son where he has born in a subsisting marriage and there is, therefore, no reason to call for DNA test of a child.

4. I have considered the judgment cited by learned counsel.

5. In **Dalip Singh's case** (supra), the plaintiff no.1 & 2 who were son and wife respectively of defendant no.1 Dalip Singh, preferred a suit for cancellation of four sale deeds executed by defendant no.1 whereby ancestral property was sold by him. In response to the said suit, defendant filed written statement denying all the allegations of plaintiffs being his son and his wife, and thereafter moved an application under Order 26 Rule 10A CPC for seeking of conducting DNA test. Issue was framed whether the plaintiff no.1 was son of defendant and plaintiff no.2 was legally wedded wife of defendant and on the said basis, the application for seeking DNA test came to be allowed by the trial court which was assailed before the High Court, therefore, the Coordinate Bench observed as under:

> "18. Secondly, in the light of the issues framed by the court, particularly issue No.1, it is not only imperative rather essential for the court to have a scientific investigation done. DNA Test is not only a scientific but more conclusive Test or method to determine the core question involved in the present case.
>
> 19. If the factum or presumption of paternity is disputed by some one, more particularly by the alleged father, it is difficult nay impossible for the party alleging such paternity to prove it without any scientific investigation. Needless to say that it is a tumultuous task to prove such fact and equally intricate question for the court to answer. But for a scientific investigation, such as DNA Test, it would be

disturbing and dejecting terrain to embark upon or enter into.

20. In my view DNA Test would avoid unnecessary harassment and embarrassment to the persons involved and would be more expedient in the facts of the present case. The DNA Test will bring more certainty and **quietus** to the issue and result in quick disposal of the case."

6. In ***2010 (8) SCC 633*** (**Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and another)**, the State Commissioner had directed for conducting DNA test which was confirmed by the High Court which further directed the DNA test of a child as well as father to be conducted. The Apex Court framed following question

"14. Whether such a direction could be given by the High Court? Before we answer this question, we shall notice a few decisions of this court dealing with the power of the court in directing DNA test.

7. Relying on **Goutam KunduVs. State of W.B.** reported in **(1993) 3 SCC 418**, **Sharda Vs. Dharmpal** reported in ***(2003) 4 SCC 493*** and **Ramkanya Bai Vs. Bharatram** reported in ***(2010) 1 SCC 85***, the Apex Court held as under:

"21. 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.

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 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.

23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu1 and Sharda2 . In Goutam Kundu1 , 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 Sharda2 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.

8. The Apex Court in ***2012(12) SCC 554***- **Narayan Dutt Tiwari Vs. Rohit Shekhar and anr.**, while following the principles laid down in earlier cases observed that the question before the Supreme Court was not whether the direction should be issued for conducting DNA Test? But the issue before the Supreme Court was that once a direction has been issued whether they are enforceable and whether inspite of order passed by the court, a person can refuse to submit himself for such medical examination.

Relying upon the law as held from time to time, the Apex Court concluded that the order passed by court has to be complied with. However, it observed as under:

> "53. We may highlight that as per the dicta of the Supreme Court noticed by the learned Single Judge also, a direction for DNA Testing can be issued only after the test of eminent need is satisfied. The order dated 23.12.2010 directed DNA testing of respondent 1 only after holding the said test to be satisfied in the facts of the present case. The impugned judgment though also holding that the test of eminent need is satisfied has declined to enforce the order. It is thus not as if the order for DNA testing is made or has been made in the present case on the asking or in a routine manner for the consequence only of adverse inference to flow from non-compliance thereof. We find inherent contradiction in the court on the one hand holding eminent need for such a test and in the same breath allowing the need to remain unsatiated."

9. Section 112 of the Indian Evidence Adct, 1872 lays down certain presumption relating to Birth during marriage, conclusive proof of legitimacy, which reads as under:

> **<u>Sec. 112</u>.: Birth during marriaage, 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. In ***AIR 2014 SC 932*** **(Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and anr.)**, the Apex Court held as under:

"15. From a plain reading of the aforesaid, it is evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions aforesaid are satisfied. It can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten. 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.

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.

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.

> 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. Thus, from the perusal of aforesaid judgment and examining the facts in each case, this court finds that the reasoning adopted by the learned Judge for rejecting the application was incorrect and merely because of presumption to be drawn under Sec.112 of the Evidence Act, an application for seeking DNA test cannot be ousted.

12. However, this court finds that the petitioner has yet to prove his assertions with regard to the report submitted by him relating to Sir Ivan Stedeford Hospital, Ambattur, Chennai where he allegedly got his wife's sonography conducted. He has not even proved its authenticity in the court. His wife has on the other side denied such a test having been conducted. The evidence has yet to be recorded by any expert in relation to the period of conceiving of a child. One cannot presume that the child was born after having completed the requisite 09 months i.e. 36 weeks of pregnancy or was born pre-mature. The question whether assessment of the age of fetus is also not a conclusive test. Thus it would not be appropriate to allow a DNA test to be conducted at the stage merely on the basis of bland statement of the husband making allegations without appropriate legal evidence on record as

has been noted by the Apex Court in all the aforesaid judgments. The courts cannot order blood test as a matter of course. The husband has to establish beyond reasonable doubt about his non-excess to his wife during the entire period. The court has to be very careful and sensitive to the circumstance before passing orders for getting DNA test conducted. Such a prayer ought not be granted to have a roving enquiry as it cannot be denied that the consequence thereof have a direct repurcation on the life of an individual.

13. In **Mahesh Chand Sharma Vs. State and ors.** (SBCW Pet. No.2067/1999) decided on 7.3.2019 delivered by this court, direction issued by the State Government for conducting DNA test was held to be illegal and unjustified, and held to be invading the privacy of an individual as an infant whose DNA is sought to be conducted would be not in a position to give his consent, any order passed effecting his privacy would amount to violating his rights under the Constitution of India. In the circumstances, order of getting DNA test of a child goes contrary to the basic fundamental right of the said individual child. It is, in these circumstances, that the presumption of his paternity has to be understood under Sec.112 of the Act.

14. In UK, the 2006 Human Tissue Act has been enforced which declares it illegal to take, store or use human tissue without consent. Unfortunately, there is no law in India by legislature except the judgments as noted above. However, they too do not examine the rights of a child whose parents may casually get his DNA test done which may bastardize his existence in the society.

Law makers require to think on the said aspect however till it is done, this court holds that no guardian or parent would be authorized to get DNA test conducted of a minor with seeking prior permission of the court.

On any such application, the court will first examine:

(a) whether there is an imminent need to conduct such DNA test;

(b) Whether such test would result in harming the status of the minor in any form;

(c) such report is not to be made public.

15. In view thereof, the application moved by the petitioner husband is liable to be rejected though on different ground as above.

16. Accordingly, writ petition is found to be devoid of merit and same is hereby dismissed with cost of Rs.10,000/-.

(SANJEEV PRAKASH SHARMA),J

SANDEEP RAWAT /23