The High Court of Madhya Pradesh
MP 1435/2017
Jitendra Singh Kaurav Smt. Rajkumari Kaurav

Gwalior, dtd. 09/01/2019

Shri Prashant Sharma, counsel for the petitioner.

Shri Anurag Saxena, counsel for the respondent.

This petition under Article 227 of the Constitution of India has been filed against the order dated 17/11/2017 (Annexure P1) passed by Additional District Judge, Lahar, District Bhind in Case No.249-A/2014 (HMA), by which the application filed by the petitioner for conducting the DNA Test of the petitioner with that of the child delivered by the respondent, has been rejected.

The necessary facts for the disposal of the present petition in short are that the petitioner has filed an application for grant of divorce under Section 13 of the Hindu Marriage Act on various grounds. It appears that the reconciliation proceedings were taken up on 07/09/2015. On the said date, both the parties were present before the Court. After the conciliation proceedings, the petitioner agreed to take the respondent with him on the same day only, whereas the respondent submitted that that she is pregnant and the petitioner is alleging that the child does not belong to him and, therefore, she does not want to go with the petitioner. It is further mentioned in the order that thereafter, the petitioner admitted that he is the father of the child and he wants to take the respondent with him and would keep her with full dignity and even after persuasion by the trial Court, the respondent expressed

that she wants to go to Lahar and from Lahar she would go to the house of the petitioner and thus, it was directed that on the next date of hearing, both the parties shall come together and the case was adjourned for 09/09/2015.

On 09/09/2015, it was disclosed by the petitioner that the respondent has not come to his house, whereas the respondent did not appear before the trial Court and an adjournment was sought by the counsel for the respondent that as she is not well, therefore, she could not appear. Thus, it is clear that even after the reconciliation proceedings on 07/09/2015, the respondent did not go to her matrimonial house in spite of willingness expressed by the petitioner in the said reconciliation proceedings, the respondent had herself stated that the petitioner is denying that he is the father of the child, which the respondent is carrying. However, it appears that in order to resolve the dispute, the petitioner admitted that he is the father of the child.

Thereafter, the petitioner filed an application under Section 151 of CPC, in which it was mentioned that after the reconciliation proceedings took place in the Court of JMFC, the petitioner had come to her matrimonial house on 29/04/2015 and they had physical relations on 25/05/2015. Thereafter, when the respondent was taken to the doctor for medical examination, then it was found in the ultrasound conducted on 27/07/2015 that the respondent is carrying the pregnancy of 14 months. Thus, it is clear that when the petitioner did not have physical relations with the respondent prior to 25/05/2015, then how she

became pregnant. It was further mentioned that on the next day i.e. on 28/06/2015, the respondents went back to her matrimonial home and gave birth to a boy child on 12/01/2016. It was mentioned that the petitioner is not the biological father of the child born on 12/01/2016 and accordingly, it was prayed that the DNA test of the petitioner with that of the child may be conducted so as to do complete justice.

The application was opposed by the counsel for the respondent. It was submitted in the reply that in fact, the respondent had gone to her matrimonial home on 29/04/2015 and on the said date only, she had physical relations with the petitioner and as a result of the said physical relations, the respondent became pregnant. On 25/08/2015, the ultrasound of the respondent was got done and as per the said report, the estimated age of the fetus was 18-19 weeks. Thereafter, on 12/01/2016, the respondent had given birth to a boy child, however, on several occasions, premature delivery can take place. Therefore, merely because the boy was born prior to expiry of nine months from 29/04/2015, it cannot be said that the petitioner is not the biological father of the child.

The trial Court by order dated 17/11/2017 rejected the application filed by the petitioner only on the ground that since during reconciliation proceedings, the petitioner had accepted that he is the father of the child which the respondent was carrying, therefore, in view of the admission made by the petitioner, there is no need of getting the DNA test conducted.

Challenging the order passed by the trial Court, it is submitted by the counsel for the petitioner that according to the reply filed by the respondent to the application under Section 151 of CPC, it is clear that even according to the respondent, the estimated age of the fetus on 25/08/2015 was 18-19 weeks. Thus, as per the medical evidence also, on 25/08/2015, the fetus was at least four months two weeks or three weeks old and if the age of the fetus is considered, then it is clear that the respondent had become pregnant at least two weeks prior to 29/04/2015. Thus, even according to the respondent herself, there is a serious dispute with regard to the paternity of the child. It is further submitted that it is clear from the reconciliation proceedings dated 07/09/2015 that the petitioner was denying his paternity from the very beginning and, therefore, it was expressed by the respondent herself that since the petitioner is denying that he is the father of the child, which the respondent was carrying, therefore, she does not want to go to her matrimonial house. In order to save his married life, the petitioner had accepted that he is the father of the child and he is ready and willing to take the respondent along with him on the very same day, but the respondent deliberately did not go along with the petitioner and expressed that she would go to her matrimonial home at a later stage and thereafter, she never went to her matrimonial house. Thus, it is clear that the respondent was trying to avoid any further medical examination while staying in her matrimonial house as she was apprehensive of the fact that the paternity of the child has come under

cloud. Therefore, the bona fide submission made by the petitioner should not be treated as an admission.

Per contra, it is submitted by the counsel for the respondent that as the petitioner had admitted on 07/09/2015 that he is the father of the fetus (child), which the respondent was carrying, therefore, there is no need to get the DNA test conducted.

Heard the counsel for the parties.

The Supreme Court in the case of **Dipanwita Roy vs. Ronobroto Roy,** reported in **AIR 2014 SC 418** has held as under:-

> "**9.** 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 vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633,* wherein this Court held as under:
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> > "**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 112of 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 ourt, namely, Goutam Kundu vs. State of West Bengal(1993) 3 SCC 418 and Sharda vs. Dharmpal (2003) 4 SCC 493. 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 the court must carefully examine as to what would be the consequence of ordering the blood test. In 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 prime facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked 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 is ours) 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. Recently, the issue was again considered by this Court in Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another, (2014) 2 SCC 576, wherein this Court held as under:

> "**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 not any access to his wife at the time when the child could have been begotten.
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> **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 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 circumstances, which would give way to the other is a complex question posed before us.
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> **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. The 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, a 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 bastardised 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.” (emphasis is ours) This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112of the Indian Evidence Act.''

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.''

Thus, it is clear that where the husband did not have access to his wife in spite of that his wife got pregnant and he claims that he is not the biological father of the child, then the DNA can be ordered to resolve the dispute because under these circumstances, in order to substantiate the allegations of infidelity, it would not possible for the respondent to establish and confirm the assertions in absence of DNA test. If the facts of the present case are considered, even according to the respondent, on 25/08/2015 when ultrasound was done, then it was found that she was carrying 18- 19 weeks. Thus, it is clear that on 25/08/2015, the respondent was carrying the pregnancy of at least four months two weeks or four months three weeks and if this period is calculated back from 25/08/2015, then it is clear that on 29/04/2015 (as claimed by the respondent that she had physical relations with the petitioner) only four months would pass, whereas on 25/08/2015 the respondent was found to be carrying the pregnancy of four months two weeks or four months three weeks. Thus, prima facie, even according to the reply filed by the respondent, it is clear that there is a serious dispute with regard to the paternity of the child, which was delivered by the respondent on 12/01/2016. So far as the admission made by the petitioner on 07/09/2015 is concerned, it was the case of the respondent herself that the petitioner is disputing the paternity of the child, which she was carrying, therefore, she does not want to go with the petitioner. It appears that as the petitioner was interested in saving his married life,

therefore he accepted that he is the father of child which the respondent was carrying and, therefore, he wants to take her to his house with him. However, in spite of that, the respondent did not agree to go along with the petitioner and as per the record, thereafter she did not go to her matrimonial house. Even otherwise, it is clear that the respondent had given birth to a boy child on 12/01/2016 i.e. prior to nine months from 29/04/2015. Where there is a serious dispute with regard to the paternity of the child, under these circumstances, this Court is of the considered opinion that the trial Court committed material illegality by rejecting the application filed by the petitioner under Section 151 of CPC for holding the DNA test of the petitioner with that of the child delivered by the respondent.

Accordingly, the order dated 17/11/2017 passed by the Additional District Judge, Lahar, District Bhind in Case No. 249-A/2014 (HMA) so far as it relates to rejection of the application filed under Section 151 of CPC, is hereby set aside.

The Court below is directed to proceed in accordance with law for getting the DNA test, as prayed by the petitioner.

The petition succeeds and is hereby **allowed.**

(G.S.Ahluwalia)
JUDGE

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