MP-5428 of 2023

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE VIVEK JAIN

MISC. PETITION No. 5428 of 2023

KAMLA PATEL
Versus
GOVIND BAHADUR

.....

Appearance:

Shri Anuj Pathak - Advocate for the petitioner.

Shri Sheetal Tiwari- Advocate for the respondent.

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O R D E R
(Reserved on 19.11.2025)
(Pronounced on 20.01.2026)

The present petition has been filed by the petitioner-wife, challenging the order Annexure-P2 dated 18-08-2022 passed by the Family Court Jabalpur, whereby the Family Court has allowed application of the respondent-husband to conduct Deoxyribonucleic Acid Test (DNA Test) to determine whether the girl child born during wedlock of the parties to the marriage is biological child of the respondent-husband, or not.

2. The counsel for the petitioner has vehemently argued that to protect right to privacy, the Family Court could not have issued directions for DNA test of the child to determine that whether she is biological daughter

of the respondent-husband, who has filed divorce petition before the Family Court, because it would invade the right of privacy of the individual and also create unnecessary clouds over legitimacy of the child which are not in the interest of the child nor in the interest of the parties. By placing reliance on judgment of the Hon'ble Supreme Court in the case of ***Aparna Ajinkya Firodia vs Ajinkya Arun Firodia, 2024 (7) SCC 773,*** it is argued that there is presumption of legitimacy as per Section 122 of Indian Evidence Act and such presumption cannot be lightly interfered with or demolished and the Courts cannot order DNA test as a matter of routine course only at the asking of one party to the marriage. It is argued that the right to privacy, autonomy and identity of the children under the convention on child rights have to be respected and best interests of the child have to be secured by the Courts while giving such directions. No child can be branded as illegitimate which casts shadow on identity of the child and therefore the impugned order deserves to be set aside. It is further argued that the conclusive presumption available under section 112 of the Evidence Act can be rebutted by use of DNA evidence only when there are compelling circumstances linked with access of the parties to each other which cannot be liberally used at a drop of hat on mere of asking of one of the parties to the marriage and therefore the impugned order deserves to be set aside.

3. *Per contra*, it is argued by learned counsel for the respondent husband that the present petition has no legs to stand because it is filed with suppression of material fact. It is argued that in the divorce petition filed by the respondent husband sufficient pleadings are made in the matter of non-access in terms of Section 112 of Evidence Act and also that the present divorce petition is the third divorce petition between the parties. The **first** divorce petition was filed in the year 2019 and the parties appeared before the Family Court and stated that they would file a fresh application seeking divorce with mutual consent because there has been settlement between the parties to seek divorce by mutual consent. Thereafter, the **second** application was filed in the year 2019 itself under Section 13-B of Hindu Marriage Act, 1955 and the wife appeared on first motion on 14.10.2019 but despite repeated opportunities given by the Family Court did not appear in second motion and ultimately the Family Court closed the divorce petition on account of non-appearance of the wife on 2-3-2021. Thereafter, this **third** divorce petition has been filed by the respondent-husband.

4. It is vehemently argued that the respondent-husband is posted in Indian Army and he visits his wife only once every 3 months or 6 months and that too, for a few days. The petitioner-wife is constable in MP Police and is posted at Jabalpur. It is contended that in the divorce petition which has deliberately not been filed before this Court by the petitioner, there are

sufficient pleadings in the matter of non-access of the husband to the wife at the time when the child could have been conceived by the petitioner-wife. It is argued that in the divorce petition sufficient pleadings are made in Para-4 that in October, 2015 the husband was called from his duty by the wife and within four days the wife intimated the husband that she has conceived a child and is pregnant. The husband being a soldier did not have any knowledge of such biological facts that when the factum of pregnancy becomes known, and he believed the petitioner-wife and within eight months, the girl child was born to the wife. Thereafter, when the husband consulted doctors then he came to know that conception of a child cannot be known within four days and that it can be known by the lady only atleast 20 to 30 days after conception and also that the date of delivery of the child is within eight months of October, 2015 which is also not possible and the husband had no access to the wife when the child had been conceived and he had been called in October, 2015 from his duty in Army posting only so as to instill false belief in the mind of the husband that he is the biological father of the child. On these grounds, it is prayed to reject the present petition by upholding the direction to carry out the DNA test of the child.

5. Heard learned counsel for the parties and perused the record.

6. In the present case the divorce petition has been filed on the ground of adultery. It is not the case where the husband wants to know the paternity of the child or he wants to repudiate the liability to maintain the child or for any other purpose. It is the case where DNA test of the child is being sought only to prove the fact of adultery of the wife. In the case of adultery the matter was considered by the Hon'ble Supreme Court in the case of ***Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365***. It was the case where the husband had prayed for a DNA test to establish the ground of adultery of the wife and the issue of the legitimacy of the child was only an incidental issue and it was not the main issue. The main issue which was involved in the matter was adultery of the wife. The Hon'ble Supreme Court considered Section 112 of Evidence Act and considering the legal position, the Hon'ble Apex Court held that in such cases where the ground of adultery is involved, in appropriate cases out of such cases, DNA test can be ordered. The Hon'ble Supreme Court held as under:-

> ***"9.*** *The learned counsel for the appellant wife, in the first instance, invited our attention to Section 112 of the Evidence Act. The same is being extracted hereunder:*
> *"**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."*

Based on the aforesaid provision, the learned counsel for the appellant wife drew our attention to decision rendered by the Privy Council in Karapaya Servai v. Mayandi [(1934) 39 LW 244 : AIR 1934 PC 49] , wherein it was held, that the word "access" used in Section 112 of the Evidence Act, connoted only the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by a fiction of law, accepted the same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child. It was the submission of the learned counsel for the appellant wife, that the determination of the Privy Council in Karapaya Servai case [(1934) 39 LW 244 : AIR 1934 PC 49] was approved by this Court in Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana [(1953) 2 SCC 627 : AIR 1954 SC 176 : 1954 SCR 424] .

13. *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 Evidence Act would not strictly come into play.*

16. *It is borne from the decisions rendered by this Court in Bhabani Prasad Jena [Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501 : (2010) 3 SCC (Cri) 1053] and Nandlal Wasudeo Badwaik [Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576 : (2014) 2 SCC (Civ) 145 : (2014) 4 SCC (Cri) 65] 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 party concerned 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.

17. *The question that has to be answered in this case is in respect of the alleged infidelity of the appellant wife. The respondent husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person who was the father of the male child born to the appellant wife.* ***It is in the process of substantiating his allegation of infidelity that the respondent husband had made an application before the Family Court for conducting a DNA test which would establish whether or not he had fathered the male child born to the appellant wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity****. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant wife is right, she shall be proved to be so.*

18. *We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent husband against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the court concerned by drawing a presumption of the nature contemplated in Section 114 of the Evidence Act, especially, in terms of*

Illustration (h) thereof. Section 114 as also Illustration (h), referred to above, are being extracted hereunder:

*"**114.Court may presume existence of certain facts**.—The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

"Illustration (h)—that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;"

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.

(Emphasis supplied)

7. The counsel for the wife had heavily relied on judgment in the case of ***Aparna Ajinkya Firodia (supra)***. The judgment of the case of ***Dipanwita Roy (supra)*** has been considered in the case of ***Aparna Ajinkya Firodia (Supra)*** and in Para-10 it has been held that the said judgment is in view of the fact that it was a divorce petition on the ground of adultery of the wife and the necessary facts had been pleaded so as to justify direction to conduct a DNA Test. The Supreme Court in **Aparna Ajinkya Firodia (Supra)** has held that inferences are to be drawn by the Court on consideration of facts and circumstances of each individual case and therefore the judgment in case of **Dipanwita Roy (supra)** is to be read in the aforesaid context.

8. Subsequently, the Hon'ble Apex Court in ***Ivan Rathinam v. Milan Joseph, 2025 SCC OnLine SC 175*** has again considered the law on the subject. The Hon'ble Supreme Court has laid great stress on 'eminent need' and 'balancing the interests'. The Hon'ble Supreme Court considered that in what manner the presumption under Section 112 of Evidence Act can be rebutted. The Hon'ble Supreme Court held as under:-

> ***28.*** *The language of the provision makes it abundantly clear that there exists a strong presumption that the husband is the father of the child borne by his wife during the subsistence of their marriage. This section provides that conclusive proof of legitimacy is equivalent to paternity.*[29] *The object of this principle is to prevent any unwarranted enquiry into the parentage of a child. Since the presumption is in favour of legitimacy, the burden is cast upon the person who asserts 'illegitimacy' to prove it only through 'non-access.'*
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> ***29.*** *It is well-established that access and non-access under Section 112 do not require a party to prove beyond reasonable doubt that they had or did not have sexual intercourse at the time the child could have been begotten. 'Access' merely refers to the possibility of an opportunity for marital relations.*[30] *To put it more simply, in such a scenario, while parties may be on non-speaking terms, engaging in extra-marital affairs, or residing in different houses in the same village, it does not necessarily preclude the possibility of the spouses having an opportunity to engage in marital relations.*[31] *Non-access means the impossibility, not merely inability, of the spouses to have marital relations with each other.*[32] *For a person to rebut the presumption of legitimacy, they must first assert non-access which, in turn, must be substantiated by evidence.*
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> ***35.*** *In the peculiar circumstances of this case, this Court must undertake an exercise to 'balance the interests' of the parties involved and decide whether there is an 'eminent need' for a DNA test.*[33] *This pertains not simply to the interests of the child, i.e. the Respondent, but also to the interests of the Appellant.*
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> ***46.*** *When dealing with the eminent need for a DNA test to prove paternity, this Court balances the interests of those involved*

> *and must consider whether it is possible to reach the truth without the use of such a test.*[37]
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> ***47.*** *First and foremost, the courts must, therefore, consider the existing evidence to assess the presumption of legitimacy. If that evidence is insufficient to come to a finding, only then should the court consider ordering a DNA test. Once the insufficiency of evidence is established, the court must consider whether ordering a DNA test is in the best interests of the parties involved and must ensure that it does not cause undue harm to the parties. There are thus, two blockades to ordering a DNA test : **(i)** insufficiency of evidence; and **(ii)** a positive finding regarding the balance of interests.*

9. The Hon'ble Supreme Court went on to consider the judgment in the case of **Dipanwita Roy (supra)** in Para- 50 and held that those proceedings were not proceedings for legitimacy of the child but divorce petition on the ground of adultery. The Hon'ble Apex Court held as under:-

> ***"50.*** *In Dipanwita Roy v. Ronobroto Roy (supra), this Court directed the child therein to undergo a DNA test. However, this direction was not given in furtherance of a declaration as to the legitimacy of the child. On the contrary, the proceedings therein were regarding a prayer for divorce based on adultery. The DNA test was to be conducted to prove that the wife was adulterous for the sake of obtaining a divorce. The appellant therein did not desire to prove the illegitimacy of the child; it was merely incidental. This Court explicitly stated that though the question of legitimacy was incidentally involved, the issue of infidelity alone would be determined by the DNA test, without expressly disturbing the presumption under Section 112 of the Indian Evidence Act, 1872."*

10. The Hon'ble Supreme Court in the most recent case of **R. Rajendran v. Kamar Nisha, 2025 SCC OnLine SC 2372** has considered the law on the subject and considered the judgment in the **Dipanwita Roy (supra)** and also how in usual cases the matter is to be examined because that particular case was the case of cheating by one of the parties to the marriage. The Hon'ble Apex Court considered the judgment in the case of **Dipanwita Roy (supra)** in the following manner :

> ***41.*** *In Dipanwita Roy (supra), this Court directed a DNA test to be conducted on the child. However, the direction was not issued for the purpose of determining the legitimacy of the child. The proceedings were in the context of a petition for divorce on the ground of adultery. The DNA test was sought to establish the wife's infidelity in order to obtain a decree of divorce. The appellant's objective was not to prove that the child was illegitimate, that question arose only incidentally. This Court expressly observed that while the issue of legitimacy was incidentally involved, the DNA test would determine solely the question of infidelity, and would not disturb the presumption under Section 112 of the Evidence Act.*
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> ***42.*** *In sharp contrast, respondent No. 1 in the present case seeks a direction for DNA testing precisely to dislodge the statutory presumption of legitimacy that safeguards the child, and to establish the appellant as the biological father so as to sustain the criminal charges of cheating and harassment. The decision in Dipanwita Roy (supra) is, therefore, inapplicable to the facts of the present case.*

11. From a perusal of the aforesaid judgments, it is clear that in case where necessary pleadings are there and no declaration is sought regarding illegitimacy of the child and the issue only relates to adultery of the wife then in appropriate cases, DNA test can be ordered, and if there are sufficient pleadings of non-access.

12. In the present case, sufficient pleadings are there in the divorce petition in Para-4 wherein the respondent husband has pleaded that he is in Indian Army and was called in October, 2015 by the wife who is Constable in MP Police. Within four days he was informed that by the wife that she is pregnant and she has conceived a child which could not have been known to the wife within four days of the husband returning from his duty in army. It is further pleaded that the child was born within 8 months of October, 2015 and there is clear pleading of non-access at the time when the child was conceived. The relevant pleadings in the divorce petition are as under:-

> "4 यह कि, अनावेदिका द्वारा अक्टूबर, 2015 में आवेदक को उसकी ड्यूटी से अचानक यह कह कर जबलपुर बुलाया कि अनावेदिका को आवेदक की बहुत याद आ रही है, इसलिये आवेदक अपने नौकरी से छुट्टी लेकर घर आ जाये। तब आवेदक छुट्टी लेकर जैसे ही जबलपुर अनावेदिका के लार्डगंज पुलिस क्वाटर स्थित घर पर आया। छुट्टी से आने के चार दिन के भीतर ही अनावेदिका द्वारा आवेदक को यह बताया गया कि अनावेदिका आवेदक के बच्चे की माँ बनाने वाली है। उस वक्त आवेदक को कितने दिनों में किसी महिला में गर्भ ठहरता है, इन

सब बातों की कोई जानकारी नहीं थी। इस बीच आवेदक अपनी फौज की नौकरी में जबलपुर से बाहर पोस्टेड रहा और इसके बाद अनावेदिका ने दिनाँक 26.06.2016 को पुत्री "xxxx" को जन्म दिया, जो कि अनावेदिका के साथ रहती है।

5. यह कि पुत्री "xxxx" के जन्म के बाद आवेदक द्वारा यह जानकारी डॉ. से ली, कि कितने दिनों में किसी महिला में गर्भ ठहरता है, तो डॉ. ने आवेदक को यही बताया कि कोई भी मां गर्भवती होती है तो उसे उसकी जानकारी कम 20 से 30 दिन बाद ही जाँच से हो सकती है, न कि पति-पत्नि के मिलने / संसर्ग के मात्र चार दिन के भीतर और फिर जब अनावेदिका से आवेदक ने पुत्री xxxx के समय अनावेदिका के गर्भवती होने की बात को लेकर बात की तो, अनावेदिका ने फिर से आवेदक से वाद-विवाद कर अपने पुलिस कॉन्स्टेबल होने की धौंस दिखाई और ये धमकी दी कि आवेदक चुपचाप फ़ौज में अपनी नोकरी करे और अनावेदिका को अपनी स्वछंदता व मनमर्जी की जिंदगी जीने दे नहीं तो, आवेदक के लिये अच्छा नहीं होगा और ये धमकी भी दी कि अनावेदिका आवेदक के मिलट्री डिपार्टमेंट में आवेदक के खिलाफ झूठी रिपोर्ट करके उसे नौकरी से बर्खास्त करा देगी और उसे जेल भिजवा देगी। इसके आलावा अनावेदिका द्वारा आवेदक के जानकारी के बिना पहले भी गर्भपात कराया इन सब बातों व विवादों से आवेदक व अनावेदिका के बीच जो विश्वास था वो बिल्कुल समाप्त हो चुका है।"

13. Therefore, in the considered opinion of this Court, it is a fit case where DNA test of the child should have been ordered by the Family Court and the Family Court has not erred in ordering DNA test of the child. This is the third divorce petition and the first divorce petition was scuttled by the wife on the assertion that she intends to seek divorce by mutual consent.

Then the application for mutual consent was filed in which the wife did not appear for second motion and now this third divorce petition has been filed which is also pending since the year 2021.

14. Consequently, the impugned order passed by the family Court is upheld. The petition is **dismissed.** It is observed that in case the petitioner still refuses to part with DNA samples, then the Family Court would be at liberty to draw presumption under Section 114(h) of the Indian Evidence Act or the corresponding provisions of BSA 2023 against the petitioner-wife.

(VIVEK JAIN)
JUDGE

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