IN THE HIGH COURT OF JUDICATURE AT PATNA

Anusha Kumari

vs.

Rohan

Miscellaneous Appeal No. 460 of 2019

11 May, 2023

(Hon'ble Mr. Justice Ashutosh Kumar

and

Hon'ble Mr. Justice Harish Kumar)

Issue for Consideration

Whether judgment and decree passed by the learned Principal Judge, Family Court, Muzaffarpur, in Matrimonial Case No. 55 of 2014 is correct or not?

Headnotes

Hindu Marriage Act, 1955—Section 13(1)(ia)—Patna High Court Rules, 2000—Rule 7(G)(i)—Indian Evidence Act, 1872—Section 112—Divorce—on ground of adultery—necessity of D.N.A. test—marriage was solemnized between the parties—parties to the marriage shows that they had no access to the other at the time when the child could have been begotten—divorce was granted on ground of adultery—as per Rule 7(G)(i) of the Rules, 2000 which specifically provides that the name and address of the person who is suspected to have had physical relationship with his wife is required to be mentioned in the divorce petition whenever the charge of adultery is levelled against the wife.

Held: a Family Court has the power to direct a person to undergo medical tests, including a D.N.A. test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution of India—direction to use D.N.A. profiling technology to determine the paternity of a child is an extremely delicate and sensitive aspect—therefore, such tests must be directed to be conducted only when those are eminently needed and

not as a matter of course or in a routine manner whenever such a request is made—no D.N.A. test is required till the respondent/husband is able to dislodge the presumption under Section 112 of the Evidence Act of conclusive proof of legitimacy—children have the right not to have their legitimacy questioned frivolously in Courts of Law and cautioned that the Courts are required to acknowledge that children are not to be regarded like material objects, and be subjected to forensic/DNA testing, particularly when they are not parties to the divorce proceeding—if the wife refuses to do something for the purpose of deriving a benefit to herself, an adverse inference can be drawn against her. But in her capacity as a mother and natural guardian, if the wife refuses to subject the child to D.N.A. test for the protection of the interests and welfare of the child, no adverse inference of adultery can be drawn against her—D.N.A. test cannot be used as a short cut to establish the assertion of infidelity—impugned judgment and decree set aside—matter remanded back to learned Family Court—appeal allowed with observation.

(Paras 27, 28, 30, 31, 33, 36 to 39)

Case Law Cited

Sharda vs. Dharmpal, (2003) 4 SCC 493; Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia, SLP (Civil) No. 9855 of 2022—**Relied Upon.**

Smt. Rakhi Kumari alias Soni vs. Brij Nandan Ram and Another, 2016(3) PLJR 706; Dipanwita Roy vs. Ronobroto Roy, (2015) 1 SCC 365; Ashwinkumar K. Patel vs. Upendraj. Patel and Others, (1999) 3 SCC 161; Shivkumar and Others vs. Sharanabasappa and Others, (2021) 11 SCC 277; Ashok Kumar vs. Raj Gupta and Others, (2022) 1 SCC 20; Selvi and Others vs. State of Karnataka, (2010) 7 SCC 263—**Referred To.**

List of Acts

Hindu Marriage Act, 1955; Patna High Court Rules, 2000; Indian Evidence Act, 1872; Code of Civil Procedure, 1908.

List of Keywords

Marriage, divorce, adultery, DNA test, natural guardian, proof of legitimacy, infidelity.

Case Arising From

From judgment and decree dated 01.06.2019 and 14.06.2019, respectively, passed by the learned Principal Judge, Family Court, Muzaffarpur, in Matrimonial Case No. 55 of 2014.

Appearances for Parties

For the Appellant : Mr. Uday Prakash Shrarma, Adv.

For the Respondent : Mr. Jitendra Singh, Sr. Adv; Mr. Harsh Singh, Adv.

Headnotes Prepared by Reporter : Abhas Chandra, Advocate.

Judgment/Order of the Hon’ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.460 of 2019

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Anusha Kumari W/o Rohan, D/o Arvind Kumar Resident of C/o- Sri Ram Hardware, Khadi Bhandar Chowk Kanhauli, P/S Kanhauli, District- Muzaffarpur.

... ... Appellant/s

Versus

Rohan Son of Mohan Prasad Sinha R/o- Darhara House Kalam Bagh Chowk, District- Muzaffarpur.

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Uday Prakash Shrarma, Adv.
For the Respondent/s : Mr. Jitendra Singh, Sr. Adv.
Mr. Harsh Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE HARISH KUMAR)

Date : 11-05-2023

Heard Mr. Uday Prakash Shrarma, learned advocate for the appellant and Mr. Jitendra Singh, learned senior advocate assisted by Mr. Harsh Singh, learned advocate for the respondent.

2. The present Miscellaneous Appeal is directed against the judgment and decree dated 01.06.2019 and 14.06.2019, respectively, passed by the learned Principal Judge, Family Court, Muzaffarpur, in Matrimonial Case No. 55 of 2014, whereby the marriage between the appellant/wife and respondent/husband has been dissolved and decree of divorce has been passed on the ground of adultery.

3. The factual matrix of the case as is culled out from the records is that the marriage of the appellant/wife and the

respondent/husband was solemnized on 19.02.2012. After performance of the rituals of marriage, the appellant/wife had gone to her matrimonial home and lived in Muzaffarpur along with her husband till 03.03.2012. The husband, after having stayed with the wife for about 14 days in Muzaffarpur, returned to his service on 03.03.2012.

4. It is the case of the respondent/husband that after leaving Muzaffarpur, there had never been any physical relationship with his wife for about five and a half months. The appellant/wife, thereafter, went to Chandigarh with her father for the first time after her marriage on 14.08.2012 and she stayed there for two months. Later on, the mother of the appellant/wife visited Chandigarh to see her daughter and after having stayed for a couple of days, she returned to Muzaffarpur on 14.10.2012 with her daughter. On 17.01.2013, the appellant/wife gave birth to a male child at Muzaffarpur.

5. However, it is submitted that as there had never been any physical relationship of the respondent/husband after he left Muzaffarpur on 03.03.2012 for about five and a half months, so it was surprising for the respondent/husband as to how the appellant/wife gave birth to a child on 17.01.2013. It is further submitted that it is medically proven that the baby rests

in the womb of the mother for about nine months after conception. Though there have been instances of premature delivery in 7-9 months, but there has been no instance of baby resting in womb of the mother for about ten and half months.

6. The aforenoted facts gave rise to serious doubt about the unchaste conduct of the appellant/wife of her adultery outside the wedlock.

7. In order to dispel all the doubts, the father of the respondent/husband made a proposal for the D.N.A. test, which was accepted by the appellant's family but later on, the appellant/wife declined for D.N.A. test of paternity for her baby.

8. Thus, the abovementioned conduct confirmed the appellant/wife involvement in adultery.

9. It is also submitted that adultery is an offence against marriage under both the criminal and matrimonial laws and even one single act of adultery is enough for divorce and there is no question of living together of husband and wife. The husband had no option but to file an application for divorce under Section 13(1)(ia) of Hindu Marriage Act for dissolution of Marriage on the grounds of adultery.

10. The wife having come to know about this case from the publication of notice in news papers, entered her

appearance and filed a detailed reply, admitting that her marriage was solemnized with the respondent/husband on 19.02.2012 and that she remained in her *sasural* with the respondent/husband for 14 days. Thereafter, her husband went to Chandigarh. It is further stated that her father had spent more than 25 lacs in the marriage. Nonetheless, the family members of husband tormented her for dowry. Whenever she expressed her desire to visit Chandigarh, the parents-in-law told her to stay in flat at Muzaffarpur. She has also stated that her father-in-law used to drink and had evil eyes on her who even went to the extent of administering sleeping pills in her food. Whenever she woke up, she had a feeling that something had happened with her. She has further submitted that having lost faith on the parents of her husband, she went to Chandigarh in the first week of May, 2012 on the pretext of taking advice of the doctor and tried to narrate the entire facts to her husband but due to his non-cooperative attitude, she could not state her ordeal and finally she returned on 14.08.2012. Thereafter, again, she visited Chandigarh on 14.10.2012 to live with her husband. However, after spending sometime, she fell ill and when she was taken to doctor, she was diagnosed to be in family way. Thereupon, she returned to Muzaffarpur along with her mother and a child was

born on 17.01.2013.

11. It is the case of the wife that her husband always convinced her that he would take her back to Chandigarh when he would get a good accommodation there and, on such pretext, he took her 25 mgs. of gold jewellery and Rs. 2 lacs loan from her father in the month of February, 2014. The wife completely denied the allegation that she visited Chandigarh on 14.08.2012 for the first time and thereafter, there was no physical relationship and thus completely denied the allegation of adultery. She had also proposed for the D.N.A. test in order to ascertain the proof of paternity and, accordingly, prayed for dismissal of the suit filed by the husband.

12. The learned Family Court, on the basis of the aforenoted pleadings, framed the issues, *inter alia*, "as to whether the wife is guilty of adultery leading to birth of illegitimate child and that she treated the husband with cruelty, entitling him for a decree of divorce."

13. The husband examined three prosecution witnesses, namely, A.W.1, the respondent/husband himself, A.W.2, Mukesh Kumar, who happens to be a medical shop owner and A.W.3, Shashi Shekhar Kumar, who is said to be the tenant of the respondent/husband.

14. On the other hand, the wife also examined altogether five witnesses including herself as O.P.W.1, O.P.W.2, who is her uncle; O.P.W.3, Sushil Singh and O.P.W.4, Vishwanath Karji, both of whom have claimed themselves to be acquainted with both the sides and O.P.W.5, Arvind Kumar, who is her father.

15. The husband had also filed a photocopy of ultrasonography of Gautam Diagnostic Centre, Juranchapra, Muzaffarpur, which is marked as Ext.X, which shows that on 16.10.2012, ultrasonography of foetal well being was tested and Gestational age was 26 weeks 04 days+/-2 weeks on the date of examination. Another report of Anupam Ultrasound & Color Doppler Centre, Juranchapra, Muzaffarpur was also exhibited and marked as Ext.X1 which showed that the test was done on 25.10.2012 and composite Gestational age was 28 weeks 03 days +/-1 week.

16. On the basis of the aforenoted ultrasound reports, it was pleaded that the wife lived in adultery, which is apparent from the date of beginning of pregnancy, which according to both the reports, is in the month of April, though the husband had not met his wife after 03.03.2012. Hence, it was submitted that the child who was born on 17.01.2013 is not his child.

17. The learned Family Court has taken note that witnesses have stated that after 03.03.2012, the wife visited her husband's place of work on 14.08.2012 and there had never been any relationship in this period. The wife gave unreliable statement that she either lived after pregnancy till 14.10.2012 or she lived in her *sasural*/Kalambagh Chowk or with her husband.

18. The learned Family Court having further took note of the fact and in order to give a quietus to the dispute, a direction for D.N.A. test was issued but such direction was put to challenge before the High Court in C.W.J.C. No. 5689 of 2015. The High Court, in order to ascertain the plea of husband and for the purposes of resolving the dispute, upheld the lower court's order for D.N.A. test. While concluding the issue involved in the Matrimonial Suit, the learned Family Court heavily relied upon a judgment rendered by the Division Bench of this Court in the case of **Smt. Rakhi Kumari @ Soni Vs. Brij Nandan Ram and Another, 2016(3) PLJR 706**, wherein the Court has observed at para 6 and 8 is as follows:

> "6. Appellant-wife having objected to subject herself and the child for D.N.A. examination, we, placing reliance on the judgment of the Supreme Court in the case of **Dipanwita Roy vs. Ronobroto Roy, (2015) 1 SCC 365 [:2015(1)PLJR (SC)89]** invoke Section 114(h) of the Evidence Act, proceed to

> draw adverse inference against her, accordingly, affirm the findings recorded by the court below in connection with issue nos. 3, 4."
>
> 8. In the above case a direction was given to the parties to appear before the Director, Forensic Science Laboratory for D.N.A. Test of wife, husband and child born out of their wedlock. The wife however did not agree to subject herself and child to D.N.A. examination. Thus, adverse inference was drawn against her. The Division Bench of this Court affirmed the finding of trial Court wherein the direction was given for their D.N.A. test. The scientific evidence by way of DNA test would certainly clinch the issue of adultery."

19. On the basis of the aforesaid dictum of the Apex Court and considering the fact that the wife had declined to subject herself and the child for D.N.A. test, adverse inference was drawn against her and it was concluded that the husband proved the case of adulterous behaviour of his wife.

20. Hence, all the issues while emerged for consideration were answered against the wife and, accordingly, the Matrimonial Divorce Suit was allowed and a decree of divorce was passed in favour of the husband on the grounds of adultery.

21. Being aggrieved by the aforesaid judgment and

decree, the wife preferred the M.A. on the ground that the learned Family Court failed to appreciate that the averments of the husband that he stayed with her only till 03.03.2012 is without any evidence and such averment could not have been relied upon unless and until the husband discharged his burden of proof by furnishing cogent evidence in support of such pleading. Apart from that, the learned Family Court failed to appreciate that the divorce petition filed by the husband did not contain the essential particulars as per Rule 7(G)(i) of the Patna High Court Rules, 2000 which specifically provides that the name and address of the person who is suspected to have had physical relationship with his wife is required to be mentioned in the divorce petition whenever the charge of adultery is levelled against the wife. The impugned judgment and decree has also been challenged on the ground that the learned Family Court failed to examine the question whether the husband had access to the wife or not during the period when she had conceived. Section 112 of the Evidence Act which in no uncertain terms provides that once the validity of marriage is proved, then there is strong presumption of the legitimacy of the child born out of that wedlock. This presumption can only be refuted by a strong, cogent and conclusive evidence. The said

presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. The Family Court, it has been argued, fell into grave error of law while drawing an adverse inference merely because the wife did not undergo D.N.A. test even before the respondent/husband could discharge his burden of proving whether he had access to his wife or not.

22. In order to dispel the aforesaid contention, the learned counsel for the husband relied upon a series of judgments rendered by the Highest Court of land on the issue of the necessity of D.N.A. test and in this regard heavy reliance has been placed on the judgment in **Dipanwita Roy Vs. Ronobroto Roy, (2015) 1 SCC 365**, wherein the Hon'ble Supreme Court has held that without D.N.A. test, it would be impossible for the husband to establish the alleged infidelity of wife. The said test which is the most legitimate and scientifically perfect means could be used by husband to establish his assertion of infidelity. Simultaneously, the said test could also be used by wife to rebut the assertions made by husband and to establish that she had not been unfaithful, adulterous or disloyal.

23. It was further contended that the High Court in appeal should ordinarily remand a case under Order 41 Rule 23

CPC on the ground that points touching the appreciation of evidence have not been dealt with by the Trial Court because the first Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. In order to buttress the aforesaid submission, reliance has been placed on the judgments rendered in the case of **Ashwinkumar K. Patel Vs. Upendraj. Patel and Others, (1999) 3 SCC 161** and **Shivkumar and Others Vs. Sharanabasappa and Others, (2021) 11 SCC 277**. Mr. Singh has further contended that evidence led by the husband and a bald denial in the written statement by wife, without any leading evidence or putting any question in the cross-examination to the witnesses, the husband has been held to have discharged his onus. It was contented that a strong case of adverse inference can be made out under Section 114 of the Evidence Act, if a party refuses to undergo D.N.A. test despite orders by the Court. Medical test is permissible in a proceeding under Section 13 of the Hindu Marriage Act. Reliance has been made on a judgment passed in the case of **Sharda Vs. Dharmpal, (2003) 4 SCC 493**. In the case of **Ashok Kumar Vs. Raj Gupta and Others, (2022) 1 SCC 20**, also the Supreme Court in uncertain terms has clearly held that a strong case of adverse inference under Section 114(h) of the Evidence

Act is made out against the party who refuses to undergo D.N.A. test despite the orders by the Court.

24. While relying upon a judgment of three Judges Bench of the Hon'ble Supreme Court in the case of **Selvi and Others Vs. State of Karnataka, (2010) 7 SCC 263**, Mr. Singh, further submitted that the plea of Article 20(3) cannot be invoked by witnesses during proceedings as a denovo proceeding cannot be characterized as any criminal proceeding even if there were a punitive outcome. D.N.A. test was permissible as it did not involve testimonial depositions.

25. The learned senior advocate, further relying on the ultrasonography reports, strenuously submitted that the reports discussed hereinabove medically suggest that the wife had conceived in the month of April, 2013. However, after 03.03.2012 till 14.08.2012, the spouses had no access to each other, which fact is also corroborated by the statement of the wife, though, she has given a vague statement in her reply that she had gone to Chandigarh in the first week of May, which fact does not improve her case or falsifies the assertion of the respondent/husband. Thus, *prima facie,* the respondent/husband has succeeded in proving his assertion namely of infidelity of his wife.

26. This Court has given anxious consideration to the submissions of learned advocates for the parties and has also perused the materials available on records.

27. Undoubtedly, a Family Court has the power to direct a person to undergo medical tests, including a D.N.A. test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution of India as has been held in the case of **Sharda Vs. Dharmpal, (2003) 4 SCC 493**.

28. This Court is also conscious of the fact that a direction to use D.N.A. profiling technology to determine the paternity of a child is an extremely delicate and sensitive aspect. Therefore, such tests must be directed to be conducted only when those are eminently needed and not as a matter of course or in a routine manner whenever such a request is made.

29. The identical issue involved in the present *lis* has been painstakingly considered by the Apex Court in the case of **Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia (Arising out of SLP (Civil) No. 9855 of 2022)**, wherein the Hon'ble Court, having taken note of earlier judgments on this point, culled out the circumstances under which a D.N.A. test of a minor child may be directed to be conducted, which reads as

follows:

> *"i. That a DNA test of a minor child is not to be ordered routinely, in matrimonial disputes. Proof by way of DNA profiling is to be directed in matrimonial disputes involving allegations of infidelity, only in matters where there is no other mode of proving such assertions.*
>
> *ii. DNA tests of children born during the subsistence of a valid marriage may be directed, only when there is sufficient prima-facie material to dislodge the presumption under Section 112 of the Evidence Act. Further, if no plea has been raised as to non-access. in order to rebut the presumption under Section 112 of the Evidence Act, a DNA test may not be directed.*
>
> *iii. A Court would not be justified in mechanically directing a DNA test of a child, in a case where the paternity of a child is not directly in issue, but is merely collateral to the proceeding.*
>
> *iv. Merely because either of the parties have disputed a factum of paternity, it does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference based on such evidence, or the controversy in*

> *issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the Court can direct such test.*
>
> *v. While directing DNA tests as a means to prove adultery, the Court is to be mindful of the consequences thereof on the children born out of adultery, including inheritance-related consequences, social stigma, etc."*

30. From the reading of the aforenoted principles, it goes without saying that no D.N.A. test is required till the respondent/husband is able to dislodge the presumption under Section 112 of the Evidence Act of conclusive proof of legitimacy. However, such a presumption is rebuttable but only by way of establishing a strong *prima facie* case.

31. Further, the Apex Court having taken note of the interest of the child, held that children have the right not to have their legitimacy questioned frivolously in Courts of Law and cautioned that the Courts are required to acknowledge that children are not to be regarded like material objects, and be subjected to forensic/DNA testing, particularly when they are not parties to the divorce proceeding. It is imperative that children do not become the focal point of the battle between

spouses. This implies that the interest of the child should be given primary consideration in actions involving children.

32. This Court is conscious of the fact that the wife has given a justifiable and cogent reason not to undergo the D.N.A. test of her child because of his aliment and chances of mental trauma to him. Hence the argument of presumption under Section 114(h) of the Evidence Act appears to us to be misplaced.

33. An adverse inference in law can be drawn only against the person who refuses to answer a question. The appellant/wife has a dual role to play viz., that of the respondent's wife and that of the mother of her son. If the appellant/wife refuses to do something for the purpose of deriving a benefit to herself, an adverse inference can be drawn against her. But in her capacity as a mother and natural guardian, if the appellant/wife refuses to subject the child to D.N.A. test for the protection of the interests and welfare of the child, no adverse inference of adultery can be drawn against her. The Apex Court in such a situation further held that by refusing to subject the child to D.N.A. test, a mother is actually protecting the best interests of the child. For protecting the best interests of the child, the appellant/wife can be rewarded, but

never punished with an adverse inference. By taking recourse to Section 114(h) of the Evidence Act, the respondent/husband cannot throw the appellant/wife to a catch-22 situation.

34. Now, reverting to the facts of the present case, it can safely be said that if one of the parties to the marriage shows that he had no access to the other at the time when the child could have been begotten, Section 112 of the Evidence Act itself does not get attracted. On the contrary, if the parties have had access to each other at the relevant point of time, the fate of the question relating to legitimacy is sealed.

35. This Court also cannot lose sight of the fact that instances abound of women carrying pregnancy for ten months (41, 42 or even 43 and occasionally 44 weeks) without problems. There are various examples of a woman carrying a baby in womb for more than ten months.

36. The D.N.A. test cannot be used as a short cut to establish the assertion of infidelity. This Court finds it difficult to dislodge the presumption under Section 112 of the Evidence Act. It would be also relevant to observe here that the respondent/husband has also failed to provide the name and address of the person with whom the appellant/wife had been in relationship. In view thereof, no *prima facie* case is made out by

the respondent/husband, which would justify a direction to conduct a D.N.A. test and in no circumstances, adverse inference can be drawn as regards the alleged adultery on the part of the appellant herein.

37. In view of the discussions made above, the impugned judgment and decree dated 01.06.2019 and 14.06.2019 passed by the learned Principal Judge, Family Court, Muzaffarpur, in Matrimonial Case No. 55 of 2014 is not found to be sustainable and is thus set aside.

38. The matter is remitted to the Family Court, Muzaffarpur, to decide it afresh by allowing the parties to lead their evidences in support of their respective cases.

39. The appeal stands allowed with the observation indicated above.

(Harish Kumar, J)

(Ashutosh Kumar, J)- I agree.

rohit/- **(Ashutosh Kumar, J)**

AFR/NAFR	AFR
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