
(2011) 08 PAT CK 0012
In the Patna High Court
Case No : CWJC No. 12301 of 2011

Brij Nandan Ram

APPELLANT

Vs

Smt. Rakhi Kumari @ Soni and Another

RESPONDENT

Date of Decision : 17-08-2011

Acts Referred:

Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 112, 4
Hindu Marriage Act, 1955 — Section 12(1), 13, 13(1)

Citation : (2012) 1 PLJR 331

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mungeshwar Sahoo, J.—Heard the learned Senior Counsel Mr. T.N. Maitin on behalf of the petitioner and Learned Counsel Mr. Binod Kumar Singh on behalf of the respondents. This application under Article 227 of the Constitution of India has been filed by the husband applicant-petitioner against the order dated 18.4.2011 as contained in Annexure-5 passed by Principal Judge, Family Court, Patna in Matrimonial Case No. 53 of 2005 whereby the learned Family Court rejected the application of the petitioner for DNA test of respondent No. 1 (wife) and her daughter.

2. It appears that the petitioner has filed the-said Matrimonial Case No. 53 of 2005 for dissolution of marriage by a decree of divorce on the ground of adultery and cruelty as provided under Sections 13(i) and 13(i)(a) of the Hindu Marriage Act, 1955. According to the petitioner respondent. No. 1 La. his wife had illicit relation with her brother-in-law, respondent No. 2 and she was living in adultery with him and out of that adulterous relationship the daughter was born on 25.1.2004 at Ranchi. Respondent No. 1 wife denied the allegation.

3. The learned Senior Counsel submitted that the petitioner filed the application for DNA test to prove that in fact he is not the father of female child rather the

respondent No. 2 is the father but the learned court below rejected the prayer by the impugned order saying that, it is not maintainable. Therefore, the learned court below has not exercised a jurisdiction vested in it by law. The Learned Counsel further submitted that the primary duty of a court is to see that truth is arrived at. According to the Learned Counsel although there is no provision in Hindu Marriage Act or Indian Evidence Act to compel a party for DNA test but court can in suitable cases exercise its inherent jurisdiction and this principle has already been decided by the Apex Court. The Learned Counsel relied upon *Sharda Vs. Dharmpal*, and submitted that the court has the jurisdiction to order for DNA test and in the said case the Apex Court did not interfere the order of the High Court directing for DNA test. The Learned Counsel relied upon various paragraphs of the said decision and placed the same in extenso. The Learned Counsel also relied upon a decision of the Andhra Pradesh High Court reported in AIR 2010 Andhra Pradesh 172 and submitted that in Andhra Pradesh case also the same very question was examined and the Andhra Pradesh High Court relying upon the case of *Sharda vs. Dharampal* (supra) held that the High Court under inherent power can compel a party to undergo DNA test to find truth of the matter and to clear misunderstanding between the parties.

4. On the contrary, the Learned Counsel Mr. Binod Kumar Singh appearing on behalf of the respondents submitted that considering all the previous judgments and decisions of the Apex Court recently the Apex Court has held that in a routine manner the court has no jurisdiction to order for DNA test. The court can in appropriate case order for DNA test but it is not the rule rather its exceptions. So far the decision of *Sharda vs. Dharampal* (supra) is concerned in that case the matrimonial suit was filed on the ground of Section 12(1)(b) and Section 13(1)(iii) of the Hindu Marriage Act, 1955 and considering the facts of that case the trial court directed for DNA test which was not interfered by the Apex Court but here the fact is otherwise. Here the parentage of the child is in question. Therefore, the decision of the Apex Court relied upon by the petitioner is not applicable in the present case. Here u/s 112 of the Evidence Act the legitimacy of the child born during the marriage is conclusive proof that the child is the legitimate daughter of the petitioner. The Learned Counsel relied upon *Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and Another*, .

5. From perusal of the impugned order it appears that the learned court below found that earlier the prayer of the petitioner was rejected and the petitioner filed civil revision before this Court which was also dismissed and this application has been filed second time. The learned court below also considered the fact that the petitioner was found to be in the habit of creating evidence in his favour. Considering all these aspects of the matter by the impugned order rejected the prayer of the petitioner.

6. From perusal of the decision of *Sharda vs. Dharampal* (supra) it appears that in that case the Hon''ble Apex Court was deciding a question as to whether a

party to a divorce proceeding can be compelled to a medical examination. It appears that the trial court directed the wife to submit herself to medical examination on the question as to whether she is of unsound mind because that was the ground for divorce. The revision application was dismissed by the High Court. The petitioner wife filed appeal before the Apex Court and the Apex Court dismissed the application finding that under the Hindu Marriage Act or in other law governing the field do not contain any express provision empowering the court to issue a direction upon a party to compel him to submit himself to a medical examination. However, this does not preclude the court from passing such an order in exercise of inherent jurisdiction. Therefore, in the aforesaid decision before the Apex Court the divorce was not sought on the ground of adultery.

7. Relying on the aforesaid decision a Single Bench of the Andhra Pradesh High Court has held that the primary duty of a court is to see that truth is arrived at. It appears that in that case the trial court had directed for DNA test and in civil revisional jurisdiction the High Court of Andhra Pradesh did not interfere with the order. The petitioner therein questioned the jurisdiction of the Trial Court to issue such direction which was upheld. Here in the present case, the prayer of the petitioner was earlier rejected by the trial court and also by this Court in Civil Revision No. 302 of 2008 and second time this application has been filed.

8. In (2010)8 SCC 633, the Apex Court examined two questions which are evident from paragraph 1 of the judgment itself. The second question was that whether the High Court of Orissa was justified in issuing direction for DNA test of the child and the appellant who according to the mother of the child was father. The Apex Court considered the case of *Sharda vs. Dharampal* (supra) and also the other decisions of the Apex Court has held at paragraphs 20, 21 and 22 as follows:-

20. Recently, in *Ramkanya Bai vs. Bharatram* decided by the Bench of which one of us, R.M. Lodha, J. was the member, the order of the High Court directing DNA test of the child at the instance of the husband was set aside and it was held that the High Court was not justified in allowing the application for grant of DNA test of the child on the ground that there will be possibility of reunion of the parties if such DNA test was conducted and if it was found from the outcome of the DNA test that the son was born from the wedlock of the parties.

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 u/s 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.

9. In the case of Shri Banarsi Dass Vs. Mrs. Teeku Dutta and Another, , it was held that even the result of a genuine DNA test may not be enough to escape from the conclusiveness of Section 112 of the Evidence Act like a case where a husband and wife were living together during the time of conception.

10. Section 4 of the Indian Evidence Act reads as follows:-

4. "May presume".-Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

"Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

"Conclusive proof".-When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

11. Section 112 of the Indian Evidence Act reads as follows:-

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."

12. Therefore, in view of the provision as contained in Section 112 of the Indian Evidence Act the female child born to the respondent No. 1 during the continuance of valid marriage between petitioner and respondent No. 1 shall be deemed to be the legitimate daughter of the petitioner and this will be conclusive proof and no amount of evidence can rebut this presumption. The petitioner can avoid this presumption only if he can show that he had no access with his wife at any time when the child could have been begotten.

13. In view of the above discussions, it emerges that the court has the jurisdiction to order for DNA test but it depends on the facts of the each case.

Merely because an application has been filed for DNA test the court cannot pass routine order directing for DNA test. In present case, the marriage is admitted and the female child was born during the continuance of valid marriage. In such circumstances, presumption u/s 112 of the Evidence Act is conclusive. This conclusiveness of the proof of legitimacy cannot be rebutted by DNA test only. Moreover, the court has the discretion to pass order for DNA test in appropriate cases and to refuse in appropriate case. Therefore, the court has to exercise its discretionary jurisdiction according to the judicial norms considering the facts of each case.

14. Admittedly, in the present case the prayer of the petitioner for DNA test was rejected earlier considering the presumption u/s 112 of the Evidence Act on 19.4.2007. Against the said order Civil Revision No. 302 of 2008 was filed before this Court which was dismissed on 8.5.2009 finding that there was no jurisdictional error in the impugned order. However, while dismissing the revision application observation was made that if at any given point of time during the hearing of the suit the petitioner would make out a full proof case for DNA test the court, below will consider the prayer strictly in accordance with law. Because of this observation the petitioner again filed the application praying for DNA test. After considering all these aspects of the matter by the impugned order the learned court below has rightly rejected the prayer of the petitioner. In such circumstances, it cannot be said that the learned court below has not exercised a jurisdiction vested in it by law nor it can be said that it is the case of failure of justice or grave injustice. In supervisory jurisdiction therefore, the impugned order cannot be interfered with as this matter has already been settled by the Apex Court in the case of Bhabni Prasad Jena (*supra*). The aforesaid decision is fully applicable to the present case. The decision of the Apex Court in this case was delivered on 3rd August, 2010 and the decision of Andhra Pradesh High Court is dated 1.4.2010. Therefore, the decision of the Apex Court is later than the Andhra Pradesh High Court. I therefore, follow the decision of the Apex Court in the aforesaid case. In view of the above facts and circumstances of the case, I find no merit in this application under Article 227 of the Constitution of India and accordingly, it is dismissed.