IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 18TH DAY OF SEPTEMBER 2023 / 27TH BHADRA, 1945

OP(CRL.) NO. 631 OF 2023

AGAINST THE ORDER IN CRL.M.APPL NO.307/2022 IN

MC 35/2023 OF FAMILY COURT, PARAVOOR

PETITIONER/PETITIONER/RESPONDENT:

SUJITH KUMAR S

[redacted]PO,

BY ADV I.S.LAILA

RESPONDENTS/RESPONDENTS/PETITIONERS:

1 VINAYA V S,

[redacted]

2 VIVEK,

[redacted]

THIS OP (CRIMINAL) HAVING BEEN FINALLY HEARD ON 22.08.2023, THE COURT ON 18.09.2023 DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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O.P(Crl).No.631 of 2023

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Dated this the 18th day of September, 2023

J U D G M E N T

This Original Petition has been filed challenging order in Crl.M.Appl.No.307/2022 in M.C.No.35/2023 on the files of the Family Court, Paravoor.

2. Heard the learned counsel for the petitioner on admission. Notice to the other side stands dispensed with.

The averments in CMP.No.774/2019 is as under:

The petitioner in the above C.M.P, who is the petitioner herein, raised a contention before the Family Court that he married the 1st respondent herein on 14.07.2004 and the 1st responndent is a person suffering from mental disease and, therefore, he had no

occasion to have sexual intercourse with the 1st respondent. According to the petitioner, the petitioner was abroad for years after the marriage and the petitioner brought the 1st respondent abroad twice. Thereafter the 1st respondent left the company of the petitioner due to mental problem. As such the paternity of the petitioner is doubtful. Therefore, the petitioner sought DNA test to find out the paternity of the 2nd respondent, who is the minor child.

3. The 1st respondent filed detailed objection mainly contending that the marriage between the petitioner and the 1st respondent was solemnised on 17.04.2004 before the Mahadevar Temple, Puthiyadom, Paravoor and in the said wedlock, the 2nd minor child was born on 21.02.2006. It was also contended that in between 12.02.2005 and 12.05.2005, the 1st respondent along with the petitioner resided in Oman and the 2nd respondent minor child was born during the said period. The petition was filed to deny payment of maintenance without denying the paternity and, therefore, the petition filed as an experimental measure is liable to

be dismissed.

4. The learned Family Court Judge considered the rival contentions and dismissed the application as per Ext.P6 order, finding that the petitioner herein had no case that he did not have any access with the 1st respondent at the begotten time, in a case, where Section 112 of the Evidence Act would apply. It was also observed by the learned Family Court Judge that earlier also, the petitioner filed a similar application seeking the relief to conduct DNA test and thereafter the petitioner/1st respondent resumed joint residence and accordingly the said petition was withdrawn. It is also noted by the Family Court that in the objection filed in the main petition the only contention raised by the petitioner herein was that he had suspicion with respect to the paternity and he did not have a consistent case denying the paternity of the child. Therefore, it was found by the Family Court that DNA test to rebut the conclusive presumption available under Section 112 of the Evidence Act could be available only in compelling circumstances

and the same is not a device to clear suspicion, regarding paternity.

5. The learned counsel for the petitioner reiterated the contention raised before the Family Court and pressed for the necessity of DNA test. But the learned counsel failed to substantiate an outright denied of paternity.

6. Thus the question to be considered is; whether DNA test can be pressed into, in order to clear a suspicion regarding the paternity of the child, when there is no specific denial of paternity?

7. In this connection, it is relevant to refer Section 112 of the Indian Evidence Act, 1972, which provides 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.* In fact, DNA test is intended to rebut the `conclusive proof' provided under

Section 112 of the Evidence Act.

8. While taking the legal sanctity of DNA test, in a latest decision reported in [2023 KHC 6155 : 2023 (2) KLT 101 : 2023 (1) KLJ 876 : 2023 SCC OnLine SC 161], ***Aparna Ajinkya Firodia v. Ajinkya Arun Firodia,*** the Apex Court considered the circumstances under which DNA test of a minor child may be directed to be concluded and held as under:

> *"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.*
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> *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 S.112 of the Evidence Act. Further, if no plea has been raised as to non-access, in order to rebut the presumption under S.112 of the Evidence Act, a DNA test may not be directed.*
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> *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 proceedings.*
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> *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. (Para 12)

Family Courts Act, 1984 – S.7 – DNA test – When Court should exercise power to order DNA test – Only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, Court can direct such test – Further, a direction to conduct DNA test of a child, is to be ordered even rarely, in cases where the paternity of a child is not directly in issue but is merely collateral to the proceeding.

Held: With the advancement of science, DNA profiling technology which is a tool of forensic science can, in case of disputed paternity of a child by mere comparison of DNA obtained from the body fluid or body tissues of the child with his parents, offer infallible evidence of biological parentage. But, it is not always necessary to conduct a DNA test to ascertain whether a particular child was born to a particular person, however, the burden of proof is on the husband who alleges illegitimacy. He has to establish the fact that he has not fathered the child born to his wife which is a negative plea by positive proof in accordance with S.112 of the Evidence Act. A Family Court, no doubt, has the power to direct a person to undergo medical tests, including a DNA test and such an order would not be in violation of the right to personal liberty under Art.21 of the Constitution, vide Sharda. However, the Court should exercise such power only when it is expedient in the interest of justice to do so, and when the fact situation in a given case warrants such an exercise. Thus,

an order directing that a minor child be subjected to DNA test should not be passed mechanically in each and every case. The reasons for the parent's refusal may be several, and hence, it is not prudent to draw an adverse inference under S.114 of the Evidence Act, in every case where a parent refuses to subject the child to a DNA test. Therefore, it is necessary that only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, the Court can direct such test. Further, a direction to conduct DNA test of a child, is to be ordered even rarely, in cases where the paternity of a child is not directly in issue but is merely collateral to the proceeding, such as in the instant case."

9. In the decision reported in [(2019) 4 SCC 771], ***Pattu Rajan v. State of Tamil Nadu***, the Apex Court considered the evidentiary value insofar as expert opinion under Section 45 of the Evidence Act, 1872 is concerned and held that it cannot be forgotten that opinion evidence is advisory in nature and the court is not bound by the evidence of the experts. It has been held further that it is the duty of an expert witness to assist the court effectively by furnishing the relevant report based on his expertise along with his reasons, so that the court may form its independent judgment by assessing such materials and reasons furnished by expert for coming to an appropriate conclusion. Thus the law

emerges is that merely because parties have dispute about paternity, it does not mean that the court should direct DNA or such other test to resolve the controversy. In such circumstances, the parties should be directed to lead evidence to prove the dispute of factum of paternity and only when the court finds it impossible to draw an inference based on such an evidence or the controversy in issue cannot be resolved without DNA test, it may direct the DNA test and not otherwise. To put it differently, only in rare and exceptional cases of deserving nature, DNA test or any other scientific test become indispensable to resolve the controversy.

10. It has to be held further that when DNA test cannot be resorted to clear a suspicion regarding the paternity of the child, in the absence of specific denial of paternity of the child.

11. In view of the above legal position, the dismissal of the application put in by the petitioner to conduct DNA test with a view to clear his suspicion/doubt regarding the paternity of the child, can only be justified. As a sequel thereto, this petition

deserves no merits and is liable to be dismissed.

In the result, this Original Petition stands dismissed.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF OP(CRL.) 631/2023

PETITIONER'S EXHIBITS

Exhibit P1	TRUE COPY OF THE MAINTENANCE PETITION FILED BY THE RESPONDENTS BEFORE THE FAMILY COURT, KOLLAM AS M.C. NO. 268/2019 DATED 18/7/2019.
Exhibit P2	TRUE COPY & TYPED COPY OF THE PETITION BEARING CRL. MP NO. 774/2019 IN M.C. NO.35 OF 2023 PENDING BEFORE THE (M.C.NO.268/2019 ON THE FILES OF THE FAMILY COURT, KOLLAM).
Exhibit P3	A TRUE COPY OF THE CRL.M.P. NO. 307/2022 FILED BY THE PETITIONER IN M.C. NO. 35/2023.
Exhibit P4	TRUE COPY OF THE OBJECTION DATED 5/1/2023 FILED BY THE PETITIONER IN EXT. P1 MAINTENANCE PETITION.
Exhibit P5	TRUE COPY OF THE OBJECTION IN CRL.M.P. NO. 307/2022 IN M.C. NO. 35/2023.
Exhibit P6	TRUE COPY OF THE ORDER DATED 14/6/2023 IN CRL.M.P. NO. 307/2022 IN M.C. NO. 35/2023 ON THE FILES OF THE FAMILY COURT, SOUTH PARAVUR.
Exhibit P 7	TRUE COPY OF THE ORDER IN CRL MP NO.774/2019 IN M.C. NO.35/2023 (FORMER NO.M.C.NO. 268/2019, FAMILY COURT KOLLAM) DATED 19-06-2023 ON THE FILES OF THE FAMILY COURT, PARAVUR IS PRODUCED HEREWITH