

2022 LiveLaw (SC) 869

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
ANIRUDDHA BOSE; J., VIKRAM NATH; J.**

September 15, 2022

CRIMINAL APPEAL NO. 1569/2022 (Arising out of the SLP (Cr.) No.4946/2017)

INAYATH ALI & ANR. versus STATE OF TELANGANA & ANR.

DNA Test for paternity – Supreme Court sets aside HC direction for DNA test of children in a matrimonial disputes - SC cites Right to Privacy – Merely because something is permissible under the law cannot be directed as a matter of course, to be performed particularly when a direction to that effect would be invasive to the physical autonomy of a person – Important question is not only whether it would amount to testimonial compulsion – Also encompasses right to privacy – Test could be prejudicial to the privacy rights of persons subjected to it – May also be prejudicial to future of children subjected to the test. (Para 9)

Indian Evidence Act 1872; Section 112 - DNA test - SC sets aside direction for DNA test of children - notes that children were not parties to the proceedings - the test will have the potential of exposing them to inheritance related complication. Section 112 of the Evidence Act, gives a protective cover to children from allegations of this nature. (Para 7)

(Arising out of the impugned Judgment and Order dated 20.02.2017 passed by the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Criminal Revision Case No. 2246 of 2014)

For Appellant(s) Mr. Shwetank Sailakwal, Adv. Mr. Tanmaya Agarwal, AOR Mr. Wrick Chatterjee, Adv. Mr. Ravindra Vikram Singh, Adv.

For Respondent(s) Ms. Bina Madhavan, Adv. Mr. S. Udaya Kumar Sagar, AOR Ms. Sweena Nair, Adv. Mr. G. N. Reddy, AOR Mr. Ravi Shankar, Adv.

ORDER

Leave granted.

2. Heard learned counsel appearing for the parties. The present proceeding arises out of an FIR lodged by the defactocomplainant (respondent no.2) followed by chargesheet pertaining to offences under Sections 498A, 323, 354, 506 and 509 of Indian Penal Code, 1860 (the "Code"). The FIR was made against the appellants, the appellant no. 2 being her husband and the first appellant being her brother-in-law (husband's brother). Having regard to the nature of controversy involved in this proceeding, we have avoided revealing her identity in this judgment and direct the Registry to mask her identity with "XX". Her complaint mainly related to dowry allegations as well as harassment and physical violence committed on her by her husband and her in-laws. The Trial Court had proceeded in the case and several witnesses were examined, when the complainant filed an application under Section 45 of the Indian Evidence Act, 1872 with a prayer for direction for obtaining expert opinion for DNA fingerprint test comparing blood samples of two minor daughters of the respondent no.2 with that of the first appellant. The basis of this application was her allegation that she was forced to cohabit and develop a physical relationship with the appellant no. 1 and the two children were born out of that relationship. The Trial Court allowed her prayer and she, along with the appellants and the children, were directed to give blood samples to a specified hospital for obtaining an expert opinion on DNA fingerprint test.

3. The appellants invoked the revisional jurisdiction of the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh seeking invalidation of the said Order. The revisional application, however, was dismissed. The High Court held that such DNA fingerprint test was permitted under Sections 53, 53A and 54 of the Criminal Procedure Code, 1973. It was observed in the judgment of the High Court, relying on several authorities, that it does not tantamount to testimonial compulsion. It was also held by the High Court that in the event the directions were not complied with, the Court had to draw an adverse inference. The order of the Trial Court was, thus, upheld.

4. We have been taken through the FIR and the chargesheet as well as the additional chargesheet by the learned counsel for the parties. The allegations, which we have already indicated, were primarily in respect of dowry related offences but later on the offence related to outraging modesty of the respondent no.2 was added. Paternity of the children of the complainant were not directly related to the allegations, out of which the present appeal arises.

5. In the case of **Ashok Kumar v. Raj Gupta and Ors.** [(2022) 1 SCC 20] decided by a Coordinate Bench, sparing use of the DNA fingerprint test was opined. This was a suit for declaration of ownership of certain property and the defendants had raised the plea that the plaintiff was not the son of the original owner thereof, from whom he claimed to have derived the title. In that case also, plea was made for conducting a DNA test. The Coordinate Bench of this Court held, referring to, inter-alia, Section 112 of the 1872 Act:-

“15. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India [K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India, (2019) 1 SCC 1], wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued i.e. whether the same are not arbitrary or discriminatory, whether they may have an adverse impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test.”

6. In the present proceeding, we are taking two factors into account which have been ignored by the Trial Court as also the Revisional Court. The Trial Court allowed the application of the respondent no.2 mechanically, on the premise that the DNA fingerprint test is permissible under the law. High Court has also proceeded on that basis, referring to different authorities including the case of **Dipanwita Roy v. Ronobroto Roy** [2015 (1) SCC 365]. The ratio of this case was also examined by the Coordinate Bench in the decision of **Ashok Kumar** (supra).

7. The first factor, which, in our opinion, is of significance, is that in the judgment under appeal, blood sampling of the children was directed, who were not parties to the proceeding nor were their status required to be examined in the complaint of the respondent no.2. This raised doubt on their legitimacy of being borne to legally wedded parents and such directions, if carried out, have the potential of exposing them to inheritance related complication. Section 112 of the Evidence Act, also gives a protective cover from allegations of this nature. The said provision stipulates:-

“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.”

8. In our opinion, the Trial Court as also the Revisional Court had completely ignored the said factor and proceeded as if the children were material objects who could be sent for forensic analysis. The other factor, in our opinion, which was ignored by the said two Courts is that the paternity of the children was not in question in the subject-proceeding.

9. The substance of the complaint was not related to paternity of the children of the respondent no.2 but the question was whether the offences under the aforesaid provisions of the 1860 Code was committed against her or not. The paternity of the two daughters of the respondent no.2 is a collateral factor to the allegations on which the criminal case is otherwise founded. On the basis of the available materials, in our opinion, the case out of which this proceeding arises could be decided without considering the DNA test report. This was the reasoning which was considered by the Coordinate Bench in the case of **Ashok Kumar** (supra), though that was a civil suit. Merely because something is permissible under the law cannot be directed as a matter of course to be performed particularly when a direction to that effect would be invasive to the physical autonomy of a person. The consequence thereof would not be confined to the question as to whether such an order would result in testimonial compulsion, but encompasses right to privacy as well. Such direction would violate the privacy right of the persons subjected to such tests and could be prejudicial to the future of the two children who were also sought to be brought within the ambit of the Trial Court’s direction.

10. We, accordingly, allow the appeal and set aside the judgment of the High Court. Consequentially, the order of the Trial Court passed on 17th October, 2014 in Crl.M.P. No. 92 of 2014 arising out of S.C.No. 70/2012 shall also stand set aside.

11. Pending application(s), if any, shall stand disposed of.

12. There shall be no order as to costs.

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