IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Revision No.66 of 2022

Reserved on: 24th March, 2023

Decided on : 1st April, 2023

Anil Kapoor **.....Petitioner**

Versus

Dipika Chauhan **.....Respondent**

Coram

Ms. Justice Jyotsna Rewal Dua

Whether approved for reporting?[1] Yes.

For the Petitioner: Mr. Sudhir Thakur, Senior Advocate with Mr. Karun Negi, Advocate.

For the Respondent: Mr. Peeyush Verma and Mr. Ajay Kumar, Advocates.

Jyotsna Rewal Dua, Judge

In the divorce proceedings pending between the petitioner (husband) and the respondent (wife) under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, the husband moved an application for conducting Deoxyribonucleic Acid (DNA) test of the child and the parties. This application was dismissed by the learned District Judge (Family Court), Shimla, H.P. on 07.04.2022. The petitioner seeks to assail this order in the instant petition.

---

[1] Whether reporters of print and electronic media may be allowed to see the order? Yes.

2. Relevant facts:-

2(i). In October, 2018, the petitioner instituted petition under Section 13(1)(ia) and (ib) of the Hindu Marriage Act against his wife (respondent). Decree of Divorce was prayed for on the grounds of cruelty and desertion.

2(ii). The husband pleaded that marriage between the parties was solemnized on 19.05.2015. After the marriage, the petitioner and respondent lived together as husband and wife. They consummated their marriage only once on 21.07.2015. The baby was born to the respondent (wife) within eight months, on 14.03.2016. After the birth of the child, the respondent had stayed for a period of 11 days at petitioner's home and then demanded separate residence at Shimla. The husband further submitted in the petition that the respondent (wife) had herself told him about the child not belonging to him. Some relevant paras from the petition are as under:-

> *"4. That marriage of parties has been consummated once on 21st July 2015 and baby to the marriage was born on 14-03-2016 before eight months, therefore the Petitioner is requesting to the Ld Court for the DNA test of the parties, especially as the respondent herself had stated to the Petitioner that the child does not belong to the Petitioner.*
>
> *5. That the Respondent had only stayed for the period of 11 days at Petitioner home after birth of baby and then demanded from the Petitioner separate flat at Shimla which was refused by the Petitioner as the Petitioner*

has old age parents to be taken care off and was not in a condition to purchase flat.

13. *That the respondent was pregnant from some other men/stranger during the marriage with the petitioner and she had affair with someone else as she used to send text message to the Petitioner stating that "I Don't like You". The petitioner will produce the proof at the time of evidence.*

14. *That the situation had become so worse that once when he visited the house in Shimla there was one man whose name not known to petitioner was present inside the bedroom of the respondent and at that time the Respondent asked the Petitioner that why he had come to her house without any prior information, thereafter many times when Petitioner visited her house the same person/stranger was always present inside the house and when the Petitioner tried to ask to the respondent she used to say to the petitioner that you are not my husband and neither the child belongs to you. Thereafter the Petitioner did not go to the house in Shimla from past near about two years and they both are living separately.*

15. *That the respondent has deserted the petitioner without any reasonable and justifiable cause and rhyme and hence it has become impossible for the petitioner to live more in the company of the respondent therefore, the petitioner is entitled for a decree of divorce on the grounds of cruelties and desertion."*

2(iii). In her reply to the petition, the respondent, inter alia, denied the allegations of having ever stated to the petitioner about the child not belonging to him. She also denied that the parties did not cohabit as husband and wife.

2(iv). The petitioner (husband) moved an application under Section 45 of the Indian Evidence Act with the prayer to carry out DNA test of the child and the parties. The application was with the averment that the respondent

(wife) had repeatedly informed the petitioner about the baby child not belonging to him. To determine the paternity of the child and to establish that the child did not belong to him, the DNA test of the child and parties was essential. The respondent (wife) opposed the application and denied the allegations of the petitioner (husband).

2(v). Learned Family Court vide its order dated 07.04.2022, considered the fact that:- the evidence had already been led by both the parties; the divorce petition was at the stage of final arguments; the allegations of cruelty and desertion levelled by the husband were to be proved by him and that belated filing of the application by the husband seeking DNA test would impinge upon the privacy of minor child. Learned Family Court also observed that the child, in the instant case, was born during subsistence of the marriage between the petitioner and the respondent, therefore, it would not be appropriate for the Court to allow DNA test of the child and the parties. The application was dismissed, giving cause of action to the petitioner (husband) to institute the present civil revision.

3. Submissions:-

Learned Senior Counsel for the petitioner-husband submitted that the husband had taken the plea of

adultery in the divorce petition. His specific case was that the parties had consummated the marriage only once, that too on 21.07.2015, whereas the child was born even before eight months, i.e. on 14.03.2016. In these circumstances, petitioner's prayer for DNA test of the child and parties was justified. In support of his submissions, learned Senior Counsel placed reliance upon the decisions rendered by the Co-ordinate Benches of this Court in ***Cr.MMO No.198 of 2016 (Sharda Versus Surat Singh)*** and ***CMPMO No.11 of 2013 (Arvinder Singh Versus Smt. Anuradha Chauhan)***, decided on 18.04.2017 and 19.09.2016, respectively. Reference was also made to the judgment passed by the Hon'ble Apex Court in ***(2022) 1 SCC 20 (Ashok Kumar Versus Raj Gupta and others)***. The emphasis in the arguments advanced by learned Senior Counsel for the petitioner was that to unearth the truth and in order to do complete justice between the parties, the DNA test of the child and the parties to the litigation was essential.

Learned counsel for the respondent (wife) defended the impugned order. Pointing out the pleadings of the petitioner in the divorce petition, learned counsel submitted that the plea of denial of access to the wife had not been taken by the petitioner. The parties had been

living as husband and wife. The husband had sought decree of divorce on grounds of cruelty and desertion. No specific allegations of adultery were pleaded in the petition. The petitioner had levelled allegation about the child not being his by merely projecting that the respondent (wife) had told him so. This allegation was refuted by the wife in her defence. The parties had led evidence. In evidence also, the petitioner (husband) did not deny having access to the respondent (wife). Rather, his statement was to the effect that he had been visiting his wife in Shimla every weekend. The child was born to the couple during subsistence of a valid marriage. Therefore, presumption under Section 112 of the Indian Evidence Act was attracted. It was for the petitioner to prove his case by leading evidence. He could not have hunted for evidence by moving application under Section 45 of the Indian Evidence Act, seeking to determine paternity of the child, thereby infringing child's right of privacy. In support of these submissions, learned counsel for the respondent-wife placed reliance upon a judgment passed by the Hon'ble Apex Court in ***SLP(C) No.9855/2022 (Aparna Ajinkya Firodia Versus Ajinkya Arun Firodia)***, decided on 20.02.2023.

4. Having heard learned counsel on both sides at length, I do not find any reason to interfere with the impugned order. This is on account of following reasons:-

4(I). Legal Position:-

4(I)(a). Previous decisions rendered on the subject by Hon'ble Apex Court in ***Bhabani Prasad Jena v. Orissa State Commission for Women [(2010) 8 SCC 633] and Dipanwita Roy v. Ronobroto Roy [(2015) 1 SCC 365]***, were considered again in ***(2022) 1 SCC 20 (Ashok Kumar Versus Raj Gupta and others)***, as under:-

> *"10. The above decision in Bhabani Prasad Jena was considered and approved in Dipanwita Roy v. Ronobroto Roy, where the Court noticed from the facts that the husband alleged infidelity against his wife and questioned the fatherhood of the child born to his wife. In those circumstances, when the wife had denied the charge of infidelity, the Court opined that but for the DNA test, it would be impossible for the husband to establish the assertion made in the pleadings. In these facts, the decision of the High Court to order for DNA testing was approved by the Supreme Court. Even then, J.S. Khehar, J., writing for the Division Bench, considered it appropriate to record a caveat to the effect that the wife may refuse to comply with the High Court direction for the DNA test but in that case, presumption may be drawn against the party."*

Hon'ble Apex Court in *Ashok Kumar's* case, *supra*, went on to hold that in the circumstances where other evidence is available to prove or dispute the relationship, the Court should ordinarily refrain from ordering blood tests. This is because such tests impinge

upon the right of privacy of an individual and could also have major societal repercussions. Indian law leans towards legitimacy and frowns upon bastardy. The presumption in law of legitimacy of a child cannot be lightly repelled. Hon'ble Apex Court in *Ashok Kumar's* case, *supra*, also considered and reiterated its previous decision in ***Kanti Devi v. Poshi Ram [(2001) 5 SCC 311]***, wherein, it was observed that even though Section 112 of the Evidence Act was enacted at a time when modern scientific advancements with DNA and RNA tests were not even in contemplation of the legislature, but even then, it is not enough to escape from the conclusiveness of Section 112 of the Act, i.e. if a husband and wife were living together during the time of conception, but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. Even in such case, the law would lean in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception.

4(I)(b). While deciding ***Criminal Appeal No.1569/2022 (Inayath Ali and another Vs. State of Telangana and another)*** on 15.09.2022, Hon'ble Supreme Court, inter alia, held that direction for DNA test of children

in matrimonial disputes cannot be ordered merely because something is permissible under the law when such direction would be invasive to 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 privacy right of persons subjected to such tests and could be prejudicial to the future of children.

4(I)(c). It will be appropriate at this stage to notice Section 112 of the Indian Evidence Act, which reads as under:-

> *"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 eight 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."*

The section came up for consideration before the Hon'ble Apex Court in *Aparna Aninkya Firodia's* case, *supra*. Hon'ble Apex Court held that the latter part of Section 112 of the Evidence Act indicates that if a person is able to establish that the parties to the marriage had no access to each other at any time when the child could have

been begotten, the legitimacy of such child can be denied. It must be proved by strong and cogent evidence that access between them was impossible on account of serious illness or impotency or that there was no chance of sexual relationship between the parties during the period when the child must have been begotten. Unless the absence of access is established, the presumption of legitimacy cannot be displaced. Where the husband and wife have co-habited together and no impotency is proved, the child born from their wedlock is conclusively presumed to be legitimate, even if the wife is shown to have been, at the same time, guilty of infidelity. The fact that a woman is living in adultery would not by itself be sufficient to repel the conclusive presumption in favour of the legitimacy of a child. The operation of conclusive presumption under Section 112 can be avoided by proving non-access at the relevant time. The Hon'ble Apex Court culled out following principles as to the circumstances under which a DNA test of a minor child could be directed to be conducted:-

> *"12. Having regard to the aforesaid discussion, the following principles could be culled out as to the circumstances under which a DNA test of a minor child may be directed to be conducted:*
>
> *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 become 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."

Hon'ble Justice V. Ramasubramanian, in his concurrent judgment in *Aparna Aninkya Firodia's* case, *supra,* observed that the Indian Evidence Act places birth during marriage as "conclusive proof" of legitimacy. A combined reading of Section 112 shows that once the party questioning the legitimacy of birth of a child shows that the parties to the marriage had no access to each other, then, the benefit of Section 112 is not available to the party invoking Section 112. In other words, if a party to a

marriage establishes that there was no access to the party to the marriage, then the shield of conclusive proof becomes unavailable.

The judgment rendered by the Co-ordinate Bench of this Court in Sharda's case, supra, was in different fact scenario. The Court therein was dealing with a case where a woman admitted that she had never married the man, but claimed that he had access to her and out of that relationship, two children were born. The man denied the allegations. Hence, to ascertain the truth, DNA test was ordered.

4(II). The facts of the instant case may now be examined on the touchstone of above legal pedestal:-

4(II)(a). The petitioner (husband) in his divorce petition has not denied access to the respondent (wife). His pleadings relevant to the controversy are that the marriage between the couple was consummated once and further that the respondent had told him about the child not belonging to him. These allegations have been denied by the respondent (wife) in her reply.

4(II)(b). The parties have already led evidence. While appearing in the witness box as PW-1, the petitioner-husband, in his cross-examination, stated that after his

marriage with the respondent, he used to visit her every Saturday and used to stay with her during the weekend. He has also stated that at the time of birth of **their son,** he was at Shimla. His elder brother and sister-in-law had also visited **couple's son** at Shimla. He has also stated that he had celebrated **his son's** *mundan* at Kumarsain. It is quite evident from the perusal of petitioner's statement that leaving aside the point of husband's not raising the plea of non-access to respondent-wife in his divorce petition, the petitioner-husband has categorically admitted in his statement that he had been visiting his wife every weekend after their marriage, had been residing with her at Shimla in her premises and had celebrated his son's birth and also performed his son's *mundan* ceremony with much fanfare.

It will also be relevant to notice the line of cross-examination of the wife by the husband. While appearing in the witness box as RW-1, the respondent-wife has admitted the suggestion given to her that her son was born to her and her husband (petitioner). This question put to the wife indicates that husband admits the child to be his progeny.

5. Conclusion:-

In view of the evidence on record, it is evident that the couple had access to each other. The husband has

not even denied access to his wife in his pleadings to the divorce petition. He has specifically admitted having access to his wife while appearing as PW-1 and further that he used to stay with his wife during weekends. Thus, the presumption under Section 112 of the Indian Evidence Act gets attracted. The baby was born to the couple having access to each other and during subsistence of valid marriage between them. It is conclusive proof of baby's legitimacy. In such circumstances, the paternity of the child cannot be allowed to be ascertained in the manner sought by the petitioner (husband). It is for the petitioner to prove his allegations of cruelty and desertion against the respondent (wife) on the strength of evidence adduced by him. He cannot be allowed to fill up the lacuna, if any, in his evidence by seeking to conduct the DNA test of the child and the parties.

In view of the above, I find no merit in the instant revision petition. The same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

Jyotsna Rewal Dua
Judge

April 01, 2023
Mukesh