IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

TUESDAY, THE 12TH DAY OF JUNE 2018 / 22ND JYAISHTA, 1940

OP (FC).No. 556 of 2017

AGAINST THE ORDER/JUDGMENT IN OP 1438/2008 of FAMILY COURT,THRISSUR

PETITIONER(S)

E.C. RAMAKRISHNAN,
AGED 77, S/O. EARATT CHEERANKUNJI,
VALAPPAD VILLAGE, P.O KAZHIMBRAM,
CHAVAKKAD TALUK, THRISSUR DISTRICT.

BY ADV.SRI.G.SREEKUMAR (CHELUR)

RESPONDENT(S):

1. **MRINALINI @ NALINI,**
AGED 68, D/O. EARATT RAMI AYYAPPAN,
EDAMUTTAM, P O KAZHIMBRAM,
CHAVAKKAD TALUK,
THRISSUR DISTRICT- 680 001

2. **THAMI,**
AGED 59, S/O. EARATT RAGHAVAN,
EDAMUTTAM, P O KAZHIMBRAM,
CHAVAKKAD TALUK,
THRISSUR DISTRICT- 680 001

R1 BY ADV. SRI.K.S.BHARATHAN
R1 BY ADV. SMT.S.ANJUSHA

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 05-06-2018, THE COURT ON 12-06-2018 DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1	**A TRUE COPY OF THE OP NO. 1438 OF 08 ON THE FILE OF THE FAMILY COURT, THRISSUR DATED 15.10.08.**
EXHIBIT P2	**A TRUE COPY OF THE IA NO 1931 OF 09 IN EXT.P1 DATED 5.5.09.**
EXHIBIT P3	**A TRUE COPY OF THE OBJECTION RAISED BY THE 1ST RESPONDENT IN THE SAID APPLICATION DATED 8.6.2011.**
EXHIBIT P4	**A TRUE COPY OF THE ORDER PASSED IN IA NO 1931 OF 09 IN EXT. P1 DATED 29.11.12 BY THE FAMILY COURT, THRISSUR.**
EXHIBIT P5	**A TRUE COPY OF THE ORDER PASSED BY THIS HON'BLE COURT IN OP(FC) NO. 2578 OF 2013 DATED 9.2.2017.**
EXHIBIT P6	**A TRUE COPY OF THE ORDER PASSED IN IA NO 1931 OF 09 IN OP NO 1438 OF 08 ON THE FILE OF THE FAMILY COURT, THRISSUR DATED 19.8.2017.**

'C.R.'

V. CHITAMBARESH & K.P. JYOTHINDRANATH, JJ.

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O.P.(F.C) No.556 of 2017

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Dated this the 12th day of June, 2018

J U D G M E N T

Jyothindranath, J.

The facts in this case reminds the words of a French Philosopher, Michel de Montaigne - “a good marriage would be between a blind wife and a deaf husband”. A husband aged now 77 years and a wife aged 68 years are parties in a divorce proceeding before a Family Court. The ground alleged is adultery/infidelity. The husband is the petitioner. It is the case of the petitioner that the wife told him, rather declared in the presence of the adulterer that three children born in the wedlock are not his children but adulterer is the the father. After hearing the said declaration, the petitioner moved the above referred petition for divorce.

2. An application was filed as I.A. 1931/2009 in the above divorce O.P. for a DNA examination. As per an order dated 29.11.2012, in I.A.No.1931/2009 the trial court opined that “it is better to allow the petition”. When the

matter was taken up before this court, in O.P.(F.C) 2578/2013, it was ordered to consider the matter in the proper perspective after hearing the affected parties, in the light of the judgment of Hon'ble Apex Court in **Bhabani Prasad Jena v. Orissa State Commission For Women [(2010) 8 SCC 633]**. Thereafter the impugned order of dismissal was passed by the Family Court.

3. It can be seen that there is no dispute regarding the marriage or the relationship in between the petitioner herein and the first respondent/wife. The dispute is whether the DNA test is necessary or not. Before discussing the matter, the dictum laid down by the Hon'ble Apex Court in **Bhabani Prasad**'s case (supra) is relevant to be considered. It was held by the Hon'ble Apex Court in the said decision as follows:

> “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 tool which result in invasion of right to privacy of an individual an 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 bastardize 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 under Section 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.

23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu and Sharda. In Goutam Kundu it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda while concluding that

> matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course."

In the above referred case the petitioner/husband filed a petition under Section 25 (iii) of the 1954 Act for a declaration that the marriage between him and the respondent was a nullity and the said marriage has not been consummated. It is to be remembered that while the said application was filed, the child was in the womb. During the pendency of the said petition, State Commission for Woman directed a DNA test, which was ultimately reached before the Hon'ble Apex Court for consideration. There, the issue directly involved was the paternity and held as stated above. Surely in a subsequent decision in **Dipanwita Roy v. Ronobroto Roy [(2015) 1 SCC 365] = [2014 KHC 4675]**, while considering a divorce petition alleging infidelity of the wife, the Hon'ble Apex Court held as follows:

It is borne from the decisions rendered by this Court in Bhabani Prasad Jena (supra), and Nandlal Wasudeo Badwaik (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegations, which constitute one of the grounds, on which the concerned party would either succeed or lose.

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We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant – wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent- husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in S.114 of the Indian Evidence Act especially, in terms of illustration (h) thereof. S.114 as also illustration (h), referred to above, are being extracted hereunder:

"114 Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (h).- That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him".

4. The above decision was followed by this Court in **Saji Mathew v. Bindu and Anr. [2016 (2) KHC 907]** and

DNA test was ordered. But it was a case where paternity and liability to pay maintenance was in dispute. A DNA test will bring the dispute to a finality in such a case where the child is only a minor.

5. Thus, what comes out is that on the given facts of the case whether the impugned order is sustainable is the question to be considered by this court. The dispute is in respect of three major children who are not party to the original proceeding. It is evident from paragraphs 5 and 6 of the impugned order in I.A. 1931/2099 dated 19.8.2017, which states as follows:

> 5. The additional respondents Jayasree and Rajasree have filed counter statement opposing the petition. They contended that DNA test can be ordered to the best interest of the children and not against their interest. Moreover, the petition is filed for divorce on the ground of adultery. Now the petitioner wants to bastardize the children. It is a speculative attempt by the petitioner requesting the court to have a DNA test. The court has to consider the OP under the presumption contemplated under Section 112 of the Evidence Act and not by DNA test. Therefore, they pray for dismissal of the petition.
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> 6. They also filed an additional counter in which they

> contended that already Vishnu is now omitted from the party array. This itself shows that the petitioner has no bonafides in the contention.

If the major children are not co-operating with the DNA test on the ground of privacy, reputation and dignity, what will be the consequence in the appreciation of evidence of the case has to be kept in mind while any order is passed. No adverse inference can be drawn in the given case as the contesting parties are the husband and wife and not the children. When the children are major, surely they cannot be compelled to give blood sample in a civil proceeding where they were not parties. The case projected by the petitioner seems to be that if DNA test proves the petitioner is not the biological father of the said three children, the corollary is that the wife committed infidelity and there is adultery.

6. Thus the second aspect to be considered in this matter is whether for a just decision, DNA test is eminently needed. Here, it can be said that a DNA test is not a direct evidence but a fact from which an inference can be drawn.

This is not a case where the test is the only safe route to reach the truth. If the paternity of the children is the issue in the proceeding, DNA test may be the only safe method. It is not so in this case. In the case of the three major children, after the passage of a long time, the DNA test cannot be used as a short cut to establish infidelity that might have occurred decades ago. Even an order to undergo DNA test itself may its own effect on the reputation of the children in the society and it is also to be considered that they are major children born during the existence of a valid marriage, who are not party to the original proceeding. They are also not party in this proceeding.

7. When the medical science is advancing and reached at a stage of sperm donation and surrogate mother, the legal right of the biological father and mother as well as the right of the innocent child, against the biological parents are all matters in the domain of the legislation.

8. As the law now stands, by virtue of Section 112 of the Evidence Act, as well as the right of privacy and

reputation of major children, it can be only said that the court below not committed any error in dismissing the petition. The evidence of DNA test to rebut the conclusive presumption available under Section 112 of the Evidence Act, can be allowed only when there is compelling circumstances linked with 'access', which cannot be liberally used as cautioned by the Hon'ble Apex Court in **Dipanwita Roy**'s case (supra), wherein it is stated that “there can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided.”

Thus, it may not be proper to direct a DNA test in a case like this. There is no merit in the petition. Hence, the original petition is dismissed.

Sd/-

V. CHITAMBARESH
JUDGE

Sd/-

K.P. JYOTHINDRANATH
JUDGE

shg/