Court No. - 43

Case :- MATTERS UNDER ARTICLE 227 No. - 7442 of 2019

Petitioner :- Smt. Neelam
Respondent :- Ram Asrey
Counsel for Petitioner :- Salman Ahmad
Counsel for Respondent :- Vijay Bahadur Shivhare

Hon'ble Vivek Agarwal,J.

1. None for the petitioner even when the list is revised. Sri Vijay Bahadur Shivhare, learned counsel for the respondent is present.

2. This petition under Article 227 of the Constitution of India has been filed challenging order dated 22.09.2018 passed by learned Additional Principal Judge, Family Court/F.T.C. IInd, Hamirpur in Case No. 104 of 2015, Ram Asrey vs. Smt. Neelam under Section 13 of the Hindu Marriage Act, 1955.

3. The only issue which has been canvassed as appears from order dated 21.10.2019 is that whether a Court in a divorce petition under Section 13 of the Hindu Marriage Act, 1955 filed by the husband on the ground of adultery can direct that the wife, either to undergo a D.N.A. test or refuse to undergo a D.N.A. test, but in case she elects to undergo a D.N.A. test, then findings of the D.N.A. test will determine conclusively the veracity of accusation leveled by the petitioner-husband against her. It is further mentioned that in case, wife refuses to undergo a D.N.A. test, then whether a presumption can be drawn by the Court against the wife that is to say whether report of D.N.A. test is just a piece of expert evidence or a conclusive or a substantive piece of evidence.

4. After going through the record and hearing learned counsel for the respondent certain facts needs to be enumerated as have

been alleged in the divorce petition filed by the husband under Section 13 of the Hindu Marriage Act. They are; marriage between the petitioner and the respondent took place on 28.04.2004. Admittedly, three daughters are born from this wedlock.

5. According to the husband-respondent, he is not living with his wife i.e. the petitioner since 15.01.2013 and there has been no resumption of cohabitation since then. On 25.06.2014, husband had given customary divorce to the petitioner and is paying maintenance to her since then. A male child was born to the petitioner on 26.01.2016 in her paternal house.

6. The ground for divorce is adultery.

7. On the other hand, the present petitioner filed her objections 28-C(2), and objected to the application filed by the husband seeking D.N.A. Test on the ground that no legal provision is mentioned in the application. She denied that there has been no co-habitation between the parties since 15.01.2013. She claimed that when she was pregnant then she was tortured by her husband and was driven out of the matrimonial home, therefore, she gave birth to a male child on 26.01.2016. Plea of presumption under Section 112 of the Evidence Act too has been raised by the present petitioner.

8. Learned family court has placed reliance on the judgment of Supreme Court in case of ***Dipanwita Roy*** Vs. ***Ronobroto Roy, 2015 (1) SCC D 39 (SC)***, wherein husband had filed divorce petition on the ground of adultery. The adulterer was named and then husband had moved an application for D.N.A. Test of himself and male child born to the wife. Family Court had dismissed the application. High Court reversed the orders of the family court. Supreme Court upheld the order of the High Court

despite the pleading of the wife that husband had access to her, whereas the husband had denied the same categorically.

9. Reliance has also placed on the judgment of Supreme Court in case of ***Nandlal Wasudeo Badwaik*** Vs. ***Lata Nandlal Badwaik and another, 2014 (2) SCC 576***, wherein, Supreme Court observed as under:-

15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the Appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent No. 2 is the daughter of the Appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the Appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the Appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not

be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice. (emphasis is ours). This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112 of the Indian Evidence Act.

10. Thus, the crux of the matter is that even Supreme Court has approved D.N.A. Test as the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal.

11. When the impugned order is tested on the touchstone of the legal pronouncement of the Supreme Court, same cannot be faulted with, therefore, I do not find any illegality, infirmity or arbitrariness to interfere with the impugned order dated 22.09.2018 passed by the learned Additional Principal Judge, Family Court/Fast Track Court-II, Hameepur.

12. Petition fails and is **dismissed.**

Order Date :- 21.10.2020
Ashutosh