

IN THE COURT OF THE SENIOR CIVIL JUDGE AND JMFC AT SEDAM

PRESENT:

SRI.SAGAR GURUGOUDA PATIL

Senior Civil Judge & JMFC., Sedam ^{B.A., LL.B(Spl).}

DATED THIS THE 27th DAY OF JULY-2024.

M.C. No.37/2023.

PETITIONER:

Gundappa S/o Late Basawaraj

(Adv. for petitioner by Sri.N.R.)

(V E R S U S)

RESPONDENT:

Smt.Chennamma @ Channamma

(Advocate for Resp. by Sri.R.M.)

I.A.No.1

Gundappa

Applicant

//Versus//

Channamma

Opponent

i.	Provision under which the application is filed	U/O 26 Rule 10-A of CPC
ii	Relief sought for	Sec.12(d) of Hindu Marriage Act
iii	The date on which the application is filed	24-07-2023

iv	Number of application	One
v	The date on which the objections are filed by different opponents	--
vi	The date on which the orders were passed on the said application	27-07-2024

ORDER ON I.A.No-1 U/Order 26 Rule 10(A) of CPC

The petitioner has filed this application U/O 26 Rule 10(A) of CPC and sought to appoint court commissioner to ascertain the paternity of female child born to the respondent.

2. The petitioner has sworn to an affidavit in support of IA and stated that the he has filed this petition for annulment of marriage. The respondent was pregnant by somebody prior to her marriage with him. Therefore, the marriage of the respondent with the petitioner is void ab initio. The petitioner and respondent married on 22.5.2023 at Mallikarjun Temple, Bijanalli, Tq: Sedam. After the marriage the respondent came and lived with him and after 4 months 13 days from the date of marriage, the respondent gave birth to a full grown female child on 11.10.2023. The petitioner had no relationship with the respondent prior to his marriage. The respondent got pregnant before the marriage and kept it secret until delivery of child on 10.10.2023. The respondent gave birth to female child after 4 months 13 days of marriage. Therefore, this petitioner expressed his willingness to undergo DNA test and the respondent also agreed for the same.

Hence, prays to allow the IA.

3. The counsel for the respondent has submitted no objections to allow the IA.

4. In view of the above above facts and circumstances the following points arise for my consideration:

1. Whether the DNA test can be conducted to determine the paternity of the child?

2. What order?

5. My findings to the above points are as under:

Point No.1: In the Affirmative.

Point No.2: As per final order, for the following:

REASONS

6. Point No.1: At the first instance the petitioner had filed this petition U/s.12(d) of Hindu Marriage Act alleging that the petitioner and respondent married on 22.5.2023. There was no physical relationship between the petitioner and the respondent prior to the date of marriage i.e., 22.5.2023. The respondent gave birth to a female child on at 2 AM on 11.10.2023 and the child was full grown baby. The respondent gave birth to the child on 11.10.2023 the petitioner came to know about the pregnancy of the respondent prior to the marriage.

7. The respondent in her objection statement has admitted the relationship and contended that the engagement of the petitioner and respondent was performed on 16.12.2022. Thereafter the petitioner and respondent were in live in relationship and they had cohabitation and due to that respondent became pregnant and the same was informed to the parents of the petitioner. Therefore, the parents of the petitioner agreed to perform the marriage as early as possible. Accordingly the marriage was performed on 22.5.2023. At the time of marriage the respondent was pregnant of 2 and half months. The baby girl was born on 11.10.2023 and the said baby is daughter of the petitioner and the respondent.

8. Now the question arise for consideration is that whether this court can order for DNA test in matrimonial proceedings to decide th paternity of the child. In order to find out answer to this question it is worth to refer the decision of the Hon'ble Supreme Court in the case of **Dipanwita Roy V/s Ronobroto Roy reported in (2015) 1 SSC 365**, wherein at paras 15 to 17 of its judgment the Hon'ble Supreme Court held as under:

15. Recently, the issue was again considered by this court in Nandlal Wasudeo BadwalkV. Lata Nandlal Badwalk, wherein this court held as under: (SCC pp.585-86, paras 15-19)

"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 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 given 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 time when the modern scientific advancement and DNA test were not 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. The 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, a presumption of a facts 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 created 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 fact 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.'

This court has therefore clearly opined, that proof based on DNA test would be sufficient to dislodge a presumption under Section 112 of the Evidence Act.

16. *It is born from the decisions rendered by this court in Bhabani Prasadjena and Nandlal Wasudeo Badwalk 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 party concerned would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this court, is that the legitimacy of a child should not be put to peril.*

17. *The question that has to be answered in this case in respect of the alleged infidelity of the appellant wife. The respondent husband has made clear and categorical assertions in the petition filed by him under section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person who was the father of the male child born to the appellant wife. It is in the process of substantiating his allegation of the infidelity that the respondent husband had made an application before the Family Court for conducting a DNA test which would establish whether or not he had fathered the male child born to the appellant wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent husband to establish and confirm the assertions made in the pleadings. We are therefore, satisfied that the direction issued by the High Court, as had been extracted hereinabove, was fully justified. DNA testing is 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. If the appellant wife is right, she shall be proved to be so.*

9. In view of the above principle of law it is clear that this court can order for DNA test to ascertain the paternity of the child whose paternity is in dispute. Hence, I answer point No.1 in the Affirmative.

10. Point No.2: For the aforesaid reasons, I proceed to pass the following:

ORDER

The application filed by the petitioner U/O 26 Rule 10(A) of CPC is hereby allowed.

The Deputy Director, Regional Forensic Science Laboratory Gokul Road, Near New KSRTC Bus Stand, Hubballi-580030. Phone No.0832-233489 is appointed as Court commissioner to examine the blood samples of the petitioner and the child delivered by the respondent on 11.10.20223, by way of DNA test and report whether the DNA samples of both tally with each other or not and whether the petitioner is biological father of the child or not.

The District Surgeon, District Hospital Kalaburagi is directed to attend the court on 17.8.2024 to draw blood samples of the petitioner and the child and to send the same to Deputy Director, Regional Forensic Science Laboratory Gokul Road, Near New KSRTC Bus Stand, Hubballi-580030.

The court commissioner fees is fixed at Rs.20,000/- and out of which Rs.5,000/- shall be paid to the District Surgeon, District Hospital, Kalaburagi.

The petitioner is hereby directed to deposit commissioner fees of Rs.20,000/- before the court.

The petitioner is directed to appear before the court on 17.8.2024 without fail and the respondent is hereby directed to appear before the court on 17.8.2024 along with child.

Office to issue intimation to the District Surgeon, District Hospital, Kalaburagi through RPAD calling upon him to attend the court on 17.8.2024 to collect blood samples for DNA test.

The petitioner shall furnish RPAD cover and pay PF.

(Dictated to the Stenographer directly on computer and corrected, signed and then pronounced by me, in the open Court on this the **27th day of July-2024**)

(Sagar Gurugouda Patil)
Senior Civil Judge & JMFC.,
Sedam.