HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Civil Writ Petition No. 1015/2023

.....
.....
.....

----Petitioner

Versus

.....
.....
.....
.....

----Respondent

For Petitioner(s) : Dr. Sachin Acharya, Senior Advocate assisted by Mr. Jitendra Choudhary

For Respondent(s) :

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI

Order

Reportable

Reserved on 18/05/2023

Pronounced on 26/05/2023

1. This writ petition has been preferred claiming the following reliefs:

> *"It is, therefore, most respectfully prayed on behalf of petitioner that the writ petition may kindly be allowed and by an appropriate writ, order or direction:-*
> *I. the order dated 15.11.2022 (**Annexure-6**) passed by the learned Family Court No.1, Udaipur in case no.757/2019 may kindly be set aside and the application (**Annexure-2**) filed by the petitioner under Order 6 Rule 17 read with Section 151 CPC may kindly be allowed in toto;*
> *II. Any other appropriate order or direction, which this Hon'ble Court considers just and proper in the facts and circumstances of this case, may kindly be passed in favour of the petitioner.*
> *III. Costs of the writ petition may kindly be awarded to the petitioner."*

2. Brief facts of the case as placed before this Court by Dr.Sachin Acharya, learned Senior Counsel assisted by Mr. Jitendra Choudhary, appearing on behalf of the petitioner-husband, are that the petitioner-husband filed an application (registered as Case no.83/2019) under Section 13 of the Hindu Marriage Act, 1955 (*hereinafter referred to as 'Act of 1955'*), seeking a divorce decree, before the learned Family Court, Bhilwara, against respondent-wife; the same was further transferred to the learned Family Court No.1, Udaipur, and registered as Case No.757/2019 in the said Court.

2.1. The ground, as raised in the application under Section 13 of the Act of 1955, was cruelty, and not adultery.

2.2. During pendency of the divorce application, the petitioner-husband preferred an application therein under Order 6 Rule 17 read with Section 151 Code of Civil Procedure, 1908 (in short, 'CPC') seeking to add para nos. 12A and 12B as well as ground A-1 in the pleading of the application under Section 13 of the Act of 1955, on the basis of the Deoxyribonucleic Acid (DNA) Paternity Test Report dated 11.09.2019 (as annexed with the said application), of the child (son), while claiming the same to be a subsequent development in the case before the learned Family Court.

2.3. The respondent-wife filed a detailed reply to the said application under Order 6 Rule 17 read with Section 151 CPC, denying the averments made therein. The learned Family Court vide the impugned order dated 15.11.2022 rejected the application under Order 6 Rule 17 read with Section 151 CPC

preferred by the petitioner-husband. Hence, the present petition has been preferred by the petitioner-husband, claiming the afore-quoted reliefs.

3. Learned Senior Counsel for the petitioner-husband submitted that the DNA Paternity Test Report dated 11.09.2019 clearly reveals that the petitioner-husband is not the father of the child (son), and that, the requisite test has been conducted at DDC, an ISO/IEC 17025:2005, ICLA and Cap Accredited Laboratory.

3.1. Learned Senior Counsel further submitted that a Family Court, dealing with matrimonial matters, has the power to order conducting of the medical test, owing to the issue involved in a particular case, and the same would certainly not amount to violation of the right to personal liberty, of any person, as enshrined under Article 21 of the Constitution of India.

3.1.1. Therefore, as per learned Senior Counsel, a person can be lawfully compelled to undergo DNA Paternity Test in a matrimonial matter for the purpose of proving or disproving the paternity in question. In support of such submission, reliance has been placed on the judgment rendered by the Hon'ble Apex Court in the case of ***Sharda Vs. Dharmpal (2003) 4 SCC 493,*** and the judgment rendered by the Hon'ble Madras High Court in the case of ***Bommi & Ors. Vs. Munirathinam (C.R.P. No. 2710 of 2003***, *decided on 28.07.2004*).

3.2. Learned Senior Counsel also submitted that the DNA Paternity Test is the most important method for the purpose of determining the paternity of a child, and thus, the same can be claimed as a matter of right, and cannot be denied by any person;

as regards the present case, the DNA Paternity Test, as conducted, clearly shows that the petitioner-husband is not the father of the child (son).

3.2.1. In support of such submission, reliance has been placed on the judgment rendered by the Hon'ble Apex Court in the case of ***Dipanwita Roy Vs. Ronobroto Roy (2015) 1 SCC 365;*** relevant portion whereof, as relied by learned Senior Counsel, is reproduced as hereunder-:

> *"11……..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……..."*

3.2.2. Reliance has also been placed on the judgment rendered by the Hon'ble Apex Court in the case of ***Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik & Ors. (2014) 2 SCC 576;*** relevant portion whereof, as relied by learned Senior Counsel, reads as under:

> *"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."*

3.3. Learned Senior Counsel further submitted that the primary objective of any legal system is to unearth the truth, for fair and effective dispensation of justice.

3.3.1. Learned Senior Counsel also submitted that as per the settled proposition of law, in case there is a dispute pertaining to paternity, as involved in the present matter, the truth regarding the biological relationship between a child and his father becomes much crucial. Therefore, as per learned Senior Counsel, the DNA Paternity Test is a matter of right and can be claimed and allowed at any time. In support of such submission, reliance has been placed on the judgment rendered by the Hon'ble Apex Court in the case of ***Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commissioner for Women & Ors. (2010) 8 SCC 633***.

Relevant portion of the said judgment rendered in ***Bhabani Prasad (supra)***, as relied by learned Senior Counsel, reads as under:

> *"13. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives 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 use of such scientific advances and tools which result in invasion of right to privacy of an individual and 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 bastardise an innocent child even though his mother and her spouse were living together during the time of conception. 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 is eminently needed. DNA 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."

4. Heard learned Senior Counsel for the petitioner-husband as well as perused the record of the case, alongwith the judgments cited at the Bar.

5. This Court observes that the petitioner-husband filed an application under Section 13 of the Act of 1955, in which there is no allegation of adultery, and subsequently, the petitioner-husband after getting the DNA Paternity Test of the child (son) conducted, report whereof came on 11.09.2019, filed an application under Order 6 Rule 17 read with Section 151 CPC seeking to add certain paras, on the basis of the said report, while claiming the same to be a subsequent development.

5.1. It was also claimed in the said application that the report clearly reveals that the petitioner-husband is not the biological father of the child (son).

5.2. However, the said application under Order 6 Rule 17 read with Section 151 CPC for amendment of pleadings was rejected by the learned Family Court vide the impugned order dated 15.11.2022.

5.3. The judgments cited on behalf of the petitioner-husband have either been reversed by the Hon'ble Apex Court in the judgment rendered in ***Aparna Ajinkya Firodia Vs Ajinkya Arun Firodia (Arising out of SLP (C) No.9855/2022,*** *decided on 20.02.2023),* or the said judgments do not apply in the current factual perspective.

6. This Court, at this juncture, considers it appropriate to reproduce the relevant portion of the judgment rendered by the Hon'ble Apex Court in the case of ***Aparna Ajinkya Firodia (Supra)***, as hereunder:

> *"8.1. According to Sarkar on Law of Evidence, 20th Edition, in the interest of health, order and peace in society, certain axiomatic presumptions have to be drawn. One such presumption is the conclusive presumption of paternity under Section 112 of the Evidence Act. Section 112 embodies the rule of law that the birth of a child during the continuance of a valid marriage or within 280 days (i.e., within the period of gestation) after its dissolution shall be "conclusive proof" that the child is legitimate unless it is established by evidence that the husband and wife did not or could not have any access to each other at any time when the child could have been conceived. The object of this provision is to attach unimpeachable legitimacy to children born out of a valid marriage. When a child is born during the subsistence of lawful wedlock, it would mean that the parents had access to each other. Therefore, the Section speaks of "conclusive proof" of the legitimate birth of a child during the period of lawful wedlock.*
>
> ***The principle underlying Section 112 is to prevent an unwarranted enquiry as to the paternity of the child whose parents, at the relevant time had "access" to each other.*** *In other words, once a marriage is held to be valid, there is a strong presumption as to the children born from that wedlock as being legitimate. This presumption can be rebutted only by strong, clear and conclusive evidence to the contrary. Section 112 of the Evidence Act is based on the presumption of public morality and*

public policy vide Sham Lal vs. Sanjeev Kumar, (2009) 12 SCC 454. Since Section 112 creates a presumption of legitimacy that a child born during the subsistence of a marriage is deemed to be legitimate, a burden is cast on the person who questions the legitimacy of the child.

8.2. Further, "access" or "non-access" does not mean actual cohabitation but means the "existence" or "non-existence" of opportunities for sexual relationship. Section 112 refers to point of time of birth as the crucial aspect and not to the time of conception. The time of conception is relevant only to see whether the husband had or did not have access to the wife. Thus, birth during the continuance of marriage is "conclusive proof" of legitimacy unless "non-access" of the party who questions the paternity of the child at the time the child could have been begotten is proved by the said party.

8.3. It is necessary in this context to note what is "conclusive proof" with reference to the proof of the legitimacy of the child, as stated in Section 112 of the Evidence Act. As to the meaning of "conclusive proof" reference may be made to Section 4 of the Evidence Act, which provides that when one fact is declared to be conclusive proof of another, proof of one fact, would automatically render the other fact as proved, unless contra evidence is led for the purpose of disproving the fact so proved. A conjoint reading of Section 112 of the Evidence Act, with the definition of "conclusive proof" under Section 4 thereof, makes it amply clear that a child proved to be born during a valid marriage should be deemed to be a legitimate child except where it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten or within 280 days after the dissolution of the marriage and the mother remains unmarried, that fact is the conclusive proof that the child is the legitimate son of the man. Operation of the conclusive presumption can be avoided by proving non-access at the relevant time.

8.4. 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. That is, 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. Thus, unless the absence of access is established, the presumption of legitimacy cannot be displaced. Thus, 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. Therefore, shreds of evidence to the effect that the husband did not have intercourse with the wife at the period of conception, can only point to the illegitimacy of a child born in wedlock, but it would not uproot the presumption of legitimacy under Section 112.

8.5. The presumption under Section 112 can be drawn only if the child is born during the continuance of a valid marriage and not otherwise. "Access" or "non-access" must be in the context of sexual intercourse that is, in the sexual sense and therefore, in that narrow sense. Access may for instance, be impossible not only when the husband is away during the period when the child could have been begotten or owing to impotency or incompetency due to various reasons or the passage of time since the death of the husband. Thus, even though the husband may be cohabiting, there may be non-access between the husband and the wife. One of the instances of non-access despite co-habitation is the impotency of the husband. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy.

8.6. Thus, "non-access" has to be proved as a fact in issue and the same could be established by direct and circumstantial evidence of an unambiguous character. Thus, there could be "non-access" between the husband and wife despite co-habitation. Conversely, even in the absence of actual co-habitation, there could be access.

8.7. Section 112 was enacted at a time when modern scientific tests such as DNA tests, as well as Ribonucleic acid tests ('RNA', for short), were not in contemplation of the legislature. However,

even the result of a genuine DNA test cannot escape from the conclusiveness of the presumption under Section 112 of the Evidence Act. If a husband and wife were living together during the time of conception but the DNA test reveals that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. What would be proved, is adultery on the part of the wife, however, the legitimacy of the child would still be conclusive in law. In other words, the conclusive presumption of paternity of a child born during the subsistence of a valid marriage is that the child is that of the husband and it cannot be rebutted by a mere DNA test report. What is necessary to rebut is the proof of non-access at the time when the child could have been begotten, that is, at the time of its conception vide Kamti Devi vs. Poshi Ram, (2001) 5 SCC 311.

……..

22.3. It is undeniable that a finding as to illegitimacy, if revealed in a DNA test, would, at the very least adversely affect the child psychologically. It can cause not only confusion in the mind of the child but a quest to find out who the real father is and a mixed feeling towards a person who may have nurtured the child but is not the biological father. Not knowing who one's father is creates a mental trauma in a child. One can imagine, if, after coming to know the identity of the biological father what greater trauma and stress would impact on a young mind. Proceedings which are in rem have a real impact on not only the child but also on the relationship between the mother and the child itself which is otherwise sublime. It has been said that parents of a child may have an illegitimate relationship but a child born out of such a relationship cannot carry the stamp of illegitimacy on its forehead, as, such a child has no role to play in its birth. An innocent child cannot be traumatised and subjected to extreme stress and tension in order to discover its paternity. That is why Section 112 of the Evidence Act speaks about a conclusive presumption regarding the paternity of a child, subject to a rebuttal, as provided in the second part of the Section.

In today's world, there can even be a race to claim paternity of a child so as to invade upon its rights, particularly, if such a child is endowed with property and wealth. There could also be exclusions in a testament doubting the paternity of a child

or an evasion in performance of parental obligations such as payment of maintenance or living and educational expenses by simply doubting the paternity of a child.

In many cases, this would cast a doubt on the chastity of the mother of a child when no such doubt could arise. As a result, the reputation and dignity of a mother of a child would be jeopardised in society. What is of utmost importance for a lady who is the mother of a child is to protect her chastity as well as her dignity and reputation, in that, she would also preserve the dignity of her child.

No woman, particularly, who is married can be exposed to an enquiry on the paternity of a child she has given birth to in the face of Section 112 of the Evidence Act subject to the presumption being rebutted by strong and cogent evidence. Section 112 particularly speaks about birth of a child during marriage and raises a conclusive presumption about legitimacy. Section 112 has recognised the institution of marriage i.e., a valid marriage for the purpose of conferring legitimacy on children born during the subsistence of such a marriage.

As to children born outside a valid marriage, the personal law of respective parties would apply. But in the cases of children born from a relationship in the nature of marriage and when the parents are in a domestic relationship or those born as a result of a sexual assault or to those who are in a casual relationship or to those forced or subjected to render sexual favours and beget children, the problem of their legitimacy gets complex and is serious.

A child should not be lost in its search for paternity. Precious childhood and youth cannot be lost in a quest to know about one's paternity. Therefore, the wholesome object of Section 112 of the Evidence Act which confers legitimacy on children born during the subsistence of a valid marriage, subject to the same being rebutted by cogent and strong evidence, is to be preserved

Children of today are citizens and the future of a nation. The confidence and happiness of a child who is showered with love and affection by both parents is totally distinct from that of a child who has no parents or has lost a parent and still worse, is that of a child whose paternity

is in question without there being any cogent reason for the same. *The plight of a child whose paternity and thus his legitimacy, is questioned would sink into a vortex of confusion which can be confounded if Courts are not cautious and responsible enough to exercise discretion in a most judicious and cautious manner.*

……..

Conclusions:

23. 'Illegitimate'- a term that brands an individual with the shame of being born outside wedlock, casts a shadow on one's identity. Times change and attitudes may change, but the impact of growing up with the social stigma of being illegitimate, does not. The Courts must hence be inclined towards upholding the legitimacy of the child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimisation of the child would result in rank injustice to the father, vide Dukhtar Jahan vs. Mohammed Farooq, (1987) 1 SCC 624.

24. Questions as to illegitimacy of a child, are only incidental to the claim of dissolution of marriage on the ground of adultery or infidelity necessary. This is not a case where a DNA test is the only route to the truth regarding the adultery of the mother. If the paternity of the children is the issue in a proceeding, DNA test may be the only route to establish the truth. However, in our view, it is not so in the present case. 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 this Court in Dipanwita Roy (supra).***

9. It is interesting to note that the Evidence Act does not include legitimacy of birth during marriage, either under the category of a fact which "may be presumed" or under the category of a fact which "shall be presumed". On the contrary, the Act places birth during marriage as "conclusive proof" of legitimacy. ***But Section 112 keeps a window open, enabling a party to the marriage who questions the legitimacy of the child, to***

show that he/she had no access to the other, when the child could have been begotten.

11. A combined reading of Section 4 and Section 112 would show that once the party questioning the legitimacy of the 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 other party to the marriage, then the shield of conclusive proof becomes unavailable. If on the contrary, such a party is not able to prove that he had no access to the other party to the marriage, then the shield of Section 112 protects the other party to such an extent that it cannot be pierced by any amount of evidence in view of the prohibition contained in Section 4.

21. But we do not know how a mix up of Section 112 and Section 114 is possible. Section 112 deals with something where the existence of a fact is taken to be conclusive proof, without any possibility for the disputing party to lead evidence for disproving the same. The only escape route or emergency exit as we may call it, available for a person to deprive another person of the benefit of Section 112, is to show that the parties to the marriage did not have access to each other at the time when the child could have been begotten. Section 114 has nothing to do with, nor is in connection with conclusive proof of legitimacy dealt with by Section 112. Both Section 112 and Section 114 fall under different compartments. The word "presumption" itself is not used in Section 112. The expression used in Section 112 is "conclusive proof". Therefore, by virtue of Section 4, no evidence shall be allowed to be given for the purpose of disproving it.

22. As we have indicated elsewhere, if one of the parties to the marriage shows that he had no access to the other at the time when the child could have been begotten, then Section 112 itself does not get attracted. On the contrary, if the parties have had access to each other at the relevant point of time, the fate of the question relating to legitimacy is sealed.

23. We are not suggesting for a moment that Section 112 acts as a shield even for the alleged adulterous conduct on the part of

the wife. All that we say is that anything that would destroy the legal effect of Section 112 cannot be used by the respondent, on the ground that the same is being done to achieve another result.

…..

29. Therefore, Section 114(h) has no application to a case where a mother refuses to make the child undergo DNA test. It is to be remembered that the object of conducting a DNA test on the child is primarily to show that the respondent was not the biological father. Once that fact is established, it merely follows as a corollary that the appellant was living in an adulterous relationship.

30. What comes out of a DNA test, as the main product, is the paternity of the child, which is subjected to a test. Incidentally, the adulterous conduct of the wife also stands established, as a by-product, through the very same process. To say that the wife should allow the child to undergo the DNA test, to enable the husband to have the benefit of both the product and the by product or in the alternative the wife should allow the husband to have the benefit of the by-product by invoking Section 114, if she chooses not to subject the child to DNA test, is really to leave the choice between the devil and the deep sea to the wife.

33. As rightly contended by Shri Huzefa Ahmadi, learned senior counsel for the appellant, the question as to whether a DNA test should be permitted on the child, is to be analysed through the prism of the child and not through the prism of the parents. The child cannot be used as a pawn to show that the mother of the child was living in adultery. It is always open to the respondent husband to prove by other evidence, the adulterous conduct of the wife, but the child's right to identity should not be allowed to be sacrificed."

6.1. This Court also considers it appropriate to reproduce the relevant portion of the judgment rendered by the Hon'ble Bombay High Court at Nagpur Bench in ***Criminal Writ Petition No. 66 of 2022,*** *Decided on 10.03.2023)*, as hereunder:

"25. In my view, therefore, all these facts cannot be brushed aside while deciding the application. The children have right not

to have the legitimacy questioned frivolously in Courts of law. ***The DNA test cannot be ordered on the assumption that the mother, who equally knows the truth about the paternity, should not hesitate for a minute to come forward and express her willingness for the DNA test. It is to be noted that, in such a matter, the child is on test and not the mother. Therefore, in such cases, the absolute need and necessity for such test, to adjudicate upon a serious issue, must be made out.*** *In this case, the father, who is gainfully employed, is trying to avoid his liability to pay the maintenance to the unfortunate child. In order to deny the right to get maintenance, he has been asking the son to undergo the DNA test. In my view, keeping in mind the cascading consequences that could ensue, the Court should in every possible manner thawart such an attempt at the very inception.* ***The order directing the DNA test in such matters must be need-based and has to be passed in an exceptional case***

26] In the facts and circumstances, in my view, the learned Additional Sessions Judge was absolutely well within the parameters of law laid down in the decision in the case of ***Aparna Ajinkya Firodia (supra).. . . .”***

6.2. It is also considered to reproduce the relevant portion of the judgment rendered by the Hon’ble Himachal Pradesh High Court in the case of ***Anil Kapoor Vs Dipika Chauhan*** *(****Civil Revision No. 66 of 2022,*** *decided on 01.04.2023),* as hereunder:

“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. ……..”

7. This Court also deems it appropriate to observe the chronology of the events, pertaining to the case at hand, as hereunder -:

a) The Marriage between the petitioner-husband and respondent-wife was solemnized on 06.02.2010.

b) The child (son) was born on 13.04.2018.

c) The respondent-wife left the petitioner’s house on 05.01.2019.

d) The divorce application was filed by the petitioner-husband on 17.01.2019, before the learned Family Court, without taking any ground of adultery, but merely by mentioning the fact that the respondent-wife used to tell him, that he (petitioner-husband) is not the father of the child.

e) The petitioner got the DNA Paternity Test of the child (son) conducted at DNA Paternity Test Forensic Laboratory, New Delhi; report whereof came on 11.09.2019, without taking the child or his mother (respondent-wife) into confidence.

8. This Court also deems it appropriate to deal with the following issues raised in the present case:

I. <u>As to whether the wife can be compelled to give the DNA of her son (child) in a matrimonial matter to prove or disprove the Paternity/Adultery</u> :

(i) At this juncture, it is considered appropriate to reproduce the relevant provision i.e. Section 112 of the Indian Evidence Act, 1872 as hereunder-:

> ***"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 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."*

(ii) This Court finds that the this issue has been dealt by the Hon'ble Apex Court in the case of ***Aparna Ajinkya Firodia (supra)***, while observing that the Family Courts have power to order for DNA Test, but it should not be directed in a routine manner, without any justifiable reason for the same; the same should be done after duly complying with the principles of natural justice. The husband thus, cannot take undue advantage of DNA Test so as to shirk away from his obligation as a father of the child.

(iii) This Court further observes that conducting of the DNA Test can only be directed, when the case falls outside the presumption as provided under Section 112 of the Indian Evidence Act, 1872, as quoted hereinabove. In the case of ***Aparna Ajinkya Firodia (supra),*** it was observed thus:

> "*11.1. A Family Court, no doubt, has the power to direct a person to undergo medical tests, including a DNA test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution, vide*

Sharda. However, the Court should exercise such power only when it is expedient in the interest of justice to do so, and when the fact situation in a given case warrants such an exercise. Thus, an order directing that a minor child be subjected to DNA test should not be passed mechanically in each and every case.

…...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.. . . .”

(iv) This Court further observes that the Hon’ble Apex Court in case of ***Aparna Ajinkya Firodia (supra)*** observed that *““access” or “non-access” does not mean actual cohabitation but means the “existence” or “non-existence” of opportunities for sexual relationship”.*

(v) This Court observes that in the present case, the petitioner-husband’s marriage was solemnized in the year 2010 with the respondent-wife, and the child (son) was born on 13.04.2018; the wife left her husband’s (petitioner’s) house on 05.01.2019. The record of the case clearly reveals that the petitioner-husband and the respondent-wife were living together at the time of birth of the child (son), and thus, the petitioner-husband was having access for cohabitation; thus, the question regarding presumption under Section 112 of the Indian Evidence does not even arise in the present case. Furthermore, in view of the aforementioned law laid down by the Hon’ble Apex Court there is no need of any further clarification on the issue.

II. <u>As to whether litigation between the husband and the wife should consider paternity as a requirement for proving any point of civil wrong/matrimonial wrong pertaining to adultery. It is needless to say that adultery has already been decriminalized</u> :

(i) This Court observes that the act of adultery has already been decriminalized by the Constitution Bench of the Hon'ble Apex Court in the judgment rendered in the case of ***Joseph Shine Vs Union of India (2019) 3 SCC 39.*** This Court also observes that any Matrimonial (Civil) dispute between the husband and wife pertaining to the child born from the wedlock, cannot be used for their own benefit by way of DNA Paternity Test, among other things.

(ii) This Court is quite conscious of the fact that any frivolous claim of the husband or wife would have much adverse affect on the mental health of the child; though the husband has a right to prove adultery on the strength of cogent evidence against his wife.

(iii) This Court also observes that the DNA Paternity Test requires to be conducted only in exceptional cases, and therefore, the child cannot be used as a weapon to get divorce on ground of adultery, on the strength of outcome of a DNA Paternity Test.

(iv) This Court further observes that the Hon'ble Apex Court in the case of ***Aparna Ajinkya Firodia (supra)*** that, *<u>"Allowing DNA tests to be conducted on a routine basis, in order to prove adultery, would amount to redefinition of the maxim, "Pater est</u>*

quem nuptiae demonstrant" which means, the father is he whom the nuptials point out. While dealing with allegations of adultery and infidelity, a request for a DNA test of the child, not only competes with the presumption under Section 112, but also jostles with the imperative of bodily autonomy. . . . .If the appellant does or refuses to do something, for the purpose of deriving a benefit to herself, an adverse inference can be drawn against her. But in her capacity as a mother and natural guardian if the appellant refuses to subject the child to DNA test for the protection of the interests and welfare of the child, no adverse inference of adultery can be drawn against her. By refusing to subject the child to DNA test, she is actually protecting the best interests of the child. For protecting the best interests of the child, the appellant-wife may be rewarded, but not punished with an adverse inference. By taking recourse to Section 114(h), the respondent cannot throw the appellant to a catch-22 situation. . . . .The child cannot be used as a pawn to show that the mother of the child was living in adultery. It is always open to the respondent husband to prove by other evidence, the adulterous conduct of the wife, but the child's right to identity should not be allowed to be sacrificed."

III. Impact of the paternity test upon the child and such test be allowed or taken on record &

IV. Requirement of paternity test and its implications in matrimonial law :

(i) This Court observes that the DNA Paternity Test cannot be conducted or ordered to be conducted in a routine and

mechanical manner, because it would certainly adversely affect the very mental health of the child. It is thus, necessary to see whether there is any access between the husband and wife.

(ii) This Court further observes in ***Aparna Ajinkya Firodia (supra)*** that "***A combined reading of Section 4 and Section 112 would show that once the party questioning the legitimacy of the 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.***"

(iii) This Court also observes that the children's rights are very crucial for any nation, as the future prospects of any country depends upon the mental and physical health of the children; the same is also enshrined under the Constitution of India as well as various laws laid down by the Hon'ble Apex Court, for protecting the rights of the child; therefore, such rights cannot be permitted to be affected, amongst others, by the matrimonial dispute between the husband and wife, more particularly, for their individual benefits.

(iv) Therefore, it is necessary for the party concerned to firstly prove that there was no access between the husband and wife, and only thereafter, the benefits of exceptional exclusion from the purview of Section 112 of the Indian Evidence Act, 1872 can be extended to the aggrieved party.

(v) In the present case, the petitioner-husband and the respondent-wife were living together at time of birth of the child (son), and thus, they were having access to each other for

cohabitation; hence, the presumption as provided under Section 112 of the Indian Evidence Act, 1872 cannot be drawn in the present case, as claimed by the petitioner-husband.

(vi) This Court further observes that for protecting the best interest of the child, the DNA Paternity test cannot be allowed in a routine manner, and that the same can only be permitted in exceptional circumstances, and as per the law laid down by Hon'ble Apex Court in the case of ***Aparna Ajinkya Firodia (supra)***.

(vii) This Court thus finds that the requirement of the DNA Paternity Test can only be in the rarest of the rare and exceptional cases, while duly keeping in mind the best interest of the child as well as the law laid down by the Hon'ble Apex Court in the case of ***Aparna Ajinkya Firodia (supra).***

9. This Court has to keep into paramount consideration the mental and physical health of a child and the aspects adversely affecting it.

10. It is high time that the society and law realize the importance of the child and childhood *vis-a-vis* the matrimonial disputes, as losing and winning in a marriage is having a dwarfed impact, when it is compared with losing of childhood, in terms of victimizing the child or sacrificing his constitutional right of dignity, at the altar of matrimonial conflicts.

11. This Court also finds that the DNA Test is invading upon the rights of a child, which may range from affecting his property rights, right to lead a dignified life,

right to privacy and right to have the confidence and happiness of being showered with love and affection by both parents.

12. This case has to be seen through the prism of the child and not through the prism of the cantankerously fighting parents. This Court is of the firm opinion that the child cannot be used as a pawn in a divorce litigation, where either of the parents want to get rid of the spouse, while sacrificing the crucial rights of the child to a dignified parenthood, which shall not only cause an unfathomable misery upon the rights of the child, but also create a permanent dent in his existence/Psyche

13. The pain of winning or losing a battle of divorce amongst the contesting spouses is much trivial when compared with the rights of the child to have dignity and parenthood.

14. Therefore, while choosing between the sanctity of marriage and sanctity of the childhood, the Court has no option but to tilt towards the sanctity of the life, i.e. tilting towards the sanctity of the childhood. The parties may or may not lose the marriage, but the spirit of justice cannot afford to lose the child/childhood, as no Court can shut its eyes, so as only to achieve the goal of justice in matrimonial redressals, while losing the battle of parenthood, being detrimental to the childhood.

15. Thus, in light of the above observations and looking into the factual matrix of the present case, this Court does not find it a

fit case so as to grant any relief to the petitioner in the present petition.

16. Consequently, the present petition is ***dismissed***. All pending applications stand disposed of.

(DR.PUSHPENDRA SINGH BHATI), J.

SKant/-