IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE MANINDER S. BHATTI

ON THE 25th OF APRIL, 2024

CRIMINAL REVISION No. 1402 of 2018

BETWEEN:-

KAUSHAL SHARMA S/O SHRI DAYASHANKAR SHARMA, AGED ABOUT 45 YEARS, R/O. 36-2, SAKET NAGAR BHOPAL (MADHYA PRADESH)

.....PETITIONER

(BY SHRI ANKIT SAXENA - ADVOCATE)

AND

1. **KU. KHUSHI D/O KAUSHAL SHARMA, AGED ABOUT 2 YEARS, OCCUPATION: THR HER GUARDIAN MOTHER SM.T KHUSHI SHARMA R/O. NEAR BRIGHT CARRIER SCHOOL STATION ROAD SEHORE (MADHYA PRADESH)**

2. **SEEMA SHARMA W/O KAUSHAL SHARMA R/O NEAR BRIGHT CARRIER SCHOOL, STATION ROAD, SEHORE (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI RAMANUJ CHOUBEY - ADVOCATE)

This revision coming on for admission this day, the court passed the following:

ORDER

This Criminal Revision has been filed challenging the order dated 14/02/2018 passed in MJCR No.299/2015 by Principal Judge, Family Court, Sihore by which the Family Court has directed the present petitioner to pay a sum, of Rs.4,000/- per month as maintenance to respondent No.1.

2. Learned counsel for the petitioner submits that respondent No.2 approached the Family Court by way of an application under Section 125 of

Cr.P.C. in which the present respondents were arrayed as applicant No.1 and 2. It was submitted in the application that after marriage of the petitioner with respondent No.2 on 07/05/2009, respondent No.1 was born out of their wedlock. Thereafter, respondent No.2 at her matrimonial house was subjected to cruelty, therefore, subsequent events ensued in filing of an application under Section 125 of Cr.P.C. which has been allowed in respect of respondent No.1.

3. It is contended by the counsel that the order passed by the Family Court, Sehore suffers from perversity as the Court was required to appreciate as to whether respondent No.1 is biological daughter of the present petitioner or not. It is contended by the counsel that respondent No.2 was suffering from a gynecological disease known as Fibriod and on account of said disease, the respondent No.2 was unable to conceive, therefore, she could not have delivered the child. It is contended by the counsel that in response to the application filed under Section 125 of Cr.P.C., it was specifically averred by the present petitioner that he was not a biological father of respondent No.1. It is contended by the counsel that an application was also moved during pendency of the proceedings and the said application was registered as IA No.2 and was taken up for consideration by the Family Court on 12/05/2017. While dealing with the said application, the Court considering the rival stand of the parties issued direction for conducting DNA test of respondents.

4. It is contended by the counsel that the respondent No.2 did not appear before the Doctor at Apollo Pathology, Kolar Road, Bhopal for the purpose of DNA test and resultantly, no test could be conducted. It is contended by the counsel that as the factum of petitioner being father of respondent No.1 was specifically refuted, therefore, conduct of DNA test was

the only option to ascertain the conflicting issue. It is further contended by the counsel that even in the birth certificate, name of the father of respondent No.1 was mentioned as Kishore Sharma whereas name of the present petitioner is Kaushal Sharma. This aspect was also required to be taken into consideration but the Family Court did not appreciate this important aspect and proceeded to pass the impugned order in favour of the respondents. Thus, the impugned order deserves to be set aside.

5. Per contra, learned counsel for the respondents submits that the impugned order does not require any interference. The Court after considering the evidence adduced by the parties, have arrived at the findings which are based on cogent reasons and therefore, no interference is warranted with the order passed by the Family Court. It is further submits that in the present case there is a presumption in terms of Section 112 of the Evidence Act in favour of the respondents, therefore, the petitioner could not have disputed the legitimacy of the child i.e respondent No.1. Thus, the Revision filed by the petitioner deserves to be dismissed.

6. No other point is pressed or argued by the parties.

7. Heard rival submissions of the parties and perused the record.

8. Learned counsel for the petitioner is assailing the order passed by the Family Court on the ground that he is not a biological father of respondent No.1 and the respondent No.1 does not belong to natal family. The contention is based on the pleadings as well as the evidence so adduced by the petitioner. The said argument is also based on the birth certificate in which the name of father of respondent No.1 was mentioned as Kishor Sharma whereas the petitioner's name is Kaushal Sharma.

9. To deal with the first objection, if paragraph 28 of the order is

perused, it would reveal that initially the name of the father of respondent No.1 was incorrectly mentioned as Kishor Sharma but later on, while carrying out the correction, name of present petitioner was mentioned in the birth certificate. The Court also considered that the name of the mother was rightly mentioned as Seema Sharma and the Court concluded that the present petitioner is father of respondent No.1.

10. Now in order to deal with the contention regarding DNA test of respondent No.1, it would be profitable to refer to the decision of Apex Court in the case of **Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik** reported in **(2014) 2 SCC 576**. The Apex Court while dealing with the issue bestowed its consideration on the provisions of Section 112 of Evidence Act.

11. In order to have the handle on controversy, it is first apposite to deal with Section 112 of the Indian Evidence Act which has reproduced 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 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."

12. The Apex Court while dealing with Section 112 of Indian Evidence Act in the case of Nandlal Wasudeo Badwaik (Supra) has held in paragraphs 16 to 19 as under:

> "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 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. 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 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 bastardised 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."

13. The High Court of Delhi in the case of **Nikhat Parveen Vs. Rafiqui and Ors.** reported in **2023 SCC Online Del 6751** also examined the provisions of Section 112 and Section 4 of the Evidence Act, and concluded that only the proof of non-access between the parties is permissible to challenge the otherwise irrebuttable presumption of Section 112 of the Evidence Act. The Court in the case of Nikhat Parveen (Supra) held in paragraphs 13 to 16 as under:

"13. Thus, careful examination of Section 112 and Section 4 of the Indian Evidence Act reveals that only the proof of non-access between the parties is permissible to challenge the otherwise irrebuttable presumption of Section 112.

(ii) Intent Behind Section 112 of Indian Evidence Act

14. Section 112 of the Indian Evidence Act, reflects a legislative intent rooted in safeguarding the welfare of children born within the confines of a valid marriage. This provision establishes a strong presumption of paternity, asserting that a husband is presumed to be the biological father of any child born to his wife during their wedlock. This presumption serves to ensure the well-being of the child and ensure that his legal rights are not affected and legal rights of children.

15. This provision underscores the principle that children born within the confines of a legally recognized marriage are deemed legitimate per se and it ensures that no unwarranted assumptions of impropriety or moral transgressions are made and instead places the burden of proof on those who contest the child's legitimacy.

16. The objective of Section 112 is to ensure that the child's social and economic rights within the family structure, such as inheritance and access to family resources are protected and it also diminishes the risk of the child being stigmatized as illegitimate.

(iii) Whether DNA Test Can Be Conducted To Rebut Presumption Under Section 112 Of Indian Evidence Act."

14. The Apex Court in the case of **Aparna Ajinkya Firodia Vs.**

Ajinkya Arun Firodia reported in **2023 SCC Online SC 161** held in paragraphs 60, 70 and 85 as under:

"60. 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 becomes 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.

70. The phrase "mankind owes to the child the best it has to give" clearly underlines our duties towards children, and it entitles them to the best that mankind can give. This implies that the interest of the child should be given primary consideration in actions involving children.

> 85. '**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 v. Mohammed Farooq, (1987) 1 SCC 624."

15. A thorough analysis of the aforesaid decisions would reveal that the DNA test is not to be conducted as a matter of right. The task which a party is required to complete is to rebut the presumption which is available in terms of Section 112 of the Indian Evidence Act. The provisions of Section 112 of the Evidence Act as laid down by the Delhi High Court in the case of Nikhat Parveen (Supra), provides safeguard to the welfare of the children, as on the basis of DNA report, the legitimacy of a child is at stake. It cannot be ruled out that once the DNA test report is there, and if the same goes contrary to the presumption, the same may have an adverse effect on the child's upbringing and his/her psychological/mental health also. Thus, a balance is required to be striked while keeping in mind the child's welfare and his/her future as well as fastening of liability of maintenance to a person who is not a biological father of the child.

16. Therefore, ramification of a direction to conduct DNA test should be considered while considering a request of the parties to conduct the DNA test. The interest of the child is the paramount consideration in such cases, inasmuch as, child is infact is made a scapegoat whereas the parents are at loggers-head on account of rift between them. It is being noticed further that in the matrimonial cases, the children are being roped in, either by way of an

application for grant of maintenance or when the parents are seeking custody of the child. While leveling allegations against each other, even a child's legitimacy is also made an issue. Hence, the utmost caution which the Court is required to take recourse to, is the welfare and interest of the child. The Court should keep in mind that a result of DNA report may even have adverse affect on the future of the child, therefore, the DNA test cannot be ordered upon mere asking.

17. In the present case, the record would reveal that by interlocutory orders dated 12/05/2017 and dated 28/11/2017, the Family Court while dealing with the applications did not deal with said applications in the light of Section 112 of the Evidence Act. The Family Court even while passing the aforesaid interlocutory orders, was required to taken into consideration that there existed a statutory presumption which is made available to spouse in terms of Section 112 of the Evidence Act, therefore, a direction for DNA test could not have been given on an application which was moved by the petitioner inasmuch as, it was a burden on the present petitioner to rebut the presumption under Section 112 of the Evidence Act. In the case in hand, the said rebuttal should be based on the evidence which was required to be adduced by the present petitioner. Undisputedly, no evidence was adduced to rebut the said presumption by the present petitioner and a perusal of the record reveal that in paragraph 1 of the reply to the application filed under Section 125 of Cr.P.C. the petitioner denied the fact that he was biological father of respondent No.1.

18. The petitioner contended in paragraph 4 of the reply to the application filed under Section 125 of Cr.P.C. that the respondent No.2 left matrimonial home in the month of October, 2009 and from October 2009 onwards, she was residing at Sehore. The respondent No.1 in the present case was born on 28/06/2010, therefore, there was heavy burden upon the petitioner

to rebut the said presumption and the said presumption could have been rebutted by achieving the uphill task of proving that there was no access between the petitioner and respondent No.2 in terms of Section 112 of Evidence Act.

19. The Section 112 of the Evidence Act palpably reflects that the presumption is rebuttable when it is shown that the parties to the marriage had no access to each other at any time when he (child) could have been begotten. It is further stipulated in Section 112 of the Evidence Act that even when a child is born within 280 days after dissolution of marriage, and the mother remains unmarried, there is a presumption that the child born between the aforesaid period is, legitimate child. Hence, the rigor of such conclusive presumption can only be refuted by proving non access and such proof is based on the strong evidence, which is required to be adduced by the husband.

20. In the present case, undisputedly, no evidence was adduced by the petitioner to rebut the said presumption. Merely, denying an averment made in the application under Section 125 of Cr.P.C was not enough to rebut the said presumption. The petitioner in his examination-in-chief also in a most casual manner stated in paragraph 3 that respondent No.1 was not his daughter, however, no other evidence was issued by the present petitioner to demonstrate as to how respondent No.1 was not his daughter nor efforts were made by the present petitioner to establish parenthood of the child.

21. Hence, a collective reading of the pleadings as well as the evidence adduced by the petitioner, reflect that there was utter failure on the part of the petitioner to rebut the statutory presumption as stipulated in Section 112 of the Evidence Act. Hence the petitioner cannot dispute the impugned order on the

ground that no DNA test in the present case has been conducted.

22. A perusal of paragraph 27 of the impugned order reflects that the Family Court while considering the provisions of Section 112 of the Evidence Act, has directed the present petitioner to pay amount of maintenance of Rs.4,000/- to respondent No.1. The order impugned even if perused from any angle leaves to scope of interference.

23. Resultantly, this Criminal Revision stands dismissed.

24. No order as to cost.

(MANINDER S. BHATTI)
JUDGE

Astha