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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 11.09.2023***
Pronounced on: 17.10.2023

\+ **CRL.M.C. 3944/2019, CRL.M.A. 33248/2019, CRL.M.A. 23738/2023**

NIKHAT PARVEEN @
KHUSBOO KHATOON ..... Petitioner

Through: Mohd. Azam Ansari, Mohd. Shahnawaz Alam and Mohd. Ashfaque Ansari, Advocates

versus

RAFIQUI @ SHILLU & ORS. ..... Respondents

Through: Mr. Anurag Pratap and Mr. Rishiraj, Advocates

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

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SWARANA KANTA SHARMA, J.

1. The instant petition has been filed under Section 482 of Code of Criminal Procedure, 1973 (*'Cr.P.C'*) by the petitioner seeking setting aside of impugned judgment dated 20.03.2019 passed by learned District and Sessions Judge, South East District, Saket, Delhi (*'learned Sessions Court'*) in criminal appeal no. 507/2017 *vide* which the learned Sessions Court had upheld judgment passed by learned Metropolitan Magistrate, Saket, Delhi (*'learned MM'*) in CT Case No. 612349/2016.

FACTUAL BACKGROUND

2. Brief facts of the case are that the petitioner used to work as domestic help/work at the house of respondents for three years i.e. from February 2013 to February 2016. It is alleged that during this period, respondent no. 1 had made sexual advances towards the petitioner and had sexual intercourse on regular basis with the petitioner on the pretext of promise to marry her. As alleged, respondent no. 1 had also compelled the petitioner twice to have sexual intercourse with two of his friends also and when the petitioner had refused to do so, respondent no. 1 had threatened not to marry her in case she will not maintain physical relations with his two friends and, due to such threats, she had performed involuntary sexual intercourse with the said two friends of

respondent no. 1 on two occasions in the aforesaid period of three years. The petitioner states that names of those two persons can be disclosed only if this Court directs the petitioner to do so.

3. It is stated that on 02.03.2016, marriage was solemnized between the petitioner and respondent no. 1. On 01.04.2016, a girl child was born to the petitioner, i.e within less than one month of solemnisation of marriage between the parties. On 14.07.2016, a petition under Section 12 of Protection of Women from Domestic Violence Act, 2005 ('DV Act') was filed by the petitioner against the respondents before learned ACMM, Saket Court, New Delhi alongwith affidavit of income as well as application for grant of interim maintenance. On 19.01.2017, reply to the petition was filed by the respondents alongwith an application for conducting DNA test to determine the paternity of the child. The said application seeking direct to conduct DNA test was allowed. However, on 01.12.2017, the learned Magistrate had rejected the claim of maintenance of petitioner herein *vide* first impugned order dated 01.12.2017 on the ground of concealment of income. On 21.12.2017, an appeal was preferred before the learned Sessions Court challenging the said order dated 01.12.2017 and on 20.03.2019, learned Sessions Court was pleased to dismiss the appeal which is the second impugned order before this Court. It is now prayed that both the orders of the learned Magistrate as well as the Sessions Court dated 01.12.2017 and 20.03.2019 respectively be quashed.

ARGUMENTS ADDRESSED BY BOTH THE PARTIES

4. Learned counsel for the petitioner argues that the learned

Magistrate and Sessions Court have not considered any of the submissions made by the petitioner before it. It is stated that the Courts below have grossly committed an error on the point of concealment of income by the petitioner since it was explained during hearing of the case and in the written submissions before the learned Sessions Court that there was no concealment of income since the petitioner has mentioned in her complaint that "MAIN PATI RAFIQUE URF SILLU KE GHAR TEEN SAAL SE KHAANA BNAATI THEE….". It is stated that she had continuously worked as a cook for the respondents and, thereafter, she had never been employed ever. It is also stated that learned Trial Court has dealt with the grant of maintenance to the petitioner whereas plea for maintenance to child was dropped by the petitioner for the time being. It is now stated that both the orders impugned before this Court be set aside.

5. In addition, learned counsel for the petitioner also argues that since the child in this case was born during subsistence of a legal marriage, the presumption under Section 112 of the Indian Evidence Act will be in favour of the petitioner and it is prayed that maintenance be not only granted to the petitioner but also to the child born in this case by ignoring the DNA test since the child has been born during subsistence of legal marriage between the parties. It is also stated that due to social stigma caused to her due to DNA result going against the petitioner, she has been continuously taunted and her parents are also not taking care of her.

6. Learned counsel for petitioner submits that in view of Section 112 of the Indian Evidence Act, despite there being a DNA test which

concludes that the respondent had not fathered the child, presumption will be in favour of paternity of the child and the respondent would be liable to pay maintenance to the child as well as the petitioner and that the Courts below have committed an error by not granting maintenance to the petitioner. Learned counsel for petitioner also argues that the petitioner is lawfully married to the petitioner and therefore, she is entitled to maintenance. He also states that there is no proof on record that she is presently working and therefore, maintenance cannot be denied to her.

7. On the other hand, learned counsel for the respondents argues that in this case, respondent no. 1 was a minor when the petitioner had alleged that she was pregnant with the child of respondent no. 1. It is stated that respondent nos. 2 and 3, who are the parents of respondent no. 1, as good human beings and to be fair to the complainant, had themselves stated that in case the petitioner is pregnant with the child of respondent no. 1, and it is his mistake, he should take responsibility of her and thus they had got them married. It is submitted that petitioner no. 1 being a minor at the relevant time, due to the representation that she had been sexually assaulted by respondent no. 1 and was pregnant with his child, the parents of respondent no. 1 had themselves agreed to the marriage. However, when the child was born i.e. within one month of the marriage, the petitioner was residing at her parental home and the present complaint was filed. It is also stated that the application for conducting DNA test had been filed by respondent which was allowed *vide* a judicial order and the DNA test report had concluded that respondent no. 1 was not the biological father of the child delivered by

the petitioner. It is therefore, stated that the marriage itself is void as it was on misrepresentation and fraud and on the ground that petitioner was a minor at the time of marriage.

8. Learned counsel for respondent also argues that since respondent no. 1 has not fathered the child, and the child was born one month after the marriage of the petitioner with respondent no. 1, he is not entitled to pay the maintenance to the child as well as to the petitioner. It is also stated that in this case, the very fact that the petitioner has concealed the factum of her pregnancy to the extent that the pregnancy was due to the relationship between the petitioner and the respondent whereas in reality, the respondent had no physical access to her, also shows that she has approached the Court after concealing not only material facts at the time of marriage but also before this Court. It is also argued that in this case the marriage between the parties was solemnised due to a threat that she was pregnant with the child of the respondent no. 1 whereas it was found that she was not pregnant with the child of the respondent but she was pregnant with the child of someone else. Learned counsel for the respondent also argues that petitioner was a minor at the time of the alleged marriage between the parties and, therefore, marriage itself was void. Thus, it is prayed that present petition be dismissed.

ANALYSIS AND FINDINGS

9. In light of the contentions raised before this Court, this Court is of the opinion that the issue of factum of validity of marriage between the parties is already sub-judice before a Court of law and, therefore,

cannot be gone into at this stage by this Court while deciding the issue of grant of maintenance to the petitioner and the child and the same can be looked into at the final stages of grant of maintenance.

(i) Section 112 of Indian Evidence Act: The Ingredients

10. As far as the contention of learned counsel for the petitioner is concerned that protection of presumption under Section 112 of the Indian Evidence Act will be available to the child born during subsistence of a lawful marriage, this Court deems it appropriate to refer to Section 112 of the Indian Evidence Act, which provides 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."

11. The ingredients of Section 112 of the Indian Evidence Act can be summed up as under:

(i) *Birth during a valid marriage:* The section applies when a child is born while the marriage between the child's mother and any man is still legally valid.

(ii) *Birth within 280 days after dissolution:* Alternatively, the section applies if the child is born within two hundred and eighty days after the dissolution of the marriage between the child's mother and any man, and the mother has not remarried

during this period.

(iii) *Conclusive proof of legitimacy:* The section establishes a strong presumption of legitimacy for the child in such cases. It conclusively deems the child to be the legitimate son of the husband in the marriage, unless certain conditions are proved.

(iv) *No access to each other:* The presumption can be rebutted only if it can be demonstrated that the parties to the marriage had no access to each other during any period when the child could have been conceived. In other words, if it can be proven that sexual intercourse between the husband and wife was not possible during the relevant time, the presumption of legitimacy can be challenged.

12. Interpreting the context and mandate of Section 112 of the Act, establishing the existence of a valid marriage between the child's mother and another man is sufficient for the Court to accept this as conclusive proof of the child's legitimacy, with regard to the person to whom his/ her mother is married. However, it is important to note that Section 112 of the Indian Evidence Act itself provides a limited exception to this presumption, i.e. establishing non-access. At this juncture, it is also relevant to note Section 4 which provides 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

17. As noted in preceding discussion, the responsibility of demonstrating non-access that concerned parties had no access to each other during the time the child could have begotten, falls upon the party making such an allegation.

18. It is also important to note that the law stipulates that meeting this burden goes beyond a mere preponderance of probabilities; instead,

the evidence presented to establish non-access must be robust, unambiguous, convincing, and definitive to rebut a presumption of conclusive proof. Thus, a plausible yet insufficient explanation will not suffice; instead, the evidence must meet the rigorous standard of "proved" as articulated under Section 3 of the Act.

19. In contents of Section 112 of Indian Evidence Act, the Hon'ble Apex Court in ***Goutam Kundu v. State of W.B.*** *(1993) 3 SCC 418* had laid down that the Courts cannot readily order blood tests or DNA tests and there must be a strong *prima facie* case of non-access, and individuals cannot be compelled to provide blood samples for analysis. The relevant portion of the judgment reads as under:

> " 24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non- existence of opportunities for sexual intercourse; it does not mean actual cohabitation.
> 25. The effect of this section is this: there is a presumption and a very strong one though a rebuttable one. Conclusive proof means as laid down under section 4 of the Evidence Act.
> 26. From the above discussion it emerges -
> (1) that courts in India cannot order blood test as matter of course;
> (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
> (3) There must be a strong primafacie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act. (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
> (5) No one can be compelled to give sample of blood for analysis. "

20. Similarly, in case of ***Bhabani Prasad Jena v. Orissa State***

Commission for Women *(2010) 8 SCC 633* also, the law on conducting DNA test was discussed and it was held that court can order such test only in case of strong prima facie case and sufficient material befoe it. Relevant portion of the decision reads as under:

> "23. There is no conflict in the two decisions of this Court, namely, *Goutam Kundu* and *Sharda*. In *Goutam Kundu1*, 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 court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda2 while concluding that a 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 can be given by the court only if a strong prima facie case is made out for such a course.
>
> 24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court over-looked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court."

(iv) Precedence of DNA Report over Conclusive Proof Under Section 112 of Indian Evidence Act

21. In this case, however, the DNA test was conducted by a judicial order which has not been challenged ever till date and has attained

finality. The DNA test report in the present case has concluded that respondent no. 1 is not the biological father of the child of petitioner.

22. In the case of ***Nandlal Wasudeo Badwaik v. Lata Nandlal Badwail & Anr*** *(2014) 2 SCC 576*, the Hon'ble Apex Court was confronted with the presence of a DNA report on record and the absence of findings with respect to any objections on part of husband regarding the non-access of his wife. The Hon'ble Apex Court ruled that the DNA test would take precedence over the presumption of conclusive proof as enshrined in Section 112 of the Indian Evidence Act since there is no need of presumption when truth is known through DNA test result. The Apex Court had made the following important observations:

> 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 a 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."

23. Further, the Hon'ble Apex Court in ***Aparna Ajinkya Firodia v. Ajinkya Arun Firodia*** *2023 SCC OnLine SC 161*, while reiterating the principle discussed in ***Nandlal Wasudeo Badwaik*** *(supra)* had made the following observations:

> 61. Further, in *Nandlal Wasudeo Badwaik*, the facts of the case were that due to non-opposition of the counsel for the wife, this Court directed that the serological test be conducted. The report was brought on record, which stated that the appellant-husband was not the biological father of the minor child. At the request of the respondent-wife, a re-test was ordered, which also revealed the same result. The plea with regard to the applicability of section 112 of the Evidence Act was taken only after the DNA test was conducted on the direction of this Court and the report was brought on record. **This Court held that when a report of a**

> **DNA test conducted on the direction of a Court, was available on record and was in conflict with the presumption of conclusive proof of the legitimacy of the child, the DNA test report cannot be ignored. Hence, this Court relied on the DNA test report and held that the appellant-husband would not be liable to pay maintenance.** The said case would be of no assistance to the case of the respondent herein. This is because, in the said case, this Court was confronted with a situation in which DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child, under Section 112 of the Evidence Act.However, in the present case, no DNA test is available till date, which was conducted on the direction of a competent Court. Therefore, the respondent-husband would first need to dislodge the presumption under Section 112 of the Evidence Act and thereafter seek a direction to conduct a DNA test of Master Arjun."
>
> (Emphasis supplied)

24. Therefore, the protection under Section 112 of the Act would have been available to the petitioner only in case the DNA test had not been conducted since the intent of the legislation behind enactment of Section 112 of the Indian Evidence Act is to save every child from being born 'illegitimate' and to give him protection of legitimacy by invoking presumption under the section 112 in favour of legitimacy of the child born during subsistence of a valid marriage.

(v) Appreciating the Contentions Raised By The Parties

25. Learned counsel for the petitioner has presented a story regarding two of the friends of respondent No. 1 having sexually assaulted the petitioner against her wishes on the instigation and asking of respondent no. 1, which was introduced at a later stage and not in the initial complaint. The names of said persons have not been disclosed to any court of law. It has only been stated that at some point of time during the period of three years, two friends of respondent no. 1 had

established sexual relations with her against her wishes. Be that as it may, the fact remains that respondent no. 1 herein is not the biological father of the child in question, whose mother is petitioner herein.

26. Therefore, in face of DNA report existing on record, respondent no. 1 herein cannot be held liable to make payment of maintenance to the child, even though the child was born during the subsistence of marriage between the petitioner and respondent no. 1. In this regard, the law is also settled that the biological father is liable to maintain his child.

27. As far as the petitioner herein is concerned, this Court has gone through the impugned order which has denied maintenance to the petitioner on the ground of concealment of her income. Having gone through the same, this Court notes that the following findings have been recorded by the learned Trial Court for denying maintenance to the petitioner, as reflected in the impugned order, relevant portion of the which reads as under:

> "A copy of complaint dated 19.05.2016 is on record, wherein the complainant has stated that she was working as a cook for last three years in the house of the respondents and therefore, it appears that the complainant has concealed her income from the Court. A DNA Test Report of the minor child is on record wherein the DNA of the minor child does not match with that of the respondent no. 1. Thus, considering the material available on record, this Court holds that the complainant has concealed the true facts and has not come to the Court with clean hand and thus, she is not entitled to grant of any interim relief. Accordingly, interim relief to the complainant is declined."

28. This Court is of the opinion that at the stage of grant of interim maintenance, a *prima-facie* view of the facts placed before the Court had to be taken, along-with the affidavit of income and expenditure

filed before it by the parties concerned, as per settled law. The factors for deciding the grant of maintenance are also settled in this regard.

29. In this case, even if it is the case of the petitioner that she was working as a cook or domestic help and was earning earlier, at present, there is nothing on record to reveal that she is earning anything or is working anywhere. Since the factum of marriage between the parties is not disputed though validity thereof is disputed, which is subject matter of adjudication before the concerned court of law, this Court is of the opinion that the learned Trial Court has committed an error by denying maintenance to the petitioner herein since at this stage, it is apparent from the record that she is not working or earning.

THE DECISION

30. Therefore, considering the facts and circumstances of this case, this Court directs that the present matter be remanded back to the concerned Court for deciding afresh the quantum of maintenance to be paid to the petitioner on the basis of documents placed before it by both the parties, within two months from receipt of copy of this judgment.

31. Accordingly, the present petition is disposed of with pending applications, in above terms.

32. Copy of this judgment be forwarded to the learned Trial Court for information and compliance.

33. The judgment be uploaded on the site forthwith.

SWARANA KANTA SHARMA, J

OCTOBER 17, 2023/ns