HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No. 12470 of 2011

In the matter of application under Articles 226 & 227 of the Constitution of India.

Chinmayee Mohanty @ Kamila ..... Petitioner

-Versus-

Krushna Narayan Kamila ..... Opp. Party

For Petitioner : Mr. A.Panda & Associates

For Opp. party : Mr.S.S.Das & Associates

P R E S E N T:

THE HON'BLE MR. JUSTICE L.MOHAPATRA
AND
THE HON'BLE MR. JUSTICE B.K.MISRA

Date of Judgment: 28.09.2011

B.K.MISRA, J The petitioner who was the opposite party in Civil Proceeding No. 166 of 2004 pending in the Court of learned Judge, Family Court, Cuttack challenges the propriety of the order passed by the said Judge, Family Court, Cuttack on 15.2.2011 directing the petitioner as well as the opposite party so also their child to undergo D.N.A. test with regard to the determination of the paternity of the child in question.

2. Before going to examine the propriety or impropriety of the impugned order of the learned Judge, Family Court, Cuttack, it will be worthwhile to mention the cases of the parties in brief. According to the

husband-petitioner, he married the opposite party-wife on 24.2.2003. But according to the petitioner, there was no relationship between them and the opposite party behaved differently in maintaining conjugal relationship and ultimately the opposite party-wife was taken by her father to his house on the pretext of some custom. The further case of the petitioner is that he came to know that his wife has given birth to a male child in S.C.B. Medical College Hospital, Cuttack on 9th November, 2003. The apprehension of the petitioner is that the opposite party was impregnated by some other person before marriage and that was the reason as to why she deprived him of his conjugal rights. Under such circumstances the petitioner filed the proceeding for annulling his marriage with the opposite party and to grant a decree of divorce with a further prayer to declare that the child born to the opposite party (wife) is not his child.

3. The opposite party-wife contested the proceeding by way of filing the written statement wherein she denied the allegations of the petitioner and interalia pleaded that the child born to her is out of her wedlock with the petitioner and it is her specific case that she was physically and mentally tortured by the petitioner and his mother on demand of dowry and after the birth of the child the petitioner did not take care of her as well as the child nor did pay anything towards their maintenance for which she is residing with her parents especially when the petitioner refused to take them back to his house.

4. In the proceeding before the Family Court, both parties have led evidence. During the pendency of the said proceeding a petition

was filed by the petitioner-husband for a direction to the parties including the child to undergo the prescribed D.N.A. test to ascertain the paternity of the child which was born to opposite party on 9.11.2003. Such petition filed by the husband was stoutly resisted by the wife.

5. The Judge, Family Court, Cuttack upon hearing the learned counsel for the petitioner-husband as well as the opposite party-wife passed the impugned order directing the parties as well as the child to go for D.N.A. test which would help the Court in arriving at the just decision of the case.

6. Learned counsel appearing for the petitioner challenged the impugned order contending that when the marriage between the parties is an admitted fact and after marriage the spouses lived under one room and when sufficient materials are there before the Court that Opposite Party has access to her, the Court should not have ordered a roving enquiry in directing the parties and the child to go for the D.N.A. test. It was also contended that there has been abuse of the discretionary power so exercised by the learned Judge, Family Court, Cuttack. It was also contended that right to personal liberty is very important and compelling a person to undergo for medical examination of his or her blood test or the like without his or her consent and wish tantamount to interference with his or her fundamental right of life or liberty when there is no provision either in the Family Court's Act, the Code of Civil Procedure or the Evidence Act. It was also contended that the D.N.A. test is not to be directed as a matter of routine since Court's

of Law always are inclined towards holding legitimacy of a 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 legitimation of the child would result in rank injustice to the father. Courts have always desisted from rendering a verdict lightly or hastily which will have the effect of branding a child as a bastard and its mother as unchaste woman. Law always presumes both that a marriage ceremony is valid and that every person is legitimate.

7. Learned counsel appearing on behalf of the husband while admitting the marriage of the opposite party with the petitioner submitted that from the medical history of the petitioner it can not be said that the child born to the petitioner on 9.11.2003 is a legitimate child as the medical history of the petitioner shows that she had conceived prior to her marriage as her period was missing as per the Bed Head ticket since 18.2.2003 i.e. seven days prior to the marriage and when the child was born to the petitioner on 9.11.2003 and was a “term baby”, the same shows that the child was born when the gestation had attained 37 complete weeks but less than 42 weeks in other words between 259 and 294 days since the last menstrual period. It was also contended by the learned counsel for the opposite party that when a child is born before completion of 37 weeks (259 days) the child is considered preterm. It was also contended that at the time of admission of the petitioner to S.C.B. Medical College & Hospital, Cuttack for delivery it was reported to the doctor that the petitioner had married for the last one year. Thus, according to learned counsel for the opposite

party-husband pregnancy begins from the first date of the last menstrual period (L.M.P.) and starting from that date the expected date of delivery is calculated and therefore when the bed head ticket shows that the period of the petitioner was missing since 18.2.2003 and her expected date of delivery was 25.11.2003 the child born to the petitioner is not born through him as he had no access to his wife namely, the petitioner during her stay in his house. In other words, the opposite party disputing the paternity of the child prayed for the DNA test. It was very vociferously contended by the learned counsel for the Opposite Party that the only way to disprove the paternity of the child is by blood group test. Having regard to the development of the medical jurisprudence to deny such request of him would be unreasonable.

8. In support of their respective contentions, the learned counsel for the parties placed reliance in several decisions of the Apex Court, namely **AIR 1965 S.C. 364, Mahendra Manilal Nanavati –v- Sushila Mahendra Nanavati, AIR 1993 S.C. 2295, Goutam Kundu –v- State of West Bengal & another, AIR 2001 (S.C.) 2226, Smt. Kamti Devi & another –v- Poshi Ram, (2003) 4 SCC 493, Sharada –v- Dharampal, Vol.100 (2005) CLT 73, (S.C.) Banarsi Dass –v- Mrs. Teeku Dutta & another and 2010 (II) OLR (S.C.) 575 Bhabani Prasad Jena –v- Convenor Secretary, Orissa State Commission for Women & another**.

9. In the instant case, we are called upon to decide as to whether the impugned order of the learned Judge, Family Court,

Cuttack dated 15.02.2011 in C.P.No.166 of 2004 could be sustainable in the eye of law in the given facts and circumstances of this case.

10. We may point out at the outset that challenging the order of the Judge, Family Court, Cuttack regarding payment of monthly maintenance to the wife and child the present Opposite Party had preferred MAT Appeal No. 34 of 2008 before this Court. At that time the learned counsel for the present Opposite Party raised the dispute about the paternity of the child and prayed for a direction for D.N.A. test to find out as to whether he (Opposite Party) is the father of the child or not. But the said suggestion was rejected by the Court while dismissing the appeal.

11. Since in this case the parties have led evidence and the matter is sub-judice before the learned Judge, Family Court, Cutttack, we refrain ourselves from expressing any opinion as to the pregnancy of the petitioner as well as the period of gestation as any finding or expressing opinion on that would definitely weigh in the minds of the trial Judge and may pre-judge the issue in question. Therefore, without delving into the technicalities of pregnancy, period of gestation and when fertilization occurs, which have been advanced in course of argument by the learned counsel for the opposite party, we would be confining ourselves with regard to the DNA test which has been ordered by the learned Judge, Family Court, Cuttack.

12. In matters of this kind and when dispute arises with regard to parentage, resort is being made to Section 112 of the Indian Evidence Act. There is a presumption and very strong one, though at the

same time a rebuttal one. Section 112 of the Evidence Act is based on the well-known maxim “pater is est quem nuptiae demonstrant” (he is the father whom the marriage indicates.) The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate. It throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed. The law is general presuming against vice and immorality.

13. It is to be mentioned here that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be

answered in the light of what is meant by access or non-access. (**Kamti Devi Vrs. Poshi Ram, 4 (2001) 5 SCC 311: 2001 SCC (Cri) 892)**.

14. In **Bhabani Prasad Jena's** case (supra), the Apex Court by analyzing the position of law in the case of **Sharada** and **Banarasi** (supra) have concluded as follows:-

> "(1) That Courts in India cannot order blood test as a matter of course;
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> (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
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> (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.
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> (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.
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> (5) No one can be compelled to give sample of blood for analysis."
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> It has also been held that:-
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> "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."

15. In the instant case, the opposite party-husband had earlier prayed for DNA test on 18.8.2007 and the Court rejected such prayer of the present opposite party-husband on 19.5.2010 but again the husband renewed his prayer for DNA test of the parties including the child which was disposed of by the impugned order. On going through the impugned order, it has come to our notice that the learned court below was swayed away with the notion that the oral evidence and documentary evidence and medical Texts which were produced by the petitioner-husband and holding that the opposite party-wife might have conceived prior to her marriage ordered for a DNA test to arrive at a just decision of the case. It would be appropriate to quote the reasoning of the court below hereunder:-

> "xx xx xx Learned counsel of O.P. argued that if she was pregnant before her marriage petitioner's female relatives could notice it after her marriage seeing her swelled abdomen and since no such physical development was noticed in her, a conclusion is not available that she was impregnated by somebody else before her marriage. He also argued that petitioner did not suggest to O.P. during her cross-examination that as she was already pregnant before her marriage her father gave her in marriage hastily.

> He also argued that a hasty marriage would not necessarily always denote pregnancy prior to marriage. These contentions of learned counsel of O.P. would not succeed. Merely because petitioner's female family members found no feature of pregnancy in O.P. soon after the marriage, a conclusion cannot be reached that whatever petitioner is saying now about the pregnancy of O.P. has to be rejected. Petitioner by various items of materials i.e. oral evidence, documentary evidence and medical texts have filed to show that O.P. might have been pregnant prior to her marriage. Under these circumstances D.N.A. test of all the parties including the child would help the court in arriving at the just decision of the case."

16. Thus on analyzing the impugned order, we have no hesitation to hold that the DNA test should not have been directed by way of having a roving enquiry. Before ordering for DNA test the Court should have arrived at a finding that the applicant had established a strong prima facie case and the Court must have sufficient material before it to enable it to exercise its discretion. Abuse of the discretionary power at the hands of a Court cannot be expected when parties have led evidence before the Court. The Court has to examine the materials before it regarding the degree of proof of non-access for rebutting conclusiveness in the light of the judgment of the Apex Court in **Kamti Devi's Case** (supra). When parties have led evidence before the Court, it would have been prudent on the part of the learned Judge, Family Court not to direct the parties and the child to go for the D.N.A. test with regard to determining the question of paternity raised by the Opposite Party and the pros and con of such D.N.A. test should have been considered.

17. The contention of the learned counsel for the opposite party-husband that the petitioner (wife) when had earlier prayed for time for collection of blood sample she cannot thereafter have a volte-face and question the propriety of the impugned order, appears fallacious and not tenable.

18. The above being the position, the direction for DNA test as has been given by the learned Judge, Family Court, Cuttack is unsustainable in the eye of law.

19. In the ultimate analysis, the impugned order is set aside and the writ petition stands allowed.

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B.K.Misra, J.

L.Mohapatra, J. I agree.

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L.Mohapatra, J.

Orissa High Court, Cuttack
The 28th September, 2011/RNS