

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 14TH DAY OF SEPTEMBER 2021 / 23RD BHADRA, 1943

OP (FC) NO. 670 OF 2019

AGAINST THE ORDER DATED 20/9/2019 IN IA NOS.2537/2019,

2538/2019 and 2732/2019 IN OP 868/2016 OF FAMILY COURT,

THIRUVANANTHAPURAM

PETITIONER/PETITIONER:

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XXXXXXXXXX XXXXXXXXXXXX

BY ADVS.SINDHU SANTHALINGAM
SRI.A.D.SHAJAN

RESPONDENTS/RESPONDENTS:

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2 XXXXXXXXXXXX
XXXXXXXXXX XXXXXXXXXXXX

3 XXXXXXXXXXXX
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BY ADVS.SRI.BRIJESH MOHAN
SRI.SHAJIN S.HAMEED
SMT.RESMI G. NAIR

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
24.08.2021, ALONG WITH OP (FC).679/2019, THE COURT ON
14.09.2019 THE FOLLOWING:

OP(FC) Nos.670 & 679/2019

-:2:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 14TH DAY OF SEPTEMBER 2021 / 23RD BHADRA, 1943

OP (FC) NO. 679 OF 2019

AGAINST THE ORDER IN IA NOS.1570/19, 2535/19, 2536/19 AND

2731/2019 IN OP 1921/2013 OF FAMILY COURT,

THIRUVANANTHAPURAM

PETITIONER/PETITIONER:

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XXXXXXXXXXXX XXXXXXXXXXXX

BY ADVS.SINDHU SANTHALINGAM
SRI.A.D.SHAJAN

RESPONDENTS/RESPONDENTS:

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BY ADVS.SRI.BRIJESH MOHAN
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THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
24.08.2021, ALONG WITH OP (FC).670/2019, THE COURT ON
14.09.2021 DELIVERED THE FOLLOWING:

"C.R."

J U D G M E N T

Dated this the 14th day of September, 2021

Kauser Edappagath, J.

Can a direction to undergo Deoxyribonucleic Acid Test (commonly known as DNA Test) be given in a proceedings for divorce to establish the husband's assertion of infidelity and adultery on the part of the wife without the child in the party array? - is the core question falls for consideration in these Original Petitions.

2. The husband is the petitioner in both the original petitions. The first respondent is the wife. The second respondent is the brother-in-law (sister's husband) of the first respondent.

3. The petitioner preferred OP No.1921/2013 for dissolution of marriage on the ground of cruelty, desertion and adultery and OP No.868/2016 for recovery of money and gold ornaments while the first respondent preferred OP No.432/2018 for recovery of money at the Family Court, Thiruvananthapuram

(for short, 'the court below'). The joint trial of all the three petitions was ordered by the court below.

4. The main allegation of the petitioner in OP No.1921/2013 is that the first respondent has been living adulterous life with the second respondent and the child born to the first respondent is that of the second respondent. To prove infidelity and adulterous act on the part of the first respondent, the petitioner filed IA No.1570/2019 to conduct DNA test of the first respondent's son as also himself. The court below after hearing both sides dismissed the said application as per the impugned order dated 1/7/2019 on the ground that the child is a necessary party to the petition and without the child on the party array, its paternity and legitimacy cannot be determined. Thereafter, the petitioner filed three interlocutory applications at the court below; IA No.2535/2019 to implead the child, IA No.2536/2019 for consequential amendment and IA No.2731/2019 to appoint the first respondent as the guardian of the child. The petitioner also filed similar applications as IA Nos.2537/2019, 2538/2019 and 2732/2019 in OP No.868/2016. The court below as per common order dated 20/9/2019 dismissed

all those applications holding that the applications were highly belated. Challenging the orders in IA Nos.1570/2019, 2535/2019, 2536/2019 and 2731/2019 in OP No.1921/2013, OP(FC) 679/2019 has been filed. Challenging the order in IA Nos.2537/2019, 2538/2019 and 2732/2019 in OP No.868/2016, OP(FC) No.670/2019 has been filed.

5. Heard both sides and perused the records.
6. OP No.1921/2013 has been filed for dissolution of marriage on the ground of cruelty, desertion and adultery. The marriage between the petitioner and the first respondent was solemnized on 7/5/2006. A child was born to the first respondent on 9/3/2007. The definite case of the petitioner is that the first respondent is having adulterous relationship with the second respondent and the child was born in the said illicit relationship. The petitioner has also taken a specific plea that he was suffering from infertility and incapable to have a child. The application to conduct DNA test has been filed to prove that he is not the father of the child and thereby to substantiate his assertion of infidelity and adultery. The first respondent opposed the application on the ground that in a lawyer notice sent by the petitioner as well as in

the service records of the petitioner, he has admitted that he is the father of the child. It was further contended that in the birth certificate of the child also, the petitioner was shown as the father. The court below dismissed the application not on merits, but on the ground that the child was not impleaded. Thereafter, when the petitioner filed application to implead the child and for consequential amendment, those applications were also dismissed on the ground of delay.

7. The learned Counsel for the petitioner submitted that but for the DNA test, it would be impossible for the petitioner husband to establish and confirm the assertions made by him in his pleadings and hence, the court below ought to have ordered the DNA Test. The Counsel further submitted that the petitioner has made out a strong *prima facie* case to raise presumption against legitimacy. Per contra, the learned counsel for the wife placing reliance on Section 112 of the Indian Evidence Act argued that once the validity of marriage is proved, then there is strong presumption about the legitimacy of children born from that wedlock and the presumption can only be rebutted by a strong and conclusive evidence. The counsel further submitted that

- :7:-

even the evidence of adultery by the wife by itself is not sufficient to repel this presumption and will not justify the finding of the illegitimacy if the husband has had access. Non access between the husband and wife is the only way to dislodge the conclusive presumption enjoined by Section 112 of the Evidence Act and, hence, the prayer for DNA test cannot be allowed in the absence of strong *prima facie* proof of non access, submitted the counsel. The counsel added that it is settled that no one can be compelled to give sample of blood for analysis. The counsel relied on the following decisions of the Apex Court in support of his submission: ***Goutam Kundu v. State of West Bengal and Another*** (AIR 1993 SC 2295) and ***Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another*** (AIR 2010 SC 2851). In ***Goutam Kundu*** (supra), the Apex Court while dealing with a question about the paternity of a child noticed the provisions of S.112 of the Evidence Act and held that the presumption arising thereunder can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. It was further held that there must be a strong *prima facie* case in that the husband has established

non access in order to dispel the presumption arising under S.112. In **Bhabani Prasad Jena** (supra), it was held that DNA test or paternity test should not be directed by the court as a matter of routine and such an order can only be given only if a strong *prima facie* case is made out for such a course.

8. Both the judgments relied on by the learned counsel for the respondent were on the question of legitimacy of the child born during the subsistence of a valid marriage. The question involved in OP No.1921/2013 pertains to the alleged infidelity and adultery on the part of the respondent wife. It is to establish the ingredients of S.13(1)(i) of the Hindu Marriage Act viz., that after the solemnization of marriage of the petitioner with the first respondent, the first respondent had voluntarily engaged in sexual intercourse with the second respondent, the application to conduct DNA test has been filed. The prayer made by the petitioner for conducting DNA test of the first respondent's son as also himself was to substantiate the alleged adulterous act of the first respondent. Therefore, insofar as the present controversy is concerned, S.112 of the Indian Evidence Act would not strictly come into play. A similar issue came to be adjudicated by the

Apex Court in ***Dipanwita Roy v. Ronobroto Roy*** (AIR 2015 SC 418), wherein it was held as follows:-

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

In ***Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Another*** (AIR 2014 SC 932), the Apex Court took the view that the result of a genuine DNA test is scientifically accurate and when there is 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. Thus, it is borne out from the decisions of the Apex Court in ***Dipanwita Roy*** (*supra*) and ***Nandlal Wasudeo Badwaik*** (*supra*) that depending upon the facts and circumstances of the case, it would be permissible for a court to direct the holding of a DNA examination, to determine the veracity of the allegations constituting the grounds for divorce if a strong *prima facie* case is made out. In ***Sharda v. Dharmpal*** (AIR 2003 SC 3450), the Apex Court has held that a matrimonial court has the power to order a person to undergo a medical test and such a direction need not be in violation of any right to personal liberty. It was further held that while exercising the power to order a medical test to be undergone by a person, the court should exercise restraint and there must be a strong *prima facie* case and sufficient material before the court to pass such an

-:11:-

order. The wife's alleged adulterous act and infidelity are issues to be decided in the original petition. In order to get a decree for divorce u/s 13(1)(i) of the Hindu Marriage Act, the petitioner must establish that the first respondent has, after the solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse. The burden to prove the said fact is entirely on the petitioner. DNA test result of the child, no doubt, would be the best piece of evidence to substantiate the said allegation. The opinion of a DNA expert is relevant u/s 45 of the Evidence Act. The Court shall not preclude a party from adducing evidence which may be relevant in accordance with the Evidence Act to prove his case. Thus, we hold that when the husband seeks dissolution of marriage alleging adultery or infidelity on the part of the wife disputing the paternity of the child born during the subsistence of their marriage, the court can order DNA test to establish his assertion of infidelity or adultery without expressly disturbing the presumption contemplated u/s 112 of the Evidence Act with regard to the legitimacy of the child provided a strong *prima facie* case is made out for such a course.

9. As stated already, the marriage was solemnized on

-:12:-

7/5/2006 and the child was born to the first respondent on 9/3/2007. At the time of marriage, the petitioner was employed at military service. The petitioner has specifically pleaded in the original petition that after 22 days of the marriage he left to his work place at Ladakh and during those 22 days or thereafter there was no physical relationship between them due to the non co-operation of the first respondent. The petitioner has also clear pleading in the petition that the first respondent has been leading an adulterous life with her brother-in-law. He has been impleaded in the petition also. The definite case of the petitioner is that he was suffering from infertility and there was no possibility for him to have a child. The petitioner had earlier filed OP No.640/2009 at the Court below for dissolution of marriage on the ground of cruelty and desertion. Later, it was transferred to the Family Court Nedumangad and renumbered as OP No.687/2012. The said original petition was dismissed which was confirmed in appeal. Even though the first respondent raised a preliminary objection in OP No.1921/2013 that the said petition was barred by the principles of *res judicata* on account of the dismissal of OP No. 687/2012, the objection was ultimately overruled by this

Court in Mat. Appeal No. 383/2016 holding that the petition was not barred by the principles of *res judicata*. In OP No.640/2009 (re numbered as OP No.687/2012), the Assistant Professor, Department of Obstetrics and Gynecology, Medical College, Thiruvananthapuram was examined as PW3. He is an infertility expert. His deposition has been produced and marked as Ext. P6 in OP(FC) No.670/2019. The Infertility Certificate issued by him to the petitioner has been produced and marked as Ext. R1 (c) along with the counter affidavit of the first respondent in OP(FC) No. 679/2019. The certificate was marked through him. It is stated in the certificate that the petitioner is suffering from oligoasthenoteratospermia. It is a condition that includes low sperm number, low sperm motility and abnormal sperm morphology. It is the commonest cause of male infertility. The doctor gave evidence that there is no possibility for the petitioner to have the child. The doctor further deposed that before issuing the certificate, semen test of the petitioner was conducted. This is a strong *prima facie* circumstance in support of the case of the petitioner that he is not the biological father of the child. That apart, the Family Court, Nedumangad in MC No.375/2012 filed by

-:14:-

the first respondent seeking maintenance for the child against the petitioner passed an order to conduct DNA test at the instance of the petitioner herein. But, the first respondent failed to comply with the direction of the Family Court to appear for DNA test and hence, MC was dismissed. This is yet another strong *prima facie* circumstance. For all these reasons, we are of the view that the petitioner has made out a strong *prima facie* case to order DNA test. DNA testing is the most authentic and scientifically proved means to establish the paternity and thereby prove the case of infidelity and adultery set up by the petitioner. As observed by the Apex Court in **Nandlal Wasudeo Badwaik** (*supra*), a presumption cannot prevail over truth of a fact established by science.

10. The court below rejected the prayer for DNA test mainly on the ground that the child was not made a party in the application. There are two tests for determining the question whether a particular party is a necessary party to the proceedings or not: (1) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question; and (2) It should not be possible to pass

-:15:-

an effective decree in the absence of such a party. It is pertinent to note that the original petition (OP No. 1921/2013) is not one under S.7(1) r/w Explanation (e) of the Family Courts Act for a declaration as to the legitimacy of any person. The petition is only for dissolution of marriage u/s 13 of the Hindu Marriage Act. The presence of child does not have any bearing whatsoever in deciding the petition for dissolution of marriage on merit. The illegitimacy or paternity of the child is only incidental to the claim for dissolution of marriage on the ground of adultery or infidelity. The child's presence is not necessary to adjudicate the relief claimed. The finding, if any, as to the paternity or legitimacy of the child in a proceedings for dissolution of marriage between the husband and the wife would not bind the child who is not a party to the proceedings. The child if it wishes to establish its paternity and its legitimacy may do so by appropriate legal proceedings on attaining majority. Inasmuch as the presence of the child is not necessary to effectively adjudicate the *lis*, the child need not be unnecessarily dragged to the proceedings. Two decisions of this Court {**Radhakrishnan P.S. v. A.Indu** [2018 (3) KHC 877] and **Nizar v. Raseena** [2018 (5) KHC 356]} were relied on by the

-:16:-

court below in support of its finding that child is a necessary party in the proceedings. But, the prayer in both those decisions was to declare the illegitimacy of the child. Hence, the dictum in those decisions cannot be applied to the present petitions. We, in the circumstances, hold that in a petition filed by the husband seeking dissolution of marriage alleging adultery or infidelity on the part of the wife disputing the paternity of the child born during the subsistence of their marriage, the child is not a necessary party. In such a petition, the court can order DNA test to establish the husband's assertion of infidelity and adultery on the part of the wife without the child in the party array if a strong *prima facie* case is made out.

In the light of the above findings, the dismissal of IA No.1570/2019 by the court below cannot be sustained. Accordingly, we allow OP(FC) No.679/2019 in part and set aside the dismissal of IA No.1570/2019. We allow IA No.1570/2019. The DNA test of the petitioner as well as the son of the first respondent shall be conducted at Rajiv Gandhi Centre for Biotechnology, Thiruvananthapuram. The court below in consultation with the Center shall fix the date and time. The first

OP(FC) Nos.670 & 679/2019

-:17:-

respondent shall accompany the child to the Center. The petitioner shall also be present. The DNA samples of the child and the petitioner shall be obtained by the laboratory in the presence of the petitioner and the first respondent. The petitioner shall bear the expenses. OP(FC)No.670/2019 stands dismissed. The parties are directed to bear their respective costs in both the original petitions.

Sd/-

A.MUHAMED MUSTAQUE

JUDGE

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

APPENDIX OF OP (FC) 679/2019

PETITIONER'S EXHIBITS

- EXHIBIT P1 A TRUE COPY OF THE JUDGMENT DATED
6.3.2019 IN MAT.APPEAL NO.383/2016 OF
THE HON'BLE HIGH COURT OF KERALA.
- EXHIBIT P2 A TRUE COPY OF THE ORDER DATED 1.7.2019
IN I.A.NO.1570/2019 IN OP.1921/2013 OF
THE FAMILY COURT, THIRUVANANTHAPURAM.
- EXHIBIT P3 A TRUE COPY OF THE ORDER DATED 20.9.2019
IN IA.NO.2537/2019, IA.2538/2019 &
IA.2732/2019 IN OP.NO.868/2016 OF THE
FAMILY COURT, THIRUVANANTHAURAM.
- EXHIBIT P4 A TRUE COPY OF THE ORDER DATED 20.9.2019
IN IA.2535/2019, IA.2536/2019 &
IA.2731/2019 IN OP.1921/2013 OF THE
FAMILY COURT, THIRUVANANTHAPURAM.
- EXHIBIT P5 A TRUE COPY OF THE JUDGMENT DATED
15.11.2011 IN OP(FC)NO.1403/2011 OF THE
HIGH COURT OF KERALA, ERNAKULAM.
- EXHIBIT P6 A TRUE COPY OF THE DEPOSITION OF PW3 IN
O.P.(HMA)640/2009 OF FAMILY COURT,
THIRUVANANTHAPURAM.
- EXHIBIT P7 A TRUE COPY OF THE DEPOSITION OF PW4 IN
OP(HMA)640/2009 OF FAMILY COURT,
THIRUVANANTHAPURAM.
- EXHIBIT P8 A TRUE COPY OF THE JUDGMENT DATED
20.12.2012 IN OP(FC)NO.4441/2012 OF THE
HON'BLE HIGH COURT OF KERALA.

- EXHIBIT P9 A TRUE COPY OF THE ORDER DATED 15.1.2013
IN CMP.NO.10/2013 IN MC.NO.375/2012 OF
FAMILY COURT, NEDUMANGAD.
- EXHIBIT P10 A TRUE COPY OF THE ORDER DATED 10.6.2013
IN MC.NO.375/2012 OF FAMILY COURT,
NEDUMANGAD.
- EXHIBIT P11 A TRUE COPY OF THE ORDER DATED 3.2.2015
IN CMP.NO.2412/2914 IN MC.NO.29/2014 OF
THE JUDICIAL FIRST CLASS MAGISTRATE
COURT, THIRUVANANTHAPURAM.
- EXHIBIT P12 A TRUE COPY OF THE RECEIPT NO.777 DATED
19.2.2015 ISSUED BY RAJIV GANDHI CENTRE
FOR BIO -TECHNOLOGY, THIRUVANANTHAPURAM.
- EXHIBIT P13 A TRUE COPY OF THE INVOICE DATED
19.2.2015 ISSUED BY RAJIV GANDHI CENTRE
FOR BIO - TECHNOLOGY THIRUVANANTHAPURAM.
- EXHIBIT P14 A TRUE COPY OF THE COMMUNICATION DATED
19.2.2015 ISSUED BY RAJIV GANDHI CENTRE
FOR BIO - TECHNOLOGY TO THE PETITIONER.
- EXHIBIT P15 A TRUE COPY OF THE COMMUNICATION DATED
4.3.2015 ISSUED BY RAJIV GANDHI CENTER
FOR BIO - TECHNOLOGY, THIRUVANANTHAPURAM
TO THE JUDICIAL MAGISTRATE OF THE FIRST
CLASS - 2, THIRUVANANTHAPURAM.

RESPONDENT'S EXHIBITS

- EXHIBIT R1 (a) COPY OF THE LAWYER NOTICE DATED
24.3.2009 ISSUED ON BEHALF OF THE
PETITIONER TO THE 1ST RESPONDENT.
- EXHIBIT R1 (b) COPY OF THE LETTER WRITTEN BY THE
PETITIONER TO THE 1ST RESPONDENT DATED
14.5.2009

OP(FC) Nos.670 & 679/2019

-:20:-

- EXHIBIT R1 (c) COPY OF INFERTILITY CERTIFICATE ISSUED BY DR.T.V.SARAVANAKUMAR, ASSISTANT PROFESSOR, DEPARTMENT OF OBSTETRICS & GYNECOLOGY, MEDICAL COLLEGE, TRIVANDRUM ON 4.3.2011 TO THE PETITIONER.
- EXHIBIT R1 (d) COPY OF JUDGMENT DATED 11.7.2013 IN OP NO.687/2012 OF THE FAMILY COURT, NEDUMANGAD.
- EXHIBIT R1 (e) COPY OF JUDGMENT DATED 24.9.2013 IN MAT.APPEALNO.606/2013 OF THE HON'BLE HIGH COURT OF KERALA.

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OP(FC) Nos.670 & 679/2019

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