DIPANWITA ROY

v.

RONOBROTO ROY

(Civil Appeal No. 9744 of 2014)

OCTOBER 15, 2014

[JAGDISH SINGH KHEHAR AND R.K. AGRAWAL, JJ.]

Hindu Marriage Act, 1955 – s.13 – Divorce petition under – Husband seeking divorce on ground of infidelity – On application of husband, direction issued by High Court for holding of DNA test of the husband and the child born to wife – Propriety – Held: Depending on facts and circumstances of a case, it is permissible for a Court to direct the holding of DNA examination – On facts, but for the DNA test, it was impossible for the husband to establish and confirm the assertions made in the divorce petition, alleging infidelity – Direction issued by High Court therefore justified – However, wife given liberty to comply with or disregard the said direction of High Court in order to preserve her right of individual privacy to the extent possible, without sacrificing the cause of justice – Evidence Act, 1872 – s.112 and s.114, Illustration (h).

Disposing of the appeal, the Court

HELD:1.1. Proof based on a DNA test would be sufficient to dislodge a presumption under Section 112 of the Indian Evidence Act. Depending on 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 allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. If the direction to hold such a test can be avoided, it should be so avoided. The

A **reason is that the legitimacy of a child should not be put to peril. [Paras 9, 10] [570-E-F; 570-F-H]**

1.2. In the instant case, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. B **Therefore, the direction issued by the High Court 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** C **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. [Para 11] [571-D-E]**

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Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another **(2010) 8 SCC 633: 2010 (9) SCR 457; and** *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another* **(2014) 2 SCC 576: 2014** E **(1) SCR 120 – relied on.**

Chilukuri Venkateshwarly vs. Chilukuri Venkatanarayana **1954 SCR 424;** Goutam *Kundu vs. State of West Bengal and another* **(1993) 3 SCC 418: 1993 (3) SCR 917;** *Kamti Devi and another v. Poshi Ram* **AIR 2001 SC 2226: 2001 (3) SCR** F **729;** *Sham Lal @ Kuldeep vs. Sanjeev Kumar and others* **(2009) 12 SCC 454: 2009 (5) SCR 1049 – referred to.**

Karapaya Servai v. Mayandi **AIR 1934 PC 49 – referred to.**

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2. However, while upholding the order passed by the High Court, it is just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring

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the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. This course has been adopted to preserve the right of individual privacy to the extent possible, without sacrificing the cause of justice. [Para 12] [571-F-H; 572-A, D]

Case Law Reference:

AIR 1934 PC 49	**referred to**	**Para 8**
1954 SCR 424	**referred to**	**Para 8**
1993 (3) SCR 917	**referred to**	**Para 8**
2001 (3) SCR 729	**referred to**	**Para 8**
2009 (5) SCR 1049	**referred to**	**Para 8**
2010 (9) SCR 457	**relied on**	**Para 9**
2014 (1) SCR 120	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9744 of 2014.

From the Judgment and Order dated 06.12.2012 of the High Court at Calcutta in C.O. No. 3590 of 2012.

Soumya Chakarborty (for Dharma Bir Raj Vohra) for the Appellant.

Ranjan Mukherjee, S.C. Ghosh for the Respondent.

The Judgment of the Court was delivered by

A **JAGDISH SINGH KHEHAR, J.** 1. The petitioner-wife Dipanwita Roy and the respondent-husband Ronobroto Roy, were married at Calcutta. Their marriage was registered on 9.2.2003. The present controversy emerges from a petition filed under Section 13 of the Hindu Marriage Act, 1955 (hereinafter B referred to as the 'Act') by the respondent, inter alia, seeking dissolution of the marriage solemnised between the petitioner-wife and the respondent-husband, on 25.1.2003.

2. One of the grounds for seeking divorce was, based on C the alleged adulterous life style of the petitioner-wife. For his above assertion, the respondent-husband made the following allegations in paragraphs 23 to 25 of his petition.

"23. That since 22.09.2007 the petitioner never lived with the respondent and did not share bed at all. On a very few D occasion since then the respondent came to the petitioner's place of residence to collect her things and lived there against the will of all to avoid public scandal the petitioner did not turn the respondent house on those occasion.

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24. That by her extravagant life style the respondent has incurred heavy debts. Since she has not disclosed her present address to bank and has only given the address of the petitioner. The men and collection agents of different F banks are frequently visiting the petitioner's house and harassing the petitioner. They are looking for the respondent for recovery of their dues. Notice from Attorney Firms for recovery of due from the respondent and her credit card statements showing heavy debts are being G sent to the petitioner's address. The respondent purchased one car in 2007 with the petitioner's uncle, Shri Subrata Roy Chowdhary as the guarantor. The respondent has failed to pay the installments regularly.

25. That the petiitoner states that the respondent has gone H

astray. She is leading a fast life and has lived in extra marital relationship with the said Mr. Deven Shah, a well to do person who too is a carrier gentlemen and has given birth to a child as a result of her cohabitation with Shri Deven Shah. It is reported that the respondent has given birth to a baby very recently. The respondent is presently living at the address as mentioned in the cause title of the plaint."

(emphasis is ours)

3. The above factual position was contested by the petitioner-wife in her reply wherein she, inter alia, submitted as under:

"That the statements made in paragraph Nos. 5 and 6 of the plaint are admitted by the respondent to the extent that the daughter namely "Biyas" is residing in the custody of the respondent's mother with the arrangement of the petitioner and as a result of which the petitioner used to come at his mother in law's place and spending days therein and the respondent used to spend time with him and carrying on their matrimonial obligation which includes co-habitation.

That the statements made in paragraph No.7 in the plaint is absolutely false, concocted, untrue, frivolous, vexatious and made with the purpose of harassing the respondent and the petitioner is call upon to prove the allegation intoto. It is categorically denied by the respondent that she was a selfish person, very much concern about her own self and own affairs and without any concern for the petitioner as alleged. The respondent further denied that she was self willed, arrogant and short tempered and she used to fly into rage every now and then over small matter and used to quarrel with the petitioner and his mother as alleged. The respondent further denied and disputes that she used to go out every now and then according to her whims without

informing either the petitioner and his mother as alleged. That the respondent further denies and disputes that she failed to disclose her whereabouts and used to stay out for long hours as alleged. The respondent further denies and disputes that she does not care little for the feelings of either the petitioner or his mother as alleged. The respondent further denies and disputes that she got extremely irritated and used to quarrel with the petitioner whenever the petitioner tried to speak to her as alleged.

That the statements made in paragraph 23 in the plaint are absolutely imaginative, concocted and false and the same are being made for the purpose of this case. The respondent denies and disputes in its present form the statement they lead an extravagant life style and thereby she incurred debts as alleged therein and the respondent provided her matrimonial house address to the bank as because the same is her permanent address after her marriage. The respondent denies and disputes the statement that men and collection agent of different banks were frequently visiting the petitioner's house and harassing the petitioner and they are looking for the respondent for recovery of dues as alleged therein. The respondent is to state and submit that many a times at the behest of the petitioner she used to purchase many things for him and spent lot of money while attending dinner and lunch at clubs and restaurants with the petitioner. The respondent is to further state and submit on repeated insistence of the petitioner the respondent purchased a car on credit for accommodating herself smooth journey at her office work as well as for other places and in such event the petitioner promised that he would pay 50% of the EMI in respect of purchase of the car which is actually failed to contribute. It is needless to mention that the respondent had incurred some debts due to financial recession in consequences of which she lost her job and as a result of that she failed to make payment of her outstanding to the

bank in spite of her willingness although her parents extended their helpful hands to accommodate her which could enable to come out from the debts but the petitioner is such situation kept himself silent.

That the statements made in paragraph no.24 in the plaint are false, untrue, frivolous and concocted and the same are being made with a malafide intention for degrading and harassing the respondent in the eye of society in order to get the divorce from her. The respondent strongly denies and disputes the statement that she is leading a fast life in extra marital relationship with one Mr. Deven Shah and she had given a birth of a child as a result of cohabitation with Shri Deven Shah as alleged. The respondent further denies and disputes the statement that she ever live in the address mentioned in the case title in the plaint as alleged and the petitioner is call upon to prove the statements into.

The respondent is to state and submit that she had no extra marital relationship with one Mr. Deven Shah. It is pertinent to mention that the respondent is having a continuous matrimonial relationship with the petitioner and the petitioner too performed the matrimonial relation to as well as the cohabitation with the respondent in great spirit and as a result of which a male chid was born. At this stage raising question regarding birth of the child would actually put adverse effect not only towards the family but also towards of the mind of the tender aged child and this unscrupulous attitude is actually goes against the concept of welfare of the child."

(emphasis is ours)

A perusal of the written statement filed on behalf of the petitioner-wife reveals that the petitioner-wife expressly asserted the factum of cohabitation during the subsistence of their marriage, and also denied the accusations levelled by the

respondent-husband of her extra marital relationship, as absolutely false, concocted, untrue, frivolous and vexatious.

4. In order to substantiate his claim, in respect of the infidelity of the petitioner-wife, and to establish that the son born to her was not his, the respondent-husband moved an application on 24.7.2011 seeking a DNA test of himself (the respondent-husband) and the male child born to the petitioner-wife. The purpose seems to be, that if the DNA examination reflected, that the male child born to the petitioner-wife, was not the child of the respondent-husband, the allegations made by the respondent-husband in paragraphs 23 to 25 of the petition, would stand substantiated. The petitioner-wife filed written objections thereto, categorically asserting, that the factual position depicted in the application filed by the respondent-husband was false, frivolous, vexatious and motivated. It was asserted that the allegations were designed in a sinister manner, to cast a slur on the reputation of the petitioner-wife. The petitioner-wife strongly denied and disputed the statement made at the behest of the respondent-husband to the effect, that she was leading a fast life in extra marital relationship with Mr. Deven Shah, and had given birth to a child as a result of her cohabitation with the said Mr. Deven Shah. She also asserted, that she had a continuous matrimonial relationship with the respondent-husband, and that, the respondent-husband had factually performed all the matrimonial obligations with her, and had factually cohabited with her. The petitioner-wife accordingly sought the dismissal of the application filed by the respondent-husband, for a DNA test of himself and the male child born to the petitioner-wife. The respondent-husband filed a reply affidavit reiterating the factual position contained in the application, and thereby also repudiating the assertions made by the petitioner-wife in her written objections.

5. The Family Court by an order dated 27.08.2012

dismissed the prayer made by the respondent-husband, for conducting the afore-mentioned DNA test. A

6. Dissatisfied with the order passed by the Family Court on 27.8.2012, the respondent-husband approached the High Court at Calcutta (hereinafter referred to as the 'High Court') in its civil revisional jurisdiction by filing CO No.3590 of 2012 under Article 227 of the Constitution of India. The High Court allowed the petition filed by the respondent-husband vide an order dated 6.12.2012. The operative part of the impugned order dated 6.12.2012 is being extracted hereunder: B C

> "CO No.3590 of 2012 is disposed of by setting aside the order impugned and by directing the DNA test of the son of the wife to be conducted at the Central Forensic Science Laboratory on December 20, 2012. The wife will accompany her son to the laboratory at 11 am when the petitioner herein will also be present and the DNA samples of the child and the husband will be obtained by the laboratory in presence of both the husband and wife. The expenses for the procedure will be borne by the husband and the result will be forwarded by the laboratory as expeditiously as possible to be husband, the wife and the trial Court. The expenses for such purpose will be obtained in advance by the laboratory from the husband. D E
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> In addition, prior to December 20, 2012 the husband will deposit a sum of Rs.1 lakh with the trial court which will stand forfeited and made over to the wife in the event the paternity test on the basis of the DNA results shows the husband to be the father of the child. In the event the result reveals that the petitioner is not the father of the child, the money will be refunded by the trial Court to the petitioner herein. F G
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> The wife has sought to file an affidavit, but such request has been declined. The wife seeks a stay of operation of H

this order, which is refused. CO No.3590 of 2012 is disposed of without any order as to costs.

A copy of this order will immediately be forwarded to the laboratory by the husband such that the laboratory is ready to obtain the DNA sample on the specified date."

(emphasis is ours)

Aggrieved with the order passed by the High Court on 6.12.2012, the petitioner-wife has approached this Court by filing the instant special leave petition. Notice was issued by this Court on 15.2.2013. The respondent-husband has entered appearance. Pleadings are complete.

7. Leave granted.

8. Learned counsel for the appellant-wife, in the first instance, invited our attention to Section 112 of the Indian Evidence Act. The same is being extracted 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."

Based on the aforesaid provision, learned counsel for the appellant-wife drew our attention to decision rendered by the Privy Council in Karapaya Servai v. Mayandi, AIR 1934 PC 49, wherein it was held, that the word 'access' used in Section 112 of the Evidence Act, connoted only the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence

of a valid marriage, the provision by a fiction of law, accepted the same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child. It was the submission of the learned counsel for the appellant-wife, that the determination of the Privy Council in Karapaya Servai's case(sûpra) was approved by this Court in Chilukuri Venkateshwarly vs. Chilukuri Venkatanarayana, 1954 SCR 424. Learned counsel for the appellant-wife also invited our attention to a decision rendered by this Court in Goutam Kundu vs. State of West Bengal and another, (1993) 3 SCC 418, wherein this Court, inter alia, held as under:

> "(1) That Courts in India cannot order blood test as a 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 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.
>
> (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 samle of blood for analysis."

Reliance was also placed on the decision rendered by this Court in Kamti Devi and another v. Poshi Ram, AIR 2001 SC 2226, wherefrom, the following observations made by this Court, were sought to be highlighted:

> "10. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness.

The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

11. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleric 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 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 unrebuttable. This may look hard from thepoint 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 as delineated above.

12.....Its corollary is that the burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband. " A B

(emphasis is ours)

Lastly, learned counsel for the appellant-wife, placed reliance on the decision rendered by this Court in Sham Lal @ Kuldeep vs. Sanjeev Kumar and others, (2009) 12 SCC 454, wherein it was inter alia, held as under: C

"Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. In the instant case, admittedly the plaintiff and Defendant 4 were born to D during the continuance of her valid marriage with B. Their marriage was in fact never dissolved. There is no evidence on record that B at any point of time did not have access to D." D E F

(emphasis is ours)

It was, therefore, the vehement contention of the learned counsel for the appellant-wife, that the impugned order passed by the High Court directing, holding of a DNA test, of the respondent-husband and the male child born to the appellant-wife, may be set aside. G H

A 9. All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not B the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had C voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behaviour of the appellant. In the determination of D the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play. A similar issue came to be adjudicated upon by this Court in Bhabani Prasad Jena vs. E Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633, wherein this Court held as under:

> "21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science F gives the 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 the use of such scientific advances and tools which result in invasion of right to G 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 H conception.

22. 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 test is eminently needed. DNA test 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.

23.There is no conflict in the two decisions of this ourt, namely, Goutam Kundu vs. State of West Bengal (1993) 3 SCC 418 and Sharda vs. Dharmpal (2003) 4 SCC 493. In Goutam Kundu, 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 the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda, 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 prime facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test 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 test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded

A its jurisdiction in passing the impugned order. Strangely, the High Court overlooked 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
B 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
C matter, it is not possible to sustain the order passed by the High Court. "

(emphasis is ours)

D It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties. Recently, the issue was again considered by this Court in Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another,
E (2014) 2 SCC 576, wherein this Court held as under:

"15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically
F pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea
G of the husband that he had not any access to his wife at the time when the child could have been begotten.

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
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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 circumstances, which would give way to the other is a complex question posed before us. A B C

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. D E F G

18. We must understand the distinction between a legal H

A 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 B 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 C 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 D 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."

(emphasis is ours)

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This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112 of the Indian Evidence Act.

F 10. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena (supra), and Nandlal Wasudeo Badwaik (supra), that depending on 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 G veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.

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11. 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.

12. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by

A drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

B "114. Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the
C particular case.

Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

D This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of
E the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.

13. The instant appeal is disposed of in the above terms.

F Bibhuti Bhushan Bose Appeal disposed of.