Research Paper LAW

Presumption of Legitimacy Over by Expert Opinion in India

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ABSTRACT

The development of science and technology has a close link in the administration of justice. The recent Supreme Court judgment of Nandlal WasuDeo Badwaik has proved the acceptance of DNA test over a legal presumption. This is a glaring example that the science and law has a close link to discover the truth.

KEYWORDS Expert opinion, DNA Test, Legal Presumption.

THE CASE, Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr was a special leave petition directed against the order of High court for not allowing DNA test to prove the paternity of child. The appellant Nandlal Wasudeo Badwaik married a Latha on 30th June, 1990 at Chandrapur. According to him, both the husband and wife separated from 1991. They had no physical contact between them after 1991. An application for maintenance under Section 125 of the Code of Criminal Procedure filed by his wife, but the same was dismissed by the learned Magistrate by order dated 10th December, 1993. Thereafter, the wife resorted to a fresh proceeding under Section 125 of the Code of Criminal Procedure, 1973 claiming maintenance for herself and her daughter. She alleged that she started living with her husband from 20th of June, 1996 and stayed with him for about two years and during that period got pregnant. The appellant resisted the claim of his wife and stated that the assertion of his wife that she stayed with his husband since 20th June, 1996 is false. He denied the claim that he is the father of respondent No.2, the girl child. The claim of the wife accepted. The Magistrate granted maintenance to both the wife and daughter. The appellant preferred a revision petition before the High Court to order for DNA test to prove the paternity of child and claimed that no maintenance ought to have been awarded to the child. The High Court denied his claim and dismissed his revision petition. The appellant preferred a Special Leave Petition before the Supreme Court against the order of High Court.

The Supreme Court dismissed the order of High court and favored the appellant to order for DNA test on a condition that the appellant petitioner to deposit all dues, both arrear and current, in respect of the maintenance awarded to the wife and child to enable us to consider the prayer for holding of such DNA test on 8th November 2010. The deposit was paid by the appellant on 3rd January, 2011. The Supreme Court allowed the petitioner's prayer for conducting DNA test for ascertaining the paternity of the child.

The Supreme Court has ordered the appellant and respondent to make a joint application to the Forensic Science Laboratory, Nagpur, for conducting DNA test. The appellant, the respondent No. 1 shall present themselves at the Laboratory with respondent No. 2. The laboratory is directed to send the result of such test to the Court within four weeks thereafter. The Forensic Science Laboratory has submitted the result of DNA testing and opined that appellant is excluded to be the biological father of respondent no. 2.

By the said order, the respondent has not been satisfied so she requested for re-test. The Court directs that a further DNA test be conducted at the Central Forensic Laboratory, Hyderabad. The parties are directed to appear before the Laboratory. The Central Forensic Laboratory submitted its report and opined that the appellant can be excluded from being the biological father of respondent no.2.

The respondents counsel submits that the appellant having failed to establish that he had no access to his wife at any time when she could have begotten respondent no. 2, the direction for DNA test ought not to have been given. In view of the aforesaid he submits that the result of such a test is fit to be ignored. To justify his claim the respondent's counsel relied on the judgment of Supreme Court in Goutham Kundu v. State of West Bengal, Banarsi dass v.Teeku Dutta, Bhabani Prasad Jena v. Orissa State Commission for Women. In all most all the cases the court ruled that blood test as well as DNA test cannot be ordered as a routine. The result of a genuine DNA test is said to be scientifically accurate. But, 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.

The appellant's counsel raised the contention that the DNA test had already been ordered and the respondent had also not denied. It is only after the reports of the DNA test had been received, which was adverse to the respondents, that they are challenging it on the ground that such a test ought not to have been directed. We cannot go into the validity of the orders passed by a Court at this stage. It has attained finality.

Before, the Supreme Court proceeds to consider the rival submissions analyzing the DNA test that we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is

about 5 billion, this test shall have accurate result. It has been recognized by this Court in the case of Kamti Devi v. Poshi Ram, that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child.

Based on the facts and circumstances, the crucial question placed before the Supreme Court is:

12. "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 No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us."

The Supreme Court ruled and evolved a beautiful concept that, 13. "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 rises 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. 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."

14. "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 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. 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 bastardized 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."

CASE COMMENT:

In the above decision, the Supreme Court has changed the presumption under section 112 of the Indian Evidence Act, 1872 which has been followed still now from its enactment. Section 112 of the Indian Evidence Act, 1872 states that the husband has to prove that he has no access with his wife during the time when the child have been begotten. It can be proved either impotency or far away from his wife. The latter is very difficult because "Access and non-access mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation." This above ruling helps the innocent husband to prove his non-access by way of DNA test. For the first time, the Court favors the innocent husband to prove his paternity claim. Here, the court gives priority to DNA test under Section 45 of the Indian Evidence Act, 1872 over the legitimate presumption under Section 112 of Indian Evidence Act, 1872. It is really a welcoming step and by that way our Supreme Court has enforced the fundamental duties enunciated under Article 51A (h) and (j) of Part IV A of the Indian Constitution.