Aparna Ajinkya Firodia vs Ajinkya Arun Firodia on 20 February, 2023

Author: V. Ramasubramanian

Bench: V. Ramasubramanian, B.V. Nagarathna

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2023
(Arising out of SLP (C) No.9855/2022)

Aparna Ajinkya Firodia …Appellant

Versus

Ajinkya Arun Firodia …Respondent

J U D G M E NT

NAGARATHNA J.

Leave granted.

2. Indian Law has proceeded on the assumption that parents are persons who beget a child or who assume the legal obligations of parenthood through formal adoption of child. Under the Indian legal spectrum, a husband is strongly presumed to be the father of a child born to his wife. Thus, there is a strong presumption regarding the paternity of a child. This presumption can be overcome only by evidence precluding any procreative role of the husband, such as by showing that the husband and wife had no access to each other at the relevant time

of possible conception. In the absence of proof of non-access, the law

considers the husband's paternity to be conclusively established if they cohabited when the child was likely to have been conceived. By allowing rebuttal with proof, that the husband could not have been the biological father, the marital presumption was implicitly premised, in part, on a policy linking parenthood with biological reproduction and on an assumption about the probability of the husband's genetic contribution. The presumption protects social parentage over biological parentage.

Scientific proof now makes it possible to know with virtual certainty whether a man is genetically related to a child. As a result, Courts are routinely confronted with husbands seeking to disavow their paternity based on newly acquired DNA evidence, notwithstanding them having long performed the social role of father to a child. The short question in the present appeal is as to how a Court can prevent the law's tidy assumptions linking paternity with matrimony, from collapsing, particularly when parties are routinely attempting to dislodge such presumptions by employing modern genetic profiling techniques.

Factual Background:

3. The present controversy emerges from an application (Exhibit 84/B) filed by the respondent-husband on 9 th November, 2020 before the Principal Judge Family Court, Pune, praying for a direction to subject Master Arjun, the second child born to the appellant-wife, during the subsistence of her marriage with the respondent, to deoxyribonucleic acid test ("DNA test" for short), with a view to ascertain his paternity. The said

application was filed by the respondent-husband in a petition for divorce filed by him under Sections 13(1)(i) and (ia) of the Hindu Marriage Act, 1955, being Petition No. P.A. 639 of 2017. The same was allowed by the Family Court, Pune by an order dated 12 th August, 2021 and confirmed by the High Court of Judicature at Bombay by way of the impugned judgment dated 22nd November, 2021 in Civil Writ Petition No.7077 of 2021.

4. Succinctly stated, the facts leading to the present appeal are as follows:

4.1. The appellant and the respondent got married as per Hindu rites and rituals at Pune, on 23rd November, 2005. Their first child, Master Hridaan Firodia, was born on 21st December, 2009. During the subsistence of their marriage, a second son, namely, Master Arjun Firodia, was born on 17th July, 2013.

4.2. On 1st June, 2017, the respondent-husband, filed a petition for divorce under Sections 13(1)(i) and (ia) of the Hindu Marriage Act, 1955 being Petition No.P.A. 639 of 2017 and a petition seeking custody of their two children, being P.D. No. 17 of 2017 against the appellant-wife, before the Family Court, Pune. In the petition for divorce, the respondent, inter-alia, alleged that the appellant-wife was in an adulterous relationship with one Kshitij Bafna, and the respondent discovered the same on 14 th September, 2016 when he found that certain intimate messages had been exchanged between the appellant and Kshitij Bafna.

4.3. On 9th November, 2020, the respondent filed an application, being application 84/B, before the Family Court, Pune seeking a direction to subject Master Arjun, the second child born to the appellant-wife, during

the subsistence of her marriage with the respondent to DNA testing, with a view to ascertain the child's paternity. The contents of the said application may be summarised as under:

i. That Master Arjun, the second son born to the appellant-wife, during the subsistence of her marriage with the respondent, was born out of an adulterous relationship between the appellant and Kshitij Bafna.

ii. That the respondent discovered that the appellant had been in an adulterous relationship with Kshitij Bafna, while he was using her phone on 14th September, 2016. That on being confronted about the same the appellant admitted to the adulterous relationship with Kshitij Bafna.

iii. That the respondent, being unwilling to accept the truth as confirmed by the appellant, decided to further investigate the issue of Master Arjun's paternity and hence, caused a DNA test to be conducted at DNA Labs India, a private laboratory. The DNA Test report dated 24th November, 2016 indicated as follows:

> "The alleged father lacks genetic markers that must be contributed to the child by the biological father. The probability of paternity is 0%".

iv. That the respondent was certain that Master Arjun was born as a result of the adulterous relationship of the appellant. However, in order to substantiate his contention as to the appellant's infidelity as a ground for divorce, it was necessary to conduct a DNA test which would reveal that the respondent was not the biological father of Master Arjun.

v. That a DNA test is the most legitimate and scientifically perfect means, that the respondent could use to establish the assertion of

infidelity on part of the appellant. That in the absence thereof it would be impossible for the respondent to conclusively establish the assertions made by him in the pleadings.

vi. That the respondent had access to telephonic conversations between him and Kshitij Bafna, wherein Kshitij Bafna had expressed his anger at the respondent for intimating his wife i.e., the wife of Mr. Bafna, of his illicit relationship with the appellant. That Kshitij Bafna when confronted about the paternity of Master Arjun, did not deny that the child was born to him and the appellant. That the appellant was in the habit of maintaining a daily diary wherein she had penned her thoughts as to her adulterous relationship. Having regard to the sensitive nature of the conversation and the contents of the diary, the respondent sought for the leave of the Family Court to produce the recording, the diary and other evidences, if necessary, at the time of final hearing of the divorce proceedings.

4.4. The appellant filed an affidavit in reply, opposing the application filed by the respondent seeking a direction to conduct DNA test of Master Arjun, inter-alia, contending that the respondent had not made out a prima-facie case requiring the Court to exercise its discretion to direct DNA test to be conducted as prayed for.

4.5. By an order dated 12th August, 2021, the Family Court, Pune, allowed the application filed by the respondent seeking DNA test of Master Arjun and further observed that in the event that the appellant fails to comply with the directions of the Court, the allegations of adultery as against her would be determined by drawing an adverse inference as contemplated under Illustration (h) of Section 114 of the Indian Evidence

Act, 1872 (hereinafter “Evidence Act” for the sake of brevity). The salient findings of the Family Court may be encapsulated as under:

i. That the respondent had filed the application seeking direction to conduct DNA test of Master Arjun, only with a view to establish adultery on the part of the appellant and not to disparage the paternity of the minor child.

ii. On perusal of the DNA Test Report issued by DNA Labs India dated 24th November, 2016, the Family Court concluded that the possibility of the respondent being the biological father Master Arjun has been excluded. That in view of Section 14 of the Family Courts Act, 1984 the said Report can be read as evidence.

iii. Reliance was placed on the decision of this Court in Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik, (2014) 2 SCC 576, to hold that Section 112 of the Evidence Act was enacted at a time when scientific advancement in the field of DNA test was not as sophisticated. That although Section 112 raises a presumption of conclusive proof on the satisfaction of the conditions enumerated therein, the same is rebuttable. That where the truth of a fact is known, there is no need or room for any presumption. Thus, 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.

iv. That the respondent had made out a prima-facie case justifying the Court’s exercise of discretionary power to direct conducting DNA Test by collecting blood samples of the respondent and the minor child.

v. That the respondent would be able to substantiate his allegations of adultery/infidelity on the part of the appellant, only if permission is

granted for conducting a DNA test. That it would be impossible for the respondent to establish and confirm the assertions made in the pleadings, other than by way of a DNA test. That DNA Testing is the most legitimate and scientifically perfect means, that the husband could use, to establish his assertion of infidelity.

vi. That in the event that the appellant accepts the direction issued by the Court, the DNA Test will determine conclusively the veracity of the accusations levelled by the respondent against her. In case, she declines to comply with the direction issued by the Court, the allegations would be determined by the Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, particularly, in terms of illustration (h) thereof.

vii. That by adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act.

4.6. Aggrieved by the Order dated 12th August, 2021 passed by the Family Court, Pune, the appellant filed a Writ Petition, being Civil Writ Petition No.7707 of 2021, before the High Court of Judicature at Bombay, assailing the same, inter-alia, on the ground that the Family Court failed to appreciate that a strong prima-facie case is a sine qua non for directing DNA profiling and that there was no evidence to support the respondent’s prayer for DNA test. Further, that the order of the Family Court was contrary to the presumption provided under Section 112 of the Indian Evidence Act and the provisions of the Hindu Marriage Act, 1955 and was contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India.

d.7. By the impugned judgment dated 22nd November, 2021 the High

Court dismissed the Writ Petition filed by the appellant herein and upheld the order of the Family Court dated 12 th August, 2021. The pertinent findings of the High Court may be epitomized as under:

i. That the respondent had carried out a DNA Test of Master Arjun at DNA Labs India and had produced the report of the same dated 24 th November, 2016 wherein the possibility of the respondent being the biological father of Master Arjun was stated to be 0%. Thus, the very foundation for taking recourse of moving an application for a direction to conduct the DNA Test was expressly and strongly laid down by the respondent.

ii. As regards the question as to whether an order directing DNA test of the appellant's minor child would encroach on the legal or Constitutional rights of the appellant, the High Court held that fundamental rights guaranteed under Article 21 of the Constitution of India are always subject to reasonable restrictions. Reliance was placed on Sharda vs. Dharmpal, (2003) 4 SCC 493 to hold that a matrimonial court has the power to direct a person to undergo medical tests and such a direction would not amount to a violation of the personal liberty guaranteed under Article 21 of the Constitution of India.

iii. That Section 112 of the Indian Evidence Act provides for the presumption of conclusive proof of legitimacy. However, such a presumption is rebuttable. One way of rebutting such presumption is by pleading and establishing a strong prima facie case like the one demonstrated by the respondent.

iv. That a Court is required to be sensitive to the fact that but for the medical/DNA test, it would be impossible for the respondent to

establish the assertions made in the pleadings.

v. That the Family Court had been adequately sensitive in taking note of the statement of the respondent to the effect that he would not disown Master Arjun even if the paternity test establishes that he is not the biological father. That the respondent had also made prayers for the custody of the said child, therefore, the interest of the child was not jeopardized in allowing the DNA test.

vi. That if the appellant failed to comply with the directions of the Family Court, the Court can draw a presumption of the nature contemplated under illustration (h) of Section 114 of the Evidence Act.

4.8. Aggrieved by the order of the Family Court dated 12 th August, 2021, as well as the impugned judgment, the appellant has assailed the same in the present appeal.

Submissions:

5. We have heard learned Senior Counsel, Sri Huzefa Ahmadi for the appellant-wife, and learned Senior Counsel, Sri Kapil Sibal for the respondent-husband and perused the material on record.

f. At the outset, Sri Huzefa Ahmadi submitted that the High Court had erred in upholding the direction of the Family Court, Pune, to conduct the DNA test of the younger son of the parties. That the respondent had failed to satisfy the test of “eminent need” as laid down by this Court in Goutam Kundu vs. State of West Bengal, (1993) 3 SCC 418 wherein it was observed that the Indian law leans towards legitimacy and that a direction for DNA test should be passed only after balancing the interests of the parties, including the rights of the child, and if such a test is eminently needed. That in the present case, the respondent had failed to

demonstrate that the direction for conducting DNA test could not have been avoided, and therefore, the direction to conduct the same was erroneous.

6.1. Learned Senior Counsel for the appellant further contended that the High Court erred in observing that the interest of the child would not be jeopardized by simply relying on the statement of the respondent that he would not disown his son. That even if such a statement is taken at its face value, it will not be enough to protect the child from societal repercussions associated with the illegitimacy of his birth (if any) and that any direction to conduct DNA test would be contrary to the interests of the child and the same is being sought by the respondent to secure his interests alone, without any consideration of the interest of the child. It was next contended that the rationale behind the Indian Law leaning towards legitimacy is that the DNA test would impinge on the right to privacy of a child and any issue as to legitimacy will have major societal repercussions on the innocent child. Further, balancing the interests of the child and the respondent does not justify passing a direction for conducting the DNA test of the child.

6.2. Sri Huzefa Ahmadi, learned senior counsel next submitted that the respondent had failed to establish any case demonstrating non-access at the relevant time, so as to dislodge the presumption under Section 112 of the Evidence Act and thus, no direction could have been passed to conduct a DNA test of the child. That the language of Section 112 of the Evidence Act and the decisions of this Court in Goutam Kundu, Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women, (2010) 8 SCC 633 and Ashok Kumar vs. Raj Gupta, (2022) 1

SCC 20, would establish that a party seeking a direction to conduct DNA test is required to bring on record strong prima-facie evidence of non-access vis-a-vis the presumption under Section 112 of the Evidence Act. That clear and satisfactory evidence of non-access is needed to rebut the presumption under Section 112 of the Evidence Act, vide Perumal Nadar (dead) by Lrs. vs. Ponnuswami, (1970) 1 SCC 605.

6.3. That in the instant case, Master Arjun was born on 17 th July, 2013, during the continuance of marital relations between the parties and that the respondent does not deny access to the appellant at the relevant time.

f.4. That a direction to conduct a DNA test cannot be passed based on vague material. That the respondent has sought to rely on the DNA test report dated 24th November, 2016. However, the authenticity of the said DNA Report has to be established during trial and any reliance placed on the same before the authenticity of the same is proved would, in future, amount to giving a license to a party (such as the respondent herein), seeking a direction to conduct a DNA test, to produce unauthenticated reports and this would have a devastating effect on the child.

6.5. With respect to the assertion of the respondent that he came across messages on the phone of the petitioner in the month of September 2016, disclosing the appellant’s adulterous actions, it was submitted on behalf of the appellant that no evidence or material in support of the same had been produced by the respondent and thus, no reliance can be placed on the same.

6.6. That it would be incorrect to state that simply because DNA tests are scientifically accurate, the same may be routinely conducted to dislodge the presumption of legitimacy under Section 112 of the Evidence Act.

6.7. It was averred that the issue of legitimacy is inextricably linked to the allegations of adultery and the same cannot be lightly trifled with, merely at the request of the respondent. Therefore, the presumption of legitimacy must be preserved by Courts.

With the aforesaid submissions, learned Senior Counsel, Sri Huzefa Ahmadi has prayed that the instant appeal be allowed and the impugned judgment of the High Court, as well as the order of the Family Court dated 12th August 2021, be set aside.

7. Per contra, learned Senior Counsel Sri Kapil Sibal, appearing on behalf of the respondent-husband submitted that the impugned judgment of the High Court and the order of the Family Court dated 12 th August 2021 have been passed on an unimpeachable appreciation of the facts of the case, as well as the relevant law, and therefore, the same do not call for interference by this Court.

7.1. Sri Kapil Sibal asserted that the instant appeal is an abuse of the process of law and is not maintainable either on law or based on the facts of the present case. That the present appeal has been filed with a view to mask the adulterous conduct of the appellant, in the guise of the child’s welfare.

7.2. Reliance was placed on the decision of this Court in Uday Chand Dutt vs. Saibal Sen, (1987) Supp SCC 506 to contend that in the face of two concurrent findings of the Family Court and the High Court, such findings may not be interfered with by this Court.

7.3. Learned Senior Counsel appearing on behalf of the respondent

referred to Section 41 of the Evidence Act and stated that a judgment in a matrimonial proceeding is a judgment in-rem and therefore, to arrive at a just and proper judgment in the pending Divorce Petition, any evidence to bring out the truth is germane to the matter and has to be permitted to be brought in and cannot be ignored. That the issue is one of a fair trial from the point of view of both the parties.

7.4. It was next submitted that Section 112 of the Evidence Act would not come in the way of the Courts directing DNA tests to be conducted in deserving cases. Reliance was placed on the decision of this Court in Dipanwita Roy vs. Ronobroto Roy, (2015) 1 SCC 365 to contend that this Court in the said case laid down the process to be followed by Courts in directing DNA tests, while at the same time preserving the presumption under Section 112 of the Evidence Act. That a similar approach must be permitted to be adopted in the present case.

7.5. It was further contended that in the present case, the most material piece of evidence to establish the allegations of adultery is the DNA test and the same cannot be shut out on the ground of sensitivity or privacy. Reliance was placed on the decision of this Court in Sharda to contend that in the said case it was categorically held that an order passed by a matrimonial court ordering a person to undergo a medical test would not be violative of the right of personal liberty as envisaged in Article 21 of the Constitution of India. That therefore, the reluctance and hesitation of the appellant to allow the DNA test corroborates the allegations of adultery against her and brings forth the need to conduct the said DNA Test.

7.6. That the Family Court passed the order directing DNA test after having due regard to the prima facie evidence brought before the said

court and the High Court has rightly confirmed the order passed by the Family Court. The Report of the privately conducted DNA test filed before the Family Court, in unequivocal terms rules out the possibility of the respondent being the biological father of the minor child. The said Report strongly lays down the foundation for taking recourse of moving an application for directions to conduct the DNA test. That under Section 14 of the Evidence Act, Family Courts have been given vast powers to take into consideration any report, statement, documents, and information which may assist the court to deal effectively with the dispute and thus, the Family Court was right in accepting the report of the privately conducted DNA test.

With the aforesaid averments, it was prayed that the instant appeal be dismissed as being devoid of merit and an abuse of the process of law, and the impugned judgment as well as the order of the Family Court, be affirmed.

Points for Consideration:

Having heard learned Senior Counsel for the respective parties, and upon perusal of the record, the following points would arise for our consideration:

i. Whether, the Family Court, Pune and the High Court of Judicature at Bombay, have rightly appreciated Section 112 of the Evidence Act in directing that a DNA test of Master Arjun be conducted?

ii. Whether, on non-compliance on the part of the appellant of the direction to subject Master Arjun to DNA test, allegations of adultery as against her could be determined by drawing an adverse inference as contemplated under Illustration (h) of Section 114?

iii. What order?

Legal Scheme:

8. For an easy and immediate reference, the relevant provisions of the Evidence Act are extracted hereinunder:

> "4. 'Conclusive proof'.—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.
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> 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.
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> 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 particular case. The Court may presume ——
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> xxx
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> (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; ….…"

8.1. According to Sarkar on Law of Evidence, 20th Edition, in the interest of health, order and peace in society, certain axiomatic presumptions have to be drawn. One such presumption is the conclusive presumption of paternity under Section 112 of the Evidence Act. Section 112 embodies the rule of law that the birth of a child during the continuance of a valid marriage or within 280 days (i.e., within the period of gestation) after its dissolution shall be "conclusive proof" that the child is legitimate unless it is established by evidence that the husband and wife did not or could not

have any access to each other at any time when the child could have been conceived. The object of this provision is to attach unimpeachable legitimacy to children born out of a valid marriage. When a child is born during the subsistence of lawful wedlock, it would mean that the parents had access to each other. Therefore, the Section speaks of “conclusive proof” of the legitimate birth of a child during the period of lawful wedlock.

The latter part of the Section is with reference to proof of the non-access of the parents of the child to each other. Thus, the presumption of legitimacy of the birth of the child is rebuttable by way of strong evidence to the contrary.

The principle underlying Section 112 is to prevent an unwarranted enquiry as to the paternity of the child whose parents, at the relevant time had “access” to each other. In other words, once a marriage is held to be valid, there is a strong presumption as to the children born from that wedlock as being legitimate. This presumption can be rebutted only by strong, clear and conclusive evidence to the contrary. Section 112 of the Evidence Act is based on the presumption of public morality and public policy vide Sham Lal vs. Sanjeev Kumar, (2009) 12 SCC 454. Since Section 112 creates a presumption of legitimacy that a child born during the subsistence of a marriage is deemed to be legitimate, a burden is cast on the person who questions the legitimacy of the child.

8.2. Further, “access” or “non-access” does not mean actual co-habitation but means the “existence” or “non-existence” of opportunities for sexual relationship. Section 112 refers to point of time of birth as the crucial aspect and not to the time of conception. The time of conception is

relevant only to see whether the husband had or did not have access to the wife. Thus, birth during the continuance of marriage is "conclusive proof" of legitimacy unless "non-access" of the party who questions the paternity of the child at the time the child could have been begotten is proved by the said party.

8.3. It is necessary in this context to note what is "conclusive proof" with reference to the proof of the legitimacy of the child, as stated in Section 112 of the Evidence Act. As to the meaning of "conclusive proof" reference may be made to Section 4 of the Evidence Act, which provides that when one fact is declared to be conclusive proof of another, proof of one fact, would automatically render the other fact as proved, unless contra evidence is led for the purpose of disproving the fact so proved. A conjoint reading of Section 112 of the Evidence Act, with the definition of "conclusive proof" under Section 4 thereof, makes it amply clear that a child proved to be born during a valid marriage should be deemed to be a legitimate child except where it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten or within 280 days after the dissolution of the marriage and the mother remains unmarried, that fact is the conclusive proof that the child is the legitimate son of the man. Operation of the conclusive presumption can be avoided by proving non-access at the relevant time.

8.4. The latter part of Section 112 of the Evidence Act indicates that if a person is able to establish that the parties to the marriage had no access to each other at any time when the child could have been begotten, the legitimacy of such child can be denied. That is, it must be proved by strong and cogent evidence that access between them was impossible on account of serious illness or impotency or that there was no chance of

sexual relationship between the parties during the period when the child must have been begotten. Thus, unless the absence of access is established, the presumption of legitimacy cannot be displaced.

Thus, where the husband and wife have co-habited together, and no impotency is proved, the child born from their wedlock is conclusively presumed to be legitimate, even if the wife is shown to have been, at the same time, guilty of infidelity. The fact that a woman is living in adultery would not by itself be sufficient to repel the conclusive presumption in favour of the legitimacy of a child. Therefore, shreds of evidence to the effect that the husband did not have intercourse with the wife at the period of conception, can only point to the illegitimacy of a child born in wedlock, but it would not uproot the presumption of legitimacy under Section 112.

8.5. The presumption under Section 112 can be drawn only if the child is born during the continuance of a valid marriage and not otherwise. “Access” or “non-access” must be in the context of sexual intercourse that is, in the sexual sense and therefore, in that narrow sense. Access may for instance, be impossible not only when the husband is away during the period when the child could have been begotten or owing to impotency or incompetency due to various reasons or the passage of time since the death of the husband. Thus, even though the husband may be cohabiting, there may be non-access between the husband and the wife. One of the instances of non-access despite co-habitation is the impotency of the husband. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy.

8.6. Thus, “non-access” has to be proved as a fact in issue and the same

could be established by direct and circumstantial evidence of an unambiguous character. Thus, there could be “non-access” between the husband and wife despite co-habitation. Conversely, even in the absence of actual co-habitation, there could be access.

8.7. Section 112 was enacted at a time when modern scientific tests such as DNA tests, as well as Ribonucleic acid tests (‘RNA’, for short), were not in contemplation of the legislature. However, even the result of a genuine DNA test cannot escape from the conclusiveness of the presumption under Section 112 of the Evidence Act. If a husband and wife were living together during the time of conception but the DNA test reveals that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. What would be proved, is adultery on the part of the wife, however, the legitimacy of the child would still be conclusive in law. In other words, the conclusive presumption of paternity of a child born during the subsistence of a valid marriage is that the child is that of the husband and it cannot be rebutted by a mere DNA test report. What is necessary to rebut is the proof of non-access at the time when the child could have been begotten, that is, at the time of its conception vide Kamti Devi vs. Poshi Ram, (2001) 5 SCC 311.

9. The next aspect of the matter that requires to be considered is whether an adverse presumption can be drawn in the nature of Illustration (h) to Section 114, as to the wife’s adulterous conduct when she refuses to comply with a direction for the child to undergo a DNA test.

9.1. Section 114 states that the Court may presume the existence of any fact that it thinks likely to have happened, having regard to the common

course of natural events, human conduct and public and private business, in relation to the facts of a particular case. Broadly speaking, there are two classes of presumptions, viz presumption of fact and presumption of law. The latter is again categorised as “rebuttable presumptions of law” and “irrebuttable or conclusive presumptions of law”.

The Court may presume 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. The questions that one is not compelled to answer by law, are dealt with in Sections 121-129. Refusal to answer a question is generally a legitimate ground for unfavourable inference against the person who may not answer the question. If a witness refuses to answer the question, the Court has the power to draw an inference from such refusal vide Section 148(4) of the Evidence Act. Section 148(4) reads as under:-

> “148. Court to decide when question shall be asked and when witness compelled to answer.—
> If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—
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> (4) The Court may, if it sees fit, draw, from the witness’s refusal to answer, the inference that the answer if given would be unfavourable.”

The use of the word expression “may” would imply that the Court has the discretion to draw such an inference and it not bound to do so. The Court is to exercise such discretion having regard to the facts of each

independent case.

9.2. For the purpose of reaching one conclusion, the Court can rely on a factual presumption unless the presumption is disproved or dispelled or rebutted. However, Illustration (h) to Section 114 has given enough discretionary power to the Court to draw certain inferences from the facts. The presumption under the section is discretionary and not mandatory. The use of the phrase “may presume” in the said provision indicated that that the Courts of Justice are to use their own sense and experience in judging the effect of particular facts, and in determining whether a presumption is to be drawn therefrom.

10. At this juncture, it may be useful to refer to the decision of this Court in Dipanwita Roy wherein the interplay between Sections 112 and 114 of the Evidence Act has been discussed. The said case arose out of divorce proceedings initiated by the respondent-husband on the ground of adultery and infidelity. The respondent’s case was that at the time when the child, whose paternity was in question, was conceived, the parties were not living in co-habitation and on no occasion shared a bed. The respondent sought to establish by way of a DNA test that the son conceived during the said period was born outside wedlock and as a result of the appellant-wife’s adulterous relationship with another person and consequently demonstrated infidelity on the part of the appellant-wife. This Court took note of the plea of the respondent-husband as to non-access at the relevant time, and accordingly opined that it would be a fit case for directing that a DNA test be conducted. Further, in the facts and circumstances of the said case, this Court accepted that a DNA test would be the only way in which the respondent-husband could establish his plea

of infidelity on the part of the appellant-wife. While upholding the direction of the High Court to conduct DNA test of the minor child, this Court cautioned that if the direction to hold such a test can be avoided, it should be so avoided, and legitimacy of the child should not be put to peril. The relevant portions of the decision in the said case have been usefully extracted hereinunder:

> "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 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 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:

> "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 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."

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 the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

a0.1. However, it is necessary to distinguish the facts of the present case with the facts in Dipanwita Roy. In the said case, the respondent-husband had made a specific plea of non-access in order to rebut the presumption under Section 112. He made clear and categorical assertions in the petition filed by him alleging infidelity. He even named the person who was the father of the male child born to the appellant-wife, and asserted that at the relevant time, he and his wife did not share a bed on

any occasion. In that backdrop, this Court specifically recorded a finding that in the facts and circumstances of the said case, it would have been impossible to prove the allegations of adultery/infidelity in the absence of a DNA test. However, in the present case, no plea has been raised by the respondent-husband as to non-access in order to dislodge the presumption under Section 112 of the Evidence Act. Further, the respondent has specifically claimed that he is in possession of call recordings/transcripts, and the daily diary of the appellant, which would point to the infidelity of the appellant. Therefore, this is not a case where a DNA test would be the only possible way to ascertain the truth regarding the appellant's adultery. Hence, in the present case, there is insufficient material to dislodge the presumption under Section 112 of the Evidence Act and permit a DNA test of Master Arjun.

Further, having regard to the compelling need for a DNA test in the said case, in order to establish the truth, this Court directed that if the appellant-wife therein refused to comply with the direction of the Court regarding DNA test, the allegations of adultery as against her would be determined by drawing an adverse inference as contemplated under Illustration (h) of Section 114 of the Evidence Act. However, such an observation made in the said case cannot be regarded as a precedent which can be applied to all cases in a strait jacket manner wherein the wife refuses to comply with the direction of the Court regarding DNA test.

It is highlighted at this juncture that presumptions are established on the basis of facts, and the Court enjoys the discretionary power, either to presume a fact or not. As observed hereinabove, the facts in Dipanwita Roy were so compelling, so as to justify a direction to conduct a DNA test. In the said case, the husband had taken a specific plea of non-access.

Further, the Court accepted that a DNA test would be the only manner in which the case of adultery could be proved. However, facts of the present case neither warrant a direction to conduct a DNA test of Master Arjun, nor do they justify drawing an adverse inference as against the appellant-wife, under Section 114 of the Evidence Act, on her refusal to subject her son to a DNA test.

As per Black's Law Dictionary, 9th Edition, 'Inference' means "a conclusion reached by considering other facts and deducing a logical consequence from them."

'Adverse Inference' is explained as follows:

> "A detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control. Some courts allow the inference only if the party's failure is attributable to bad faith."

The aforesaid meaning would also suggest that inferences, whether adverse or otherwise, are to be drawn by the Court, on consideration of facts and circumstances of each individual cases. Hence, the judgment of this Court in Dipanwita Roy is to be read in the aforesaid context.

In the instant case, there is no dispute about the paternity of Master Arjun as even during the course of arguments, Learned Senior Counsel Shri Kapil Sibal admitted that Master Arjun was born during the continuous cohabitation of the parties and thus during the subsistence of a valid marriage. The thrust of the submissions of Learned Senior Counsel Shri Kapil Sibal was that if the appellant herein does not agree to subject Master Arjun to a DNA test, then, an adverse inference could be raised against her regarding her adulterous life. What is the nature of the adverse inference that could be raised against the appellant herein? The adverse inference is not with regard to Master Arjun being a child born

outside wedlock and therefore an illegitimate child. What was contended was that an adverse inference regarding adultery on the part of the appellant herein could be raised. We cannot accede to such an approach in the matter. The issue of paternity of Master Arjun is alien to the issue of adultery on the part of the appellant herein. Master Arjun being a legitimate child of the parties herein has nothing to do with the alleged adultery on the part of the appellant herein. Hence, the judgment of this Court in Dipanwita Roy is of no assistance to the respondent herein. The aforesaid case, turns on its own facts and cannot be relied upon as a precedent having regard to the facts of this case.

Use of DNA profiling technology as a means to prove adultery:

11. With the advancement of science, DNA profiling technology which is a tool of forensic science can, in case of disputed paternity of a child by mere comparison of DNA obtained from the body fluid or body tissues of the child with his parents, offer infallible evidence of biological parentage. But, it is not always necessary to conduct a DNA test to ascertain whether a particular child was born to a particular person, however, the burden of proof is on the husband who alleges illegitimacy. He has to establish the fact that he has not fathered the child born to his wife which is a negative plea by positive proof in accordance with Section 112 of the Evidence Act.

11.1. A Family Court, no doubt, has the power to direct a person to undergo medical tests, including a DNA test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution, vide Sharda. However, the Court should exercise such power only when it is expedient in the interest of justice to do so, and when the fact situation in a given case warrants such an exercise. Thus,

an order directing that a minor child be subjected to DNA test should not be passed mechanically in each and every case.

a1.2. This Court has, while considering questions connected with Section 112 of the Evidence Act, consistently expressed the stand against DNA tests being ordered on a mere asking. Further, the law does not contemplate use of DNA tests as exploratory or investigatory experiments for determining paternity. The following decisions of this Court are highly instructive in determining the circumstances under which a DNA test may be ordered by a Court in matters involving disputed questions of paternity:

i. In Goutam Kundu, this Court was required to consider whether a blood test of a minor child could be ordered to be conducted as a means to determine disputed questions of paternity in what was essentially a matrimonial dispute concerning maintenance. In the said case, the appellant-husband therein disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. According to him, if that could be established, he would not be liable to pay maintenance. In that context, this Court held that due deference must be accorded to the presumption of legitimacy of a child born during the subsistence of a marriage, as expressed under Section 112 of the Evidence Act. The consequence of the said presumption on the power of the Courts to direct blood test as a means to determine paternity in matrimonial disputes was discussed by this Court, and the following principles were culled out so as to guide the Courts in issuing such directions:

> “26. From the above discussion it emerges:
>
> (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 sample of blood for analysis."

ii. In Bhabani Prasad Jena, this Court emphasised that a direction to use DNA profiling technology to determine the paternity of a child, is an extremely delicate and sensitive aspect. Therefore, such tests must be directed to be conducted only when the same are eminently needed. That DNA profiling 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. It was further declared that a Court may direct that a DNA test be conducted, to conclusively determine paternity, only when there is a strong prima-facie case in favour of the person seeking such a direction.

iii. In Inayath Ali vs. State of Telangana, MANU/SC/1538/2022, the question before this Court was whether a DNA test of two minor children could be ordered by a Court, with a view to facilitate proof

of allegations under Sections 498A, 323, 354, 506 and 509 of Indian Penal Code, 1860. This Court speaking through Aniruddha Bose, J. at the outset took note of the fact that the dispute was essentially one relating to dowry related offences, and that paternity of the children of the complainant was not directly related to the allegations. The complainant therein sought for a direction to conduct DNA test of her two minor children, in order to establish that they were born as a result of her forced relationship with her brother-in-law. Rejecting the complainant's plea, this Court held as under as to the power of Courts to subject children to DNA testing, in proceedings in which their status is not required to be examined:

> "In the present proceeding, we are taking two factors into account which have been ignored by the Trial Court as also the Revisional Court. The Trial Court allowed the application of the respondent no.2 mechanically, on the premise that the DNA fingerprint test is permissible under the law. High Court has also proceeded on that basis, referring to different authorities including the case of Dipanwita Roy v. Ronobroto Roy [2015 (1) SCC 365]. The ratio of this case was also examined by the Coordinate Bench in the decision of Ashok Kumar (supra).
>
> 7. The first factor, which, in our opinion, is of significance, is that in the judgment under appeal, blood sampling of the children was directed, who were not parties to the proceeding nor were their status required to be examined in the complaint of the respondent no.2. This raised doubt on their legitimacy of being borne to legally wedded parents and such directions, if carried out, have the potential of exposing them to inheritance related complication. Section 112 of the Evidence Act, also gives a protective cover from allegations of this nature. The said provision stipulates:-
>
> "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."

8. In our opinion, the Trial Court as also the Revisional Court had completely ignored the said factor and proceeded as if the children were material objects who could be sent for forensic analysis. The other factor, in our opinion, which was ignored by the said two Courts is that the paternity of the children was not in question in the subject-proceeding.

9. The substance of the complaint was not related to paternity of the children of the respondent no.2 but the question was whether the offences under the aforesaid provisions of the 1860 Code was committed against her or not. The paternity of the two daughters of the respondent no.2 is a collateral factor to the allegations on which the criminal case is otherwise founded. On the basis of the available materials, in our opinion, the case out of which this proceeding arises could be decided without considering the DNA test report. This was the reasoning which was considered by the Coordinate Bench in the case of Ashok Kumar (supra), though that was a civil suit. Merely because something is permissible under the law cannot be directed as a matter of course to be performed particularly when a direction to that effect would be invasive to the physical autonomy of a person. The consequence thereof would not be confined to the question as to whether such an order would result in testimonial compulsion, but encompasses right to privacy as well. Such direction would violate the privacy right of the persons subjected to such tests and could be prejudicial to the future of the two children who were also sought to be brought within the ambit of the Trial Court's direction."

(Emphasis by us)

12. Having regard to the aforesaid discussion, the following principles could be culled out as to the circumstances under which a DNA test of a

minor child may be directed to be conducted:

i. That a DNA test of a minor child is not to be ordered routinely, in matrimonial disputes. Proof by way of DNA profiling is to be directed in matrimonial disputes involving allegations of infidelity, only in matters where there is no other mode of proving such assertions.

ii. DNA tests of children born during the subsistence of a valid marriage may be directed, only when there is sufficient prima-facie material to dislodge the presumption under Section 112 of the Evidence Act. Further, if no plea has been raised as to non-access, in order to rebut the presumption under Section 112 of the Evidence Act, a DNA test may not be directed.

iii. A Court would not be justified in mechanically directing a DNA test of a child, in a case where the paternity of a child is not directly in issue, but is merely collateral to the proceeding.

iv. Merely because either of the parties have disputed a factum of paternity, it does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference based on such evidence, or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the Court can direct such test.

v. While directing DNA tests as a means to prove adultery, the Court is to be mindful of the consequences thereof on the children born out of adultery, including inheritance-related consequences, social

stigma, etc.

13. 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.

a4. The evidentiary value of blood tests for determining paternity, has been discussed in Rayden and Jackson on Divorce and Family Matters, (1983) Vol. I, at Pg. 1054, in the following words:

"…depending on the type of litigation, samples of blood,

> when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a parentage set up in the said case. But the consideration remains that the party asserting the claim to have a child and the rival set up parents put to blood test must establish his right to do so. The courts exercise protective jurisdiction on behalf of an infant. In my considered opinion, it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his incapacity; the aim is to ensure that he gets his rights. If in a case the court has reason to believe that the application for the blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not according to such a prayer."
>
> (Emphasis by us)

15. It is trite that the burden is on a litigating party to prove his case by adducing evidence in support of his plea. The Court is not to compel one party to the dispute to assist the other contesting party, vide Ashok Kumar. Therefore, DNA tests are not to be directed on a routine basis, merely to enable a party to prove his case of adultery.

The right of children not to have their legitimacy questioned frivolously in Courts of Law:

16. The default position in India is that for many reasons, parents are presumed to be the decision makers for their children, in so far as healthcare, consent for genetic testing etc. are concerned. Justifications for this position include that parents are free within very broad limits to decide how to bring up their children, parents are thought to be most likely to act in their child's best interests, children generally lack the capacity to make fully competent decisions so someone else must, and state intervention is rarely appropriate. Genetic information is broadly understood as shedding light on a person's essence, as going to the very heart of who he/she is. That kind of intimate, personal information,

which is so highly valued in our society, is precisely what the law protects in the right of privacy, which extends even to children.

17. Further, children have the right not to have their legitimacy questioned frivolously before a Court of Law. This is an essential attribute of the right to privacy. Courts are therefore required to acknowledge that children are not to be regarded like material objects, and be subjected to forensic/DNA testing, particularly when they are not parties to the divorce proceeding. It is imperative that children do not become the focal point of the battle between spouses.

The Rights to Privacy, Autonomy and Identity of Children under The Convention on Rights of Child:

18. In 1989, the United Nations Organisation drew up the Convention on Rights of Child with a view to provide special protection to children, proclaiming that “childhood is entitled to special care and assistance.” The Declaration, inter-alia, recognises that a child, for full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. The Declaration further emphasises the importance of family, as the “fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”

19. Article 19 of the Convention protects children against all forms of violence, neglect, and abuse; Article 24(3) protects children against traditional practices that are prejudicial to a child’s health; and Article 37 protects children against torture and cruel, inhuman, and degrading treatment. Complementing these provisions is a child’s right to privacy, which extends to the physical and psychological integrity of a child.

Importantly, violations of a child's bodily integrity that reach the threshold of torture or cruel inhuman degrading treatment will never be justifiable, given the absolute prohibition on such treatment. Thus, a violation of this prohibition will always constitute a violation of a child's right to privacy. However, the right to privacy has a residual application in those cases where there is an interference with a child's physical and/or psychological integrity that does not reach the threshold for torture or cruel, inhuman, and degrading treatment. In such circumstances the question becomes whether the interference with a child's integrity is lawful and non-arbitrary.

b0. The Convention accommodates and protects parental rights with respect to the upbringing of their Children, vide Article 5. However, this deference to parental wishes is subject to the strict caveat that such rights are exercised for the purpose of providing guidance and assistance to a child. Thus, unless a parent can demonstrate on the basis of objective evidence that an interference with a child's bodily integrity is intended to benefit the health and development of a child, the interference will not be justified. If any interference with the right to privacy or bodily integrity of a child is to be justified, it must be established that there is objective evidence that establishes a nexus between the measure and aim; that there is no reasonably available alternative which would have minimized the interference with the child's right. Applying the said principles enumerated in the Convention, to the facts of the present case, we are unable to accept that conducting a DNA test of a child, as a means to prove adultery on the part of the appellant-wife, is with a view to provide guidance and assistance to a child, as required under the Convention. Further, interference with the bodily integrity of a child in such a case,

would not be justified, as there is no nexus between the Respondent's request for the DNA test and the best interests of the child.

21. The concept of privacy for a child may not be equivalent to that of an adult. However, the evolving capacity of children has been recognised and the Convention acknowledges the control that individuals, including children, have over their own personal boundaries and the means by which they define who they are in relation to other people. Children are not to be deprived of this entitlement to influence and understand their sense of self simply by virtue of being children. Further, Article 8 of the Convention provides children with an express right to preserve their identity. Details of parentage are an attribute of a child's identity. Therefore, long-accepted notions about a child's parentage must not be frivolously challenged before Courts of Law.

Best interests of a child:

22. The phrase "mankind owes to the child the best it has to give" clearly underlines our duties towards children, and it entitles them to the best that mankind can give. This implies that the interest of the child should be given primary consideration in actions involving children.

This idea has been effectively expressed in Article 3 of the Convention on the Rights of Child which reads as under:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

22.1 In two English decisions reported in Re L., (1968) 1 All ER 20 and B. (B.R.) vs. B.(J.), (1968) 2 All ER 1023, blood test of the child

was permitted for determining paternity. However, the decision in Re L. was passed based on the reasoning that a blood test can be directed if it serves the best interest of the child. Lord Denning, MR, was however of the view that blood tests could be ordered even in cases involving paternity issues or in proceedings where it is in the best interest of the child to have its paternity settled one way or the other. However, in the same decision, Wilmer, LJ and Davoes, LJ, expressed their reservations against the opinion of Lord Denning, MR, regarding blood tests in proceedings other than in custodial jurisdiction.

However, in the latter decision of B. (B.R.), it was held that a judge of the High Court can order a blood test on a paternity issue or indeed on any other issue, when doing so would be in the best interest of the child to do so.

22.2 This Court has consistently invoked the principle of best interest of child, particularly, in disputes concerning custody of children.

22.3. It is undeniable that a finding as to illegitimacy, if revealed in a DNA test, would, at the very least adversely affect the child psychologically. It can cause not only confusion in the mind of the child but a quest to find out who the real father is and a mixed feeling towards a person who may have nurtured the child but is not the biological father. Not knowing who one's father is creates a mental trauma in a child. One can imagine, if, after coming to know the identity of the biological father what greater trauma and stress would impact on a young mind. Proceedings which are in rem have a real impact on not only the child but also on the relationship between the mother and the child itself which is otherwise sublime. It has been said that parents of a child may have an illegitimate relationship but a child born out of such a relationship cannot carry the

stamp of illegitimacy on its forehead, as, such a child has no role to play in its birth. An innocent child cannot be traumatised and subjected to extreme stress and tension in order to discover its paternity. That is why Section 112 of the Evidence Act speaks about a conclusive presumption regarding the paternity of a child, subject to a rebuttal, as provided in the second part of the Section.

In today's world, there can even be a race to claim paternity of a child so as to invade upon its rights, particularly, if such a child is endowed with property and wealth. There could also be exclusions in a testament doubting the paternity of a child or an evasion in performance of parental obligations such as payment of maintenance or living and educational expenses by simply doubting the paternity of a child.

In many cases, this would cast a doubt on the chastity of the mother of a child when no such doubt could arise. As a result, the reputation and dignity of a mother of a child would be jeopardised in society. What is of utmost importance for a lady who is the mother of a child is to protect her chastity as well as her dignity and reputation, in that, she would also preserve the dignity of her child.

No woman, particularly, who is married can be exposed to an enquiry on the paternity of a child she has given birth to in the face of Section 112 of the Evidence Act subject to the presumption being rebutted by strong and cogent evidence. Section 112 particularly speaks about birth of a child during marriage and raises a conclusive presumption about legitimacy. Section 112 has recognised the institution of marriage i.e., a valid marriage for the purpose of conferring legitimacy on children born during the subsistence of such a marriage.

As to children born outside a valid marriage, the personal law of

respective parties would apply. But in the cases of children born from a relationship in the nature of marriage and when the parents are in a domestic relationship or those born as a result of a sexual assault or to those who are in a casual relationship or to those forced or subjected to render sexual favours and beget children, the problem of their legitimacy gets complex and is serious.

A child should not be lost in its search for paternity. Precious childhood and youth cannot be lost in a quest to know about one's paternity. Therefore, the wholesome object of Section 112 of the Evidence Act which confers legitimacy on children born during the subsistence of a valid marriage, subject to the same being rebutted by cogent and strong evidence, is to be preserved.

Children of today are citizens and the future of a nation. The confidence and happiness of a child who is showered with love and affection by both parents is totally distinct from that of a child who has no parents or has lost a parent and still worse, is that of a child whose paternity is in question without there being any cogent reason for the same. The plight of a child whose paternity and thus his legitimacy, is questioned would sink into a vortex of confusion which can be confounded if Courts are not cautious and responsible enough to exercise discretion in a most judicious and cautious manner.

Further, questions surrounding paternity have a significant impact on the identity of a child. Routinely ordering DNA tests, particularly in cases where the issue of paternity is merely incidental to the controversy at hand, could, in some cases even contribute to a child suffering an identity crisis. It is also necessary to take into account that some children, although born during the subsistence of a marriage and on the desire and

consent of the married couple to beget a child, may have been conceived through processes involving sperm donation, such as intrauterine insemination (IUI), in-vitro fertilisation (IVF). In such cases, a DNA test of the child, could lead to misleading results. The results may also cause a child to develop a sense of mistrust towards the parents, and frustration owing to the inability to search for their biological fathers. Further, a child's quest to locate its biological father may compete with the right to anonymity of the sperm donor. Having regard to such factors, a parent may, in the best interests of the child, choose not to subject a child to a DNA test. It is also, antithetical to the fundamentals of the right to privacy to require a person to disclose, in the course of proceedings in rem, the medical procedures resorted to in order to conceive.

The reasons for the parent's refusal may be several, and hence, it is not prudent to draw an adverse inference under Section 114 of the Evidence Act, in every case where a parent refuses to subject the child to a DNA test.

Therefore, it is necessary that only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, the Court can direct such test. Further, a direction to conduct DNA test of a child, is to be ordered even rarely, in cases where the paternity of a child is not directly in issue but is merely collateral to the proceeding, such as in the instant case.

Conclusions:

23. 'Illegitimate'- a term that brands an individual with the shame of being born outside wedlock, casts a shadow on one's identity. Times change and attitudes may change, but the impact of growing up with the

social stigma of being illegitimate, does not. The Courts must hence be inclined towards upholding the legitimacy of the 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 legitimisation of the child would result in rank injustice to the father, vide Dukhtar Jahan vs. Mohammed Farooq, (1987) 1 SCC 624.

24. Questions as to illegitimacy of a child, are only incidental to the claim of dissolution of marriage on the ground of adultery or infidelity. Allowing DNA tests to be conducted on a routine basis, in order to prove adultery, would amount to redefinition of the maxim, “Pater est quem nuptiae demonstrant” which means, the father is he whom the nuptials point out. While dealing with allegations of adultery and infidelity, a request for a DNA test of the child, not only competes with the presumption under Section 112, but also jostles with the imperative of bodily autonomy.

25. Another aspect that needs to be considered in the instant case is whether, for a just decision in the divorce proceedings, a DNA test is eminently necessary. This is not a case where a DNA test is the only route to the truth regarding the adultery of the mother. If the paternity of the children is the issue in a proceeding, DNA test may be the only route to establish the truth. However, in our view, it is not so in the present case. The evidence of DNA test to rebut the conclusive presumption available under Section 112 of the Evidence Act, can be allowed only when there is compelling circumstances linked with 'access', which cannot be liberally used as cautioned by this Court in Dipanwita Roy.

26. The case of the Respondent-husband is that if a DNA test is allowed

and the same reveals that he is not the biological father of Arjun, as a corollary, it would be proved that the Appellant-wife committed adultery. We do not find favour with the approach suggested by the Respondent-husband to prove adultery, for the following reasons:

i. It is not in dispute that Master Arjun, the son stated to be born to the Appellant-wife from the wedlock, was born in the year 2013. DNA testing, cannot be used as a short cut to establish infidelity that might have occurred over a decade ago or subsequently after the birth of Master Arjun.

ii. In the circumstances of the present case, we are unable to accept that a DNA test would be the only way in which the truth of the matter can be established. The respondent-husband has categorically claimed that he is in possession of call recordings/transcripts and the daily diary of the appellant, which may be summoned in accordance with law to prove the infidelity of the appellant. Therefore, it seems to us that the respondent is in a position to attempt to make out a case based on such evidence, as to adultery/infidelity on the part of the appellant.

iii. No plea has been raised by the respondent-husband herein as to non-access in order to dislodge the presumption under Section 112 of the Evidence Act. Therefore, no prima-facie case has been made out by the respondent which would justify a direction to conduct a DNA test of Master Arjun.

iv. No adverse inference can be raised in the instant case regarding the legitimacy or paternity of Master Arjun vis-à-vis the appellant herein, on her declining to subject Master Arjun to a paternity test. Further, on the appellant declining to subject Master Arjun to a

paternity test, no adverse inference can be drawn as regards the alleged adultery on the part of the appellant herein can be raised. In our view, the allegation of adultery has to be proved by the respondent herein de hors the issue of paternity of Master Arjun.

27. In the result, the present appeal is allowed. Consequently, the impugned judgment of the High Court of Judicature at Bombay dated 22 nd November, 2021 and the order of the Family Court, Pune dated 12 th August, 2021, are set aside.

Bearing in mind the facts of the present case, the appeal is allowed with cost of Rs.1 Lakh payable by the respondent to the appellant. The same shall be paid before the Family Court within a period of one month from today.

….....……..J.
[V. RAMASUBRAMANIAN]

…..……..J.
[B.V. NAGARATHNA]

NEW DELHI;
20th FEBRUARY, 2023.

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO……. OF 2023
(Arising out of S.L.P. (Civil) No.9855 of 2022)

APARNA AJINKYA FIRODIA …..APPELLANT

VERSUS

AJINKYA ARUN FIRODIA …..RESPONDENT

JUDGMENT

V. Ramasubramanian, J.

1. While I am entirely in agreement with the opinion well- crafted by my learned sister Hon'ble Mrs. Justice B.V. Nagarathna, I thought that two aspects of the matter require little more emphasis. Hence a separate but concurring opinion.

2. As we have seen from the narration of facts given by my learned sister Hon'ble Mrs. Justice B.V. Nagarathna – The marriage of the appellant with the respondent took place on 23.11.2005.

The first child was born on 21.12.2009.

The second child was born on 17.7.2013.

The respondent-husband claims to have found out the alleged adulterous conduct of the appellant, on 14.9.2016, (3 years after the birth of the second child) when he accidentally stumbled upon the Whatsapp messages in the mobile phone of the appellant.

Then the respondent privately had a DNA test conducted on the second child, in November 2016, from DNA Labs India, which is said to be an ISO 17025 certified, A2LA and NATA accredited agency.

The respondent then filed a petition for divorce on the ground of adultery, in June 2017.

During the pendency of the proceedings for divorce, the respondent moved an application in November 2020 seeking a direction to subject the second son to DNA testing at the Government Central Forensic Laboratory.

3. The Family Court allowed the application filed by the respondent-husband and the High Court also affirmed the same, forcing the wife to come up with the above appeal, contending that under Section 112 of the Indian Evidence Act, 1872 1, birth during marriage is conclusive proof of legitimacy and that no evidence to disprove the same can be allowed by the Court. This is especially so when the parties to the marriage admittedly had 1For short, "Evidence Act" or the "Act", as the case may be access to each other during the time when the child could have been begotten.

4. The main contention of Shri Kapil Sibal, learned senior counsel for the respondent-husband is that the respondent is not even questioning the legitimacy of the child, but alleging adultery against the appellant-wife and that therefore, on the refusal of the wife to subject the child to DNA test, a presumption under Section 114(h) of the Evidence Act can be drawn against the appellant-wife. In other words, his contention is that what is applicable in the case on hand, is not Section 112 but Section 114(h) and that the Court need not subject the child to DNA test, if the appellant is not willing.

5. In the light of the aforesaid contention, two aspects, in my opinion, require deeper analysis. They are (i) the interplay between Sections 112 and 114(h) of the Evidence Act; and (ii) whose rights, are to tilt the balance in the scales of justice? Interplay between Sections 112 and 114(h) of the Evidence Act

6. Section 4 of the Evidence Act defines the expressions "may presume", "shall presume" and "conclusive proof". Section 4 indicates the course of action to be followed by a Court, wherever the Act makes it (i) optional to presume a fact; (ii) mandatory to presume a fact; and (iii) obligatory for the Court to take one fact to be conclusive proof of another. To put it in simple terms, wherever the Act uses the expression "may presume", it is optional for the Court either to presume or not to presume. If a Court refuses to presume the fact in question as proved, that is the end of the matter. But when the Court agrees to presume such fact, it is up to the other party to lead evidence to rebut the presumption. Wherever the Act uses the expression "shall presume", the Court has no option but to presume the fact, till such time it is rebutted. But wherever the Act uses the expression "conclusive proof", the Court cannot even allow evidence to be given for the purpose of disproving it.

7. The expression "shall presume" is used in the Evidence Act-

In Section 79 in relation to genuineness of certified copies of documents.

In Section 80 in relation to documents produced as record of evidence.

In Section 81 in relation to genuineness of Gazettes, newspapers, Acts of Parliament, etc. In Section 81A in relation to genuineness of every electronic record purporting to be the Official Gazette. In Section 82 in relation to documents admissible in England without proof of seal or signature.

In Section 83 in relation to accuracy of maps or plans made by the authority of the Government.

In Section 84 in relation to genuineness of every book purporting to be printed or published under the authority of the Government, containing collection of the laws of the country and reports of the decisions of the Courts. In Section 85 in relation to certain powers-of-attorney. In Sections 85A, 85B and 85C in relation to electronic agreements, electronic records and the electronic signature certificates.

In Section 89 in relation to due execution of documents called for and not produced after notice to produce. In Section 111A in relation to certain offences. In Section 113 in relation to cession of territory. In Section 113B in relation to dowry death.

In Section 114A in relation to absence of consent in certain prosecutions for rape.

8. The expression "may presume" is used in the Evidence Act-

In Section 86 in relation to certified copies of judicial records of countries other than India.

In Section 87 in relation to the author, publisher and the place and time of publication of books, maps and charts, to which a reference is made for information on matters of public or general interest.

In Section 88 in relation to telegraphic messages. In Section 88A in relation to electronic messages. In Section 90 in relation to documents which are thirty years old.

In Section 90A in relation to electronic records which are five years old.

In Section 113A in relation to abetment of suicide by a married woman.

In Section 114 in relation to existence of certain facts.

9. It is interesting to note that the Evidence Act does not include legitimacy of birth during marriage, either under the category of a fact which "may be presumed" or under the category of a fact which "shall be presumed". On the contrary, the Act places birth during marriage as "conclusive proof" of legitimacy. But Section 112 keeps a window open, enabling a party to the marriage who questions the legitimacy of the child, to show that he/she had no access to the other, when the child could have been begotten.

10. We have seen that under Section 4, when one fact is declared by the Act to be conclusive proof, the Court shall, on proof of that one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. This is why Section 112 does not use the word "proved" or "disproved". Section 112 uses the words "unless it can be shown".

11. A combined reading of Section 4 and Section 112 would show that once the party questioning the legitimacy of the birth of a child shows that the parties to the marriage had no access to each other, then the benefit of Section 112 is not available to the party invoking Section 112. In other words, if a party to a marriage establishes that there was no access to the other party to the marriage, then the shield of conclusive proof becomes unavailable. If on the contrary, such a party is not able to prove that he had no access to the other party to the marriage, then the shield of Section 112 protects the other party to such an extent that it cannot be pierced by any amount of evidence in view of the prohibition contained in Section 4.

12. In contrast, Section 114 on which heavy reliance is placed by Shri Kapil Sibal, learned senior counsel for the respondent, deals only with facts which the Court "may presume". The existence of any fact which the Court may presume to have likely to have happened, turn on three things, namely, (i) common course of natural events; (ii) common course of human conduct; and (iii) common course of public and private business. Since natural events, human conduct, etc. are not always consistent, the presumption regarding the existence of any fact with regard to these things, are placed only under the category of facts which "may be presumed".

13. As pointed out earlier, wherever the Act uses the expression "may presume", it is only optional and not mandatory for the Court to presume the existence of such a fact. That it is only optional

stands reinforced by, (i) the Illustrations under Section 114; and (ii) the further exposition of those Illustrations. At this stage it may be useful to extract (i) Section 114; (ii) the Illustrations under Section 114; and (iii) the exposition of those Illustrations, all of which read as follows:-

> "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 particular case.
>
> Illustrations The Court may presume—
>
> (a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
>
> (b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;
>
> (c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
>
> (d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;
>
> (e) That judicial and official acts have been regularly performed;
>
> (f) That the common course of business has been followed in particular cases;
>
> (g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
>
> (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;
>
> (i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:— As to illustration (a)—A shop-keeper has in his bill a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

As to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;

As to illustration (b)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was young and ignorant person, completely under A's influence; As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;

As to illustration (e)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances;

As to illustration (f)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances; As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family; As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;

As to illustration (i)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it."

14. As may be seen from the exposition to the Illustrations, the Court, while taking a decision to presume or not, the existence of any fact, should have regard to some additional facts, in considering whether such maxims do or do not apply to the particular case.

15. It is relevant to note that there are nine Illustrations under Section 114, from (a) to (i). Immediately after those Illustrations, the exposition of those Illustrations begins with the words: "But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it".

16. Let us take for instance, Illustration (h) under Section 114. It says that if a man refuses to answer a question which he is not compelled to answer by law, the Court may presume that the answer, if given, would be unfavourable to him. But the exposition to Illustration (h) says that in considering the maxim under (h), the Court shall have due regard as to whether the refusal of the man to answer the question, is due to the fact that the answer may cause loss to him in matters unconnected with the matter in relation to which it is asked.

17. In other words, while dealing with a situation where a presumption in terms of Illustration (h) under Section 114 is sought to be raised, the Court has to examine whether the refusal of the person to answer, is on account of the fear that the answer may produce an unfavourable result to him in relation to the matter in issue or due to the fear that such an answer might cause loss to him in a matter unconnected to it. 18 Keeping in mind the above scheme of Sections 4, 112 and 114, let us now test the main contention of Shri Kapil Sibal, learned senior counsel for the respondent-husband that the attempt of the respondent-husband is not so much to show that he did not father the second child but is only to show that the appellant was living in adultery and that what comes into play in this case is only Section 114 and not Section 112. The learned senior counsel submitted that the respondent-husband is even prepared to accept the second child as his own, irrespective of the outcome of the DNA test. According to the learned senior counsel for the respondent, it is open to the appellant-wife not to subject the child to DNA test, even if the Court orders the same, but if the appellant chooses not to subject the child to DNA test, the Court is obliged to draw an adverse inference in terms of Section 114(h). According to the learned senior counsel, such adverse inference need not be about the paternity of the child but shall be only about the adulterous conduct of the appellant-wife.

19. To drive home the point that such an adverse inference, not about the paternity of the child, but about the adulterous conduct of the wife is permissible in law, learned senior counsel for the respondent placed heavy reliance upon last two paragraphs of the decision in Dipanwita Roy vs. Ronobroto Roy2. These paragraphs read as follows:

> 2 (2015) 1 SCC 365 “17. 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.
>
> 18. 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 court concerned by drawing a presumption of the nature contemplated in Section 114 of the Evidence Act, especially, in terms of Illustration (h) thereof. Section 114 as also Illustration (h), referred to above, are being extracted hereunder:

"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 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;" 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 the Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

20. Heavy reliance is also placed by Shri Kapil Sibal, learned senior counsel for the respondent on paragraph 79 of the decision in Sharda vs. Dharmpal3. It reads as follows:

"79. If despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Indian Evidence Act also enables a court to draw an adverse inference if the party does not produce the relevant evidences in his power and possession."

21. But we do not know how a mix up of Section 112 and Section 114 is possible. Section 112 deals with something where the existence of a fact is taken to be conclusive proof, without any possibility for the disputing party to lead evidence for disproving 3 (2003) 4 SCC 493 the same. The only escape route or emergency exit as we may call it, available for a person to deprive another person of the benefit of Section 112, is to show that the parties to the marriage did not have access to each other at the time when the child could have been begotten. Section 114 has nothing to do with, nor is in connection with conclusive proof of legitimacy dealt with by Section 112. Both Section 112 and Section 114 fall under different compartments. The word "presumption" itself is not used in Section 112. The expression used in Section 112 is "conclusive proof". Therefore, by virtue of Section 4, no evidence shall be allowed to be given for the purpose of disproving it.

22. As we have indicated elsewhere, if one of the parties to the marriage shows that he had no access to the other at the time when the child could have been begotten, then Section 112 itself does not get attracted. On the contrary, if the parties have had access to each other at the relevant point of time,

the fate of the question relating to legitimacy is sealed.

23. We are not suggesting for a moment that Section 112 acts as a shield even for the alleged adulterous conduct on the part of the wife. All that we say is that anything that would destroy the legal effect of Section 112 cannot be used by the respondent, on the ground that the same is being done to achieve another result.

24. In the case on hand, the very pleading of the respondent in his petition for divorce before the Family Court is that the second child-Master Arjun was born on 17.7.2013 and that the respondent came to know about the alleged adulterous behavior of the appellant herein, only on 14.9.2016. In paragraph 23 of his petition for divorce, the respondent pleaded as follows:

> "23. The Petitioner states that he has not condoned the adultery and the cruel behavior of Respondent No.1. The Petitioner has had no physical relations with Respondent No.1 after discovering her adulterous act. The Petitioner states that though the Petitioner and the respondent no.1 are living under the same roof, the Petitioner and Respondent no.1 have not shared the bedroom and have had no physical relations since the day the Petitioner discovered the adultery of Respondent No.1."

25. The pleading of the respondent extracted above to the effect that after September 2016, he has had no physical relationship with the appellant-wife means that he has at least had access to the wife both at the time when the child was begotten and for a full period of three years even thereafter. Therefore, the conclusive proof under Section 112 has actually come into play in this case.

26. There is another fallacy in the argument of the respondent. It is the contention of the respondent that he is seeking an adverse inference to be drawn only as against the wife under Section 114(h), upon the refusal of the wife to subject the child to DNA test. But the stage at which the wife may refuse to subject the child to DNA, would arise only after the Court comes to the conclusion that a DNA test should be ordered. To put in simple terms, there are three stages in the process, namely, (i) consideration by the Court, of the question whether to order DNA test or not; (ii) passing an order directing DNA test, after such consideration; and (iii) the decision of the wife to comply or not, with the order so passed. The respondent should first cross the outer fence namely whether a DNA test can be ordered or not. It is only after he convinces the Court to order DNA test and successfully secures an order that he can move to the inner fence, regarding the willingness of the wife to abide by the order. It is only at that stage that the respondent can, if at all, seek refuge under Section 114(h).

27. But today, we are actually at the outer fence in this case, adjudicating as to whether DNA test can be ordered at all. Therefore, the respondent cannot jump to the inner fence by- passing the outer fence.

28. Coming to the presumption under Section 114(h), the contention of the respondent is obviously misplaced. An adverse inference, in law, can be drawn only against the person who refuses to

answer a question. In the case on hand, the appellant has a dual role to play, namely, that of the respondent's wife and that of Master Arjun's mother. If the appellant does or refuses to do something, for the purpose of deriving a benefit to herself, an adverse inference can be drawn against her. But in her capacity as a mother and natural guardian if the appellant refuses to subject the child to DNA test for the protection of the interests and welfare of the child, no adverse inference of adultery can be drawn against her. By refusing to subject the child to DNA test, she is actually protecting the best interests of the child. For protecting the best interests of the child, the appellant-wife may be rewarded, but not punished with an adverse inference. By taking recourse to Section 114(h), the respondent cannot throw the appellant to a catch-22 situation.

29. Therefore, Section 114(h) has no application to a case where a mother refuses to make the child undergo DNA test. It is to be remembered that the object of conducting a DNA test on the child is primarily to show that the respondent was not the biological father. Once that fact is established, it merely follows as a corollary that the appellant was living in an adulterous relationship.

30. What comes out of a DNA test, as the main product, is the paternity of the child, which is subjected to a test. Incidentally, the adulterous conduct of the wife also stands established, as a by-product, through the very same process. To say that the wife should allow the child to undergo the DNA test, to enable the husband to have the benefit of both the product and the by- product or in the alternative the wife should allow the husband to have the benefit of the by-product by invoking Section 114, if she chooses not to subject the child to DNA test, is really to leave the choice between the devil and the deep sea to the wife.

31. In fact, in cases of this nature the Court must bear in mind that Section 114 uses only the word "may" and not the word "shall". Therefore, the constraints articulated in the exposition to Illustration (h) under Section 114 may dissuade the Court not to presume at all.

32. Hence, we reject the contention of the respondent that what is sought to be invoked is only Section 114(h) and not Section

112. Whose rights, are to tilt the balance in the scales of justice?

33. As rightly contended by Shri Huzefa Ahmadi, learned senior counsel for the appellant, the question as to whether a DNA test should be permitted on the child, is to be analysed through the prism of the child and not through the prism of the parents. The child cannot be used as a pawn to show that the mother of the child was living in adultery. It is always open to the respondent-husband to prove by other evidence, the adulterous conduct of the wife, but the child's right to identity should not be allowed to be sacrificed.

34. It is contended by Mr. Kapil Sibal, learned senior counsel for the respondent that after all the endeavour of every Court should be to find the truth and that every party to a litigation is entitled to produce the best evidence. Enabling the party to produce the best of evidence, is part and parcel of right to fair trial. Therefore, it is contended by learned senior counsel that the refusal to subject the child to DNA test would infringe upon the respondent's right to fair trial. To buttress the contention

that the right to privacy of an individual must yield to the right to fair trial of another, reliance is placed upon the decision of this Court in Sahara India Real Estate Corporation Limited & Ors. vs. Securities and Exchange Board of India & Anr.4.

35. Attractive as it may seem at first blush, the said argument does not carry any legal weight. The lis in these cases is between the parties to a marriage. The lis is not between one of the parties to the marriage and the child whose paternity is questioned. To enable one of the parties to the marriage to have the benefit of fair trial, the Court cannot sacrifice the rights and best interests of a third party to the lis, namely, the child.

36. Therefore, I concur wholeheartedly with my learned sister that the Family Court as well as the High Court were wrong in allowing the application of the respondent for subjecting the child to DNA test. Therefore, the appeal deserves to be allowed and accordingly it is allowed. However, this shall not preclude the respondent-husband from leading any other evidence to establish the allegations made by him against the appellant in the petition for divorce.

.....J. (V. Ramasubramanian) New Delhi February 20, 2023 4 (2012) 10 SCC 603