Patna High Court
Dev Raj Dev vs The State Of Bihar Through The ... on 20 July, 2018

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.950 of 2017
Arising Out of PS. Case No.- Year- Thana- District- Purnia

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Dev Raj Dev Son of Ramchandra Bhagat, Resident of Shiksha nagar Banmankhi, P.S.- Banmankhi, District- Purnia (Bihar) presently posted at Coimbatore as Commissionar of disciplinary Proceedings.

... ... Petitioner Versus

1. The State of Bihar Through The Principal Secretary General Administration Dept. Govt. of Bihar, Patna .

2. Pritam Chaudhary, D/o Dr. P.K. Choudhary , Resident of Navratan Hata Purnia, P.S.- K. Hat Purnia, presently Residing at not disclosed and Refused to inform the Court.

... ... Respondents ==========
Appearance :

For the Petitioner/s : Mr. Sandeep Kumar, Advocate Mr. Samrendra Kumar Jha, Advocate Mr. Rohit Raj, Advocate For the Respondent no. 2: Mr. Saket Tiwary, Advocate Mr. Saket Gupta, Advocate For the State : Mr. Parth Sarthi (GA 4) Mr. Apurva Kumar, AC to G..A. -4 ========== CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD ORAL JUDGMENT Date : 20-07-2018 Petitioner in the present case has moved this Court seeking a writ of Certiorari to quash and cancel the part of the order dated 10.11.2016 passed by the learned Principal Judge, Family Court, Purnea in Maintenance Case No. 208 of 2013 vide Annexure-4 to the writ application. Upon quashing of impugned order the further prayer of the petitioner is to issue a writ of Mandamus directing the Principal Judge, Family Court, Purnea to get conducted the Dioxy Nucleric Acid Test (DNA test) of the applicant, his wife and the youngest son in two laboratories at the cost of the applicant.

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2. The grievance of the petitioner is that even though in course of her deposition in Maintenance Case No. 208 of 2013 the wife of the petitioner took a stand that if the court would direct for paternity test of her sons, she would be ready to go for that test, later on when an application seeking such a direction was filed by the petitioner, she opposed his application on various grounds and refused to give consent for the DNA test. Considering the objections of the wife, the learned Principal Judge, Family Court, Purnea rejected the application dated 17.05.2014 preferred by the present petitioner. The impugned order dated 10.11.2016 has been annexed as Annexure-4 to the present writ application.

3. Mr. Sandeep Kumar, learned Advocate assisted by Mr. Sunil Kumar and Mr. Ranjit Kumar, learned Advocates submits that this petitioner has filed a divorce case under Section 13 of the Hindu Marriage Act on the statutory ground of cruelty, the divorce petition was registered as Matrimonial Case No. 201 of 2012 in the Family Court, Purnea. It is admitted that in the divorce petition there was no allegation of 'adultery' and the same was not set forth as a ground for divorce. It is, however, stated that during pendency of the divorce case, the wife of the petitioner (respondent no. 2) brought a Maintenance Case giving rise to Maintenance Case No. 208 of 2013 in the court of learned Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 Principal Judge, Family Court, Purnea. The learned Principal Judge, Family Court, Purnea vide his order dated 20.01.2014 awarded an interim maintenance of Rs. 18,000/- per month, which according to the petitioner is being paid to respondent no. 2. At the stage of awarding interim maintenance, though no plea of 'adultery' was taken against the respondent no. 2 but after few days, the petitioner filed an application dated 17.05.2014 seeking DNA test in which he questioned the paternity of the youngest son delivered by respondent no. 2 during the subsistence of marriage. In his application before the learned Principal Judge, the petitioner traced the entire history of his conjugal life since marriage and though he admitted that there had been occasional marital intercourse with respondent no. 2 on various occasions, he raised a doubt on the paternity of the second son citing certain circumstances. It is his stand that there were several marital intercourse during the natural cycle and after the birth of first child but the petitioner had never gone for unsafe intercourse with the respondent no. 2 in the present case.

4. It is the submission of the petitioner that in the case of Dipanwita Roy vs. Ronobroto Roy reported in (2015) 1 SCC 365 the Hon'ble Supreme Court had occasion to go through the entire case laws on the subject and finally agreed with the Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 submissions of the husband that in the process of substantiating his allegation of infidelity he had made an application before the Family Court for conducting DNA test which would establish whether or not he had fathered the male child born to the appellant's wife. The Hon'ble Supreme Court in its observation in paragraph 17 of the said judgment inter alia held as under :

> "…. respondents 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 directions issued by the High Court, as has been extracted hereinabvoe, 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 mot 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."

5. While assailing the impugned order dated 10.11.2016, Mr. Kumar, learned counsel submits that the learned Principal Judge was more impressed with the fact that this Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 petitioner had not taken the plea of 'adultery' in the divorce petition

filed under the Hindu Marriage Act and in the Matrimonial Suit he had admitted about the second son being his son and there was no pleading that the respondent no. 2 had any illicit relationship with anyone. It is for this reason that the judgment of the Hon'ble Supreme Court in the case of Dipanwita Roy (Supra) had been distinguished by the learned Principal Judge, Family Court and rejected the contention of the petitioner. Further consideration which prevail with the learned Principal Judge, as reflected in the impugned order, is that the youngest son was born on 24.02.2005 and the petitioner has made an objection against the paternity of the youngest son (after 8 years of his birth) without there being any reasonable or plausible explanation as to why he has raised this objection after such a long time. The submission is that the impugned order passed by the learned Principal Judge, Family Court, Purnea is wholly illegal, arbitrary and bad in law, hence, the same is liable to be set aside.

6. On the other hand, Mr. Saket Kumar Tiwary, learned Advocate representing the respondent no. 2 has heavily and strongly opposed the submissions of Mr. Kumar. Learned counsel for the respondent no. 2 submits that the petitioner is now making the allegations of 'adultery' and is questioning the paternity of his Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 second son on a totally baseless ground. It is pointed out that the marriage in the present case took place on 22.11.2000 in accordance with Hindu rites and customs. The petitioner admits in his petition that after marriage both the petitioner and respondent no. 2 had been living together and admittedly they were going for marital intercourse on several occasions. In such circumstance, the doubt raised by the petitioner as to paternity of his second son on the ground that because both the petitioner and respondent no. 2 are having blood group of B Positive so they cannot give birth to a child with A Positive blood group and further that the petitioner was indulging in intercourse with safe methods only cannot be a ground to seek paternity test of the child after 8years of his birth.

7. Mr. Tiwary has placed before this Court Section 112 of the Evidence Act which has been discussed in the case of Nandlal Wasudeo Badwaik v. Lata nandlal Badwaik reported in (2014) 2) SCC 576 and the judgment of the Hon'ble Supreme Court in the case of Bhabani Prasad Jena versus Convenor Secretary, Orissa State Commission for Women and Another reported in (2010) 8 SCC 633 to contend that the provisions of Section 112 of the Evidence Act conclusively prove, in the facts of the present case that the youngest son has been fathered by this petitioner, however, the Hon'ble Supreme Court while considering Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 the DNA test report which was showing that the appellant in that case of Dipanwita Roy (Supra) was not the biological father of the girl child held that depending on the facts and circumstances of the case only it would permissible for a court to direct the holding of a DNA examination to determine the veracity of the allegations which constitute one of the grounds, on which the party concerned would either succeed or lose. In paragraph 16 of the judgment in the case of Dipanwita Roy (Supra) the Hon'ble Supreme Court has cautioned that if the direction to hold such a test can be avoided, should be so avoided. The Hon'ble Supreme Court has held that the legitimacy of a child should not be put on peril.

8. Learned counsel submits that this case is not a fit case for a direction to conduct DNA test for various reasons. Firstly, that the marriage in the present case was solemnized in the year 2000, the parties lived together and had access to each other and admittedly, they went for intercourse on

several occasions. If this is the position, questioning the paternity of a child after 8 years of his birth should not be allowed to take place as it would put the child in peril. It is submitted that the court should adopt the eminent theory as has been laid down in the case of Dipanwita Roy (Supra) wherein if the DNA test is the only way out left to put it rest the controversy and there is no other way out, then, only the Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 court should direct for DNA test. It is submitted that this Court would also take note of the fact that initially in the divorce petition for annulment of marriage, the present petition did not take any plea of 'adultery' but at a belated stage, he did file an application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of pleadings to introduce a plea of 'adultery' against respondent no. 2 but thereafter, on his own will and volition, the petition seeking amendment of plaint in the divorce case has been withdrawn as not pressed. While seeking withdrawal of the petition for amendment no reason whatsoever has been given. Here, this Court would take note of the explanation furnished by Mr. Sandeep Kumar, learned Advocate for the petitioner in this regard submitting that the amendment petition was withdrawn only when the wife (respondent no. 2), in course of her cross- examination in the maintenance case, agreed that if the court orders for DNA test, she would go for that test. It has been submitted that taking a bonafide approach, the petitioner withdrew his application seeking amendment in the divorce case. Mr. Tiwary, learned counsel for the respondent no. 2, has, however, submitted that the plea now being advanced by the petitioner to explain the withdrawal of the amendment petition is not a bonafide plea as it is not his plea that the withdrawal was based on any legal Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 opinion. It is submitted that the proceeding under Section 125 Cr.P.C. is only a summary proceeding as has been held by this Court in the case of Vijay Shankar Prasad Vs. Smt. Manika Roy reported in 1990 (2) PLJR 104. In a summary proceeding seeking maintenance, the court is not supposed to decide or look at the allegations of 'adultery' or 'paternity' of a child. Referring to Section 125 (4) Cr.P.C. which reads as follows:-

> "125(4). No wife shall be entitled to receive an allowance from her husband under this Section if she is living in adultery, or if, without any sufficient reason, she refused to live with her husband, or if they are living separately by mutual consent."

Mr. Tiwary, submits that Section 125 (4) Cr.P.C. maybe taken recourse to only when it is the case of the husband that his wife is living in 'adultery', in the present case, it is contended that there is no allegation that respondent no. 2 is living in 'adultery'. Learned counsel submits that living in 'adultery' is one thing and committing an act of 'adultery' is another thing. In this connection, he has drawn the attention of this Court towards paragraph 7 of the judgment in the case of Vijay Shankar Prasad (Supra).

9. Learned counsel has further relied upon the paragraph 21 of the judgment in the case of Bhabani Prasad Jena (Supra) and submits that in the facts of the present case the second Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 view that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child, is required to be adopted. Placing reliance on yet another judgment of the Hon'ble Supreme Court in the case of Sham Lal Alias Kuldip versus Sanjeev Kumar and others reported in (2009) 12 Supreme

Court Cases 454. Learned counsel submits that the Rule, contained in Section 112 of the Evidence Act provides that the continuance of a valid marriage will prevent an inference being drawn to the effect that the child born to a woman during the continuance of a valid marriage was born to another person as a result of adulterous intercourse is only a rule of evidence and the presumption under Section 112 of Evidence Act, 1872 contemplates is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the Section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature, the husband could have been the father of the child. Referring to the judgment of the Hon'ble Supreme Court in the case of Goutam Kundu V. State of W.B. reported in (1993) 3 SCC 418 (paragraph

26), learned counsel submits that the Hon'ble Supreme Court has Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 held that there cannot be a roving inquiry on mere allegations of chastity. There must be a strong prima facie case in which the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act. It is submitted that the facts of this case, in fact, shows otherwise wherein the husband (the petitioner) admits his access to respondent no. 2 but at this belated stage he is questioning the paternity of his second child. It is, thus, submitted that by rejecting the petition dated 17.05.2014 filed by this petitioner, the learned Principal Judge, Family Court, Purnea has not committed any wrong.

CONSIDERATION

10. Having heard learned counsel for the parties and on perusal of the records as also after going through the various judgments of the Hon'ble Supreme Court and this Hon'ble Court cited at the Bar, I am of the considered opinion that the petitioner is not able to make out a case for interference with the impugned order. The reasons which prevail with me for taking this view are summarized hereunder:

(i) In a marriage which took place on 22.11.2000 and the youngest son was born in the year 2005, for the first time this petitioner questioned the paternity of his second child by filing an Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 amendment application in the divorce petition being Matrimonial Case no. 201 of 2012 after about 8 years from the date of birth of his second child. The fact that in the original plaint there was no allegation of adultery and subsequently the amendment petition was withdrawn unconditionally on his own will, would compel this Court to take a view that the petitioner had set out a case of 'adultery' at a much belated stage and the learned Principal Judge, Family Court, Purnea has committed no error by taking into consideration of this aspect of the matter going against the petitioner.

(ii) It is the case of the petitioner himself that he was living with respondent no. 2 and had access to her. He has admitted establishing physical relationship/intercourse during the period on or about which the second son was conceived, he had filed a case against Mr. Manish Kumar with whom respondent no. 2 allegedly had fathered the second son but the case filed against Manish Kumar has already been dismissed.

(iii) In 125 Cr.P.C. proceeding which is in the nature of a summary proceeding, a wife may be debarred from getting maintenance only when it is proved that she is 'living in adultery'. In the present case the facts suggest that the allegation of the petitioner against his wife is that of committing an act of 'adultery' Patna High Court Cr. WJC No.950 of 2017 dt.20-07-2018 and not that she is 'living in adultery'. Even that allegation of committing an act of 'adultery' is now not existing because the amendment petition filed in divorce case has already been withdrawn unconditionally.

(iv) In the present case the petitioner is unable to demonstrate even prima facie that he had no access to his wife during the period the second son was conceived. The Privy Council in the case of Karapaya Servai v. Mayandi reported in AIR (1934)39 LW 244 : AIR 1934 PC 49 held that existence and non-existence of opportunities for material intercourse and in a case where such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by invocation of law accepted the same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child. The determination of the Privy Council in Karapaya Servai (Supra) was approved by the Hon'ble Supreme Court in the case of Chilukuri Venkateshwarlu V. Chilukuri Venkatanarayana reported in 1954 SC 424 : AIR 1954 SC 176. The judgments have been taken note of by the Hon'ble Apex Court in the case of Dipanwita Roy (Supra).

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(iv) The views propounded by the Hon'ble Supreme Court in paragraph 21 of the judgment rendered in the case of Bhabani Prasad Jena (Supra) reads as under:-

> "In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may be devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception."

11. On going through the judgments of the Hon'ble Supreme Court which have been cited at the Bar and I have taken note of the same hereinabove, I am inclined to take the second view in the facts and circumstances of this case. Finding no merit, this writ application is dismissed.

(Rajeev Ranjan Prasad, J) avin/-

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