**IN THE HIGH COURT AT CALCUTTA**
(CIVIL REVISIONAL JURISDICTION)

**C.O. 2940 of 2015**

**Ranatish Saha**

**Vs.**

**Smt. Soma Saha & Anr.**

**CORAM: The Hon'ble Mr. Justice Siddhartha Chattopadhyay**

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| For the Petitioners | : | Mr. Shahjahan Hossain,<br>Ms. Sanjida Sulatana. |
| For the Opposite Party | : | Mr. Tapan Kumar Basu,<br>Ms. Priyanka Basu. |
| Heard On | : | 10.09.2015. |
| C.A.V. on | : | 10.09.2015. |
| Judgment Delivered on | : | **24.09.2015.** |

## Siddhartha Chattopadhyay, J.:

Being unsuccessful in connection with the application dated 07.05.2015 filed before the Family Court at Kolkata in connection with Mat Suit No. 03 of 2015, the petitioner has come before this forum with a prayer to set aside the impugned order No. 4 dated 07.05.2015 passed by the Learned Additional Principal Judge, Family Court No. 2 at Kolkata.

2. According to the petitioner, he had filed a matrimonial suit being Mat Suit No. 03 of 2015 under Section 13(1), (i), (ia) & (ib) of Hindu Marriage Act, 1955 in the Court of Principal Judge, Family Court at Kolkata for a decree of divorce

against the respondent No. 1 on the grounds of adultery, cruelties and desertion, which was ultimately transferred to the Court of Additional Principal Judge, Family Court No.2 at Kolkata. In his said application he has categorically stated that his wife used to have extra-marital relationship with other persons and she used to interact and mix-up with them as if they are husband and wife. She is in the habit of leaving matrimonial home every now and then with her male friends and used to return home at late night. On being protested by the petitioner, the respondent No. 1 turned furious and started ill behaving with the petitioner. The specific case of the petitioner is such that she lives in adultery and in one occasion the respondent No. 1 wife refused to share bed with him and categorically admitted that she has illicit terms with other persons. When reconciliation process was going on in connection with a case under Domestic Violence Act, the opposite party wife disclosed that the petitioner is not the father of 'Rithika' i.e. the daughter of the opposite party. In such circumstances, the petitioner had reason to believe that he is not the biological father of the child namely 'Rithika'. Since the divorce suit has been filed in which one of the grounds is adultery, so with a view to proving his case he filed an application before the Learned Court below with a prayer that he is willing to undergo D.N.A. Test and simultaneously the D.N.A. Test of the child is required to be ascertained if the girl child was begotten by him or not.

3. After hearing both sides Learned Additional Principal Judge, Family Court No. 2 at Kolkata vide Order No. 4 dated 07.05.2015 had rejected his such prayer on the ground that it is a tactics of the petitioner to cause delay of matrimonial suit and that the said petition was filed for the purpose of collecting evidence. He has also made a prayer in the said application that he wanted to take the help of an advocate in the said litigation but his such prayer has also been rejected.

4. At the time of hearing Learned Counsel appearing on behalf of the petitioner has further contended that if his wife leads an adulterous life or not and

if the child is fathered by him or not that can be ascertained only after a D.N.A. Test of himself and 'Rithika'. To substantiate his allegation against his wife, DNA Test is essential so that a Court of law can come to a correct conclusion and it will not be treated as collection of evidence. He further added that without D.N.A. Test it is impossible on his part to substantiate that the child is not fathered by him. He also stressed on the point that respondent wife herself admitted that the said girl child is not fathered by him. According to him, in such peculiar circumstances the Learned Court ought to have passed an order in his favour.

5. Learned Counsel appearing on behalf of the opposite party wife has categorically stated that Learned Court below quite rightly held that it was intended to collect evidence and nothing else. He has also pointed out that if any child is born during the wedlock of the parties in that case there is strong presumption that the child is begotten by them and more particularly when the husband had an access to the wife. He also contended that conclusiveness of marriage and birth of a child has been recognized in our Evidence Act. He further argued that the petitioner's pretention that he is a layman is absolutely false and the Learned Court below rightly rejected his prayer for taking assistance of an advocate.

6. After hearing rival submissions of the parties I am of the view that the Learned Court's below finding so far as appointment of lawyer is concerned is justified. Learned Court below held that the parities to the suit are well educated and quite intelligent. In such circumstances, there was no reason to take the assistance of any advocate. Therefore I do not find any illegality or irregularity in the order impugned so far as appointment of lawyer is concerned. Learned Court below relied on the averments of the plaint which goes to suggest that the petitioner is quite aware about the legal provisions. Section 13 of the Family Courts Act specifically bars the participation of the learned lawyers in Family Court proceeding. So, I do not find any reason to interfere with his such part of the order.

7. Now I am to consider if the order for conducting D.N.A. Test of the petitioner and the child has been properly appreciated by the Learned Court below or not. Learned Counsel appearing on behalf of the petitioner has referred a judgment reported in the case of Nandlal Wasudeo Badwaik –Vs.- Lata Nandlal Badwaik & Anr., wherein the Hon'ble Apex Court held that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and D.N.A. Test were not even in contemplation of the legislature. He categorically stated that although Section 112 of Evidence Act raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. As against this Learned Counsel appearing on behalf of the opposite party No. 1 has referred to a decision reported in AIR 2005 Gujarat 157 and contended that no one can be compelled to submit himself for D.N.A. Test and to compel a person to undergo D.N.A. Test will be interfering with his personal liberty. In this particular case nobody has compelled the petitioner for undergoing a D.N.A. Test rather he voluntarily wants the D.N.A. Test of himself. And since the fatherhood has been challenged by him so he had no option left with except to seek for that in regard to 'Rithika', the girl child of the opposite party No. 1. However, in the said judgment referred to by the opposite party Hon'ble Court held "at the most, if petitioner No. 1 is not giving consent for D.N.A. Test, and then at the most, adverse inference can be drawn at the final conclusion." Learned Counsel appearing on behalf of the opposite party has referred to the judgment reported in AIR 1993 Supreme Court Page 2295 in connection with Goutam Kundu –Vs.- State of West Bengal. I have gone through the said judgment and it appears to me that in the said case father disputed the paternity of a child and sought for blood test of a child and it was intended to avoid payment of maintenance. In that judgment Hon'ble Apex Court held: (1) that courts in India cannot order blood test as a matter of course. (2) Wherever applications are made for such prayer 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. While passing that judgment Hon'ble Apex Court had considered the decision of Bhartiraj –Vs.- Sumesh Sachdeo reported in AIR 1986 Allahabad 259, and the view of Kerala High Court in Vasu -Vs.- Santha, 1975 Ker LT 533. Views of Kerala High Court is such "there is an aspect of the matter also. Before a blood test of a person is ordered his consent is required. The reason is that this test is a constraint on his personal liberty and cannot be carried out without his consent. Whether even a legislature can compel a blood test is doubtful. Here no consent is given by any of the respondents. It is also doubtful whether a guardian ad litem can give this consent. Therefore, in these circumstances, the learned Munsiff was right in refusing the prayer for a blood test of the appellant and respondents 2 and 3. The learned Judge is also correct in holding that there was no illegality in refusing a blood test. The maximum that can be done where a party refuses to have a blood test is to draw an adverse inference (see in this connection Subayya Gounder v. Bhoopala, AIR 1959 Mad 396) and the earlier decision of the same court in Venkateswarlu v. Subbayya, AIR 1951 Mad 910 (1). Such an adverse inference which has only a very little relevant here will not advance the appellant's case to any extent. He has to prove that he had no opportunity to have any sexual intercourse with the 1st respondent at a time when these children could have been begotten. That is the only proof that is permitted under Section 112 to dislodge the conclusive presumption enjoined by the Section."

8. Learned Counsel appearing on behalf of the opposite party referred to a decision reported in AIR 2005 Gujarat Page 157 (Haribhai Chhanabhai Vora & Ors –Vs.- Keshubhai Haribhai Vora). I have gone through the said judgment very meticulously and I find that the Hon'ble High Court Gujarat ultimately came to the conclusion "at the most, if petitioner No. 1 is not giving consent for D.N.A. Test, and then at the most, adverse inference can be drawn at the final conclusion. But, as stated hereinabove, he cannot be compelled for D.N.A. Test."

9. Learned Counsel appearing on behalf of the opposite party has also referred to decisions reported in 1995 CRI.L.J. 4090 (Bombay High Court) Sadashiv Mallikarjun Kheradkar, Petitioner v. Smt. Nandini Sadashiv Kheradkar and (2005) 4 Supreme Court Cases 449 Banarasi Dass –Vs.- Teeku Dutta (Mrs) & Anr. In those cases Hon'ble Courts held that D.N.A. Test is not to be directed as a matter of routine but it can be directed only in deserving cases and Bombay High Court held that proof of non-access to the wife is required to ascertain the paternity of the child. Learned Counsel appearing on behalf of the petitioner specifically argued that the decisions cited by his adversary is not applicable in the instant case and he relied on an unreported decision of Hon'ble Apex Court vide Civil Appeal No. 9744 of 2014 in connection with Dipanwita Roy –Vs.- Ronobroto Roy wherein the Hon'ble Apex Court has considered two cases of Hon'ble Apex Court i.e. Goutam Kundu –Vs.- State of West Bengal AIR 1993 Supreme Court 2295 and Sarada –Vs.- Dharampal (2003) 4 SCC Page 493. Hon'ble Apex Court also considered the case reported in Bhabani Prasad Jena –Vs.- Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633. After considering the aforesaid judgments, Hon'ble Apex Court held "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 D.N.A. Test. In case, she

accepts the direction issued by the High Court, the D.N.A. Test will determine conclusively the veracity of accusation leveled 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 well as illustration (h), referred to above, are being extracted hereunder:

(i) **Section 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.

(ii) **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."

10. The ratio of all these judgments referred to above go to suggest that D.N.A. Test cannot be ordered as a matter of routine. When Section 112 of the Evidence Act was enacted at that time there was not even any contemplation of the legislature to make provision regarding D.N.A. Test which is virtually the outcome of advancement of modern science. It is perhaps needless to repeat that if D.N.A. Test is done it will be clear if the petitioner is the biological father of the girl child or not. At the same time it has to be kept in mind that a person cannot be compelled to undergo D.N.A. Test. Here the petitioner himself voluntarily preferred to undergo

D.N.A. Test. The question is he has also prayed for D.N.A. Test of child 'Rithika'. Since the divorce suit has been filed on the allegation of adultery in my view, the Learned Court below ought to have allowed the said prayer of the petitioner. If the opposite party, in whose custody the minor girl child is, refuses to place 'Rithika' for undergoing D.N.A. Test in that case concerned Court must draw a presumption of the nature contemplated in Section 114 (H) of the Indian Evidence Act.

11. After going through the petition and after hearing rival contentions of the parties and on a meticulous reading of the decisions referred to, I have no option left with except to set aside the impugned order of the Learned Court below so far as it relates to D.N.A. Test.

12. Accordingly this revisional application is allowed in part but without cost. Learned Court below shall give an opportunity to the petitioner for undergoing a D.N.A. Test and opposite party wife be directed to produce the girl child for undergoing a D.N.A. Test on a specified date and if she does not produce the child in that case Learned Court below shall draw adverse presumption in the light of Section 114 (H) of the Indian Evidence Act.

13. Let a copy of this order be sent to the Learned Court below for information and taking necessary action in accordance with law.

14. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

***(SIDDHARTHA CHATTOPADHYAY, J.)***

A.F.R/N.A.F.R.