Reserved on : 18.08.2025
Pronounced on : 01.09.2025

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 01ST DAY OF SEPTEMBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.20342 OF 2025 (GM - CPC)

BETWEEN:

SRI HAREESH @ HARISHKUMAR
AGED ABOUT 39 YEARS
S/O A.C.SANNE GOWDA
R/AT KUMBARAGUNDI
BARANDUR POST
KASABA HOBLI
BADRAVATHI TALUK
SHIVAMOGGA DISTRICT – 577 245.

... PETITIONER

(BY SRI VIJAY KRISHNA BHAT M., ADVOCATE)

AND:

1 . SRI A.S.UMESH
AGED ABOUT 48 YEARS
S/O A.C.SANNEGOWDA.

2 . SRI A.S.LOKESH
AGED ABOUT 46 YEARS
S/O A.C.SANNEGOWDA.

BOTH ARE RESIDING AT NO.G-83
8TH CROSS, NEAR SVN SCHOOL
GAYATHRINAGAR,
BENGALURU – 560 022.

3 . SRI A.C.SANNEGOWDA
AGED ABOUT 79 YEARS
S/O LATE CHIKKALINGEGOWDA
R/AT IDK-90/A
HUTTA COLONY
BADRAVATHI CITY AND TALUK
SHIVAMOGGA DISTRICT – 577 301.

4 . SMT. LAKSHMAMMA
AGED ABOUT 64 YEARS
W/O A.C.SANNEGOWDA
R/AT KUMBARAGUNDI, BARANDUR POST
KASABA HOBLI, BADRAVATHI TALUK
SHIVAMOGGA DISTRICT – 577 245.

SRI C.V.MARIRE GOWDA
SINCE DEAD BY HIS LRS

5 . SMT. NINGAMMA
AGED ABOUT 69 YEARS
W/O C.V.MARIREGOWDA
R/AT CHIKKANAYAKANAHALLI
KASABA HOBLI
C R PATNA TALUK
HASSAN DISTRICT – 573 116.

6 . SRI DORE @ DORESWAMY
AGED ABOUT 49 YEARS
S/O C.V.MARIREGOWDA
R/AT CHIKKANAYAKANAHALLI
KASABA HOBLI, C.R.PATNA TALUK
HASSAN DISTRICT – 573 116.

7 . SRI NAGESHA
AGED ABOUT 64 YEARS
S/O CHIKKALINGEGOWDA
R/AT ADIHALLI, BAGUR HOBLI
C.R.PATNA TALUK
HASSAN DISTRICT – 573 116.

8 . SRI A.S.KRISHNE GOWDA
AGED ABOUT 39 YEARS
S/O SANNALINGEGOWDA
R/AT ADIHALLI, BAGUR HOBLI
C.R.PATNA TALUK
HASSAN DISTRICT – 573 116.

9 . SRI. SANNA LINGEOGWDA
AGED ABOUT 69 YEARS
S/O LATE MARILINGEGOWDA
R/AT ADIHALLI, BAGUR HOBLI
C.R.PATNA TALUK
HASSAN DISTRICT – 573 116.

10 . SRI REVANNA
AGED ABOUT 64 YEARS
S/O GANGEGOWDA
R/AT ADIHALLI, BAGUR HOBLI
C.R.PATNA TALUK
HASSAN DISTRICT – 573 116.

11 . SRI NANJEGOWDA
AGED ABOUT 64 TEARS
S/O NINGEGOWDA
R/AT ADIHALLI. BAGUR HOBLI
C.R.PATNA TALUK
HASSAN DISTRICT – 573 116.

... RESPONDENTS

(BY SRI M.MURALI BABU, ADVOCATE FOR C/R-1 AND R-2)

THIS WRIT PETITION IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASHING THE IMPUGNED ORDER DTD 05.04.2025 PASSED BY THE SENIOR CIVIL JUDGE AND JMFC AT CHANNARAYAPATNA IN OS NO. 89/2016 THEREBY ALLOWING IA FILED UNDER ORDER XXVI RULE 10(A) OF CPC VIDE ANX-G AND CONSEQUENTLY REJECT THE SAID APPLICATION.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 18.08.2025, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

CAV ORDER

The petitioner/3rd defendant is before this Court calling in question an order dated 05-04-2025 passed by the Senior Civil Judge & JMFC, Channarayapatna allowing the application filed by the plaintiffs under Order XXVI Rule 10A of the Civil Procedure Code in O.S.No.89 of 2016.

2. Heard Sri M. Vijay Krishna Bhat, learned counsel appearing for the petitioner and Sri M.Murali Babu, learned counsel appearing for respondent Nos.1 and 2.

FACTUAL CANVAS:

3. The petitioner is the 3rd defendant. Respondent Nos.1 and 2 who are plaintiffs 1 and 2 institute a suit for partition in O.S.No.89 of 2016. Defendants 1, 2, and 3 file their written statement. Issues are framed by the concerned Court on 11-01-2018. Evidence is led by the plaintiffs in the suit. Examination and cross-examination happen. On 07-09-2023, after completion of plaintiffs' evidence, the present petitioner was examined as DW-1 and the matter was posted for his cross-examination. At that stage, the plaintiffs file the application under Order XXVI Rule 10A of the CPC seeking DNA test of defendants 1 and 3 to determine blood relation and paternity by way of scientific examination through an expert. The said application comes to be allowed by the concerned Court in terms of its order dated 05-04-2025, despite vehement objections of defendants 2 and 3. It is allowing the application that has driven the petitioner/3rd defendant to this Court in the subject petition.

CONTENTIONS:

Petitioner:

4. The learned counsel appearing for the petitioner contends that defendants 1 and 2 are husband and wife. They have several matrimonial proceedings between them. Defendant No.3 is born from the wedlock. Therefore, the plaintiffs cannot file an application questioning paternity of defendant No.3 when there is ample evidence to show that marriage had happened between defendants 1 and 2. The learned counsel further contends that the impugned order of permitting DNA test of the petitioner is violative of Articles 19 and 21 of the Constitution of India. It is his contention that as per Section 112 of the Indian Evidence Act, the plaintiffs have to plead and prove non-access of defendant No.1 to defendant No.2 at the relevant point in time. No such plea has ever been raised. Therefore, the order permitting DNA test ought not to have been granted by the concerned Court and above all, it is in violation of right to privacy of the petitioner.

Respondents:

5. On the converse, the learned counsel appearing for the respondent 1 and 2/plaintiffs would contend that pursuant to the order of the concerned Court, the DNA test has been conducted and a report is yet to be placed before the Court. It is at that stage the present petition is moved challenging the said order and therefore, it should not be entertained. It is his contention that defendant No.1 is said to have undergone vasectomy in the year 1979 and the child was allegedly born in the year 1986. He would, therefore, contend that the 3rd defendant is not the son of defendants 1 and 2. Hence DNA test, in the case at hand, was imperative. It is his submission that the children of defendant No.1 through his second wife/defendant No.2 is wanting to seek partition, though petitioner is a stranger to the family of the plaintiffs. In all, he would submit that there is no warrant of interference with the order passed by the concerned Court.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

CONSIDERATION:

7. The afore-narrated facts and the relationship between the parties are all a matter of record including the disputed ones. A suit for partition is instituted by the plaintiffs in O.S.No.89 of 2016. The issue in the *lis* is not with regard to the merit of the claim. The 3rd defendant who is also a claimant to the joint family property is said to have born from the wedlock of defendants 1 and 2. Long after the suit having progressed for over 8 years, an application is filed under Order XXVI Rule 10A of the CPC seeking DNA test of defendant Nos.1 and 3 – father and the son to determine paternity by way of scientific examination. The sole reason projected in the application is the vasectomy operation undergone by the defendant No.1 long before the birth of the petitioner/defendant No.3. Therefore, the birth itself is highly improbable. On the application filed, defendants 2 and 3 filed their statement of objections. In the

objections it is contended that there are several matrimonial proceedings between defendant Nos.1 and 2 which is enough to prove the marriage. In those proceedings, the birth of defendant No.3 from the wedlock is clearly established. When there is no doubt about paternity of defendant No.3, as disclosed in the documents of defendants 1 and 2, the Court answers the application in favour of the plaintiffs directing conduct of DNA test. The reasons rendered insofar as they are germane are as follows:

"…. …. ….

> iii) It is further submitted that, 1st defendant had undergone Vasectomy operation on 03.07.1979 in Kasthurba Manipal Hospital and the same successful. The doctor of said Hospital has also given evidence in Crl.Mis.143/1987 on the file of JMFC., Court at Bhadravathi. Before leading evidence with respect to conduct and result of said Vasectomy operation, the 1st defendant was undergone check up on 13.11.1986. 1st defendant has also undergone another test on 27.10.1987. As per the recent test report dated 28.02.2024 presented by 1st defendant and conducted at KIMS Hospital, Bengaluru said Vasectomy operation of 1st defendant was successful. In all the above clinical tests, it is forthcoming that there is no any sperm count found in 1st defendant.
>
> iv) It is submitted that, if at all there is any form of relationship between the defendant No.1 and 2 is illegal and void-ab-initio since the mother of the plaintiffs is very much alive and their marital life is subsisting. As per the fraudulently created and concocted documents of defendant No.2 and 3 itself, the 2nd defendant is an illegitimate wife and 3rd defendant is also illegitimate son to 2nd defendant. The defendants 1 to 3 have colluded together to knock off the joint family suit properties of the plaintiffs. Till date no partition has been

effected between the plaintiffs and the 1st defendant. All these facts are well within the knowledge of the defendants.

v) It is submitted that, the defendant No.2 and 3 are not at all related to the plaintiffs and the 1st defendant in any manner or shape. The 1st defendant is addicted to bad habits like drinking, gambling and illicit relationship with others including the 2nd defendant and has adopted one or the other fraudulent tactics and activities to waste the proceeds raised from the suit properties. Since the defendant No.1 to 3 have colluded together and have got created and concocted make-believe documents and have fraudulently obtained collusive decree in OS.No.66/1993.

vi) It is further submitted that, as per vital court records marked at ExP.14, the 3rd defendant had got filed maintenance petition before the JMFC., Court at Bhadravathi in Crl.Mis.118/1991 and the same was dismissed after contest. By considering all the material and existing facts the partition relief which was sought for by the 3rd defendant in O.S.No.66/1993 was rejected by the Senior Civil Judge Court, Holenarasipura. In the said suit, the birth certificate of defendant No.3 was shown as 19.03.1987 as per the exhibited document and observation made in Page 21 and para 31 of the judgment in RA.11 and 14/2002.

vii) It is submitted that, as per the deposition in C.Mis.143/1987 the birth of 3rd defendant is very much doubtful and unimaginable too. Behind the back of the plaintiffs and with a view to defraud them, the defendant No.1 to 3 are indulged in highhanded and illegal acts against the plaintiffs to knock of their joint family properties. All the defendants are acting hostile and detrimental to the right and interest of the plaintiffs. Finding no other alternative, the plaintiffs are constrained to get file this suit for the relief of partition and separate possession.

viii) It is submitted that, the defendant No.2 and 3 have not at all placed any cogent and convincing documents to prove the alleged marriage of defendant No.1 and 2. They have also utterly failed to prove the birth of 3rd defendant as a result of alleged marital relationship between the defendant No.1 and 2. The defendants have collusively and fraudulently obtained partition decree in respect of the suit properties by suppressing

the material and existing facts and also by misleading the Courts behind the back of the plaintiffs and all the orders and decree passed by the Courts are not binding on the plaintiffs as they were not the parties to the earlier suits and proceedings. The said orders and decree are obtained behind the back of plaintiffs and without the knowledge of the plaintiffs to the above suit. The plaintiffs submit that as per the record produced by them are as per the birth certificate of defendant No.3 it is mentioned as 19.03.1987 and as per the school records produced by them the date of birth is mentioned as 25.06.1986. This makes the doubtfulness and suspicious regarding the paternity and relationship of the defendant No.1 and 3. Hence the plaintiffs request the Court for the DNA test to forthwith the truth and reality to the society and the fraudness played by the defendant No.2 and 3 before the court and the society.

ix) The plaintiffs also submit that the defendant No.3 has not made any attempts to change the date of birth and try to get correct date of birth before any court of law nor before any authorities. The defendant No.2 in the C.Mis.No.143/1987 in her cross examination has answered that she does not remember whether she has stated regarding giving birth to the child or regarding her pregnancy. The defendant No.2 and 3 have not produce the hospital birth certificate before any Court of law till today. Even this makes the doubtfulness and suspicious. The defendant No.2 and 3 have played fraud and have received two different dates of birth certificates. The plaintiffs with a view to get protected their right and interest over the suit properties and also to establish the fraudulent and illegal acts of the defendant No.1 to 3, it has become imperative for them to establish the absence of paternity of the 1st defendant towards the 3rd defendant. In view of the age oldness of the 1st defendant, it has become urgent and imminent to get file this application to ascertain and to establish the truth before the Court for the effective and complete adjudication of this matter. The plaintiffs submit that till today neither the defendant No.2 and 3 have produced the Hospital records of the child birth or the date of birth of the defendant No.3 and in which hospital he was born nor in which hospital she gave birth to the defendant No.3. the plaintiffs submit that the compromise petition was entered between the defendant No.1 and 2 on 26.06.1986 and a day before the defendant No.2 has stated that she has given birth to the child and the doubt fullness and suspicious facts and

circumstances create that whether giving birth to the child one day before can come before the court and enter to the compromise petition.

x) It is further submitted that, since the defendant No.2 and 3 are alleging marital and paternity relationship with the 1st defendant and they have fraudulently obtained partition decree, it has become imperative for the plaintiffs to get DNA test of the defendant No.1 and 3. Hence, they are constrained to get file this application to disprove the alleged blood relationship of the defendant No.1 and 3. Under the above circumstances, if the plaintiffs are permitted to prove the fraudulent relation of the defendant No.1 and 3 through scientific examination by way of DNA test in this matter, immense hardship and un-compensatatble loss will be caused to the plaintiffs and this matter may not be fairly, completely and effectively adjudicated upon beside leading to miss carriage of justice. If the plaintiffs are permitted no comparative hardship will be caused to other side. The plaintiffs submit that if the DNA test application is not allowed, there could not be fairly trial and completely and effectively adjudication and will lead to miscarriage to the justice and will lead to multiplicity of proceedings.

…. …. ….

ORDER

Application which is filed by plaintiffs under Order 26 Rule 10(A) R/w Sec.151 of CPC., is hereby allowed.

It is hereby ordered for DNA test between defendant No.1 and 3 with respect to alleged blood relation and both defendant No.1 and 3 are directed to appear before the court on dated 25.04.2025 at 3.00 p.m.

The Medical Officer, Government Hospital, Channarayapatna is directed to collect blood samples of defendant No.1 and 3 to send the blood sample for DNA test.

> The Medical Officer, Government Hospital, Channarayapatna is directed to appear before the court on dated 25.04.2025 at 3.00 p.m."

8. The tenability or otherwise of the afore-quoted order is what is necessary to be considered. The facts that led to filing of the petition is a matter of record. In the light of the legitimacy of birth of the petitioner is being questioned, it is necessary to notice Section 112 of the Indian Evidence Act.

Section 112 of the Indian Evidence Act (116 of Bharatiya Sakshya Adhiniyam):

> "**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."

The afore-quoted provision declares that birth during marriage is conclusive proof of legitimacy. The fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate son of that man, unless it is shown that the parties to the marriage had no

access to each other at any time when he could have been begotten.

9. Section 112 has been interpreted by the Apex Court, particularly, in questions of dispute of paternity and the concerned Court permitting blood test or DNA test to be conducted, as the case would be.

9.1. The Apex Court in the case of **GOUTAM KUNDU v. STATE OF WEST BENGAL**[1] has held as follows:

"…. …. ….

> **18.** Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against his/her will and no adverse inference can be drawn against him/her for this refusal.
>
> **19.** In *Raghunat Eknath Hivale* v. *Shardabai Karbharikale* [AIR 1986 Bom 386 : (1985) 87 Bom LR 657 : 1986 Mah LJ 170] it was observed that blood grouping tests have their limitation, they cannot possibly establish paternity, they can only indicate its possibilities.
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> **20.** In *Bharti Raj* v. *Sumesh Sachdeo* [AIR 1986 All 259] it was held as under:

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[1](1993) 3 SCC 418

"Discussing the evidentiary value of blood tests for determining paternity, *Rayden on Divorce*, (1983), Vol. 1, p. 1054 has this to say:

'Medical Science is able to analyse the blood of individuals into definite groups; and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves most valuable in determining paternity, that is, the exclusion aspect, for once it is determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher; between two given men who have had sexual intercourse with the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father.'

The position which emerges on reference to these authoritative texts is that 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 particular parentage set up in the case. But the consideration remains that the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right so to do. The court exercises 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 blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer."

21. The above is the dicta laid down by the various High Courts. In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim *pater estquemnuptiaedemonstrant (he is the father whom the marriage indicates)*. The presumption of legitimacy is this, that a child born of a married women is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.

… … …

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."

(Emphasis supplied)

9.2. The Apex Court, in a subsequent judgment, follows the judgment in the case of **GOUTAM KUNDU** in the case of **BANARSI DASS v. TEEKU DUTTA**[2], and holds as follows:

"…. …. ….

8. In *Goutam Kundu* v. *State of W.B.* [(1993) 3 SCC 418: 1993 SCC (Cri) 928] this Court held, inter alia, as follows: (SCC p. 428, para 26)

"*26*. (*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."

9. It was noted that Section 112 of the Indian Evidence Act, 1872 (in short "the Evidence Act") requires the party disputing the parentage to prove non-access in order to dispel the presumption of the fact under Section 112 of the Evidence Act. There is a presumption and a very strong one, though a rebuttable one. Conclusive proof means proof as laid down under Section 4 of the Evidence Act.

10. In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim *pater is estquemnuptiaedemonstrant* (he is the father whom the

[2] (2005) 4 SCC 449

> **marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality."**

(Emphasis supplied)

The Apex Court in **GOUTAM KUNDU** lays down certain principles to be considered by the Court while considering application for DNA test. **The Apex Court observes that Courts in India cannot order blood test as a matter of course; prayers in that nature will result in having a roving enquiry, therefore, DNA test must not be entertained; there must be a strong *prima facie* case that the husband and the wife did not have access to each other in terms of Section 112 *supra*; the Court must carefully examine as to what would be the consequence of such test**. These propositions are reiterated in **BANARSI DASS** *supra*.

9.3. The Apex Court, again in the case of **BHABANI PRASAD JENA v. ORISSA STATE COMMISSION FOR WOMEN**[3], has held as follows:

"…. …. ….

> **21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science 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 have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception**.
>
> **22.** In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test."

(Emphasis supplied)

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[3] (2010) 8 SCC 633

The Apex Court observes that in a matter where paternity of a child is in issue, the use of DNA test is extremely delicate and sensitive aspect. Therefore, the Court must not allow it as a matter of course, when there is apparent conflict between the right to privacy of a person not to submit himself or herself forcibly to medical examination. If DNA test is eminently needed, only then it is to be allowed, strictly within the parameters of Section 112 of the Indian Evidence Act.

9.4. The Apex Court in the case of **APARNA AJINKYA FIRODIA v. AJINKYA ARUN FIRODIA**[4], has held as follows:

"…. …. ….

> **17. According to *Sarkar on Law of Evidence*, 20th Edn., 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**

[4] (2024) 7 SCC 773

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.

18. 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* v. *Sanjeev Kumar* [*Sham Lal* v. *Sanjeev Kumar*, (2009) 12 SCC 454 : (2009) 4 SCC (Civ) 741] . 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.

19. Further, "access" or "non-access" does not mean actual cohabitation 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.

20. 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.

21. 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.

22. Thus, where the husband and wife have cohabited 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 of the Evidence Act.

23. 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 cohabitation 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.

24. 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 cohabitation. Conversely, even in the absence of actual cohabitation, there could be access.

25. Section 112 was enacted at a time when modern scientific tests such as DNA tests, as well as ribonucleic acid tests ("RNA tests" 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* v. *Poshi Ram* [*Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311 : 2001 SCC (Cri) 892].”**

(Emphasis supplied)

The Apex Court holds that it is not always necessary to conduct DNA test to ascertain whether a particular child was born to a particular person. It is the burden of the person who alleges or disputes paternity that he has not fathered the child born to his wife. It should be considered in strict consonance with Section 112 of the Indian Evidence Act.

9.5. The Apex Court in the case of **IVAN RATHINAM v. MILAN JOSEPH**[5], has held as follows:

“…. …. ….

26. The advent of scientific testing has made it much easier to prove that a child is not a particular person's offspring. To this end, Indian courts have sanctioned the use of DNA testing, but sparingly.

27. Before delving into the analysis, it is pertinent to elucidate Section 112 of the Indian Evidence Act, 1872:

“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

[5] 2025 SCC OnLine SC 175

> *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."*
>
> **28. The language of the provision makes it abundantly clear that there exists a strong presumption that the husband is the father of the child borne by his wife during the subsistence of their marriage. This section provides that conclusive proof of legitimacy is equivalent to paternity. The object of this principle is to prevent any unwarranted enquiry into the parentage of a child. Since the presumption is in favour of legitimacy, the burden is cast upon the person who asserts 'illegitimacy' to prove it only through 'non-access.'**
>
> **29.** It is well-established that access and non-access under Section 112 do not require a party to prove beyond reasonable doubt that they had or did not have sexual intercourse at the time the child could have been begotten. 'Access' merely refers to the possibility of an opportunity for marital relations. To put it more simply, in such a scenario, while parties may be on non-speaking terms, engaging in extra-marital affairs, or residing in different houses in the same village, it does not necessarily preclude the possibility of the spouses having an opportunity to engage in marital relations. Non-access means the impossibility, not merely inability, of the spouses to have marital relations with each other. For a person to rebut the presumption of legitimacy, they must first assert non-access which, in turn, must be substantiated by evidence."

(Emphasis supplied)

The Apex Court again interprets Section 112 of the Indian Evidence Act and holds that language of Section 112 is abundantly clear that there exists strong presumption that the husband is the father of

the child by his wife during the subsistence of marriage. Access merely refers to the possibility of an opportunity for marital relations. Non-access means the impossibility, not merely inability. Therefore, the Apex Court holds that first the Court must consider non-access which, in turn, must be substantiated by evidence.

10. The afore-quoted judgments being the judicial landscape with regard to demand and consideration of DNA test, the order of the concerned Court, if considered on the bedrock of the principle laid down by the Apex Court in the afore-noted judgments, it would undoubtedly run foul of those principles. DNA test is ordered for the asking by the plaintiffs, on the specious plea that vasectomy operation had happened upon the husband 8 years before the birth of the child.

INTERPLAY BETWEEN THE DNA TEST, RIGHT TO PRIVACY AND DIGNITY:

11. The Apex Court considers interwoven principles of permitting DNA test and infringement of right to privacy.

11.1. The Apex Court in the case of **ASHOK KUMAR v. RAJ GUPTA**[6], has held as follows:

"…. …. ….

15. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in *K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India* [*K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India*, (2019) 1 SCC 1], wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued i.e. whether the same are not arbitrary or discriminatory, whether they may have an adverse impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test.

16. It cannot be overlooked that in the present case, the application to subject the plaintiff to a DNA test is in a declaratory suit and the plaintiff has already adduced evidence and is not interested to produce additional evidence (DNA), to prove his case. It is now the turn of the defendants to adduce their evidence. At this stage, they are asking for subjecting the plaintiff to a DNA test. Questioning the timing of the application the trial court dismissed the defendants' application and we feel that it was the correct order.

17. In the yet to be decided suit, the plaintiff has led evidence through sworn affidavits of the respondents, his school leaving certificates and his domicile certificate. Significantly, Respondent 1, who is one of the 3 siblings (defendants) had

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[6] (2022) 1 SCC 20

declared in her affidavit that the plaintiff was raised as a son by her parents. Therefore, the nature of further evidence to be adduced by the plaintiff (by providing DNA sample), need not be ordered by the court at the instance of the other side. In such kind of litigation where the interest will have to be balanced and the test of *eminent need* is not satisfied our considered opinion is that the protection of the right to privacy of the plaintiff should get precedence.

… … …

19. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.

20. The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the evidence adduced by the other side. When the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy. Seen from this perspective, the impugned judgment [*Raj Gupta* v. *Ashok Kumar*, 2019 SCC OnLine P&H 6032] merits interference and is set aside. In consequence thereof, the order passed by the learned trial court on 28.11.2017 is restored. The suit is ordered to proceed accordingly."

(Emphasis supplied)

The Apex Court holds that when the plaintiff or the defendant is unwilling to subject himself to DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy. Seen

from the said perspective, the order which directed DNA test was set aside therein.

11.2. The Apex Court again in **IVAN RATHINAM** *supra* considers this delicate interplay between DNA, right to privacy and right to dignity. The Apex Court holds as follows:

> "…. …. ….
>
> D.1.2.1 Right to privacy and right to dignity
>
> **37.** Having recognized the diverging pathways in the present analysis, it is pertinent to first address the aspect of the right to privacy. At the outset, a cursory reference to the decision in *K.S. Puttaswamy (Privacy-9J.)* v. *Union of India*, reveals that privacy is concomitant to the right of the individual to exercise control over his or her personality. Privacy includes, at its core, the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation. Privacy also connotes a right to be left alone, as a corollary to the safeguarding of individual autonomy and the ability of an individual to control vital aspects of his life. Elaborating further, this Court held that:
>
> > *"325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational*

nexus between the objects and the means adopted to achieve them."

38. In this context, while permitting an enquiry into a person's paternity *vide* a DNA test, we must be mindful of the collateral infringement of privacy. For this, the court must satisfy itself that the threshold for the abovementioned three conditions is satisfied. If even one of these conditions fails, it is considered an unwarranted invasion of privacy and consequently, of life and personal liberty as embodied in Article 21 of the Constitution.

39. Similarly, when dealing with the right to dignity, this Court, in *X2* v. *State (NCT of Delhi)*, held that the right to dignity encapsulates the right of every individual to be treated as a self-governing entity having intrinsic value. It means that every human being possesses dignity merely by being a human, and can make self-defining and self-determining choices. Further, this Court held that the right to dignity is intertwined with the right to privacy. This means that a person can exercise his right to privacy in order to protect his right to dignity and *vice-versa*. Together, these rights protect an individual's ability to make the most intimate decisions regarding his life, including sexual activity, whether inside or outside the confines of marriage.

40. Forcefully undergoing a DNA test would subject an individual's private life to scrutiny from the outside world. That scrutiny, particularly when concerning matters of infidelity, can be harsh and can eviscerate a person's reputation and standing in society. It can irreversibly affect a person's social and professional life, along with his mental health. On account of this, he has the right to undertake certain actions to protect his dignity and privacy, including refusing to undergo a DNA test.

41. Usually in cases concerning legitimacy, it is the child's dignity and privacy that have to be protected, as they primarily come under the line of fire. Though in this instance, the child is a major and is voluntarily

submitting himself to this test, he is not the only stakeholder bearing personal interest in the results, whatever they may be. The effects of social stigma surrounding an illegitimate child make their way into the parents' lives as there may be undue scrutiny owing to the alleged infidelity. It is in this backdrop that the Appellant's right to privacy and dignity have to be considered.

42. Moreover, the Respondent is already declared to be the legitimate son of Mr. Raju Kurian. The fishing enquiry, which he wants through the judicial process is seemingly, not meant to bring 'certainty' to an uncertain event. Rather, it is predominantly targeted to harm the Appellant's reputation. The Respondent knows well who is his 'father' as per the law.

43. That apart, the courts must also remain abreast with the effects such a probe would have on other relevant stakeholders, especially women. Casting aspersions on a married woman's fidelity would ruin her reputation, status, and dignity; such that she would be castigated in society. Though in this case, the Respondent's mother is actively associated in propagating this vexatious litigation, one can only imagine the repercussions in other cases where a child, in utter disregard to the sentiments and self-respect of their mother, initiates proceedings seeking a declaration of paternity? The conferment of such a right can lead to its potential misuse against vulnerable women. They would be put to trial in a court of law and the court of public opinion, causing them significant mental distress, among other issues. It is in this sphere that their right to dignity and privacy deserve special consideration.

44. It must be noted that the law permits only a preliminary enquiry into a person's private life by allowing the parties to bring evidence on record to prove non-access to dislodge the presumption of legitimacy. When the law provides for a mode to attain a particular object, that mode must be satisfied. When the evidence submitted does not rebut this presumption, the court cannot subvert the law to attain a particular object, by permitting a roving enquiry into a person's private life, such as through a DNA test.

… … …

D.1.2.2 Eminent need for a DNA test

> **46. When dealing with the eminent need for a DNA test to prove paternity, this Court balances the interests of those involved and must consider whether it is possible to reach the truth without the use of such a test.**
>
> **47. First and foremost, the courts must, therefore, consider the existing evidence to assess the presumption of legitimacy. If that evidence is insufficient to come to a finding, only then should the court consider ordering a DNA test. Once the insufficiency of evidence is established, the court must consider whether ordering a DNA test is in the best interests of the parties involved and must ensure that it does not cause undue harm to the parties. There are thus, two blockades to ordering a DNA test: (*i*) insufficiency of evidence; and (*ii*) a positive finding regarding the balance of interests**."

(Emphasis supplied)

The Apex Court, in the afore-quoted paragraphs of **IVAN RATHINAM,** elaborates upon imminent need for DNA test and holds that DNA test should not be ordered as a matter of course. While so doing, the Apex Court considers entire spectrum of judgments on the issue. All those judgments are quoted by the concerned Court to allow the application. Therefore, in that light what would prevail is the judgments quoted hereinabove and not the ones quoted in the impugned order. Heavy reliance is placed by the concerned Court on the judgment in the case of **NARAYAN**

DUTT TIWARI which is considered by the Apex Court in **IVAN RATHINAM** *supra*.

12. In partition disputes particularly, whether DNA test should be permitted or otherwise is borne consideration by the coordinate Benches of this Court.

12.1. A coordinate Bench of this Court in the case of **DAYANANDA GOWDA S.V. v. R. VENKATAPPA**[7], has held as follows:

> "…. …. ….
>
> 12. The plaintiff has filed a suit for partition and separate possession of all the suit schedule properties by metes and bounds and to put the plaintiff in possession and enjoyment of his 1/7th share in the suit schedule properties alleging that he is the son of Venkatappa through his second wife Sundaramma. The defendants produced number of documents to disprove that he is not the son of Venkatappa through second wife. The trial Court proceeded to hold that the plaintiff has specifically pleaded that defendant No.2 is the legally wedded wife of defendant No.1 and his mother Sundaramma was the second wife. Therefore, burden is on the plaintiff to prove that his mother Sundaramma was the second wife of defendant No.1-Venkatappa. The plaintiff is not the biological son of defendant No.1 as there is no exclusive proof regarding legitimacy as per Section 112 of the Evidence Act. Further, the trial Court held that burden is on the defendants to prove that the mother of the plaintiff Sundaramma was the wife of one Rama Naika.

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[7] W.P.No.36322 of 2017 decided on 05-04-2019

13. The plaintiff also filed an application under Section XXVI Rule 10-A read with sections 75(e) and 151 of CPC. The trial Court has not come to a definite conclusion whether the plaintiff is the son of defendant No.1-Venkatappa through Sundaramma as alleged by the plaintiff and whether the plaintiff's original name is Dhudya Naika son of Rama Naika and Sundaramma was not the second wife of defendant No.1-Venkatappa and she is the wife of Rama Naika. Without arriving at any conclusion proceeded to reject the application. In view of dispute with regard to relationship between the parties and the plaintiff has produced certain documents to show that he is the son of Venkatappa through second wife Sundaramma. The defendants have also produced number of documents to prove that he is the son of Rama Naika and Sundaramma is not the wife of defendant No.1-Venkatappa. There is a serious dispute with regard to the said relationship. In the absence of any proof, in a suit for partition, the Court has to appoint a scientific person to conduct DNA as sought for.

14. The learned counsel for the respondents has relied upon the decision of the Hon'ble Supreme Court in the case of Goutam Kundu Vs. State of West Bengal reported in 1993 (3) SCC 418, wherein it is held that normally the courts in India cannot order blood test as a matter of course and also cannot be entertained and unless 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. In the said case, maintenance was sought for against the father of the child where he has disputed the paternity of the child. Under those circumstances, the Hon'ble Supreme Court held that the routine blood check up should not be allowed and ultimately, it is for the husband to dispel the presumption arising under Section 112 of the Evidence Act. The said case has no application to the facts and circumstances of the present case.

15. In the instant case, unfortunately both defendant No.1 – Venkatappa and alleged second wife Sundaramma are dead. Now, the dispute between the plaintiff and defendants No.2 to 4 the legal representatives of defendant No.1-Venkatappa is that the plaintiff claims to be the legal representative through

second wife. In the absence of any documents, the trial Court ought to have allowed the application filed by the plaintiff. In the absence of any material and any admission made by the defendants, in the peculiar facts and circumstances of the present case, the Court in order to do justice between the parties has to order for appointment of Court Commissioner for DNA test as prayed for. The presumption under Section 112 of the Evidence Act would not attract in the facts and circumstances of the present case. If appointment of Court Commissioner for scientific investigation of DNA profiling of blood samples of plaintiff and defendant No.3 is ordered to prove the plaintiff's biological relationship, no prejudice would be caused to the defendants. Admittedly, defendant No.1-Venkatappa and alleged second wife Sundaramma are also dead."

(Emphasis supplied)

12.2. The High Court of Kerala in the case of **GANGADHARAN v. SREEDEVI AMMA**[8], has held as follows:

"…. …. ….

13. From the judgments above referred, this Court notice that, there is absolutely no dearth of power for a Court, be it civil, matrimonial or otherwise to direct the DNA analysis, provided the outcome of the test would prove/disprove one of the grounds based upon which a party may either succeed or lose. However, the most clinching test is the one as expatiated in *Bhabani Prasad Jena* (supra), which is the test of "eminent need". As held by the Hon'ble Supreme Court, in its quest to unearth the truth, the Court can certainly direct to conduct DNA test. However, the court has to exercise its discretion only after balancing the interests of the parties and upon due consideration whether the DNA test is eminently needed for a just decision in the matter. The same cannot be

[8] **2024 SCC OnLine Ker 2316**

directed as a matter of course or in a routine manner. Instead, the Court has to consider diverse aspects; the pros and cons of such order and also as to whether it is possible for the Court to reach a logical conclusion without use of such test.

14. This Court is also impelled to observe that, the desirability of having a DNA test conducted would depend upon the facts and circumstances in which it is sought for and especially in the context of the relief prayed for. The consideration to be received at the hands of the court for an application to conduct DNA analysis differs from each other (i) in a case where the husband alleges adultery, where DNA analysis is sought for to prove such allegation/ground of adultery, (ii) in a case where the husband as a defense in matrimonial matter alleges non access to disown the paternity of the child, (iii) in a case where an application for DNA test is opposed disputing the very existence of the marriage claimed. In *Dipawita Roy* (supra), the Hon'ble Supreme Court in paragraph no. 13, specifically observed that, the judgments relied on by the counsel for the appellant were on the pointed subject of legitimacy of the child born during the subsistence of a valid marriage. The situation will undergo a seachange when a valid marriage, or for that matter, a marriage itself is denied and disputed. This Court may wind up the discussion by reiterating and underscoring the requirement as laid down in *Goutam Kundu* (supra) and also in *Sharda* (supra) that to exercise the power of directing the conduct of a DNA test, the applicant has to establish, not merely a *prima facie* case but a strong *prima facie* case, and there should be sufficient material before the Court, justifying a request for DNA analysis being allowed.

15. Coming to the instant facts, although it is not desirable at this stage of the suit to comment on the quality of the evidence adduced, this Court is constrained to look into the evidence adduced to some extent, to ascertain whether the applicant/plaintiff had made out a strong *prima facie* case, so as to allow Ext.P3 application for a sibling DNA test. One thing

which has to be borne in mind is that, what is being enquired into is not whether the plaintiff is the daughter of Kuttikrishnan Nair. Instead, the true question to be posed is whether the marriage between Kuttikrishnan Nair and Madhavi Amma is established as claimed in the plaint and further, whether the plaintiff is a daughter born in that wedlock. One can probe into the latter question only upon establishing the former. The question is so posed since the plaintiff has no case under Section 16 of the Hindu Marriage Act, as per the pleadings in the plaint. Therefore, evidence as to the marriage between Kuttikrishnan Nair and Madhavi Amma is what is essentially required to be established in order to ascertain a *prima facie* case, or for that matter, a strong *prima facie* case.

16. Having gone through the evidence adduced by PWs 1 to 5, this Court is of the *prima facie* opinion that, the plaintiff could not establish a strong *prima facie* case in proving a valid marriage between Kuttikrishnan Nair and Madhavi Amma. PW1 is none other than the plaintiff. Even in Ext.P3 application for conducting DNA test, her version is that, she came to know about the marriage between Kuttikrishnan Nair and Madhavi Amma, only as her mother's version. The said knowledge of the plaintiff is open to criticism as hearsay evidence. Another aspect spoken to by the plaintiff is regarding her memory that she was living with Kuttikrishnan Nair and Madhavi Amma upto the age of five. The veracity of that version has to be cross checked with the evidence adduced by other witnesses as well. It is relevant to note that all other witnesses would admit in cross examination that their knowledge about the marriage between Kuttikrishnan Nair and Madhavi Amma is nothing, but hearsay. Even the evidence adduced by PW5, the brother of the plaintiff, could not vouchsafe the plaintiff's claim that Kuttikrishnan Nair married Madhavi Amma and that the plaintiff is the daughter born in that wedlock. This Court is not elaborating much on the evidence adduced, as the same may have an adverse consequence on the fate of the suit itself. Suffice to say that, a *prima facie* case, much less a strong *prima facie* case, has not been borne out to order a DNA test as sought for in Ext.P3.

17. Another aspect which weighs with this Court to interfere with Ext.P12 order is the pleadings as contained in

Ext.P3 application to the effect that the impugned marriage took place 81 years back, that no one who witnessed the marriage are alive and that there exists no way to prove the marriage, except through a DNA analysis. It appears that, the plaintiff is completely misconceived in seeking a DNA analysis for the afore-stated reasons. As already held by the Hon'ble Supreme Court, the existence of a strong *prima facie* case is a *sine qua non* to seek conduct of the DNA test. Here, in Ext.P3, the plaintiff/applicant herself admits that there exists no evidence, except the aspect sought to be proved by DNA analysis to prove that the plaintiff is the daughter of Madhavi Amma through Kuttikrishnan Nair and consequentially, their marriage. That apart, it is questionable as to why the plaintiff did not choose to raise her claim during the life time of her mother Madhavi Amma, though Kuttikrishnan Nair passed away in the year 1987. The present suit was instituted when the plaintiff was aged 74 and therefore, none else can be blamed for dearth of evidence through those persons, who according to the plaintiff had witnessed the so-claimed marriage. At any rate, the resultant situation cannot be propounded as a reason to seek a sibling DNA test.

18. It is of seminal important to note that, DNA analysis, even if allowed, will not establish the marriage between Kuttikrishnan Nair and Madhavi Amma. At best, it may prove that the plaintiff is the daughter of Kuttikrishnan Nair. The proof of the same, by itself, would not carry the plaintiff anywhere. The prayer is one for partition. The claim is that, Kuttikrishnan Nair married Madhavi Amma and plaintiff is their daughter. The further claim is that, during the subsistence of the marriage, Kuttikrishnan Nair maintained relationship with Lakshmi Appissi, in which relation the defendants are born. The above aspect is highlighted only to point out that, the plaintiff has no claim even under Section 16 of the Hindu Marriage Act, as per the pleadings. Now, assume for a moment, that such a plea is permitted to be taken as an alternative one. Still, the existence of a ceremonious/customary marriage is again a *sine qua non* to maintain a claim under Section 16 of the Hindu Marriage Act. See in this regard, a Division Bench Judgment of this court in *Jayachandran* v. *Valsala* [(2016) 2 KLT 81].

> **19.** In the light of the above discussion, this Court finds that Ext.P12 order cannot be sustained. This court finds that, one cannot seek DNA test to be done only in his/her attempt to fish out evidence in support of his case. Unless and until the applicant makes out a strong *prima facie* case, such an application is not liable to be allowed. In arriving at the above conclusion, this Court also considers the devastating effect [as pointed out in *Bhabani Prasad Jena* (supra)] on the children of Lakshmi Appissi (the defendants in the suit), more so, when all the witnesses - except the plaintiff - would admit that Lakshmi Appissi is believed to be the legally wedded wife of Kuttikrishnan Nair by the people in the locality. This Original Petition succeeds. Ext.P12 order is set aside. The trial court will now proceed with the matter, in accordance with law, untrammelled by any of the observations contained in this judgment."
>
> (Emphasis supplied)

12.3. The High Court of Andhra Pradesh then in the case of **MEDIDA VEERAIAH @ VEERA REDDY v. MEDIDA VIJAYA NARASIMHA RAO**[9] has held as follows:

> "…. …. ….
>
> **27.** On consideration of the judgements referred above, it is obvious that a DNA test can be ordered in appropriate cases where there is necessity. It is also clear that a DNA test cannot be ordered in a routine manner. **The facts and circumstances of each case have to be taken into consideration for ordering DNA test. The parties have to bring their prima facie evidence on record to show their relationship. If the court is not satisfied with the prima facie evidence, then the court may order DNA test in appropriate cases by following the ratio laid down in the judgements referred above. The court cannot merely order DNA test on mere asking of the parties to decide the relationship. Generally in criminal cases, and matrimonial offences, DNA test is**

[9] **2018 SCC OnLine Hyd 380**

being ordered. In cases like partition and civil disputes, Courts are slow in ordering DNA test; the reasons being that there is a presumption under section 112 of Indian Evidence Act with regard to the paternity. The petitioner has to come forward with specific denial of his paternity, and his prima facie case to prove his paternity, and then only he can ask the court for a DNA test. There are disadvantages in ordering DNA test in some cases. The DNA test asked in this case by the petitioner who claims to be son of respondent No. 1. This is a case where the petitioner is raised about 35 years. There must be *prima facie* some material to connect the relationship with the petitioner and the 1st respondent. It is obvious that the trial Court has not considered any *prima facie* case brought by the petitioner on record. There is no discussion with regard to the relationship between the petitioner and respondent No. 1 basing on any documents. The trial Court has merely passed an order stating that as there is a dispute between the petitioner and respondent No. 1 with regard to paternity, the DNA test is ordered. In the light of the above decisions of Hon'ble Supreme Court held that a DNA test cannot be ordered in a routine manner.

28. This is a case where the trial Court has very casually, in a routine manner, ordered DNA test, without considering the prime facie case of the petitioner, without discussing the material placed before the Court, and the contents of the pleadings therein. It is also pertinent to note that the trial Court has not appointed a Commissioner for the said purpose as per the provisions under Order XXVI Rule 10, or Rule 10A of CPC. There are no specific directions to the Commission as to what he has to do for conducting a DNA test. There are no reasons given for allowing the petition filed for seeking DNA test. The order passed by the trial Court is not based on any plausible reasoning.

29. It is also pertinent to note that the personal liberty of an individual is at stake in cases of ordering DNA testing. The consent of the party whose blood samples are to be drawn is required. The court may not, in all cases, direct taking of blood samples from the respondent without his consent. At this juncture, it is appropriate to see the standard of proof that is required in each case. In a criminal case the standard of proof is

beyond reasonable doubt. In a civil case, it is preponderance of probabilities. Therefore, the standard of proof in a criminal case is different from the standard of proof in a civil case. As far as the ordering of DNA test is concerned, in my opinion, the Court has to see the requirement of standard of proof; in civil cases, the standard of proof being preponderance of probabilities. When there is a presumption under Section 112 of Evidence Act, the parties have to produce evidence to prima facie show that the presumption can be invoked. The parties may lead evidence to rebut the said presumption as the presumption is a rebuttable presumption. At this juncture the reference of Section 112 of the Evidence Act assumes importance. Section 112 of Evidence Act reads as under;

> **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.**

30. To prove paternity, there is a presumption in favour of the person who is claiming paternity. The petitioner has to bring on record the material to raise the said presumption. In case the petitioner fails to bring any material prima facie to show that there is a nexus between the respondent No. 1 and the petitioner's mother, there is no point in ordering a DNA test. A stranger who is not having a connection cannot be directed to undergo a test. Therefore, the petitioner has to come out with a prima facie case that there is a marriage between his parents, or that there is a relationship between his parents which led to his birth. In the instant case, there is no material considered by the trial Court as to the nature of relationship between the petitioner's mother and the 1st respondent. The 1st respondent is denying his relationship with the mother of the petitioner; and in such a case the burden

is on the petitioner to show that there is prima facie evidence to rebut the presumption under Section 112 of the Evidence Act.

31. In the instant case, the petitioner is raised about 35 years. There must be lot of material available to him to prima facie show that he is the son of the 1st defendant. The trial Court ought to have considered all the material to come to a conclusion that there is prima facie relationship between the petitioner's mother and the respondent No. 1 before ordering DNA test. Without there being any formal proof of relationship or connection between the parties, it does not appear that there is any reason for ordering a DNA test. In such cases if DNA test is ordered without there being any prima facie proof of her relationship between the parties in a case like this where the petitioner claims that he's 35 years old, without producing any record that he is related to the defendant No. 1, it is not appropriate to order a DNA test."

(Emphasis supplied)

13. On a blend of the judgments rendered by the Apex Court and different High Courts, what would unmistakably emerge is, the caution of the Apex Court followed by other High Courts that compelling such tests without imminent need, imperils not only the sanctity of marriage, but legitimacy of the child and also becomes violative of the fundamental rights to privacy and dignity, as obtaining under Article 21 of the Constitution of India.

14. The learned counsel for the respondents/plaintiffs places reliance upon a judgment rendered by the coordinate Bench, which affirms DNA Test being allowed by the concerned Court in the case of **MOHAMMED REFEEQ v. S. MOHAMMED FAIROZ AHAMED** rendered in **W.P.No.52855 of 2019** decided on **10-01-2024**. The person whose blood sample was sought to be taken for DNA test had voluntarily filed an application to know the biological root. The said judgment is distinguishable without much *ado*, as defendants 1 and 3 have objected to the application before the concerned Court.

15. In the light of the foregoing analysis, the following conclusions would emerge:

- **Section 112 of the Indian Evidence Act is steeped in the maxim *pater est quem nuptiae demonstrant* – the father is he whom the marriage indicates, which would mean the presumption of legitimacy of a child born during lawful wedlock.**

- **The blood test – DNA test must be permitted only in terms of the rigor of Section 112 of the Evidence Act, which would be a demonstrable non-access during the period of birth of the child, as the presumption under**

Section 112 is rooted in public morality and societal peace.

- The Court answering an application must bear in mind the interwoven delicate balance between the test, right to privacy and dignity, as ordained in the Constitution of India.

- The concerned Court must not for the asking permit DNA test, unless the condition stipulated in Section 112 is fulfilled, which would be pleading and proving of non-access at the relevant point in time.

- In the case at hand, plethora of marital disputes existed between defendants 1 and 2 for ages. The child is born from the said wedlock. The concerned Court has blissfully ignored this fact.

- Therefore, the Courts answering the application shall strictly adhere to the law, as narrated in the course of the order.

16. Tested on the anvil of the preceding analysis, the concerned Court ignores every tenet; there was no imminent need for conducting a DNA test; the order ignores the purport of Section 112 of the Indian Evidence Act and presumption of paternity is given a go-bye. No material is placed before the Court depicting

non-access at the time of birth. In the absence of any pleading of the kind, the concerned Court has treated the DNA test as a frolicsome act and ordered as a matter of course. Right to privacy and dignity is lost sight of. Therefore, on all the aforesaid circumstances, the order of the concerned Court is rendered unsustainable and unsustainability would lead to its obliteration.

17. For the aforesaid reasons, the following:

O R D E R

(i) Writ Petition is allowed.

(ii) The order dated 05-04-2025 passed by the Senior Civil Judge & JMFC, Channarayapatna on the application filed by the plaintiffs under Order XXVI Rule 10A of the CPC in O.S.No.89 of 2016 stands quashed.

(iii) All consequential proceedings, including the purported DNA examination and any report prepared thereto, are all declared null and void, in the eyes of law.

(iv) Registry is directed to circulate this order to the concerned Courts, to bear in mind the observations made in the course of the order, while answering an application filed seeking DNA test.

This Court places its appreciation for the able assistance rendered by Miss. Samriddhi Shenoy, Law Clerk cum Research Assistant attached to this Court.

Sd/-
(M.NAGAPRASANNA)
JUDGE

bkp
CT:MJ