NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7018 OF 2009
(Arising out of SLP (C) No. 27770 of 2008)

Ramkanya Bai …Appellant

Versus

Bharatram …Respondent

J U D G M E N T

TARUN CHATTERJEE, J.

1. Leave granted.

2. This appeal is directed against the Judgment and order dated 26th of June, 2008 passed by the High Court of

Madhya Pradesh at Indore Bench in IA No. 803 of 2007, which arose in a pending first appeal, which has been filed against the Judgment and order dated 7th of December, 2006 passed by the Additional District and Session Judge, District Mandsor, Madhya Pradesh. In the impugned order in the pending first appeal, the High Court had directed DNA test of the child of the parties to be performed.

3. The facts leading to the filing of this appeal in this Court are as follows :-

The marriage of the wife/appellant was solemnized with the husband/respondent on 20th of April, 1999. But after sometime, the husband/respondent started harassing the

wife/appellant on various issues and she was subjected to cruelty and eventually, she was turned out of her matrimonial home. In the year 2004, the husband/respondent filed an application being HMA No. 7(C) of 2004 under Section 13 of the Hindu Marriage Act in the Court of Additional District and Session Judge, District Mandsor, Madhya Pradesh. However, a child was born in the month of November, 2004 to the parties. The parties entered appearance and issues were framed and finally, the trial Court, by its Judgment and decree dated 7th of December, 2006, dismissed the petition filed by the husband/respondent against which, the husband/respondent had filed an appeal before the High Court of Madhya Pradesh at Indore Bench under Section 28 of the Hindu Marriage Act.

As noted hereinearlier, the said appeal is pending decision in the High Court.

4. In the said pending appeal, an application was made by the husband/respondent for an order to perform DNA test of the child born in the month of November, 2004 on the ground that such child could not be taken to be a child born out of the wedlock of the parties. It was the appellant who objected to this application stating *inter alia* that the child was born from the wedlock of the parties and it was also brought to the notice of the High Court that the husband/respondent did not deny the paternity of the child while the suit was pending before the trial Court. The High Court, by the impugned order, allowed the

said application of the husband/respondent by making the following observation :

> *"However, since the appellant has made a prestige issue and it appears to this Court that in case in DNA test if it is found that the son of the Respondent is from the appellant then the family can be re-united."*

5. On a plain reading of the impugned order, it is also evident that the High Court has allowed the prayer of the husband/respondent for performing the DNA test of the child without looking to the facts and circumstances of the present case and without looking into the question of law that may be raised in the matter.

6. Feeling aggrieved by this Order, the wife/appellant has come up to this Court by way of a Special Leave Petition, which on grant of leave, was heard in presence of the learned counsel for the parties.

7. We have heard the learned counsel for the parties and examined the impugned order of the High Court as well as the Judgment of the trial Court, by which the application for grant of divorce filed under Section 13 of the Hindu Marriage Act by the husband/respondent was dismissed.

8. We are unable to accept the impugned order of the High Court. The High Court was not justified in allowing the application for grant of DNA test of the child only on the ground that there will be a possibility of re-union of the parties if such

DNA test was made and if it was found from the outcome of the DNA test that the son was born out of the wedlock of the parties. In the absence of any reason except on the ground that the husband/respondent had made a prestige issue about the paternity of the child, nothing could be found from the impugned order of the High Court which could invite the Court to allow such application.

9. On a perusal of the application for grant of an order for DNA test of the child, it would also be evident that there was no allegation made by the husband/respondent that as a consequence of illicit relationship with some third person, the child was born to the wife/appellant. Apart from that, it is an admitted position that during the pendency of the divorce

proceedings in trial Court, neither such prayer for performing DNA test to find out the paternity of the child was ever made by the husband/respondent nor any allegation in the plaint was made by him in his pleading. Therefore, it was not open to the High Court at the appellate stage to direct the DNA test to be performed on the child of the wife/appellant. It is also well settled that the presumption of legitimacy is a presumption of law. When a child is born out of a wedlock, there is a presumption in favour of his legitimacy and presumption of legitimacy largely depends on the presumed fact that the parties to a marriage have necessary access to each other when a divorce petition is filed and specially, when the husband/respondent did not assert that the son of the wife/appellant was a consequence of illicit

relationship with some third person. The High Court, in the impugned order, has also observed that the son of the wife/appellant has begotten from the husband/respondent, which cannot be disputed at this stage on the basis of mere desire of the husband/respondent to deny such paternity of the child.

10. For the reasons aforesaid, the impugned order is set aside and the application of DNA test to be performed on the child of the wife/appellant is hereby rejected. Considering the facts and circumstances of the case, we request the High Court to dispose of the pending appeal at an early date, preferably within six months from the date of supply of a copy of this order to it.

11. The appeal is thus allowed. There will be no order as to costs.

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.....J. [Tarun Chatterjee]

New Delhi; .....J.

October 22, 2009 [R. M. Lodha]