REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 6222-6223 OF 2010
(Arising out of SLP(C) Nos. 22905-22906 of 2009)

Bhabani Prasad Jena …Appellant

Versus

Convenor Secretary,
Orissa State Commission for Women & Anr. ...Respondents

JUDGEMENT

R.M. Lodha, J.

Leave granted.

2. Two questions arise for consideration-first, the extent of power of the State Commission for Women constituted under Section 3 of the Orissa (State) Commission for Women Act, 1993 (for short, '1993 Act') and then, as to whether the High Court of Orissa was justified in issuing direction for deoxyribonucleic acid

test (DNA) of the child and the appellant who, according to the mother of the child, was its father suo motu. These questions arise in this way. On May 15, 2007, Bhabani Prasad Jena-the appellant and Suvashree Nayak-respondent no. 2 got married. The certificate of marriage was issued by the Marriage Officer, Khurda, Bhubaneswar on June 30, 2007 under Section 13 of the Special Marriage Act, 1954 (for short, '1954 Act'). In less than three months, to be precise, on August 7, 2007 the appellant filed a petition under Section 25(iii) of the 1954 Act in the Court of District Judge, Khurda, Bhubaneswar for a declaration that the marriage between him and the respondent no. 2, registered on June 30, 2007 was nullity and the said marriage has not been consummated. In that matrimonial proceedings, the respondent no. 2 has filed written statement and traversed the allegations made in the petition. She also claimed permanent alimony to the tune of Rs. 10,00,000/-. It is not necessary to refer to the matrimonial proceedings in detail; suffice, however, to observe that the said proceedings are pending.

3. On December 30, 2008 the respondent no. 2 filed a complaint before Orissa (State) Commission for Women (for

short, 'State Commission') alleging that she was married to the appellant and due to torture meted out to her by the appellant and his family members and other issues, they have separated; she has no source of income and she was pregnant. Based on the said complaint, the State Commission issued notices to both the parties. On April 20, 2009, the parties appeared before the State Commission. The appellant submitted his written reply to the complaint and stated that marriage between the parties was invalid due to fraud and coercion and that he has already applied to the District Court, Khurda for declaring the marriage null and void.

4. The Chairperson, State Commission passed an order on May 11, 2009 issuing the following directions:

> "1. Maintenance is compulsory for the petitioner, as she has to have safe delivery and take care of the baby.
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> 2. Compensation amount would be minimum 50% of Gross salary amount of Sri Bhabani Prasad Jena, Surgent. Amount to be placed in the A/C of the mother directly by the office of DDO (Drawl and disbursing officer).
>
> 3. Delivery expenses of Smt. Nayak will be borne by Sri Bhabani Prasad Jena as per actual.

4. D.N.A. test of Smt. Nayak will be conducted through S.P., Nawarangpur & report is sent to OSCW for future reference."

In the said order, it was observed that the aforesaid directions are subject to the final order of the appropriate court.

5. The appellant challenged the aforesaid order by filing a writ petition before the High Court of Orissa. The appellant took the position that he has not fathered the child in the womb of respondent no. 2 and there has been no relationship of husband and wife since August 7, 2007 (the date of filing of the matrimonial case before the District Judge, Khurda). It should be noted here that a letter was sent by the respondent no. 2 to the Chief Justice of Orissa High Court on June 9, 2009 giving the history of relationship between her and the appellant; their marriage; harassment meted out to her by the appellant and his family members; advanced stage of her pregnancy and that she was staying at Sanjivani Ma Ghar. She prayed for justice as her delivery was expected on June 15, 2009. The vacation Judge treated the said letter as writ petition and on June 9, 2009 itself directed the Chief District Medical Officer, Bhubaneswer to admit the respondent no. 2 in the Capital Hospital at the cost of the

State and the matter was ordered to be posted after vacation before the regular bench. It may also be noted that a day earlier i.e., on June 8, 2009 the Division Bench passed an interim order in the writ petition filed by the appellant staying the operation of clauses 2 and 3 of the order passed by the State Commission but clarified that directions regarding maintenance and DNA are not stayed.

6. On August 7, 2009, the High Court took up both writ petitions for consideration and passed an order directing that the DNA of the child shall be conducted in the SCB Medical College and Hospital, Cuttack and the appellant shall also give his blood sample for the purpose of DNA. This order is impugned in the present appeals by special leave.

7. The 1993 Act was enacted by the Orissa State Legislature to constitute a State Commission for Women and to provide for matters connected with or incidental thereto. Functions of the Commission are specified in Section 10 which reads thus:

> "S.10.- Functions of Commission—(1) The Commission shall perform all or any of the following functions, namely :

(a) make indepth studies on—

(i) the economic, educational and health situation of the women of the State, with particular emphasis on the tribal districts and areas which are under developed with respect to women's literacy, mortality and economic development.

(ii) condition in which women work in factories, establishments, con-struction sites and other similar situations,

and recommend to the State Government on the basis of specific reports on improving the status of women in the said areas;

(b) compile information, form time to time, on instances of all offences against women in the State, or in selected areas, including cases related to marriage and dowry, rape, kidnapping, criminal abduction, eve-teasing, immoral trafficking in women and cases of medical negligence in causing delivery or sterilization or medical intervention that relates to child bearing or child birth;

(c) will co-ordinate with the State Cell and District Cells for atrocities against women, if any for mobilization of public opinion in the State as a whole or in specific areas which would help in speedy reporting and detection of offences of such atrocities and mobilization or public opinion against the offenders;

(d) receive complaints on—

(i) atrocities on women and offences against women,

(ii) deprivation of women of their rights relating to minimum wages, basic health and maternity rights,

(iii) non-compliance of policy decisions of the Government relating to women,

(iv) rehabilitation of deserted and destitute women and women forced into prostitution,

(v) atrocities on women in custody,

and take up with authorities concerned for appropriate remedial measures;

(e) assist, train and orient the non-Government organization in the State in legal counseling of poor women and enabling such women to get legal aid;

(f) inspect or cause to be inspected, a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities for remedial action, if found necessary;

(g) perform functions in relation to any other matter which may be referred to it by the State Government.

(2) The State Government shall cause all the recommendations or reports, or any part thereof, as may be presented to it by the Commission under Sub-section (1), which relate to any matter with which the State Government is concerned, to be laid before the Legislature of the State alongwith a memorandum explaining the action taken or proposed to be taken on the recommendations of the Commission and the reasons for the non-acceptance, if any, of such recommendations.

(3) The Commission shall, while investigating any matter referred to in Clause (a) or Clause (d) of Sub-section(1), have all the powers of a Civil Court trying a suit and, in particular, in respect of the following matters, namely :

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commissions for the examination of witness and documents; and

(f) any other matter which may be prescribed."

8. It would be seen from Section 10 of the 1993 Act that the State Commission has been authorized to take up studies in respect of economic, educational and health situation of the women of the State and also the working conditions of women in the factories, establishments, construction sites and make its recommendations to the State Government. The State Commission is empowered to compile information in respect of the offences against women and to coordinate with the State Cell

and District Cells for atrocities against women. Further, the State Commission is competent to receive complaints in respect of the matters specified in Section 10(1)(d) and take up the grievances raised in the complaint/s with the concerned authorities for appropriate remedial measures. The State Commission is also given role of assisting, training and orienting the non-Government organization in the State in legal counseling of poor women and enabling such women to get legal aid. Under clause (f) of Section 10(1), the State Commission is authorized to inspect or cause to be inspected, a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities these matters for remedial action. In other words, the State Commission is broadly assigned to take up studies on issues of economic, educational and healthcare that may help in overall development of the women of the State; gather statistics concerning offences against women; probe into the complaints relating to atrocities on women, deprivation of women of their rights in respect of minimum wages, basic health, maternity rights, etc. and upon ascertainment of facts take up the matter with the concerned

authorities for remedial measures; help women in distress as a friend, philosopher and guide in enforcement of their legal rights. However, no power or authority has been given to the State Commission to adjudicate or determine the rights of the parties. Mr. Ranjan Mukherjee, learned counsel for respondent no. 2 submitted that once a power has been given to the State Commission to receive complaints including the matter concerning deprivation of women of their rights, it is implied that the State Commission is authorized to decide these complaints. We are afraid, no such implied power can be read into Section 10(1)(d) as suggested by the learned counsel. The provision contained in Section 10(1)(d) is expressly clear that the State Commission may receive complaints in relation to the matters specified therein and on receipt of such complaints take up the matter with the authorities concerned for appropriate remedial measures. The 1993 Act has not entrusted the State Commission with the power to take up the role of a court or an adjudicatory tribunal and determine the rights of the parties. The State Commission is not a tribunal discharging the functions of a judicial character or a court. Learned counsel for respondent no.

2 then referred to Section 10(3) and submitted that the State Commission has been conferred with all the powers of a Civil Court trying a suit. We are afraid, this is not at all proper reading of Section 10(3). The expression, 'have all the powers of a Civil Court' in Section 10(3) is qualified by the following words, 'in respect of the following matters'. That is to say, the State Commission has powers of Civil Court trying a suit for the matters specified in clauses (a) to (f) thereof and not for other purposes. It is clear to us that the Legislature has not gone so far as to give jurisdiction to the State Commission to make an order such as the one that has been made. From whatever angle we may examine the validity of the directions given by the State Commission in its order dated May 11, 2009, it appears to us that the said order was outside the jurisdiction, power or competence of the State Commission. It was an order which the State Commission had no competence to make and, therefore, a void order. The High Court instead of correcting that order went a step further and directed that DNA of the child as well as the appellant shall be conducted.

9. Whether such a direction could be given by the High Court? Before we answer this question, we shall notice few decisions of this Court dealing with the power of the Court in directing DNA. In *Goutam Kundu* v. *State of West Bengal and Anr.*[1], this Court was concerned with a matter arising out of maintenance for child claimed by the wife. The husband disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. This Court referred to Section 4 and Section 112 of the Evidence Act and also the decisions of English and American Courts and some authoritative texts including the following statement made in *Rayden's Law and Practice in Divorce and Family Matters* (1983), Vol. I, p. 1054 which reads thus:

> "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

[1] (1993) 3 SCC 418

> 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 90 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."

This Court then finally concluded, thus :

> "(1) that courts in India cannot order blood test as a matter of course;
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> (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."

10. In *Sharda* v. *Dharmpal*[2], a three-Judge Bench was concerned with the question whether a party to the divorce proceedings can be compelled to a medical examination. That case arose out of an application for divorce filed by the husband against the wife under Section 13(1)(iii) of the Hindu Marriage Act, 1955. In other words, the husband claimed divorce on the ground that wife has been incurably of unsound mind or has been suffering from mental disorder. The Court observed, "*Goutam Kundu* is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child." While dealing with the aspect as to whether subjecting a person to a medical test is violative of Article 21 of the Constitution of India, it was stated that the right to privacy in terms of Article 21 of the Constitution is not an absolute right. This Court summed up conclusions thus :

[2] (2003) 4 SCC 493

> "1. A matrimonial court has the power to order a person to undergo medical test.
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> 2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
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> 3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

11. In *Banarsi Dass* v. *Teeku Dutta & Anr.*[3], this Court was concerned with a case arising out of succession certificate. The allegation was that Teeku Dutta was not the daughter of the deceased. An application was made to subject Teeku Dutta to DNA test. The High Court held that trial court being a testamentary court, the parties should be left to prove their respective cases on the basis of the evidence produced during trial, rather than creating evidence by directing DNA test. When the matter reached this Court, few decisions of this Court, particularly, *Goutam Kundu*[1] was noticed and it was held that even the result of a genuine DNA test may not be enough to

[3] (2005) 4 SCC 449

escape from the conclusiveness of Section 112 of the Evidence Act like a case where a husband and wife were living together during the time of conception. This is what this Court said :

> "13. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

It was emphasized that DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given.

12. Recently, in the case of *Ramkanya Bai* v. *Bharatram*[4] decided by the Bench of which one of us, R.M. Lodha, J. was the member, the order of the High Court directing DNA of the child at

[4] (2010) 1 SCC 85

the instance of the husband was set aside and it was held that the High Court was not justified in allowing the application for grant of DNA of the child on the ground that there will be possibility of reunion of the parties if such DNA was conducted and if it was found from the outcome of the DNA that the son was born out of the wedlock of the parties.

13. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives 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 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. 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 is eminently needed. DNA 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.

14. There is no conflict in the two decisions of this Court, namely, *Goutam Kundu*[1] and *Sharda*[2] . In *Goutam Kundu*[1] , it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of *Sharda*[2] while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is

sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court over-looked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court.

15. Consequently, the appeals are allowed; the order of the High Court dated August 7, 2009 and the order of the Orissa

State Commission for Women dated May 11, 2009 are set aside. WP(C) No. 8725 of 2009 and WP (C) No. 8308 of 2009 pending before the High Court stand disposed of in view of this order. We clarify that our order shall not preclude the respondent no. 2 from claiming maintenance or any other order of financial support against the appellant in appropriate proceedings from the court of competent jurisdiction or in the petition filed by the appellant before the District Judge, Khurda, Bhubaneswar. Obviously the appellant shall be at liberty to contest the claim of respondent no. 2 on all available grounds and the concerned Court shall consider and determine such claim in accordance with law on its own merits. The parties shall bear their own costs.

……J
(Aftab Alam)

……..J
(R. M. Lodha)

New Delhi
August 3, 2010.