

**Babu Vs. Vidya**

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**Court :** Kerala

**Decided On :** Nov-26-2014

**Judge :** Honourable Mr.Justice v.K.Mohanan

**Appellant :** Babu

**Respondent :** Vidya

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN & THE HONOURABLE MR.JUSTICE K.HARILAL WEDNESDAY, THE 26TH DAY OF NOVEMBER 2014 5TH AGRAHAYANA, 1936 OP (FC).No. 507 of 2014 (R) ----- CRL.M.P. NO.102/2014 IN M.C. NO.42/2013 OF FAMILY COURT, MAVELIKKARA. PETITIONER(S)/RESPONDENT: ----- BABU REMYALAYAM VEETIL, PAVUMBA NORTH MURI PAVUMBA VILLAGE, KARUNAGAPPALLY TALUK. BY ADVS.SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL) SRI.A.R.DILEEP SRI.MANU SEBASTIAN SMT.PARVATHY NAIR RESPONDENT(S)/PETITIONER: ----- VIDYA, AGED 14 YEARS MINOR, KALATHINTE PADEETTATHIL VEETIL, MEKKUM MURI THAMARAKULAM VILLAGE, MAVELIKARA TALUK-690530 REPRESENTED BY HER MOTHER AND GUARDIAN, SANTHINI KALATHINTE PADEETTATHIL VEETIL, MEKKUM MURI THAMARAKULAM VILLAGE, MAVELIKARA TALUK. R1 BY ADV. SRI.R.SUNIL KUMAR R1 BY ADV.

SMT.A.SALINI LAL THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 2611-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: OP (FC).No. 507 of 2014 (R) APPENDIX PETITIONER(S)' EXHIBITS : ----- EXHIBIT-P1: A TRUE COPY OF PETITION IN MC4213 BEFORE FAMILY COURT, MAVELIKARA. EXHIBIT-P2: A TRUE COPY OF DEPOSITION OF SANTHINI IN MC4213 BEFORE FAMILY COURT, MAVELIKARA. EXHIBIT-P3: A TRUE COPY OF PETITION IN CRL.M.P.102/14 IN M.C.NO.42 OF 2013 ON THE FILE OF THE FAMILY COURT, MAVELIKARA. EXHIBIT-P4: A TRUE COPY OF OBJECTION FILED IN CRL.M.P.102/14 IN M.C.NO.42 OF 2013 ON THE FILE OF THE FAMILY COURT, MAVELIKARA. EXHIBIT-P5: A TRUE COPY OF

## ORDER

DATED 25.08.2014 IN CRL.M.P.NO.102/14 IN M.C.NO.42 OF 2013 ON THE FILE OF THE FAMILY COURT, MAVELIKARA. RESPONDENT(S)' EXHIBITS : NIL ----- okb. //true copy// P.A. to Judge. V.K.MOHANAN & K.HARILAL, JJ.

----- O.P.(F.C.) No.507 of 2014 -----  
----- Dated this the 26th day of November, 2014 -----

## JUDGMENT

### **Harilal, J.**

This original petition is filed challenging the impugned order passed in Crl.M.P. No.102/14 in M.C. No.42/13 on the files of the Family Court, Mavelikkara filed by the respondent herein. The respondent is a minor girl represented by her mother. The above M.C. was filed by the respondent herein claiming maintenance allowance from the petitioner herein under Section 125(1)(b) of the Cr.P.C. It is alleged in the M.C. that from September 1999 onwards the petitioner showed love and affection towards the mother of the respondent minor child, and they started to reside together from 1999 onwards till December 2000. While so, her mother became pregnant from the petitioner herein and the respondent herein was born on 23/10/2000. It is also alleged in the petition that till December 2000 the

petitioner looked after the affairs of the respondent and her mother. Thereafter the petitioner has been neglecting the respondent and her mother and refusing to pay maintenance O.P(FC).507/14 :2: allowance to them. The respondent is legally entitled to get maintenance allowance from the petitioner under Section 125(1)(b) of the Code of Criminal Procedure. In the above premises, she filed the above M.C. claiming maintenance allowance @ Rs.5,000/- per month.

2. The petitioner filed objection denying the paternity of the respondent and contended that the mother of the respondent had never been the wife of the petitioner. The said M.C. was filed without any bona fides and it is only an experimental exercise to defame the reputation and credibility of the petitioner in the society. It is the further case of the petitioner in the objection that the respondent's mother is the legally wedded wife of one Jayaprasad, and from 13/9/1990 onwards she has been leading a legally valid marital life with the said Jayaprasad and the respondent is the daughter born in the said wedlock with Jayaprasad. He emphatically denied the allegation that he has illicit relationship with the mother of the respondent. According to him, the said Jayaprasad is legally liable to maintain the respondent and the respondent has legal right to claim maintenance allowance from the said Jayaprasad only.

3. When the mother was cross-examined during the O.P(FC).507/14 :3: course of evidence, a question was put to her as to whether she is ready to prove the alleged paternity of the child by submitting herself to DNA test, and she answered positively. In view of the denial of paternity in the objection and the above challenge during the cross-examination of the mother, the respondent herein filed Crl.M.P. No.102/14, after the cross-examination of the mother with a prayer for directing the petitioner herein to submit himself to DNA test to prove her paternity. It was also submitted that the mother of the respondent is ready to meet all the expenses for conducting the DNA test at Rajiv Gandhi Centre for Bio-Technology, Thiruvananthapuram.

4. The petitioner herein filed objection to the above Crl.M.P. contending that the respondent was born at the time when the valid marital relationship between the mother of the child, and Jayaprasad was subsisting. So the said Jayaprasad has

the liability to maintain the respondent and the present petition filed for DNA test is not maintainable in view of the legal presumption under Section 112 of the Indian Evidence Act. So long as the earlier marriage is subsisting, the respondent is the legitimate child in that wedlock only. He prayed for dismissal of the said petition. The court below, after considering the rival contentions, passed the impugned order O.P(FC).507/14 :4: allowing the petition by directing the respondent to undergo DNA test in Rajiv Gandhi Centre for Bio-Technology, Thiruvananthapuram. The legality and propriety of this order are under challenge in this original petition.

5. Sri. George Varghese Perumpallikuttiiyil, the learned counsel for the petitioner, advanced arguments challenging the findings of the court below pointing out the rigour of legal presumption under Section 112 of the Indian Evidence Act. According to him, the DNA test on the application of the respondent is impermissible in view of the statutory legal presumption under Section 112 of the Indian Evidence Act. The sum and substance of the argument advanced by the learned counsel for the petitioner is that so long as a valid marriage is subsisting, the respondent has no right to seek a direction to the petitioner to submit himself for DNA test as the factum of valid marriage is conclusive proof of the legitimacy of the respondent under Section 112 of the Evidence Act. To fortify the said argument, the learned counsel cited the decisions in *Banarsi Dass vs. Teeku Dutta* [(2005) 4 SCC449, *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and Another* [(2010) 8 SCC633 and *Nandlal Wasudeo Badwaik vs. Lata Nandlal O.P(FC).507/14 :5: Badwaik and another* [(2014) 2 SCC576.

6. Per contra, Sri. R. Sunilkumar, the learned counsel for the respondent, contended that the term 'legitimacy' employed under Section 112 of the Indian Evidence Act and 'paternity' are distinct and different. The legal presumption of 'legitimacy' under Section 112 of the Evidence Act does not bar the conduct of a DNA test to prove the disputed paternity of a child. Since the illegitimate child is also entitled to get maintenance allowance under Section 125(1)(b) of the Cr.P.C., legitimacy pales to insignificance and the fact in issue is paternity only. Moreover, when there is a scientifically accurate, reliable and approved test is available to

prove the paternity of a child beyond doubt, no reliance can be placed on the presumptions. The learned counsel for the respondent also cited the decision in *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and Another* (2014 KHC4005) to fortify his argument in a different perspective.

7. The question to be considered is whether a direction to submit himself for the DNA test can be given to a person against whom paternity is ascribed, where a valid marriage of the mother with another person is subsisting, notwithstanding the legal presumption of legitimacy under Section 112 of the O.P(FC).507/14 :6: Evidence Act, in a maintenance case filed under Section 125(1)(b) of the Cr.P.C.?

8. The first point to be considered is, can DNA test be relied on in an enquiry to find out whether the person from whom maintenance allowance claimed is the father of the child, if he denies the paternity? In the decision in *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and Another* (2014 KHC4005), the Supreme Court considered the accuracy and reliability of the DNA test and held as given below:

"0. .... Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases - adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall O.P(FC).507/14 :7: have accurate result. It has been recognized by this Court in the case of *Kamti Devi* (supra) that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child." As has been held in the

above decision, nobody has a case that DNA test is not accurate or unreliable.

9. The next point to be considered is, what is the scope and extent of legal presumption under Section 112 of the Evidence Act? Does the presumption make the DNA test to prove the paternity of a child absolutely impermissible? U.L. Bhat (J), in the Book "Lectures on the Indian Evidence Act" desected the ingredients that constituting the said presumption, in this way: " that a person was born-- (a) during continuance of a valid marriage between his mother and any man, or (b) within 280 days after the dissolution of the marriage, mother remains unmarried, shall be conclusively proved that he is the legitimate son of that man." 10. The term "legitimacy" employed under Section 112 of the Evidence Act refers and determines the legal status of birth, O.P(FC).507/14 :8: ie. whether legitimate or illegitimate. To put it differently, legitimacy of a child is its right to be officially or legally as such. There, the question in controversy may be whether the child is born in a legally valid marriage or not. Thus, the presumption of "legitimacy" follows subsistence of a valid marriage and the same is conclusive proof of the legitimate birth of the child, unless it is rebutted by the evidence of non-access. Therefore, no evidence can be adduced for the purpose disproving it, unless and until non-access between the spouses is shown. In the decision in Nandlal Wasudeo Badwaik's case (supra), the Apex Court held as follows : "We must understand the distinction between a legal fiction and the presumption of a fact. "Legal fiction assumes existence of a fact which may not really exist. However presumption of a facts depends on a satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. S.112 of the Evidence Act does not create a legal fiction but provides for presumption." 11. Whereas, paternity is the state or fact of being father of a particular child. According to Section 125(1)(b) of the Cr.P.C., the legitimate or illegitimate minor child, whether married or not, unable to maintain itself is entitled to get maintenance allowance from his or her father, if the father O.P(FC).507/14 :9: having sufficient means neglects or refuses to maintain that child. There, the question is whether the child has been begotten in a sexual intercourse with the person from whom maintenance is claimed. An illegitimate child is also entitled to get maintenance from his father. So, legitimacy of birth is totally irrelevant and insignificant while considering the right of the child to get maintenance from his

father. In short, legitimacy and paternity are different and distinct. In our view, in that enquiry to find out the true fatherhood of a child, the legal presumption as to the legitimacy under Section 112 of the Evidence Act would not bar a scientifically accurate and approved test, if the facts and circumstances of the case tend to make such an enquiry imminently needed. When the fatherhood of a child can be determined accurately without doubt by the DNA test, there is no need to ascribe the fatherhood on an innocent person on presumption. Since the legitimacy and paternity are distinct and different and working under different spheres in different perspective, in a maintenance claim under Section 125(b) of the Cr.P.C., the presumption under Section 112 of the Evidence Act cannot be extended or stretched so as to put as a legal bar in the way of enquiry to find out the true fatherhood of a child. We are of the further opinion that in O.P(FC).507/14 :10: every enquiry, the method to be adopted depends upon the 'fact in issue' to be determined.

12. The above view is supported by a recent decision of the Apex Court in Civil Appeal No.9744 of 2014 - Dipanwita Roy vs. Ronobroto Roy. There, the DNA test of the respondent/husband and the male child born to the appellant/wife, in an application for dissolution of marriage, on the ground of adultery under the Hindu Marriage Act ordered by the High Court was challenged in the Civil Appeal. While upholding the order passed by the High Court, the Supreme Court held as follows: "9. All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13 (1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was O.P(FC).507/14 :11: aimed at the alleged adulterous behaviour of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore,

insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play".

13. In *Rajesh Francis vs. Preethi Roslin* [2012 (2) KLT613, another Division Bench of this Court observed the scope and extent of the presumption of 'legitimacy' envisaged under "Sec.112" in this way;

"2. We have considered the question whether the presumption under S.112 of the Evidence Act can be held to be limited to legitimacy of the child born and whether it can be held that the conclusive presumption applies only to legitimacy and not to paternity of the child. The contention appears to be interesting and crucially relevant. When S.112 was enacted by the legislature in 1872, science and technology had not developed to any significant extent. Authentic expert scientific evidence as to whether a person is the biological father of the offspring could not then be procured. However, with the advancements in the field of science and technology it is today possible to ascertain paternity authentically by indisputable scientific evidence. In this context the question arises whether a distinction can be drawn between legitimacy and paternity in the operation of S.112. We certainly consider the question to be very interesting. The presumption, the heading O.P(FC).507/14 :12: of the section shows is only regarding legitimacy. The semantics employed by the legislature also suggests that the presumption specifically is only regarding legitimacy. Is it possible to exclude paternity from the concept of legitimacy? What would remain and be left in the concept of legitimacy if we were to exclude paternity from the same? It is possible to take the view that legitimacy is permitted to be presumed for certain legal consequences that must follow. In that view of the matter paternity can be distinguished from legitimacy. It is not theoretically impossible for a presumed "legitimate" father to be not the biological father. Legitimacy might bring in legal consequences and obligations. When paternity can be ascertained authentically it would be perfectly permissible, nay laudable, to distinguish between legitimacy and paternity." 14. In *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another* [(2010) 8 SCC633 the Supreme Court specifically narrated the situation where DNA test can be ordered, as given below:

"2. 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 O.P(FC).507/14 :13: 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".

15. There is no conflict in the two decisions of the Supreme Court, namely, Goutam Kundu vs. State of West Bengal [(1993) 3 SCC418 and Sharda vs. Dharmपाल [(2003) 4 SCC493. In Goutam Kundu's case, 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 the court must carefully examine as to what would be the consequence of ordering the blood test.

16. In Sharda vs. Dharmपाल [(2003) 4 SCC493, the Supreme Court considered two questions: (i) Whether matrimonial court has a power to direct a party to undergo medical examination? (ii) Whether passing of such an order would be in violation of Art.21 of the Constitution of India? After elaborate discussions, the Supreme Court answered both questions positively. While concluding that a matrimonial O.P(FC).507/14 :14: 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 prime facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

17. In Nandlal Wasudeo Badwaik's case, the Apex Court considered the question whether a scientific proof accepted by the world community to be correct would prevail over the presumption of conclusive proof envisaged under Section 112 of the Evidence Act and answered positively for the reasons elaborated hereunder:

"3. We may remember that S.112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although S.112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the O.P(FC).507/14 :15: truth and the Court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former." 18. In the decision in Alexander C.C. vs. Jacob Antony Palakkathadathi @ Amith and another [2012 (3) KLJ381 a Division Bench of this Court considered the power of the Family Court to entertain application seeking direction for DNA test and this Court held as follows: "When there is a petition for guardianship or there is a case for maintenance under S.125 of Code of Civil Procedure or under S.7 of the Family Court Act, the Family Court would indeed have the power to entertain the application for DNA test. It would also have the power to incidentally decide the question of paternity. Paternity and legitimacy are distinct concepts, as held by the Division Bench. We may notice that S.125 of the Code of Criminal Procedure entitles an illegitimate minor child also to seek maintenance. The emphasis is on paternity and not on legitimacy, in a proceeding under S.125 brought by an illegitimate child. Since the claim is for maintenance alone and the Family Court, no doubt, has the O.P(FC).507/14 :16: power to decide the issue as to paternity, and the present order of the Family Court is only by way of assisting it to decide the question relating to paternity, we are of the view that there is no merit in the contention of the petitioner." 19. In all the above decisions, discussions were made in the light of the scope and extent of the presumption of legitimacy under Sec.114 of the Evidence Act also. But, none of the above decisions held a proposition that DNA test is impermissible in view of

the presumption of legitimacy under Sec.114 of the Evidence Act.

20. In the light of the above discussions enlightened by judicial precedents of the Apex Court and this Court, we hasten to hold that the direction to a person, from whom maintenance is claimed, to submit himself for DNA test is legally permissible, in a maintenance claim under Sec.125 of the Cr.P.C., in the cases where such a test is imminently needed to prove the paternity of the child which is denied by the alleged father, notwithstanding the presumption under Sec.112 of the Indian Evidence Act. The presumption under Sec.112 of the Evidence Act does not bar DNA test to prove fatherhood of a child. But, it cannot be ordered as a routine procedure and the facts and circumstances of the case must be so conducive to rely on such O.P(FC).507/14 :17: a scientific test only.

21. But, at the same time, in our view, there is no need to take coercive or forceful steps to subject the person against whom DNA test is ordered. Since DNA test is the most reliable, accurate and approved test to prove the paternity of the child as well as the innocence of a person against whom paternity is ascribed, where a person wilfully resist to undergo such a test or disobeys the direction of the court, an adverse inference can be drawn against him under the Illustration (g) of Sec.114 of the Indian Evidence Act, which is extracted below: "(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." 22. Coming to the instant case, we are satisfied with the reasons stated by the court below to issue such a direction to the petitioner to submit himself for DNA test. According to the mother of the respondent, her legally wedded husband left away a decade back and thereafter the petitioner developed illegal intimacy towards her and the same blossomed to birth of the respondent. This is a fit case where a DNA test is imminently needed, particularly when the petitioner himself challenged the mother of the respondent by putting the question in her cross-examination whether she is willing to O.P(FC).507/14 :18: undergo DNA test. She accepted the said challenge and she is ready to meet all expenses for the same. So, his subsequent withdrawal from the said challenge is not justifiable also. In all the decisions, the Supreme Court cautioned about the consequences of DNA test and held that the law leans in favour of the innocent child from being bastardised, if his mother and spouse were living together during

the time of conception. But, in the instant case, no such question would arise; but to the contrary, here, an innocent child, whose paternity stands denied, is craving for an opportunity to prove her parentage by scientific test. We are unable to deny an opportunity for the same.

23. There is no illegality or impropriety in the findings whereby the court below issued a direction to the petitioner to submit himself for DNA test. Accordingly, this Original Petition is dismissed. (V.K.MOHANAN, JUDGE) (K.HARILAL, JUDGE) okb.

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