

CASE COMMENT: APARNA AJINKYA FIRODIA VS. AJINKYA ARUN FIRODIA

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INTRODUCTION

We have often seen in our society that children are unnecessarily involved in fights between parents whether they are somehow connected to such a fight or not, without considering the impact it would have on them. One such case is this case, where the husband in order to prove adulterous relations of his wife demanded the DNA Test of his second child who was born during the existence of marriage.

The Supreme Court observes that the demand of DNA tests puts the identity and paternity of a child into peril and it often has a very negative impact on the child. It affects the child psychologically and carries a lot of social stigma. And therefore, the DNA test should be conducted in extraordinary circumstances, where the paternity of the child is in question or where there is no other evidence to prove adultery or infidelity after the parties seeking the direction of the DNA test have given sufficient evidence to rebut the presumption as contemplated under Section 112 of The Indian Evidence Act of 1872.

FACTS OF THE CASE

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(1) The appellant and the respondent got married on 23-11-2005 as per Hindu ceremonies. They have two sons namely Hridaan Firodia and Arjun Firodia who were born on 21-12-2009 and 17-12-2013 respectively.¹

(2) On 14-09-2016, the respondent found out about the adulterous relations of his wife through WhatsApp messages.

(3) Thus, on 01-06-2017, the respondent filed a divorce petition under Section 13(1) (i) and (ia) of the Hindu Marriage Act, 1956 on the ground of adultery and cruelty on the part of the wife.²

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¹ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

² *Ibid*

(4) On 9-11-2020, the respondent filed an application before Family Court seeking direction for the DNA test of his second child.³

(5) On 12-08-2021, the Family Court by an order allowed for the DNA test of their second child. The Family Court ordered that the DNA test has to be conducted at Government Central Forensic Laboratory on 14-10-2021. The Family Court laid down that if the appellant fails to comply with the directions, then the Family Court has the discretion to draw the presumption given under Illustration (h)⁴ of Section 114.⁵

(6) The appellant moved a Civil Writ Petition before the Bombay High Court against the direction of the DNA Test of the Family Court. The Appellant challenged this order to be violative of her Fundamental Right to Personal Liberty incorporated under Article 21⁶ of the Indian Constitution.⁷

(7) The High Court vide its Judgment dated 22-11-2021 upheld the order of the Family Court for conducting a DNA test of the child.⁸

(8) Aggrieved by the aforesaid judgment of the High Court, the appellant moved a special leave to appeal before the Supreme Court under Article 136⁹ of the Constitution, challenging the judgment of the Bombay High Court.¹⁰

(9) The Supreme Court granted the leave and decided to hear the case.

ISSUES RAISED

Q.1 Whether the Family Court and High Court have rightly appreciated Section 112 of the Indian Evidence Act in ordering the DNA test of Arjun?¹¹

³ Ibid

⁴ Illustration (h) of Section 114 provides that the Court may presume if a man refuses to answer a question which he is not compelled to answer by law, if given, would be unfavorable to him.

⁵ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

⁶ Protection of Life and Personal Liberty

⁷ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

⁸ Ibid

⁹ Special Leave to Appeal by the Supreme Court

¹⁰ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

¹¹ Ibid

Q.2. Whether the non-compliance of the Family Court's direction by the appellant would draw an adverse inference as to allegations of adultery as contemplated under Section 114, illustration (h)?¹²

Q.3. What order?¹³

ARGUMENTS BY PETITIONER

The key arguments advanced by the counsel on behalf of the petitioner are as follows-

(1)The DNA test shall not be allowed as the respondent fails to satisfy the eminent test laid by the Apex Court in the case of *Goutam Kundu vs. State of West Bengal*.¹⁴

(2) That the respondent fails to give strong prima facie evidence to prove non-access to rebut the presumption contemplated under Section 112¹⁵ of the Indian Evidence Act, 1872.¹⁶

ARGUMENTS BY RESPONDENT

The key arguments advanced by the counsel on behalf of the respondent is as follows-

(1)Where both the Family Court and High Court reached the same findings, then it should not be disturbed and interfered with by the Apex Court as laid down by it in the case of *Uday Chand Dutt vs. Saibal Sen*.¹⁷

(2) Any judgment in matrimonial proceedings is a judgment in rem as provided under Section 41¹⁸ of the Indian Evidence Act. Therefore, the DNA test should be allowed to arrive at a just and proper decision.¹⁹

¹² *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

¹³ *Ibid*

¹⁴ (1993) 3 SCC 418

¹⁵ Section 112 of the Indian Evidence Act provides that if a child was born during subsistence of valid marriage then it is the conclusive proof of legitimacy of such child unless it is shown by parties that they have no access to each other when the child was born.

¹⁶ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

¹⁷ (1987) Supp SCC 506

¹⁸ Section 41 of the Indian Evidence Act provides that a final judgment, decree or order of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers, declares or takes away any legal character is a judgment in rem that is it applies to the whole of the world and such judgment, decree or order is conclusive proof of legal character so conferred, declared or taken away.

¹⁹ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

(3) Section 112 of the Indian Evidence Act would not obstruct DNA tests in those cases where it is highly required to do so. The counsel refers to *Dipanwita Roy vs. Ronobroto Roy*,²⁰ where the court allowed a DNA test while saving the presumption contemplated under Section 112, and a similar approach should also be adopted in this case.²¹

(4) The most reliable and strong evidence for proving adultery is a DNA test which should not be disallowed on the grounds of privacy.²²

OBSERVATIONS BY THE COURT

1. DNA Principles: Justice Nagarathna summarized the principles of to DNA test of a minor child as follows:

- DNA tests of minor children shall not be conducted in a routine manner in case of matrimonial disputes unless there is no other way of proving infidelity.²³
- A DNA test of children who were born during the existence of marriage can only be ordered when there is strong and reliable prima facie evidence to rebut the presumption contemplated under Section 112 of the Indian Evidence Act of 1872.²⁴
- No DNA test is justified where the Paternity of the child is not a direct and substantial issue, but merely a collateral issue.²⁵
- DNA tests should only be ordered in unusual cases where it is needed to resolve the controversy relating to the paternity of the child.²⁶
- While ordering DNA tests as a means to prove adultery, the Court shall take into consideration the repercussions it will have on such a child who was born out of an adulterous relationship including repercussions as to inheritance, social stigma, etc.²⁷

2. The right of children not to have their legitimacy questioned frivolously in Courts of Law²⁸: The Court observes that one's genetic information is personal and intimate and forms part of one's right to privacy, which is protected by law and extends even to children.²⁹

²⁰ (2015) 1 SCC 365

²¹ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022

²² *Ibid*

²³ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [12]

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [12]

²⁸ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 39

²⁹ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [16]

Moreover, the right of children not to have their legitimacy frivolously questioned in any court of law is an essential attribute of their right to privacy and therefore it needs to be protected.³⁰ And therefore the court must acknowledge that children should not be viewed as material objects and should not be subjected to DNA and forensic tests in divorce proceedings where they are not party to such proceedings. The court emphasized that children should not become a focal point of contention between spouses.³¹

3. children also have the right to privacy though not equivalent to adults:³² The Court analyses various provisions of the Convention on the Rights of Child³³ and came to the conclusion that these provisions impliedly recognize a child's right to privacy which stretches from the physical to psychological integrity of the child.³⁴

Further, Article 5 of the said Convention recognizes parental rights but their exercise is restricted for the purpose of providing assistance and guidance to the child and any kind of interference with the child's body is justified and allowed only for the benefit of the child and when the same is proven by the parents.³⁵ Application of these principles to the facts of the case at hand clearly shows that there is no connection between conducting a DNA test with the assistance and guidance of the child as the same is for proving allegations of adultery.³⁶

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The Court observes that it is true that a child's right to privacy is not equal to that of adults³⁷ but it does not mean he doesn't have it. In fact, the Convention itself acknowledges that children have their own identity, and Article 8 of said Convention expressly provides them the right to preserve it.³⁸ Details of parentage form essential attribute child's identity and therefore they should not be challenged frivolously before the Court.³⁹

4. Best Interest of the Child⁴⁰: The Court carefully examines the negative impact of DNA tests on a child's psychology, when it reveals illegitimacy. Revelation as to illegitimacy often results in a child's quest to search for his real father and failure to do so causes trauma and

³⁰ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [17]

³¹ *Ibid*

³² *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [21]

³³ The Convention on the Rights of the Child, 1989

³⁴ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [19]

³⁵ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [20]

³⁶ *Ibid*

³⁷ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [21]

³⁸ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [21]

³⁹ *Ibid*

⁴⁰ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 43

frustration. It often turns up in bittering the relationship between the child and parents and the child often develops mistrust towards his parents. The precious childhood of a child may also get lost in his search for paternity. Further, this also attracts lots of social stigma towards both the child and the mother.⁴¹

5. Adverse inference cannot be drawn:⁴² Justice V. Ramasubramanian observed the presumption under Section 114, illustration (h) can only be drawn by those who refuse to answer the question. Here if the appellant in the capacity of wife raises an objection as to the DNA test of the child for her benefit, then the presumption under Section 114, illustration (h) can be raised against her. However, if the appellant raises objections as to the DNA test of the child in the capacity of a mother for the benefit of her child then no presumption under the said provision can be drawn against her.⁴³

6. Child's right to identity should not be allowed to be sacrificed:⁴⁴ Justice V. Ramasubramanian observed that whether DNA tests should be allowed or not should be decided by looking from the child's perspective and not from the perspective of the parents. The child cannot be used as a means to prove adulterous relations with the mother.

The adulterous conduct of the wife can be proved by the respondent by advancing other evidence but the identity of the child should not be compromised.⁴⁵

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Further, the Court observes that in order to give an opportunity for a fair trial, the child's rights and interests cannot be compromised⁴⁶.

JUDGMENT OF THE COURT

The division bench of the Supreme Court comprising of Justices V Ramasubramanian and B V Nagarathna in a separate and concurring judgment held that the in the instant case it is not in the 'best interest of the child' to allow for the DNA test where the ultimate object for demanding DNA test is not for determining parentage of the child but for proving allegations of adultery which can be proved by adducing any other evidence. Also, since the respondent did not raise any plea of non-access to rebut the presumption under Section 112 of the Indian

⁴¹ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [22.3]

⁴² *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [29]

⁴³ *Ibid*

⁴⁴ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [33]

⁴⁵ *Ibid*

⁴⁶ *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia* SLP (C) No.9855/2022 [45]

Evidence Act, no prima facie case has been made out. Further, no adverse inference can be drawn as to the illegitimacy of Master Arjun where the appellant disallowed the paternity test of her child. Thus, the Family Court as well as the High Court were wrong in allowing the application of the respondent for subjecting the child to a DNA test and therefore the appeal was allowed, setting aside the order of DNA test.

The Court however clarified that the husband (respondent) can give any other evidence for providing allegations of adultery against his wife (appellant) in a divorce petition. The Court further ordered the respondent to pay the cost of Rs. 1 lakh to the appellant before the Family Court within one month from the date of judgment.

ANALYSIS AND CONCLUSION

It is the duty of the Court to protect those who are unable to protect themselves. Further, it's its duty to see that its decision should prejudice no one, especially children.

The good thing about the judgment is that the Court delivered it by taking into consideration the psychological and social impact of the DNA test on the child when he comes to know about his being an illegitimate child. Moreover, it carefully examines the psychological and behavioral changes that took place in a child after the revelation of his illegitimacy. The court also acknowledges a child's right to privacy and integrity as recognized and protected under the Convention on the Rights of the Children, 1989, and Article 21 of the Indian Constitution and protects it through this judgment.

Also, the Court carefully analyzed the law contemplated under Section 112 and Section 114, illustration (h), and gave its decision accordingly. Further, the court held that DNA tests should not be allowed in a routine way where the legitimacy of the child is not in question and where there is material evidence to prove the case. But the Court laid down that DNA tests can only be demanded in two situations-

1. When the legitimacy of the Child is in question.
2. When there is no other evidence to prove the case of adultery.

However, it is subject to Section 112 of the Indian Evidence Act.

Thus, the Court gave a very remarkable judgment balancing both the interest of the child and also the interests of the parties.

Further, the Court by its judgment held the appellant as being a mother is the natural guardian of the child and can refuse the DNA Test of the child in its best interest thus reestablishing that mother have equal rights as the father to decide whether a particular act is in the best interest of the child or not and if it is not in the best interest of the child, then she has an equal right to refuse to do of such act. Moreover, if the mother is in the best interest of the child and refuses the DNA test then no adverse inference can be drawn against her under Illustration(h) of Section 114 of the Indian Evidence Act,1872.

Hence, the judgment was in concurrence with the correct position of law. And it will guide the courts in future cases that the DNA test should be allowed not in a routine fashion but only in exceptional cases where there is no cogent or clear evidence to prove the adultery or where the question of the legitimacy of a child is itself in question and where the condition of Section 112 is satisfied.

