VERDICTUM.IN

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE SHAMPA DUTT (PAUL)

CRR 3189 OF 2023

LOB DAS
VS.
THE STATE OF WEST BENGAL & ANOTHER.

For the Petitioner	:	Mr. Dipankar Aditya, Ms. Tina Biswas.
For the State	:	Mr. Bibaswan Bhattacharya.
Hearing concluded on	:	21.11.2024
Judgment on	:	02.12.2024

SHAMPA DUTT (PAUL), J. :

1. The present revisional application has been preferred against an order dated 01.08.2023 passed by the learned Additional Sessions Judge, 1st Court, Katwa in S.C. case no.77 of 2008 arising out of Katwa PS case no.177 of 2008 dated 22.06.2008 under Sections 376 and 420 of the Indian Penal Code.

VERDICTUM.IN

2. The petitioner's/accused's case is that the de facto complainan[redacted] lodged a written complaint, stating inter alia that his daughter / Victim Girl fell in love with the present petitioner. The petitioner used to stay in his maternal uncle's house at Jagadanandapur, Katwa. At that time his daughter was 17 or 18 years old and later the complainant came to know that due to intimacy and a promise to marry, his daughter was in a physical relationship for which she conceived. The complainant came to know the fact when the doctor of the concerned hospital at Katwa informed him. The de facto complainant prayed that the administration should compel the present petitioner to marry his daughter.

3. On the basis of the said complaint, the case in the present revisional application was registered. On completion of investigation, the investigating agency filed charge sheet under Sections 376 and 420 of IPC. Charge was also framed under the said Sections and the trial commenced. **During cross-examination, the victim girl specifically agreed to undergo a paternal test for herself and her son to prove that Dasarath is the son of the petitioner.**

4. It is the case of the petitioner/accused that the victim girl was in a relationship with one Ramkrishna Das and it was admitted by the victim girl in her cross-examination. **The petitioner filed an**

VERDICTUM.IN

application dated 24.01.2023 praying for DNA test of the victim girl and her child. The learned Judge rejected the said application of the petitioner on the ground that the specific test will waste the learned Court's time.

5. **The order under revision is as follows:-**

*"....**Order No.117 dt. 1.8.23***

On behalf of Accd Lob Das an absent ptn is filed.

Ld. PP & Ld. Defence lawyers are present.

Hd. Considered. Absent ptn is allowed.

Today is fixed for passing order in respect of ptn dt.24.1.23.

Perused the ptn dt.24.1.23. Considered.

It is stated in the ptn that victim girl and other witnesses have alleged that due to the reason of rape victim girl became pregnant and thereafter gave birth of a child. It is further stated that due to the above reason DNA test of the accd and the child of said victim girl is required for the interest of this case. It is also stated that victim girl during cross examination agreed for DNA test. It is also stated that accd/ptnr will bear all the expenditure of DNA test.

At the time of hearing Ld. Defence lawyer repeated the facts mentioned in the ptn and in support of his submission referred a decision of Hon'ble Calcutta High Court reported in (2016) WBLR (Cal) 705.

On the contrary Ld. PP raised strong objection and submitted that at this stage this type of ptn cannot be entertained. He in support of his submission referred a decision of Hon'ble Supreme Court reported in 1993 CRI.L.J. 3233.

On perusal of both the decisions I find that decision referred by Ld. Defence lawyer is relating to divorce case and decision referred by Ld. PP is relating to a case filed u/s 125 Cr.PC.

VERDICTUM.IN

However the instant case is relating to an offence punishable u/s 376 of IPC. On plain reading of the FIR I find that by giving assurance of marriage accd committed sexual intercourse with the victim girl and thereafter she became pregnant and gave birth of a child. From the statement of VG recorded u/s 164 Cr.PC I find the same fact.

From the above circumstances I find that offence was continuous one. So it is clear from the above circumstances that only to delay the matter further this ptn has been filed at the time of examination of accd persons u/s 313 Cr.PC. Hence ptn is rejected with a cost of Rs.1000/-.

Fix 11.8.23 for examination u/s 313 Cr.P.C.

D/C by me

Sd/-
ASJ, 1st Court,
Katwa..........”

6. The question before this court is now, as to whether a DNA examination of the victim girl and her child is necessary in the present case or not for its proper adjudication.

7. Admittedly, the proceeding is under Section 376 and 420 of IPC. It is now to be seen as to whether a DNA examination can be directed in such a proceeding, keeping in mind the rights of the child in the present case.

8. The specific case of the petitioner is that there was **no access** of the petitioner to the victim girl and, as such, the child born to the victim girl is not the child of the petitioner.

9. The judgment of the Hon’ble Supreme Court in ***Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia, in Civil Appeal No. .... of 2023 (Arising Out Of SLP (C) No.9855/2022)*** has been placed

VERDICTUM.IN

before this Court. On going through the said judgment and also the facts taken into consideration by the Hon'ble Apex Court while allowing a DNA test, the views of the Court has been laid down in the said judgment. The said judgment relates to a case whereby the husband in a **subsisting marriage** challenged the paternity of child and claimed non access to prove infidelity of his wife.

10. The Court keeping in mind the rights of the child did not permit the said test, relying upon Sections 112 and 114 of the Indian Evidence Act, 1872.

11. The exception to the said Sections was taken into consideration by the Hon'ble Supreme Court in the case of ***Dipanwita Roy vs. Ronobroto Roy*** *reported* ***(2015) 1 SCC 365,*** **where the petitioner had agitated non-access to the relationship.**

12. The following extract of the decision in ***Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia (Supra)*** are relevant in the present case :-

> *"**Nagarathna.J***
>
> ***8.7.*** *Section 112 was enacted at a time when modern scientific tests such as DNA tests, as well as Ribonucleic acid tests ('RNA', 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 vs. Poshi Ram, (2001) 5 SCC 311.***

10.1. *However, it is necessary to distinguish the facts of the present case with the facts in Dipanwita Roy. In the said case, the respondent husband had made a specific plea of non-access in order to rebut the presumption under Section 112. He made clear and categorical assertions in the petition filed by him alleging infidelity. He even named the person who was the father of the male child born to the appellant-wife, and asserted that at the relevant time, he and his wife did not share a bed on any occasion. In that backdrop, this Court specifically recorded a finding that in the facts and circumstances of the said case, it would have been impossible to prove the allegations of adultery/infidelity in the absence of a DNA test. However, in the present case, no plea has been raised by the respondent-husband as to non-access in order to dislodge the presumption under Section 112 of the Evidence Act. Further, the respondent has specifically claimed that he is in possession of call recordings/transcripts, and the daily diary of the appellant, which would point to the infidelity of the appellant. Therefore, this is not a case where a DNA test would be the only possible way to ascertain the truth regarding the appellant's adultery. Hence, in the present case, there is insufficient material to dislodge the presumption under Section 112 of the Evidence Act and permit a DNA test of Master "X".*

Further, having regard to the compelling need for a DNA test in the said case, in order to establish the truth, this Court directed that if the appellant-wife therein refused to comply with the direction of the Court regarding DNA test, the allegations of adultery as against her would be determined by drawing an adverse inference as contemplated under Illustration

VERDICTUM.IN

(h) of Section 114 of the Evidence Act. However, such an observation made in the said case cannot be regarded as a precedent which can be applied to all cases in a strait jacket manner wherein the wife refuses to comply with the direction of the Court regarding DNA test.

It is highlighted at this juncture that presumptions are established on the basis of facts, and the Court enjoys the discretionary power, either to presume a fact or not. As observed hereinabove, the facts in Dipanwita Roy were so compelling, so as to justify a direction to conduct a DNA test. In the said case, the husband had taken a specific plea of non-access. Further, the Court accepted that a DNA test would be the only manner in which the case of adultery could be proved. However, facts of the present case neither warrant a direction to conduct a DNA test of Master "X", nor do they justify drawing an adverse inference as against the appellant-wife, under Section 114 of the Evidence Act, on her refusal to subject her son to a DNA test.

As per ***Black's Law Dictionary, 9th Edition,*** *'Inference' means "a conclusion reached by considering other facts and deducing a logical consequence from them."*

'Adverse Inference' is explained as follows:

"A detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control. Some courts allow the inference only if the party's failure is attributable to bad faith."

The aforesaid meaning would also suggest that inferences, whether adverse or otherwise, are to be drawn by the Court, on consideration of facts and circumstances of each individual cases. Hence, the judgment of this Court in ***Dipanwita Roy*** *is to be read in the aforesaid context.*

In the instant case, there is no dispute about the paternity of Master "X" as even during the course of arguments, Learned Senior Counsel Shri Kapil Sibal admitted that Master "X" was born during the continuous cohabitation of the parties and thus during the subsistence of a valid marriage. The thrust

VERDICTUM.IN

of the submissions of Learned Senior Counsel Shri Kapil Sibal was that if the appellant herein does not agree to subject Master "X" to a DNA test, then, an adverse inference could be raised against her regarding her adulterous life. What is the nature of the adverse inference that could be raised against the appellant herein? The adverse inference is not with regard to Master "X" being a child born outside wedlock and therefore an illegitimate child. What was contended was that an adverse inference regarding adultery on the part of the appellant herein could be raised. We cannot accede to such an approach in the matter. The issue of paternity of Master "X" is alien to the issue of adultery on the part of the appellant herein. Master "X "being a legitimate child of the parties herein has nothing to do with the alleged adultery on the part of the appellant herein. Hence, the judgment of this Court in Dipanwita Roy is of no assistance to the respondent herein. The aforesaid case, turns on its own facts and cannot be relied upon as a precedent having regard to the facts of this case.

Use of DNA profiling technology as a means to prove adultery:

11. *With the advancement of science, DNA profiling technology which is a tool of forensic science can, in case of disputed paternity of a child by mere comparison of DNA obtained from the body fluid or body tissues of the child with his parents, offer infallible evidence of biological parentage. But, it is not always necessary to conduct a DNA test to ascertain whether a particular child was born to a particular person, however, the burden of proof is on the husband who alleges illegitimacy. He has to establish the fact that he has not fathered the child born to his wife which is a negative plea by positive proof in accordance with Section 112 of the Evidence Act.*

11.1. *A Family Court, no doubt, has the power to direct a person to undergo medical tests, including a DNA test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution, vide Sharda. However, the Court should exercise such power only when it is expedient in the interest of justice to do so, and when the fact situation in a given case warrants such an exercise.*

VERDICTUM.IN

Thus, an order directing that a minor child be subjected to DNA test should not be passed mechanically in each and every case.

11.2. *This Court has, while considering questions connected with Section 112 of the Evidence Act, consistently expressed the stand against DNA tests being ordered on a mere asking. Further, the law does not contemplate use of DNA tests as exploratory or investigatory experiments for determining paternity. The following decisions of this Court are highly instructive in determining the circumstances under which a DNA test may be ordered by a Court in matters involving disputed questions of paternity:*

i. In ***Goutam Kundu,*** *this Court was required to consider whether a blood test of a minor child could be ordered to be conducted as a means to determine disputed questions of paternity in what was essentially a matrimonial dispute concerning maintenance. In the said case, the appellant-husband therein 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. According to him, if that could be established, he would not be liable to pay maintenance. In that context, this Court held that due deference must be accorded to the presumption of legitimacy of a child born during the subsistence of a marriage, as expressed under Section 112 of the Evidence Act. The consequence of the said presumption on the power of the Courts to direct blood test as a means to determine paternity in matrimonial disputes was discussed by this Court, and the following principles were culled out so as to guide the Courts in issuing such directions:*

"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.

VERDICTUM.IN

(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."

ii. In ***Bhabani Prasad Jena,*** *this Court emphasised that a direction to use DNA profiling technology to determine the paternity of a child, is an extremely delicate and sensitive aspect. Therefore, such tests must be directed to be conducted only when the same are eminently needed. That DNA profiling 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. It was further declared that a Court may direct that a DNA test be conducted, to conclusively determine paternity, only when there is a strong prima-facie case in favour of the person seeking such a direction.*

iii. In ***Inayath Ali vs. State of Telangana,*** *MANU/SC/1538/2022, the question before this Court was whether a DNA test of two minor children could be ordered by a Court, with a view to facilitate proof of allegations under Sections 498A, 323, 354, 506 and 509 of Indian Penal Code, 1860. This Court speaking through Aniruddha Bose, J. at the outset took note of the fact that the dispute was essentially one relating to dowry related offences, and that paternity of the children of the complainant was not directly related to the allegations. The complainant therein sought for a direction to conduct DNA test of her two minor children, in order to establish that they were born as a result of her forced relationship with her brother-in-law. Rejecting the complainant's plea, this Court held as under as to the power of Courts to subject children to DNA testing, in proceedings in which their status is not required to be examined:*

"In the present proceeding, we are taking two factors into account which have been ignored by the Trial Court as also the Revisional Court. The Trial Court

VERDICTUM.IN

allowed the application of the respondent no.2 mechanically, on the premise that the DNA fingerprint test is permissible under the law. High Court has also proceeded on that basis, referring to different authorities including the case of ***Dipanwita Roy v. Ronobroto Roy*** *[2015 (1) SCC 365]. The ratio of this case was also examined by the Coordinate Bench in the decision of* ***Ashok Kumar (supra).***

7. The first factor, which, in our opinion, is of significance, is that in the judgment under appeal, blood sampling of the children was directed, who were not parties to the proceeding nor were their status required to be examined in the complaint of the respondent no.2. This raised doubt on their legitimacy of being borne to legally wedded parents and such directions, if carried out, have the potential of exposing them to inheritance related complication. Section 112 of the Evidence Act, also gives a protective cover from allegations of this nature. *The said provision stipulates:-*

"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."*

8. *In our opinion, the* ***Trial Court as also the Revisional Court had completely ignored the said factor and proceeded as if the children were material objects who could be sent for forensic analysis.*** *The other factor, in our opinion, which was ignored by the said two Courts is that the* ***paternity of the children was not in question in the subject-proceeding.***

9. *The substance of the complaint was not related to paternity of the children of the respondent no.2 but the question was whether the offences under the aforesaid provisions of the 1860 Code was committed against her or not.* ***The paternity of the two daughters of the respondent no.2 is a collateral factor to the allegations on which the criminal***

VERDICTUM.IN

case is otherwise founded. *On the basis of the available materials, in our opinion, the case out of which this proceeding arises could be decided without considering the DNA test report. This was the reasoning which was considered by the Coordinate Bench in the case of* ***Ashok Kumar (supra), though that was a civil suit. Merely because something is permissible under the law cannot be directed as a matter of course to be performed particularly when a direction to that effect would be invasive to the physical autonomy of a person.*** *The consequence thereof would not be confined to the question as to whether such an order would result in testimonial compulsion, but encompasses right to privacy as well.* ***Such direction would violate the privacy right of the persons subjected to such tests and could be prejudicial to the future of the two children who were also sought to be brought within the ambit of the Trial Court's direction."***

(Emphasis by us)

12. *Having regard to the aforesaid discussion, the following principles could be culled out as to the circumstances under which a DNA test of a minor child may be directed to be conducted:*

i. That a DNA test of a minor child is not to be ordered routinely, in matrimonial disputes. Proof by way of DNA profiling is to be directed in matrimonial disputes involving allegations of infidelity, only in matters where there is no other mode of proving such assertions.

ii. DNA tests of children born during the subsistence of a valid marriage may be directed, only when there is sufficient prima-facie material to dislodge the presumption under Section 112 of the Evidence Act. Further, if no plea has been raised as to non-access, in order to rebut the presumption under Section 112 of the Evidence Act, a DNA test may not be directed.

iii. A Court would not be justified in mechanically directing a DNA test of a child, in a case where the paternity of a child is not directly in issue, but is merely collateral to the proceeding.

iv. Merely because either of the parties have disputed a factum of paternity, it does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference based on such evidence, or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the Court can direct such test.

v. While directing DNA tests as a means to prove adultery, the Court is to be mindful of the consequences thereof on the children born out of adultery, including inheritance-related consequences, social stigma, etc.

25. *Another aspect that needs to be considered in the instant case is whether, for a just decision in the divorce proceedings, a DNA test is eminently necessary. This is not a case where a DNA test is the only route to the truth regarding the adultery of the mother. If the paternity of the children is the issue in a proceeding, DNA test may be the only route to establish the truth. However, in our view, it is not so in the present case. The evidence of DNA test to rebut the conclusive presumption available under Section 112 of the Evidence Act,* ***can be allowed only when there is compelling circumstances linked with 'access', which cannot be liberally used as cautioned by this Court in Dipanwita Roy.***

26. ....

iii. No plea has been raised by the respondent-husband herein as to non-access in order to dislodge the presumption under Section 112 of the Evidence Act. Therefore, no prima-facie case has been made out by the respondent which would justify a direction to conduct a DNA test of Master "X".

Justice **V. Ramasubramanian,** concurring held:-

*"**V. Ramasubramanian, J.***

***"22.** As we have indicated elsewhere, if one of the parties to the marriage shows that he had no access to the other at the time when the child could have been begotten, then Section 112 itself does not get attracted. On the contrary, if the parties have had access to each other at the relevant point of time, the fate of the question relating to legitimacy is sealed.*

***26.** There is another fallacy in the argument of the respondent. It is the contention of the respondent that he is seeking an 68 adverse inference to be drawn only as against the wife under Section 114(h), upon the refusal of the wife to subject the child to DNA test. But the stage at which the wife may refuse to subject the child to DNA, would arise only after the Court comes to the conclusion that a DNA test should be ordered. To put in simple terms, there are three stages in the process, namely, (i) consideration by the Court, of the question whether to order DNA test or not; (ii) passing an order directing DNA test, after such consideration; and (iii) the decision of the wife to comply or not, with the order so passed. The respondent should first cross the outer fence namely whether a DNA test can be ordered or not. It is only after he convinces the Court to order DNA test and successfully secures an order that he can move to the inner fence, regarding the willingness of the wife to abide by the order. It is only at that stage that the respondent can, if at all, seek refuge under Section 114(h).*

***29.** Therefore, Section 114(h) has no application to a case where a mother refuses to make the child undergo DNA test. It is to be remembered that the object of conducting a DNA test on the child is primarily to show that the respondent was not the biological father. Once that fact is established, it merely follows as a corollary that the appellant was living in an adulterous relationship.*

***30.** What comes out of a DNA test, as the main product, is the paternity of the child, which is subjected to a test. Incidentally, the adulterous conduct of the wife also stands established, as a by-*

> *product, through the very same process. To say that the wife should allow the child to undergo the DNA test, to enable the husband to have the benefit of both the product and the byproduct or in the alternative the wife should allow the husband to have the benefit of the by-product by invoking Section 114, if she chooses not to subject the child to DNA test, is really to leave the choice between the devil and the deep sea to the wife.*
>
> ***35.** Attractive as it may seem at first blush, the said argument does not carry any legal weight. The lis in these cases is between the parties to a marriage. The lis is not between one of the parties to the marriage and the child whose paternity is questioned. To enable one of the parties to the marriage to have the benefit of fair trial, the Court cannot sacrifice the rights and best interests of a third party to the lis, namely, the child."*

13. **In the present case, there is admittedly no marriage between the parties.** The victim girl claims the child to be that of the petitioner. On the other hand, **the petitioner denying the paternity of the child has claimed non access to the relationship.**

14. **Thus, when "non-access" is claimed in such a relationship, it is the right of the accused to have the same proved by way of evidence available/possible.**

15. The Hon'ble Supreme Court in the case of ***Dipanwita Roy vs. Ronobroto Roy , (2015) 1 SCC 365, decided on 15th October, 2014,*** held as follows:- (Para 10)

> *"**10.** The learned counsel for the appellant wife also invited our attention to a decision rendered by this Court in Goutam Kundu v. State of W.B. [(1993) 3 SCC*

VERDICTUM.IN

418 : 1993 SCC (Cri) 928] , wherein this Court, inter alia, held as under : (SCC p. 428, para 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."

Reliance was also placed on the decision rendered by this Court in Kamti Devi v. Poshi Ram [(2001) 5 SCC 311 : 2001 SCC (Cri) 892 : AIR 2001 SC 2226] , wherefrom, the following observations made by this Court, were sought to be highlighted : (SCC pp. 315-16, paras 9-11)

"9. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'être is the legislative concern against illegitimatising a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

10. 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

VERDICTUM.IN

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 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.

11. … Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband."

(emphasis supplied)

18. *We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent husband against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the court concerned by drawing a presumption of the nature contemplated in Section 114 of the Evidence Act, especially, in terms of Illustration (h) thereof. Section 114 as also Illustration (h), referred to above, are being extracted hereunder:*

*"**114. Court may presume existence of certain facts**.—The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events,*

VERDICTUM.IN

> *human conduct and public and private business, in their relation to the facts of the particular case."*
> *"Illustration (h)—that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;"*
> *This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."*

16. But in a case as the present one, where there is admittedly no marriage and the allegations includes offence under Section 376 IPC of the Indian Penal Code among others, the paternity of the child if 'positive' shall prima facie prove access to the relationship. But then the questions to the proof of offence under Section 376 IPC and other offences is to be proved by way of relevant evidence to prove such offences.

17. If 'negative' it will strengthen the defense of the petitioner of 'non-access' to the relationship and the petitioner will then be entitled to relief as provided under the law.

18. Thus, the prayer of the petitioner is required to be allowed, not only, in the interest of justice, but also in exercise of a valuable right available to the petitioner, which if denied shall be an abuse of the process of law. ***(Dipanwita Roy vs. Ronobroto Roy (Supra), paragraph 16)***

VERDICTUM.IN

19. Thus, the order under revision dated 01.08.2023 passed by the learned Additional Sessions Judge, 1st Court, Katwa in S.C. case no.77 of 2008 arising out of Katwa PS case no.177 of 2008 dated 22.06.2008 under Sections 376 and 420 of the Indian Penal Code being not in accordance with law is set aside.

20. Keeping with the view of the court in ***Dipanwita Roy vs. Ronobroto Roy (Para 7) (Supra),*** the petitioner is directed to deposit a sum of Rupees one Lakh with the trial court, which in case the test is 'positive' shall be given to the victim girl and her child.

21. Needless to say 'if negative' the amount shall be withdrawn by the petitioner with leave of the trial Court.

22. The D.N.A. test of the child be conducted as per the guidelines in ***Dipanwita Roy vs. Ronobroto Roy (Supra), paragraph 7.***

23. **CRR 3189 of 2023 is allowed.**

24. **Trial Court to complete the total procedure preferably within 60 days from the date of this order and then proceed in accordance with law.**

25. All connected application, if any, stands disposed of.

26. Interim order, if any, stands vacated.

VERDICTUM.IN

27. Let a copy of the Judgment be sent to the learned trial court at once.

28. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties, expeditiously after complying with all necessary legal formalities.

[Shampa Dutt (Paul), J.]