2024:DHC:674-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 22.01.2024
% *Judgement pronounced on :31.01.2024*

\+ **MAT.APP.(F.C.) 29/2024 and CM APPL. 3805/2024**

..... Appellant

Through: Mr Ashish Negi, Advocate.

versus

..... Respondent

Through: None.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE AMIT BANSAL
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

I. Prefatory facts:

1. At the outset, we must state that, even according to the appellant/husband, there is a delay of 195 days in filing the appeal. However, we intend to deal with the matter on merits as we expect that the point in issue could also be agitated in other cases.

2. Via the instant appeal, the appellant/husband seeks to assail the order dated 08.06.2023 passed by the learned Judge, Family Court-01, South Saket, Delhi [hereafter referred to as "Family Court"], whereby, the Family Court rejected his application seeking issuance of a direction to the respondent/wife and the minor child birthed by the respondent/wife to give

their blood samples for conducting a paternity test. The apparent purpose behind the appellant/husband seeking such direction is to establish the respondent's/wife's adulterous conduct, the child being the pawn.

3. Against the backdrop of this central issue, the following dates and events, which are not in dispute, must be noticed.

3.1 On 05.10.2008, the marriage between the disputants was solemnized.

3.2 On 18.07.2014, the respondent/wife gave birth to a male child.

3.3 A petition for dissolution of marriage was filed by the appellant/husband on 31.01.2020. The principal ground on which the said divorce petition was instituted is founded on cruelty. Hence, recourse was taken to the provisions of Section 13(1)(ia) of The Hindu Marriage Act, 1955 [in short, "HMA"]. The appellant/husband avers that it is after he had filed a divorce action that on 21.08.2020, the respondent/wife lodged a petition [MC/298/2020] before the concerned court under The Protection of Women From Domestic Violence Act, 2005 [in short, "Domestic Violence Act"].

3.4 On 03.11.2020, the appellant/husband moved an application seeking amendments to the divorce petition. By this application, the appellant/husband sought to incorporate paragraphs that would, according to him, establish that he was suffering from azoospermia [i.e. "no sperm count"] and hence, the child purportedly born from his wedlock with respondent/wife did not bear the imprint of his paternity.

3.5 The record discloses that *via* order dated 11.11.2022, the Family Court Judge allowed the application seeking amendments in the pending divorce petition, *albeit*, subject to costs of Rs. 3,000/- being paid to the respondent/wife. The respondent/wife was directed to file an amended

written statement. Likewise, the appellant/husband was granted leave to file a replication *qua* the amended written statement.

3.6 It is against this background that the appellant/husband moved an application on 30.01.2023, whereby, in substance, a direction was sought from the Family Court to the effect that the respondent/wife and the child should be asked to give their blood samples so that the minor child's paternity could be ascertained.

3.7. The Family Court declined the request. The Family Court based its decision broadly on the rationale that since the appellant/husband lived with the respondent/wife between 2008, when the marriage took place, and 2019, when they started living separately, the paternity of the child could not be questioned given the presumption that the law makes under Section 112 of The Indian Evidence Act, 1872 [in short, "Evidence Act"]. The Family Court also relied upon the judgment of the Supreme Court in ***Aparna Ajinkya Firodia v. Ajinkya Arun Firodia*** 2023 SCC OnLine SC 161 in support of its conclusion. The Family Court specifically mentioned that the appellant/husband had not taken the plea that he had no access to the respondent/wife in the aforementioned period.

II. Analysis and Reasons:

4. Having heard the learned counsel for the appellant/husband and perused the record, our view is as follows.

4.1 As alluded to above, the dates and events concerning marriage, the birth of the child and the period during which the parties lived together are not in dispute. Therefore, the birth of the child during the continuance of a valid marriage between the appellant/husband and the respondent/wife

would foreclose the challenge to the child's legitimacy unless paternity itself was an issue in the *lis* between the disputants, say between the child and their parent. Notably, the *lis* in the instant case is between the disputants/couple who entered matrimony on 05.10.2008. According to the appellant/husband, the marriage should be dissolved because of the cruelty inflicted on him by the respondent/wife. As adverted to above, in this regard, recourse is taken to the provisions of Section 13(1)(ia) of the HMA. This is how the action for divorce was initially framed. To begin with, the appellant/husband had not referred to the fact that because he was suffering from azoospermia, the respondent/wife could not have conceived a child except through in-vitro fertilization [IVF] or *via* a sperm donor. This aspect was introduced in and about 03.11.2020 *via* an amendment application, which was allowed, as noticed above, on 11.11.2022.

5. Azoospermia is a condition where a person's ejaculate does not contain spermatozoa.[1] In other words, there is an absence of live spermatozoa in the semen. There could be various causes for such a condition, including obstruction of the tubules or ducts, i.e., the reproductive tract, or even due to infection, retrograde ejaculation or aspermatogenesis. Thus, azoospermia is categorized under two heads: obstructive and non-obstructive.[2]

5.1 Thus, there are many causes for such sufferance, some of which are treatable, while in other cases, it is possible to retrieve a live sperm, which can be used in assisted reproductive techniques such as IVF.

6. Therefore, apart from anything else, it is in the realm of possibility,

[1] *[See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, SAUNDERS ELSEVIER 31st ed., 190*]*.
[2] *Id*.

despite the appellant/husband's assertion to the contrary, that the child bears his paternity. That said, the appellant's/husband's endeavour to establish that the respondent/wife had sexual intercourse voluntarily with a person other than the appellant/husband – is an aspect which may become the subject-matter of trial before the Family Court.

7. In our opinion, the appellant/husband cannot, by a sidewind, impact the interest of the child who is not a party to the proceedings. The Family Court would have to take into account the evidence that the parties may lead to arrive at a conclusion, as suggested by the appellant/husband, that the respondent/wife had sexual intercourse voluntarily with a person other than the appellant/husband. Whether or not the respondent/wife had had an adulterous relationship could be gone into without subjecting the child to a paternity test. This view finds resonance in the following observations made by the Supreme Court in the case of ***Aparna Ajinkya Firodia v. Ajinkya Arun Firodia*** 2023 SCC OnLine SC 161:

> "*122. As rightly contended by Shri Huzefa Ahmadi, learned senior counsel for the appellant,* ***the question as to whether a DNA test should be permitted on the child, is to be analyzed through the prism of the child and not through the prism of the parents. The child cannot be used as a pawn to show that the mother of the child was living in adultery. It is always open to the respondent-husband to prove by other evidence, the adulterous conduct of the wife, but the child's right to identity should not be allowed to be sacrificed***."
>
> [Emphasis is ours]

8. In this case, concededly, the disputants/couple lived together as husband and wife between 2008 and 2019. Given this undeniable fact, the presumption in favour of legitimacy under Section 112 of the Evidence Act springs forth *qua* the minor child. What also weighs against the appellant/husband is that he chose not to question the paternity of the child till November 2020, when an application was preferred to seek amendments

in the divorce action instituted by him. Thus, whether the respondent /wife had been involved in an adulterous relationship, as alleged, is an aspect that will have to go to trial.

III. Conclusion:

9. Thus, given the foregoing discussion, we find no good reason to interfere with the judgment. The appeal is, accordingly, dismissed. The pending application is rendered inefficacious and hence closed.

(RAJIV SHAKDHER)
JUDGE

(AMIT BANSAL)
JUDGE

January 31, 2024 / tr