

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P. (C) No. 576 of 2012

Lakhan Kumar Mandal, son of Sri Gobind Mandal, resident of village
Chunglo, Post Office Tara, Police Station Jamua, District Giridih

... .. **Plaintiff/Petitioner**

Versus

Foolmati Devi, Daughter of Chatri Mandal, resident of village Belatand,
Post Office Tara, Police Station Jamua, District Giridih

... .. **Defendant/Respondent**

CORAM: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Petitioner

: Mr. A. K. Das, Advocate
Mr. Siddharth Jain, Advocate
Mr. Vineet Sinha, Advocate

For the Respondents

: Mr. Amit Sinha, Advocate

Reserved On: 10.03.2026

Pronounced On: 29.06.2026

1. This writ petition has been filed challenging the order dated 17.12.2011 passed by the learned Principal Judge, Giridih in Title (Matrimonial) Suit No. 16 of 2008, whereby the petition dated 25.06.2010 filed by the petitioner-husband for D.N.A. Test of his alleged illegal son, namely, Rahul begotten to respondent-wife from person other than the spouse has been rejected.

Argument of the petitioner

2. Learned counsel for the petitioner has submitted that the specific case of the petitioner was that the marriage was solemnized on 12th July 2000 and thereafter in the month of January 2001, the petitioner went to Surat and got himself engaged in a private firm and lived there till April 2002 and came back home on 03.05.2002 and when he went to his *sasural* to meet the defendant (wife), he found his wife in advance stage of pregnancy and as such a *Panchayati* was convened on 05.05.2002 wherein the defendant and her parents accepted the fault of the defendant. The child was born on 01.06.2002.

3. It is the further case of the petitioner that even after birth of the child, the defendant has been living in adultery which has caused mental shock and agony to the petitioner. In the meantime, the defendant had also filed a criminal case with regard to demand of dowry against the petitioner on 22.01.2004. It was the case of the petitioner that he was living separately from the defendant since January 2001 and ultimately, the divorce case was filed.

4. The learned counsel for the petitioner submits that the defendant had contested the divorce case and after the fourth witness of the plaintiff was examined by the court, a petition dated 25.06.2010 was filed for DNA test of the child. The learned counsel has submitted that in the petition seeking DNA test, it has been asserted that in between January 2001 to April 2002, the petitioner was continuously in Surat and he never cohabited with the respondent. He submits that the application for DNA test was contested by the wife and the learned court has dismissed the petition *inter alia* by observing that the child was a necessary party in the proceedings and it has also been observed that the law stipulates that although the result of 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 for a decree of proof of non-access for rebutting that conclusiveness must be there to ensure that there was no possibility of the child being conceived through the husband. The learned counsel has also submitted that it has also been recorded in the impugned order that on earlier occasion relating to criminal case, the prayer for DNA test of the child was rejected. The learned counsel has submitted that in a divorce case based on adultery, the child is not a necessary party.

5. The learned counsel for the petitioner has submitted that aforesaid aspect of the matter has been considered by the Hon'ble Kerala High Court in the judgment reported in **2021 SCC OnLine Ker. 3458** and has referred to paragraph 11 of the said judgment, which is quoted as under: -

“11. The court below rejected the prayer for DNA test mainly on the ground that the child was not made a party in

the application. There are two tests for determining the question whether a particular party is a necessary party to the proceedings or not: (1) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question; and (2) It should not be possible to pass an effective decree in the absence of such a party. It is pertinent to note that the original petition (OP No. 1921/2013) is not one under S.7 (1) r/w Explanation (e) of the Family Courts Act for a declaration as to the legitimacy of any person. The petition is only for dissolution of marriage u/s 13 of the Hindu Marriage Act. The presence of child does not have any bearing whatsoever in deciding the petition for dissolution of marriage on merit. The illegitimacy or paternity of the child is only incidental to the claim for dissolution of marriage on the ground of adultery or infidelity. The child's presence is not necessary to adjudicate the relief claimed. The finding, if any, as to the paternity or legitimacy of the child in a proceeding for dissolution of marriage between the husband and the wife would not bind the child who is not a party to the proceedings. The child if it wishes to establish its paternity and its legitimacy may do so by appropriate legal proceedings on attaining majority. Inasmuch as the presence of the child is not necessary to effectively adjudicate the lis, the child need not be unnecessarily dragged to the proceedings. Two decisions of this Court (Radhakrishnan P.S. v. A. Indu [2018 (3) KHC 877] and Nizar v. Raseena [2018 (5) KHC 356]) were relied on by the court below in support of its finding that child is a necessary party in the proceedings. But, the prayer in both those decisions was to declare the illegitimacy of the child. Hence, the dictum in those decisions cannot be applied to the present petitions. We, in the circumstances, hold that in a petition filed by the

husband seeking dissolution of marriage alleging adultery or infidelity on the part of the wife disputing the paternity of the child born during the subsistence of their marriage, the child is not a necessary party. In such a petition, the court can order DNA test to establish the husband's assertion of infidelity and adultery on the part of the wife without the child in the party array if a strong prima facie case is made out.”

6. The learned counsel has also relied upon the judgment passed by the Hon’ble Supreme Court reported in **(2014) 2 SCC 576 (Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik & Anr.)** and has referred to paragraph 17 to 19, which are quoted as under: -

“17. We may remember that Section 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 Section 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. The interest of justice is best served by ascertaining the 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. 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 fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

7. The learned counsel then referred to the judgment passed by the Hon'ble Supreme Court reported in **(2015) 1 SCC 365 (Dipanwita Roy vs. Ronobroto Roy)** and has referred to paragraph 13, 17 and 18, which are quoted as under: -

"13. 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 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.

17. The question that has to be answered in this case is in respect of the alleged infidelity of the appellant wife. The respondent husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant wife. It is in the process of substantiating his allegation of infidelity, that the respondent husband had made an application before the Family Court for conducting a DNA test which would establish whether or not, he had fathered the male child born to the appellant wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most

legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.

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 concerned Court by drawing a presumption of the nature contemplated in Section 114 of the Indian 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, 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 Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.”

Arguments of the respondent

8. The learned counsel for the respondent, on the other hand, has opposed the prayer and has submitted that the impugned order rejecting the prayer for DNA test has been rightly passed. He submits that the child was born on 01.06.2002 and the divorce case was filed in the year 2008 and it was the case of the petitioner that even after birth of the child, the defendant was living in adultery.

9. The learned counsel has further submitted that though a plea has been raised in the petition seeking divorce that the petitioner had gone Surat in the month of January 2001 where he remained till April 2002 and came back home on 03.05.2002, but there is *neither* any pleading in the petition that the petitioner did not have any access to the respondent during this intervening period nor there is any plea that the respondent did not have any access to the petitioner. He submits that after much evidence was laid on the part of the plaintiff-petitioner, the petition with a prayer for DNA test was filed and there has been an improvement in the petition by stating that the petitioner was continuously living in Surat from January 2001 to April 2002 and in between this period he never cohabited with the respondent, although no such plea has been raised in the petition seeking divorce.

10. The learned counsel has submitted that the condition precedent for allowing the petition seeking DNA test of the child is not satisfied in the present case in absence of the foundational pleading of access of the

plaintiff with the defendant or access of the defendant with the plaintiff in the main petition seeking divorce. The learned counsel has also submitted that the paternity of the child is directly involved in this case, inasmuch as, the sole ground for divorce is adultery and it has been alleged by the plaintiff that the child was not begotten by the respondent through the plaintiff.

11. The learned counsel has relied upon the judgment passed by the Hon'ble Supreme Court reported in **(2024) 7 SCC 773 (*Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia*)** and has referred to paragraph 24 wherein it has been held that “*non-access*” has to be proved as a fact in issue in order to call for DNA test. He has also referred to paragraph 64 of the aforesaid judgment to submit that the question of DNA test arises only in exceptional circumstances. He has submitted that the entire jurisprudence in connection with DNA test of the child has been considered by the Hon'ble Supreme Court and the right of privacy, autonomy and identity of the child under the Conventions of Right of Child has also been considered. He has referred to paragraph 48 of the aforesaid judgment to submit that the children have the right not to have their legitimacy questioned frivolously before a court of law and this is an essential attribute of the right to privacy and therefore the courts are required to acknowledge that children are not to be regarded like material objections and be subjected to forensic/DNA testing particularly when they are not parties to the divorce proceedings and it has also been observed that it is imperative that children do not become the focal point of the battle between spouses. The learned counsel has also referred to paragraph 68.3 of the aforesaid judgment wherein the Hon'ble Court has taken note of the fact that no plea was raised by the husband as to non-access in order to dislodge the presumption under Section 112 of the Evidence Act and therefore it was held that no *prima-facie* case was made out by the husband to seek a direction to conduct DNA test of the child. Paragraphs 24, 48, 64 and 68.3 of the judgment passed in the case of ***Aparna Ajinkya Firodia (supra)*** are quoted as under: -

“24. Thus, "non-access" has to be proved as a fact in issue and the same could be established by direct and circumstantial evidence of an unambiguous character. Thus, there could be "non-access" between the husband and wife despite cohabitation. Conversely, even in the absence of actual cohabitation, there could be access.

48. Further, children have the right not to have their legitimacy questioned frivolously before a Court of Law. This is an essential attribute of the right to privacy. Courts are therefore required to acknowledge that children are not to be regarded like material objects, and be subjected to forensic/DNA testing, particularly when they are not parties to the divorce proceeding. It is imperative that children do not become the focal point of the battle between spouses.

64. Therefore, it is necessary that only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, the Court can direct such test. Further, a direction to conduct DNA test of a child, is to be ordered even rarely, in cases where the paternity of a child is not directly in issue but is merely collateral to the proceeding, such as in the instant case.

68.3. 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 Arjun.”

12. The learned counsel has also submitted that as on date the child is about 24 years of age and admittedly, he is not a party to the proceedings and it could be very harsh if the court directs for order of DNA test at this stage when the child has lived with his identity showing the petitioner as his father. Any direction upon the child to undergo DNA test would

amount to serious invasion into his privacy and such a direction is also not binding on the child.

Rejoinder argument of the petitioner

13. The learned counsel for the petitioner, *in response*, has submitted that at the relevant point of time, the child was minor and therefore the subsequent passage of time will have no bearing in the matter. He has also submitted that upon full reading of the plaint filed by the petitioner, it can be seen that the petitioner intended to say that the petitioner had no access to his wife. However, no such specific statement has been made in the plaint. He has also submitted that in the application seeking DNA test of the child, it has been explained by making a specific statement that the petitioner had no access to his wife during the period from January 2001 to April 2002.

14. During the course of hearing, the learned counsel for the petitioner has also submitted that there is no doubt that the legitimacy/paternity of the child would directly be involved if DNA test is directed to be conducted upon the child, but at the same time, in view of the judgment passed by the Hon'ble Kerala High Court reported in **2021 SCC OnLine Ker. 3458**, the finding will not be binding upon the child and if he wishes to establish his paternity he may do so at appropriate stage on attaining majority. However, it is not in dispute that as of now the child has already attained the age of about 24 years.

Findings of this Court

15. It is not in dispute during the course of hearing that the marriage was solemnized between the petitioner (*hereinafter referred to as the 'husband'*) and the respondent (*hereinafter referred to as the 'wife'*) on 12.07.2000 and a male child was born on 01.06.2002.

16. The petition seeking divorce being M.T.S. No. 16/2008 was filed on 07.06.2008, wherein the paragraphs relevant for the purposes of the present case are paragraph 5 to 10 as placed by the learned counsel for the parties during the course of hearing. Paragraph 5 to 10 of the petition dated 07.06.2008 are quoted as under: -

“5. That the petitioner went to Surat in the month of Jan, 2001 to join his job where he was engaged in a private firm and lived there till April 2002 and came back to his home on 3/5/2002 and he went to his sasural where he met the defendant and found her in advance stage of pregnancy and came back to his home.

6. That the plaintiff finding the defendant in infidelity called a Panchayat on 5/5/2002 where in presence of punches the defendant and her parents accepted the adulterous relation of defendant.

7. that the defendant gave birth to a male child out of her illicit relation on 1/6/2002 at her father's house village Balatand, P.S. Jamua, District Giridih.

8. That after the birth of child the defendant is living in adultery till now and it has hamper the prestige and reputation of the plaintiff in the society.

9. That the plaintiff is living in great mental shock agony since the date of location of the adulterous life of the defendant.

10. That when the infidelity of the defendant was located by the plaintiff the defendant filed a false case of demand of dowry in the court of the Chief Judicial Magistrate, Giridih on 22/01/2004, in which the plaintiff is still facing trial”

17. The aforesaid statements made in the plaint reveal that it was the specific case of the plaintiff-husband that he went to Surat in the month of January 2001 where he was engaged in a private firm; he lived there till April 2002 and came back home on 03.05.2002 and found that the defendant was pregnant in connection with which a *panchayati* was also held on 05.05.2002. It is alleged that the defendant gave birth to a male child out of illicit relationship on 01.06.2002. It has also been alleged that even after birth of the child, the defendant was living in adultery till the date of filing of the suit which has hampered the prestige and reputation of

the plaintiff and in the meantime, the defendant had also filed a case relating to demand of dowry in the court of Chief Judicial Magistrate, Giridih on 22.01.2004 in which the plaintiff was facing the trial.

18. The suit was filed seeking divorce, after expiry of 6 years from the date of birth of the child, solely on the ground of adultery and admittedly the child was not a party to the proceedings. It is also apparent that no statement was made in the plaint that the plaintiff had no access to his wife or that the defendant had no access to her husband during the period from January 2001 to April 2002

19. The written statement filed by the defendant has also been placed on record by the petitioner. However, from perusal of the plaint, it is apparent that though the plaintiff claimed that he went to Surat in the month of January 2001 and lived there till April 2002, but there is *neither* any averment in the plaint that the plaintiff had no access to the defendant or that the defendant had no access to the plaintiff *nor* there is any statement in the plaint that the plaintiff and the defendant never cohabited during the period from January 2001 till April 2002.

20. The records further reveal that by 25.06.2010, altogether four witnesses on behalf of the plaintiff were examined and the fourth witness was cross-examined on 30.06.2010. At this stage, the plaintiff filed a petition dated 25.06.2010 for obtaining DNA test of the child and in the petition, it has been asserted that in between January 2001 to April 2002, the plaintiff was continuously in Surat and in between this period, he never cohabited with the wife.

21. However, admittedly, *neither* any statement has been made in the plaint that the plaintiff had never cohabited with his wife during the period from January 2001 to April 2002 *nor* any statement has been made in the plaint that the plaintiff did not have any access to the defendant-wife or that the defendant had no access to the plaintiff during the period from January 2001 to April 2002 or on the date the defendant wife might have conceived the baby.

22. The petition dated 25.06.2010 was dismissed by the court vide order dated 17.12.2011.

23. A submission was made on behalf of the plaintiff before the learned court that oral evidence of several persons including the plaintiff himself revealed that the plaintiff was continuously in Surat and between January 2001 and April 2002, whereas the defendant gave birth to her son on 01.06.2002 and from this it can be legally and safely presumed that the defendant must have conceived pregnancy while the plaintiff was in Surat and it was argued that the perfect conclusion regarding legitimacy of the child can be tested by conducting DNA test. It was also argued that in the present case, the question of legitimacy of the child was involved and therefore scientific investigation was required. It was also argued that Section 112 of Evidence Act regarding conclusive proof of legitimacy of a child, if the child is born during continuous valid marriage, is a rebuttable presumption and to rebut this presumption DNA test was required. It was also argued that similar petition for conducting DNA test rejected by the court of SDJM as well as by the learned Sessions Judge, Giridih were not binding on this court since the question involved in those cases were different. It was argued that in the present case for determination of legitimacy of the child, the prayer for DNA test be accepted which would cause no prejudice to the defendant.

24. The defendant had contested the petition denying the allegation and it was asserted that there was nothing on record to prove that the plaintiff was present in Surat from January 2001 to April 2002 and on the strength of such bald allegation, the suit for divorce has been filed.

25. Further, the defendant also referred to the order of SDJM, Giridih passed in CASE No. 74/2004, T.R. No. 527/2007, whereby the prayer for conducting DNA test was disallowed vide order dated 24.05.2007, against which Criminal Revision No. 91/2007 was also filed, which was dismissed by the learned Sessions Judge, Giridih vide order dated 03.09.2008. It was also asserted that *neither* the adulterer has been made party *nor* it has been disclosed as to who was the adulterer.

26. The learned court while rejecting the petition has observed that although the petitioner charged the wife, but the alleged illegitimate child was not made party and the plaintiff has not substantiated his non-access with the defendant during the said period. The learned court also observed that Section 112 of Evidence Act exclusively deals with the subject of birth during valid marriage, which provides that unless it can be shown that the parties to the marriage had no access to each other at any time, when the child could have been begotten, it is conclusive proof of legitimacy of the child and such presumption of legitimacy of children born out of lawful wedlock can only be rebutted by strong, clear, satisfying and conclusive evidence and a presumption cannot be disbelieved by mere balance of probabilities or any circumstances creating doubt. The learned court recorded that the “access” does not only mean an actual marital intercourse, but also means opportunity for sexual intercourse between the parties, which the plaintiff has failed to prove. The learned court has also recorded that for a decree of proof of non-access for rebutting the conclusiveness must be to ensure that there was no possibility of the child being conceived through husband and has referred to the judgment passed by the Hon’ble Supreme Court reported in ***AIR 1993 SC 2295***, wherein the Hon’ble Supreme Court has laid down following position as to permissibility of blood test to prove paternity i.e.

- (i) Courts in India cannot order blood test as a matter of course;*
- (ii) if a prayer is made in order to have roving inquiry; the prayer for blood test cannot be entertained;*
- (iii) Courts must carefully examine as to what would be the consequence of ordering blood test; whether it will have the effect of branding a child as bastard and the mother as unchaste woman;*
- (iv) no one can be compelled to give sample of blood for analysis, and;*

(v) There must be a strong prima-facie case and husband must establish non-access in order to dispel the presumption arising u/s 112 of Indian Evidence Act.

27. The learned court ultimately dismissed the petition vide impugned order dated 17.12.2011.

28. During the course of hearing, it is not in dispute that the child has attained the age of majority and he is around 24 years of age, though he was minor at the relevant point of time when the impugned order was passed.

29. This Court is of the considered view that in a case where the child is a minor, the consent for getting his/her DNA test will naturally be taken care of by the natural guardian and the court has to see the interest and privacy of the child. In such circumstances, the child may not be a necessary party.

30. At the time when the divorce case was filed, the child was a minor aged 6 years and when the petition seeking DNA test was filed, the child was aged about 8 years and during this time his mother (defendant /respondent) was the authority to give consent on behalf of the child. However, now the child has attained the age of about 24 years and the child who has now become an adult cannot be forced to be subjected to DNA test. No adverse inference against the mother (defendant /respondent) can be drawn if the child refuses for DNA test. Moreover, this writ petition was filed on 01.02.2012 and was adjourned on numerous occasions and vide order No. 31 dated 10.02.2021, the case was admitted and during the pendency of this writ petition, the child has attained majority and the mother of the child cannot force the child (*who is now about 24 years of age*) to be subjected to DNA test. This Court is of the view that in the present case, the sole ground seeking divorce is adultery questioning the legitimacy of the child which has been raised after 6 years of the birth of the child and prayer for DNA test has been made when the child was 8 years and now the child is around 24 years of age.

31. The Hon'ble Kerala High Court in the judgment reported in **2021 SCC OnLine Ker 3458** has held that the legitimacy or paternity of the child is only incidental to the claim for dissolution of married on the ground of adultery and infidelity and the child's presence is not necessary to adjudicate the relevant claim and has also observed that the paternity or legitimacy of the child in a proceeding for dissolution of marriage would not bind the child who is not a party to the proceeding and if the child wishes to establish his paternity and his legitimacy, he may do so at appropriate legal proceedings on attaining majority.

In the present case, if an order for DNA test of the child, who has attained majority during the pendency of this case, is passed now, his independent right to establish his paternity and his legitimacy may not arise at a later stage as and when he attains majority, as has been observed by Hon'ble Kerala High Court in the aforesaid judgement, as the child in the present case has already attained majority.

Thus, on the one hand, the mother has lost the right to give consent for DNA test of the child, who has attained majority during the pendency of the case, and for this reason, the order of DNA test of the child at this stage is certainly not binding on the child as he is not a party in this proceeding. The petitioner has not taken any steps to make the child a party to the proceedings upon his attaining majority. The mother having lost the right to represent the child as the guardian of the child, at this stage the mother has neither any right to give consent to DNA test of the child nor has any means to enforce such an order of DNA test, if passed by this court at this stage in this writ petition.

32. It is also important to note that this writ petition was filed on 01.02.2012 and was adjourned on numerous occasions and vide order No. 31 dated 10.02.2021, the case was admitted and during the pendency of this writ petition, the child has attained majority. In spite of this, no steps have been taken by the petitioner to implead the child as a party in the proceedings.

33. Having discussed the aforesaid consequences of the child having attained majority during the pendency of this case, this court is of the considered view on the basis of materials on record as discussed in the following paragraphs that otherwise also, the impugned order rejecting the plea of DNA test, has been rightly decided by the learned court and it calls for no interference under Article 227 of the Constitution of India.

34. In the judgement passed by the Hon'ble Supreme Court in the case of *Aparna Ajinkya Firodia (supra)*, it has been held that "non-access" has to be proved as a fact in issue and the same could be established by direct and circumstantial evidence of an unambiguous character. It has been further held that there could be "non-access" between the husband and wife despite cohabitation and conversely, even in the absence of actual cohabitation, there could be access. In the said judgement, on the facts of the case, it was held that no plea was raised by the husband as to non-access in order to dislodge the presumption under Section 112 of the Evidence Act and therefore no *prima-facie* case was made out by the husband which would justify a direction to conduct a DNA test of the child involved in the said case. The Hon'ble Supreme Court has also considered the privacy rights of the child and has held that DNA test of the child should not be allowed as a matter of routine.

35. Thus, it is well settled that in a petition seeking DNA test of the child, the court can order DNA test to establish the husband's assertion of infidelity and adultery on the part of the wife without the child being the party arrayed, only if a strong *prima-facie* case is made out. The law is equally well settled that there must be a strong *prima-facie* case and husband must establish non-access in order to dispel the presumption arising u/s 112 of Indian Evidence Act.

36. In the present case, as already discussed above, in the petition seeking divorce on the ground of adultery, no specific plea has been raised that the plaintiff had no access to the defendant or that the defendant had no access to the plaintiff during the period from January 2001 to April 2002.

37. In view of the aforesaid discussions and in the light of the facts and circumstances of this case, this Court is of the considered view that the learned court has rightly dismissed the petition seeking examination of the child for DNA test on the point of access of plaintiff-husband and defendant-wife by observing that Section 112 of Evidence Act exclusively deals with the subject of birth during valid marriage, which provides that unless it can be shown that the parties to the marriage had no access to each other at any time, when the child could have been begotten, it is conclusive proof of legitimacy of the child and such presumption of legitimacy of children born out of lawful wedlock can only be rebutted by strong, clear, satisfying and conclusive evidence and a presumption cannot be disbelieved by mere balance of probabilities or any circumstances creating doubt. The learned court rightly recorded that the “*access*” does not only mean an actual marital intercourse, but also means opportunity for sexual intercourse between the parties, which the plaintiff has failed to prove in this case.

38. Accordingly, this petition is *dismissed*.

39. Pending I.A., if any, is closed.

40. Let a copy of this order be communicated to the court concerned through ‘e-mail/FAX’.

(Anubha Rawat Choudhary, J.)

Dated: 29.06.2026
Uploaded On: 29.06.2026
Mukul/-