IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

THURSDAY ,THE 08TH DAY OF NOVEMBER 2018 / 17TH KARTHIKA, 1940

OP (FC).No. 400 of 2017

AGAINST THE ORDER IN OP 277/2016 of FAMILY COURT, ALAPPUZHA DATED 04-05-2017

PETITIONER:

NIZAR
AGED 44 YEARS,S/O LATE KUNJU MUHAMED,PALLIPPARAMBIL VEEDU,THATHAMPALLY WARD,ALAPPUZHA-688013.

BY ADV. SRI.P.K.ABOOBACKER(EDAPPALLY)

RESPONDENT:

RASEENA
AGED 34 YEARS,D/O.K.K.ALIYAR,KOMARAN CHIRAYIL,MANNANCHERRY.P.O,ALAPPUZHA-688538.

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 24.10.2018, THE COURT ON 08.11.2018 PASSED THE FOLLOWING:

"CR"

C.K.ABDUL REHIM
&
R.NARAYANA PISHARADI, JJ.

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O.P.(FC) No.400 of 2017

Dated this the 8th day of November, 2018

JUDGMENT

R.Narayana Pisharadi, J

"Truth must triumph" is the hallmark of justice. When truth is known there is no need or room for any presumption. A presumption cannot prevail over truth of a fact established by science. (**Nandlal Vasudeo Badwaik v. Lata : AIR 2014 SC 932).**

2. The petitioner is the former husband of the respondent. The petitioner filed O.P.No.277/2016 in the Family Court for a decree of declaration that he is not the father of the girl child born to the respondent.

3. The marriage between the petitioner and the respondent was on 01.11.1999. A girl child was born to the respondent on 06.08.2008. The plea of the petitioner, in the original petition

filed before the Family Court, is that he had no cohabitation with the respondent and that the child born to the respondent is not his daughter. It is also alleged by the petitioner that the respondent had told him that he is not the father of the child. The petitioner divorced the respondent on 26.03.2010 by pronouncing 'talaq'.

4. The petitioner filed an application as I.A.No.593/2016 in the Family Court praying that DNA test may be conducted to prove the paternity of the child born to the respondent. The respondent filed objection to the application denying the allegations raised by the petitioner. She asserted that she is ready to conduct DNA test, provided the petitioner would file an undertaking to the effect that he shall pay an amount of Rs.25,00,000/- as compensation, if the result of the test goes against him. The respondent also filed an application I.A.No.1620/2016 to issue direction to the petitioner to undergo potency test to ascertain that he had no physical disability to perform sexual intercourse during the relevant period.

5. As per Ext.P4 order, the Family Court dismissed both

the applications, I.A.No.593/2016 and I.A.No.1620/2016. The petitioner challenges the order of the Family Court dismissing the application I.A.No.593/2016 filed by him.

6. Notice was served on the respondent. But she has not chosen to enter appearance. We have heard learned counsel for the petitioner.

7. The petitioner is the former husband of the respondent. Their marriage was solemnised on 01.11.1999. A girl child was born to the respondent on 06.08.2008. The petitioner divorced the respondent on 26.03.2010 by pronouncing 'talaq'. There is no dispute with regard to these facts.

8. The respondent had filed M.C.No.39/2010 in the Chief Judicial Magistrate's Court, Alappuzha under Section 12 of the Protection of Women from Domestic Violence Act, 2005 seeking various reliefs against the petitioner, including maintenance to the child. An order was passed by that court in M.C.No.39/2010 directing the petitioner to pay maintenance to the respondent and the child at the rate of Rs.5,000/- per month and Rs.2,000/-

per month, respectively. The petitioner had filed Crl.A.No.257/2016 in the Sessions Court, Alappuzha challenging that order. In the memorandum of appeal filed in that case, the petitioner did not raise a plea that the child born to the respondent is not his daughter.

9. The respondent had filed O.P.No.1332/2013 against the petitioner in the Family Court seeking return of gold ornaments and other reliefs. When the petitioner was examined as a witness in that case, a specific question was put to him in the cross-examination, whether he had denied paternity of the child in the case M.C.No.39/2010. The petitioner answered that question by saying that, in that case, he had not denied paternity of the child. But he had stated that, he expressed willingness to look after the respondent and the daughter considering the welfare of the daughter. In response to a specific question put to him during the cross-examination in O.P.No.1332/2013 the petitioner also stated that, he had no sexual relationship with the respondent from the time of the marriage till their estrangement in the year 2009.

10. The Family Court found that the absence of a plea by the petitioner in M.C.No.39/2010 and in Crl.A.No.257/2016, denying paternity of the child born to the respondent, amounts to an admission by him that he is the father of the child. Therefore, the Family Court held that DNA test is not needed for resolving the dispute in the instant case.

11. Section 17 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Act') provides that an admission is a statement (oral or documentary or contained in electronic form), which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances provided thereinafter. Section 21 of the Act states that admissions are relevant and may be proved as against the person who makes them.

12. An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous (See **Narayan Bhagwantrao Gosavi v. Gopal Vinayak Gosavi : AIR 1960 SC 100**). An admission by a party in a plaint signed

and verified by him in a prior suit is an admission within the meaning of Section 17 of the Act and it may be proved against him in other litigations. But, in other suits, this admission cannot be regarded as conclusive, and it is open to the party to show that it is not true (See **Basant Singh v. Janki Singh: AIR 1967 SC 341**). An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence. The weight to be attached to it would depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel (See **Nagubai Ammal v. Shama Rao : AIR 1956 SC 593**). Evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong. But, they shift the burden of proof on to the person making them or his representative in interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted (See **Avadh Kishore Dass v. Ram Gopal : AIR 1979 SC 861**). Admissions have to be clear if they are to be used against the

person making them. Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Act, though they are not conclusive proof of the matters admitted. Admission is substantive evidence of the fact admitted. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence (See **Bharat Singh v. Bhagirathi : AIR 1966 SC 405**).

13. An admission by a party in a previous suit or proceedings is admissible in evidence in a subsequent suit or proceedings. What a party himself admits to be true may reasonably be presumed to be so. The burden is upon the party who has made the admission to show that it was wrong or erroneous. Admission is only a piece of evidence to prove a fact. It does not operate as estoppel unless the other party has acted upon it.

14. On the basis of the principles stated above, it can be found that, the petitioner can prove that the admission, if any, made by him in the previous proceedings between him and the respondent, regarding the paternity of the child, is erroneous or

wrong. The petitioner had not made any categorical admission, in the previous proceedings between him and the respondent, that he is the father of the child born to the respondent. He only did not deny the paternity of the child. It amounts to an implied admission. He has got a plea that he did not specifically deny the paternity of the child considering the welfare of the child. He is entitled to prove that the admission, if any, made by him in the previous proceedings between him and the respondent, regarding the paternity of the child, is wrong. Admission made in the previous proceedings is not conclusive.

15. Section 112 of the Act provides that 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. A plain reading of this provision shows that, the fact that a child is born during the continuance of a valid

marriage, shall be conclusive proof that the child is the legitimate child of the man to whom the lady giving birth is married. It shall not be conclusive proof only when it is established that parties to the marriage had no access to each other at any time when the child could have been begotten.

16. In the instant case, the child was born to the respondent on 06.08.2008, during the continuance of a valid marriage between her and the petitioner. The petitioner has not shown that he had no access to the respondent at the time when the child could have been begotten. The petitioner has got a plea that, during the relevant period, he was abroad. But, he did not produce his passport to prove that plea. Therefore, certainly the presumption envisaged under Section 112 of the Act comes into play here.

17. However, the legal principles underlying Section 112 of the Act have been changed considerably in view of the law laid down by the Apex Court in **Nandlal Wasudeo** (supra). The Apex Court has held that the result of a genuine DNA test is scientifically accurate. It has been observed that Section 112 of

the Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The Apex Court has held that, though Section 112 of the Act raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein, the same is rebuttable. It has been held that when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. In **Sharda v. Dharmpal : AIR 2003 SC 3450**, the Hon'ble Supreme Court has held that (1) a matrimonial court has the power to order a person to undergo medical test (2) passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Constitution and (3) the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the party concerned refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

19. In the instant case, the proceeding instituted by the petitioner is for granting a decree of declaration that the child born to the respondent is not his daughter. Paternity of the child is the primary issue to be decided in the lis. It is not an incidental issue that arises in the context of other disputes between the parties. In these circumstances, we are of the considered opinion that the petitioner is entitled to prove by adopting scientific methods that he is not the father of the child born to the respondent.

20. However, the petitioner has to overcome another hurdle. The child is not a party to the proceedings before the Family Court. In **Radhakrishnan v. Indu : 2018(3) KHC 877**, a Division Bench of this Court has held that when a decree of declaration is sought with regard to the paternity of a child, the child is a necessary party to the lis. The Division Bench has held as follows:

> *"But the appellant seeks a declaration also. He seeks to declare that he is not the father of the child. Thereby the illegitimacy of the child is sought to be declared. If a declaration as sought for is granted, the child is the affected person. The child alone will*

be the person affected by the declaration. Declaring illegitimacy of the child amounts to bastardising the child. Therefore the child is a necessary party to the suit. Without the child on the party array its paternity and legitimacy cannot be decided to grant the declaration. Its illegitimacy cannot be declared. True, as argued by the learned counsel for the appellant, the decree declaring illegitimacy of the child in its absence on the array of parties does not bind it. But whether or not a decree binds the affected person is not the test to decide whether that person is a necessary party or not to the suit. The declaratory decree will not be binding on the child, but there will be a cloud on its legal character and status. There are rights and obligations attached to the status of a person. Civil consequences flow from the declaration. Therefore, we repeat, the child is a necessary party to the suit. Audi alterem partem is one of the fundamental principles of judicial procedure. The child has a right of audience through its guardian before the issue of its legitimacy is decided. We are clear in our minds that the child is a necessary party to the suit since a relief is sought to declare its illegitimacy. The declaration is sought not against the child's mother, but against the child and therefore the child is a necessary party to the suit. The child is a necessary party when the declaration is directed against it. ..... We wish to clarify that the question is

> *not whether the child is able to prove its legitimacy or disprove its illegitimacy. The question is whether the child through its guardian is entitled to be heard on the issue which the Family Court is called upon to decide. The child is certainly entitled to".* (emphasis supplied).

21. Therefore, before seeking a direction to conduct DNA test to prove the paternity of the child, the petitioner has to implead the child as a party to the proceedings before the lower court. The child is also a necessary party to the application filed by the petitioner seeking conducting of DNA test. As held in **Radhakrishnan** (supra), the child has a right to be heard through its guardian before the court takes a decision whether it should direct to conduct the test. The court cannot direct DNA or any such test without hearing the person affected irrespective of the fact whether he is a minor or major. If such person is a minor, he should be heard through the guardian. The fact that the respondent, being the mother of the child, was heard by the court below on the application filed by the petitioner for conducting DNA test, is not sufficient. The respondent was heard in the matter not in the capacity of the guardian of the minor, but

in her individual capacity only.

22. Consequently, we set aside the order passed by the Family Court, dismissing the application I.A.No.593/2016 in O.P.No.277/2016. The Family Court shall consider that application afresh and dispose of it in accordance with law on the condition that the petitioner would take steps to implead the child in the aforesaid application and in O.P.No.277/2016 within a period of one month from today. If the petitioner fails to take such steps within the stipulated time, the order passed by the Family Court dismissing the application I.A.No.593/2016 will stand.

The Original Petition is disposed of accordingly.

(sd/-)

C.K.ABDUL REHIM, JUDGE

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr/05/11/2018

APPENDIX

PETITIONER'S/S EXHIBITS:

EXT P1	**THE TRUE COPY OF THE O.P.NO.277/2016 ON THE FILE OF THE FAMILY COURT,ALAPPUZHA**
EXT P2	**THE TRUE COPY OF THE I.A.593/2010 IN O.P.277/2016 ON THE FILE OF THE FAMILY COURT,ALAPPUZHA**
EXT P3	**THE TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENT IN I.A.593/2010**
EXT P4	**THE TRUE COPY OF THE ORDER DATED 4.5.2017 IN I.A.593/2016 IN O.P.NO.277/2016 ON THE FILE OF THE FAMILY COURT,ALAPPUZHA.**

RESPONDENT'S EXHIBITS:

NIL

TRUE COPY

PS TO JUDGE