

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.
CRIMINAL APPELLATE JURISDICTION.**

Criminal Writ Petition No.25 Of 2003.

Nanasaheb s/o Ramrao Salunke.

Age: 36 Years, Occ.: Service.

R/o.: Igatpuri, Tal. Igatpuri,

Dist. Nashik.

:: Petitioner.

Versus

(1) Mrs. Vidya w/o Nanasaheb Salunke.

Age: 36 Years, Occ.: Household.

(2) Vijay s/o Nanasaheb Salunke.

Age: 11 Years, Occ.: Nil.

Petitioner No.1 is minor and U/Guardianship
of his real mother Mrs. Vidya Salunke.

Both R/o.: Karkhail, Tal. Shirpur,
Dist. Dhule.

(3) The State of Maharashtra.

:: Respondents.

Appearance ==>

Mr. C.R. Deshpande, Advocate for the Petitioner.

Mr. S.H. Jadhav, Advocate h/for Mr. S.P. Brahme, Advocate for
Respondent Nos. 1 and 2.

Mr. S.A. Ambad, Additional Public Prosecutor for the State of
Maharashtra / Respondent No.3.

CORAM : V.M. DESHPANDE, J.

DATE : 20th FEBRUARY, 2015.

J U D G M E N T :-

By the present Criminal Writ Petition, the petitioner is challenging the Judgment and Order dated 19th March, 1997 passed by the learned Judicial Magistrate, F.C., Shirpur, Dist. Dhule in Cri.M.A.No.379 Of 1991; together with the common Judgment and Order dated 26th September, 2002 passed by the learned 2nd Additional Sessions Judge, Dhule in Criminal Revision Application No.89 Of 1997 and in Criminal Revision Application No.103 Of 1997.

[2] I have heard Mr. C.R. Deshpande, Advocate for the Petitioner, Mr. S.H. Jadhav, Advocate h/for Mr. S.P. Brahme, Advocate for Respondent Nos.1 and 2 and Mr. S.A. Ambad, Additional Public Prosecutor for the State of Maharashtra / Respondent No.3.

[3] Marriage between petitioner – Nanasaheb and Respondent No.1 –Vidya was performed on 16th May, 1990 at village Bahal, Tal. Chhalisgaon. Their marital tie is still in subsistence. Mrs. Vidya delivered male child – Respondent No.2 Vijay on 17th November, 1990. Respondent Nos. 1 and 2 were constrained to file an application under Section 125 of the Code of Criminal Procedure for grant of maintenance allowance against the petitioner vide Cri.M.A.No. 379 Of 1991. It is specifically stated in the application that Respondent No.2 was born premature in the month of November, 1990. This fact was intimated to the petitioner however, just for the reason of premature delivery, the petitioner made scurrilous allegations by issuing notice dated 3rd June, 1991. It was further stated in the application that said notice was replied by reply-notice dated 20th June, 1991 (Exhibit–46) and the petitioner was called upon to take respondent No.1 from her parents house and also to make arrangement for their maintenance. In spite of receipt of said notice, no steps were taken requiring the respondents to

file proceedings under Section 125 of the Code of Criminal Procedure. [For the sake of convenience, the parties will be referred as wife, son and husband.]

[4] On being summoned, the petitioner submitted his Written Statement and he has denied the paternity of Respondent No.2-Vijay. He submitted that Respondent No.1 established sexual relations with unknown person prior to her marriage and from the said relations, Respondent No.2 was born. He submitted that due to such birth of Respondent No.2, his status in the society has lowered down and, therefore, both the respondents are not entitled to claim any maintenance allowance from him.

[5] The learned Judicial Magistrate, F.C., Shirpur, Dist. Dhule vide his Judgment and Order dated 19th March, 1997 partly allowed Cri.M.A. No. 379 Of 1991 and granted monthly maintenance allowance @ Rs.500/- to Respondent No.1 Vidya from the date of filing of an application however, the learned trial Magistrate rejected the claim of maintenance for Respondent No.2 – Vijay, on the ground that the petitioner has proved that Respondent No.2 is born to Respondent No.1 through illicit relations.

[6] The aforesaid judgment leads filing of two Criminal Revision Applications before the Revisional Court. Petitioner – Nanasaheb preferred Criminal Revision Application No.89 Of 1997 challenging the order of maintenance allowance granted in favour of Respondent No.1 – Vidya; where-as Criminal Revision Application No.103 Of 1997 was preferred challenging the correctness of order rejecting claim of maintenance of Respondent No.2 – Vijay. The learned 2nd Additional Sessions Judge, Dhule vide his common Judgment dated 26th September, 2002 decided both Criminal Revision Applications.

[7] By the common judgment, the learned revisional court dismissed Criminal Revision Application No.89 Of 1997 filed by present petitioner – Nanasaheb; where-as Criminal Revision Application No. 103 Of 1997 was allowed by the revisional court directing the petitioner to pay maintenance allowance @ Rs.500/- to Respondent No.2 Vijay from the date of application.

[8] Present Writ Petition is thus against dismissal of Criminal Revision Application filed by petitioner – Nanasaheb and also grant of maintenance allowance in favour of Respondent No.2 – Vijay.

[9] The learned counsel for the petitioner – husband submitted that the learned revisional court committed mistake at law. He submitted that the revisional court ought not to have granted maintenance allowance to Respondent No.2 – Vijay, since he is not his child at all. He submitted that since Vidya has admitted in her cross-examination that her delivery took place at her residence and that time, no Doctor was required to call, that clearly suggest that delivery was not premature and, therefore, looking to the fact that date of marriage is 16th may, 1990 and date of birth of Vijay is 7th November, 1990, Vijay is not son of Petitioner – Nanasaheb. He relied upon the decision in case of Smt. Dukhtar Jahan V/s. Mohammed Farooq, reported in AIR 1987 Supreme court 1049.

[10] Date of marriage between Vidya (Respondent No.1) and Nanasaheb (Petitioner) and date of birth of Vijay (Respondent No.2) is not in dispute. Thus, in view of section 112 of Indian Evidence Act, 1872 the petitioner cannot escape his liability. Section 112 of the Indian Evidence Act, 1872 is reproduced herein-below :-

112. 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.

The Hon'ble Apex court in case of Kamti Devi and Another Versus Poshi Ram AIR 2001 SC 2226, in paragraph No.10 has observed as under :-

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 detre* is the legislative concern against illegitimizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

[11] In the present case, burden to show that the petitioner was not having any physical contact with Respondent No.1 when she was cohabiting with him, is not at all discharged by the petitioner. On the contrary, in the cross-examination of Vidya, following is brought on record :-

“.. I had been menstruation period about 4 to 5 days earlier to my marriage, but later on I had not found menstruation period after my marriage. I was having menstruation period from 10th to 14th May 1990, my first period of intercourse with the opponent was about 5th or 6th day of last menstruation. ”

[12] The aforesaid fact, which is brought on record by the petitioner clearly shows that after the last menstruation period on 14th May, 1990, she had physical relation with the petitioner. Here the date of marriage is 16th May, 1990 which clearly clinches issue in favour of the Respondents. The learned revisional court has dealt with this issue in detail and has rightly reached to the conclusion that Respondent No.2 is entitled for the maintenance. In so far as maintenance to Respondent No.1 – Vidya is concerned, there is concurrent finding of fact recorded in her favour.

[13] The learned counsel was unable to point out any perversity, on the contrary in the Written Statement, the petitioner has made very wild allegations about the chastity of his wife - Vidya. Those wild allegations were not at all proved by the petitioner. Therefore, no fault can be found in granting maintenance allowance to her also. Since there is no perversity and no illegality committed by any of the courts below, present Writ Petition is dismissed. However, there shall be no order as to costs.

(V.M. DESHPANDE, J.)