

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
CIVIL APPELLATE SIDE JURISDICTION**

Writ Petition No. 3817 of 2013

Shri Layyappa Sidram Patil (Patel),
Age : Adult,
Occupation : Private Service,
Residing at Kumbhari,
Taluka : Jath,
District : Sangli.

.. Petitioner
(Original plaintiff)

versus

1. Sou. Mirabai Layyappa Patil,
Age : Adult,
Occupation : Household,
Residing at
C/o. Pandurang Bhimmanna Tapre,
At Post : Vaspet, Taluka : Jath,
District : Sangli.

2. Kum. Varsha Mirabai Patil,
Age : 16 years,
Occupation : Education,
Residing at
C/o. Pandurang Bhimmanna Tapre,
At Post : Vaspet, Taluka : Jath,
District : Sangli,
Through its Legal Guardian
Respondent No.1.

3. Shri Ashok Mhallppa Godhe,
Age : Adult,
Occupation : Service,
Residing at Vaspet,
Taluka : Jath,
District : Sangli

.. Respondents
(Original defendants)

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Mr. Manoj A. Patil, Advocate, for the petitioner.

*Mr. Umesh Mankapure, Advocate, for respondent
nos.1 to 3.*

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CORAM : SMT. SADHANA S. JADHAV, J.

**Date of reserving the
judgment : 30th January 2015**

**Date of pronouncing the
judgment : 5th May 2015**

JUDGMENT :

1. Heard Adv. Mr. M.A. Patil for the petitioner, and Adv. Mr. Umesh Mankapure for the respondents.
2. Rule. Rule made returnable forthwith. By consent, heard finally.
3. The petitioner herein questions the correctness and validity of the order dated 12-2-2013, passed by the Joint Civil Judge (Senior Division), Sangli, below Exhibit 8 in Regular Civil Suit No. 263 of 2004.
4. The petitioner herein happens to be the original plaintiff. The suit is filed for declaration challenging the paternity of Kum. Varsha who happens to be defendant no.2 in Regular Civil Suit No. 263/2004. During pendency of the Suit, the petitioner herein had filed an application before

the learned court, under Section 151 and Order XXVI Rule 10A of the Code of Civil Procedure, 1908. It was prayed that the plaintiff is not the biological father of Kum. Varsha and that, defendant no.1 has filed cases against the plaintiff only to extort money. It was prayed that the defendant nos.1 to 3 be directed to undergo DNA test in order to establish paternity of defendant no.2. The defendant no.3 happens to be one Ashok Mhallppa Godhe. According to the plaintiff, defendant no.3 happens to be the biological father of defendant no.2. It was contended in the said plaint, that the defendant no.3 happens to be the paternal cousin of defendant no.1 and that, there were illicit relations between defendant no.1 and defendant no.3. The learned Joint Civil Judge (Senior Division), Sangli, vide order dated 12-2-2013, has rejected the said application and hence this writ petition.

5. The facts necessary for deciding the present writ petition are as follows :-

That, the petitioner herein got married to defendant no.1 on 27-6-1994. The petitioner was employed on commercial ship and, therefore, he had to be on the sea for a considerable period of time. According to the petitioner, during the period from 1-1-1996 to 20-4-1996, from 24-5-1996 to 29-9-1996, from 18-12-1996 to 7-6-1997, he was on ship, more particularly, at Singapore, Yoshi and other places. According to the petitioner, in the month of June 1997, the petitioner had visited his native place and at that time, the petitioner had learnt that the respondent no.1 has given birth to a baby girl i.e. respondent no.2. According to him, upon enquiry, he learnt about the illicit relation between respondent no.1 and

respondent no.3 and further that, the respondent no.1 had begotten the child from respondent no.2. It is alleged that initially the respondent no.1 had agreed that the petitioner and herself would dissolve the marriage amicably. However, subsequently the respondent no.1 had filed Summary Criminal Case No. 6/2000 before Judicial Magistrate (F.C.), Jat, alleging therein that the respondent no.1 was meted with illtreatment and cruelty at the hands of the petitioner and hence, had committed an offence punishable under Section 498A of the IPC. The learned Judicial Magistrate (F.C.), vide judgment and order dated 19th May 2004, has been pleased to acquit the petitioner of all the charges. According to the petitioner, Kum. Varsha is born on 11-5-1997, and according to him, he is not the biological father of respondent no.2.

6. The respondent no.1 had filed written say in the said Suit. In the written statement, respondent no.1 had specifically contended that the petitioner was fully aware that the child is born on 11-5-1997. However, till 2004, the petitioner had not denied the paternity of the said child.

7. The learned Civil Judge (S.D.) has rightly considered Section 112 of the Indian Evidence Act, 1872, which contemplates a presumption regarding the paternity. Section 112 of the Indian Evidence Act reads thus:

“ **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 learned Judge has rightly considered that the presumption to be drawn under Section 112 of the Indian Evidence Act can be displaced by strong preponderance of evidence and not by mere balance of probabilities.

8. The learned Counsel for the petitioner has placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women & another***, reported in ***2010(5) ALL MR 895 (S.C.)***. The learned Counsel places reliance upon para 13 of the said judgment wherein the Hon'ble Apex Court has observed as follows :-

“ In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. ”

The learned Counsel for the petitioner has also placed reliance on para 14 of the said judgment, wherein the Hon'ble Apex Court has held that, '*In the case of Sharda, (2003) 4 SCC 493, while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has*

a strong prima facie case and there is sufficient material before the court’.

9. The learned Counsel for the petitioner submits that in the present case, taking into consideration the dates during which the petitioner was in India or in the company of respondent no.1, it cannot be said that the petitioner would be the biological father of respondent no.2. The learned Counsel has also relied upon the judgment of this Court, in the case of ***Sadashiv Mallikarjun Kheradkar Vs. Smt. Nandini Sadashiv Kheradkar & others***, reported in ***1995(1) ALL MR 285***, wherein this Court has held thus :

“ In my view, since there is sufficient foundation led in the pleading and the Petitioner is seriously asserting that the child is not born to him, in the interest of justice, I feel that the Respondent should be called upon to give blood sample and if she fails to obey this order, nothing can be done to compel her but it is left to the Court to draw such adverse inference depending upon the circumstances of the case. ”

10. The learned Counsel for the petitioner has also placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Smt. Kamti Devi & another Vs. Poshni Ram***, reported in ***2001(3) ALL MR 582 (S.C.)***. The Hon'ble Apex Court has held thus :

“ 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'etre* 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. The learned Counsel for the petitioner submits that at the time when the child could have been begotten, the petitioner was not in the company of respondent no.1.

12. The learned Counsel for the respondents submits that the petitioner herein was at his native place from 30th September 1996 to 18th December 1996, and the child in all probabilities, was conceived during the said period. The learned Counsel for the respondents further submits that no court can force a party to subject himself / herself to the blood test. The court must examine what would be the consequence of ordering blood test and whether it would have the effect of branding a child as bastard and the mother as an unchaste woman and, therefore, no one can be compelled to give sample of blood analysis. It is further submitted by the learned Counsel for the respondents, that in the present case, the conduct of the

petitioner needs to be taken into consideration. According to the learned Counsel, for the first time after a lapse of about 5 - 6 years, the petitioner has carved out a case of challenging paternity of the child. That, the said child is admittedly born during the subsistence of the valid marriage.

13. This Court is of the opinion, that the question of birth of child due to adulterous behaviour is nothing but void, vague and baseless allegation, and that the learned Civil Judge (S.D.) had rightly rejected the prayer for DNA test. The birth of a child during continuance of a valid marriage or even within 280 days after its dissolution is conclusive proof that child was legitimate unless parties to marriage had no access to each other at any time when conception took place. In the present case, there is no good ground to hold that the parties had no access with each other, at least, till June 1997. It is pertinent to note that for the first time, the said contention about questioning the paternity was raised only after filing of the maintenance petition.

14. It was realized that the learned Counsel for the petitioner has not placed on record the notes of evidence although the evidence has commenced. The recording of evidence i.e. cross examination was concluded on 17th April 2013. The matter was circulated before this Court [*Coram : R.M. Savant, J.*] on 24-4-2014. However, it was never brought to the notice of the Court, that the cross examination is concluded and hence, in that eventuality, the Court had granted stay to the proceedings. Hence, this Court had asked learned Counsel for the petitioner to place on record evidence of the petitioner. The same is taken on record and marked as Article "X" for the purpose of identification.

15. This Court has perused the notes of evidence. The petitioner has specifically admitted in the cross examination, that there is no evidence or neither he has any knowledge to even presume that anybody had seen nos.1 and 3 in each others company. He has also admitted that ever since marriage, there was no quarrel between the couple. Even when he was on ship, his parents or relatives had never suspected the chastity of respondent no.1. He has asserted that he had learnt from respondent no.1, that she had illicit relation with respondent no.3. However, he had never enquired with respondent no.3 about the same. He has further admitted that in respect of the allegations of chastity cast on his wife, he had never enquired about it with anybody. However, taking into consideration even substantive evidence, the petitioner has not made out a case that would cast any doubt about the fact that the child i.e. respondent no.2 was begotten during the validity of the marriage.

16. For the reasons stated herein above, the petition deserves to be dismissed as the same sans merits.

17. Hence, the petition is dismissed. Rule is accordingly discharged. In the circumstances of the case, there shall be no order as to costs.

(SMT. SADHANA S. JADHAV)
JUDGE

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