

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Criminal Application No. 2565 of 2016

District : Ahmednagar

Uddhav s/o. Laxman Kalaskar,
Age : 31 years,
Occupation : Agriculture,
R/o. Chincholi,
Taluka Paithan,
District Aurangabad.

.. Applicant
(Original respondent
no.1)

versus

1. Shakuntala w/o. Uddhav Kalaskar,
Age : 27 years,
Occupation : Nil.
2. Divya Uddhav Kalaskar,
Age : 4 years,
Minor under guardian
of Respondent no.1.
3. Kranti Uddhav Kalaskar,
Age : 1 year, Minor under
Guardian of respondent no.1.

All R/o. Chincholi,
Taluka Paithan,
District Aurangabad,
presently R/o. Sonvahir,
Taluka Shevgaon,
District Ahmednagar.

4. Laxman s/o. Asaram Kalaskar,
Age : 51 years,
Occupation : Agriculture.
5. Prayagabai Laxman Kalaskar,
Age : 47 years,
Occupation : Household.

6. Bharat Laxman Kalaskar,
Age : 26 years,
Occupation : Agriculture,

Respondent nos.4 to 6
R/o. Chincholi,
Taluka Paithan,
District Aurangabad.

.. Non-applicants
(Nos.1 to 3 -
Original applicants
&
Nos.4 to 7 -
Original respondent
nos.2 to 5)

7. Meerabai Kalyan Tarmale,
Age : 46 years,
Occupation : Household,
R/o. Gokul Jalgaon,
Taluka Paithan,
District Aurangabad.

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Mr. N.T. Tribhuwan, Advocate, for the applicant.

*Mr. Asif Ali, Advocate, for non-applicant
nos.01 to 03.*

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CORAM : Z.A. HAQ, J.

DATE : 06TH DECEMBER 2016

ORAL JUDGMENT :

Heard Adv. Mr. N.T. Tribhuwan for the applicant, and Adv. Mr. Asif Ali for non-applicant nos.01 to 03.

The non-applicant nos.04 to 07 are not concerned with the controversy raised in this application and the point which is required to be decided in this application is relevant only for adjudicating the

rights of the applicant and non-applicant nos.01 to 03. Therefore, the application is taken up for final disposal.

02. Rule. Rule made returnable forthwith.

03. The applicant (husband of non-applicant no.01 and father of non-applicant nos.02 and 03) has challenged the order passed by the learned Magistrate rejecting the application filed by him praying for directions to conduct DNA test of the applicant and non-applicant nos.02 and 03.

04. The non-applicant nos.01, 02 and 03 have filed complaint under the provisions of Protection of Women From Domestic Violence Act, 2005. The applicant is opposing the claim of non-applicant nos.01, 02 and 03. The applicant is disputing the paternity of non-applicant nos.02 and 03. To substantiate the contention, the applicant filed an application (Exhibit No.17) praying for directions for conducting DNA test. This application is dismissed by the impugned order.

05. The learned Advocate for the applicant has referred to the pleadings of the parties which show that right from the beginning, the applicant is disputing the paternity of non-applicant nos.02 and 03. Relying on the judgment given in the case of

Dipanwita Roy Vs. Ronobroto Roy, reported in **AIR 2015 SC 418**, it is submitted that the application (Exhibit No.17) filed by the applicant should have been allowed and DNA test should have been ordered.

06. The learned Advocate for the non-applicant nos.01, 02 and 03 has supported the impugned order. Relying on certain pleadings in the written statement filed by the applicant in Civil Suit No. 394/2014 which is filed by the present non-applicant nos.01, 02 and 03 seeking decree for partition of property and other ancillary reliefs, it is argued that the applicant has admitted that non-applicant nos.02 and 03 are born during the cohabitation of non-applicant no.01 with the applicant and, therefore, presumption as per Section 112 of the Indian Evidence Act will be attracted and the DNA test need not be ordered as it has far reaching effects. It is submitted that the applicant has failed to point out that conducting the DNA test is in the interest of non-applicant nos.02 and 03 and unless it is established that the DNA test is required to be conducted in the interest of minor children, Court should not order it. To support the submission, reliance is placed on the judgment given in the case of **Sunil Eknath Trambake Vs. Leelavati Sunil Trambake**, reported in **AIR 2006 Bombay 140**.

07. After examining the documents placed on record of the application, I find that the applicant

is disputing paternity of non-applicant nos.02 and 03 right from the beginning. It is the contention of the applicant that he did not have access to non-applicant no.01 during the relevant period prior to her conception.

08. In the judgment given in the case of **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another**, reported in (2014) 2 SCC 576, the Hon'ble Supreme Court has considered the situation under which DNA test can be ordered by the Court and the relevant considerations are in paragraph Nos.15 to 19 as follows :-

"15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the

same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

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 later 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, a 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 fact 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 bastardised 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. "

09. The Hon'ble Apex Court has again dealt with the issue in the judgment given in the case of **Dipanwita Roy Vs. Ronobroto Roy** (*supra*) and relying on the judgment given in the case of **Nandlal Wasudeo Badwaik** (*supra*), has expressed in paragraph No.11 as follows :-

" 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 to told DNA test in circumstances is 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. "

10. Considering the above proposition, in my view, the application (Exhibit No.17) filed by the applicant is required to be allowed.

11. Hence, the following order :-

(a) The impugned order is set aside.

(b) The application (Exhibit No.17) filed by the applicant is allowed.

(c) The DNA test of applicant - Uddhav s/o. Laxman Kalaskar, non-applicant no.02 - Divya Uddhav Kalaskar and non-applicant no.03 - Kranti Uddhav Kalaskar shall be conducted on deposit of the necessary charges by the applicant.

(d) The applicant undertakes to deposit the necessary charges as will be ordered by the learned Magistrate, within one month of the passing of the order.

(e) Rule made absolute in the above terms. In the circumstances, the parties to bear their own costs.

(Z.A. HAQ)
JUDGE

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