

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10695 OF 2015

AABA S/O SAHEBRAO BHISE
VERSUS
JAYA D/O AABA BHISE AND OTHERS

.....
Mr. V. P. Latange, advocate for the petitioner
Mr. A. P. Bhandari, advocate for respondent Nos. 1 and 2
.....

CORAM : V. K. JADHAV, J.

Date of reservation of : 20.01.2016

Order

Date of pronouncement : 28.01.2016
of Order

ORDER:-

1. By consent, heard finally.
2. By way of this writ petition, petitioner/original defendant No. 1 is challenging the order dated 30.09.2015 passed by learned Joint Civil Judge Junior Division, Ashti, District Beed, below Exh. 72 in Regular Civil Suit No. 04 of 2007, thereby allowing the said application and directing respondent No.1/original plaintiff No.1 and the present petitioner/original defendant No.1 to remain present before Civil Surgeon and make themselves available for taking samples for DNA test, along with the consequential directions to Civil Surgeon in that regard.

3. brief facts giving rise to the present petition are as follows :

Respondent Nos. 1 and 2/original plaintiff Nos.1 and 2 instituted a suit bearing Regular Civil Suit No. 04 of 2007 for partition and separate possession of the Hindu joint family property, against the present petitioner, who is defendant No.1, and other respondents/defendants. It is the case of respondent No. 2/original plaintiff No. 2 that her marriage with petitioner/defendant No. 1 was solemnized on 27.12.1985 as per Hindu rites and rituals. Respondent No. 1/plaintiff No. 1 is born out of their wedlock. It is also pleaded that petitioner/defendant No.1 performed marriage with respondent No.2/plaintiff No.2 after getting divorce from his first wife Salubai. After the marriage, said Salubai lodged a complaint against present petitioner and his relatives and also filed an application for grant of maintenance. The said criminal case came to be disposed of in terms of compromise. However, during pendency of the said case, petitioner/defendant No.1 kept respondent Nos.1 and 2/original plaintiffs to their paternal house. Petitioner/original defendant No.1 had demanded amount from the father of respondent No.2/original plaintiff No.2 for meeting expenses incurred by him in the said criminal case filed by Salubai. Even she was subjected to ill treatment on that count. Furthermore, petitioner/defendant No.1 brought one lady by name Indubai in his house. Respondent

No.2/original plaintiff No.2 was forced to stay in the matrimonial home along with said Indubai. Even the said Indubai gave birth to two male children who are arrayed as defendants in the suit. It is the case of respondent No.2/plaintiff No.2 that finally she was driven out of the matrimonial house and accordingly, she started residing in her parent's house. Even respondent No.1/plaintiff No.1 completed her education their only. It is the case of respondent No.2/plaintiff that the petitioner/original defendant No.1 has refused and neglected to maintain respondent Nos. 1 and 2, therefore, they were constrained to institute R.C.S. No. 04 of 2007 for partition and separate possession of joint Hindu family property.

Petitioner/defendant No.1 strongly resisted the said suit by filing his written statement. Petitioner/defendant No.1 has denied the marriage with respondent No.2/plaintiff No.2 and also denied paternity so far as respondent No.1/plaintiff No.1 is concerned.

In view of the said denial of relationship itself, respondent Nos. 1 and 2 have filed application Exh.72 for carrying out DNA test. Petitioner/defendant No.1 has strongly resisted the said application on various grounds. The trial court, by order dated 30.09.2015 passed below Exh.72, allowed the application and thereby directed the concerned parties to make themselves available for taking

samples for DNA test before Civil Surgeon, Civil Hospital, Beed. Hence this Writ Petition.

4. Learned counsel for the petitioner submits that DNA test cannot be directed as a matter of course or in a routine manner. Learned counsel further submits that the trial court has ignored that the suit is instituted for partition and separate possession and it is for the respondents/plaintiffs to prove the case by leading cogent evidence. Learned counsel further submits that the trial court has not considered the diverse aspects of the case including the law of conclusive presumption as provided under Section 112 of Indian Evidence Act, 1872. Learned counsel for the petitioner/defendant No.1, in order to substantiate his submissions, places reliance on the decision in the case of ***Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and Another***, reported in ***2010 (5) All M.R. 895***.

5. Learned counsel for respondent Nos. 1 and 2/plaintiffs submits that the civil court is having implicit and inherent power to order a person to submit himself for medical examination. Learned counsel submits that the result of DNA test is scientifically accurate. Learned counsel submits that although Section 112 of the Evidence Act raises presumption of conclusive proof on satisfaction of the conditions

mentioned therein, however, the same is rebuttable. Learned counsel submits that the court should be furnished with best available science and may not be left to bank upon presumption. Learned counsel further submits that in the case in hand, the daughter along with her mother has filed an application for carrying out DNA test against the father. Considering the fact that the daughter has a strong *prima facie* case, the Magistrate has exercised powers with the observations that, in the given set of facts and circumstances, claim of DNA test is justified. Learned counsel submits that no interference is called for in the impugned order. There is no substance in the writ petition and the same is liable to be dismissed. Learned counsel for respondent Nos.1 and 2, in order to substantiate his submissions, places his reliance on the decisions in the following cases :

1. Decision dated 23.09.2011 delivered by Delhi High Court in IA No.10394/2011 in CS(OS) No.700/2008 i.e. ***Rohit Shekhar vs. Shri Narayan Dutt Tiwari and Another,***
2. ***Narayan Dutt Tiwari vs. Rohit Shekhar and Another,*** reported in ***(2012) 12 SCC 554,***
3. ***Dipanwita Roy vs. Ronbroto Roy,*** reported in ***AIR 2015 SC 418,***
4. ***Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik,*** reported in ***AIR 2014 SC 932,***
5. ***Kamti Devi and Another vs. Posiram,*** reported in ***AIR***

2001 SC 2226 and

6. **Goutam Kundu vs. State of West Bengal and Another**, reported in **AIR 1993 SC 2295**.

6. Learned judge of the trial court, on perusal of documents produced by the parties in support of their rival claims, has observed that the fact of paternity of petitioner/defendant No.1 cannot be proved by any other evidence and thus, DNA test in the case is useful to determine the question of disputed paternity. It appears from the impugned order that respondent Nos.1 and 2/plaintiffs are ready to submit themselves for DNA test for proving their relationship with petitioner/defendant No.1. Petitioner/defendant No.1 has strongly opposed the said prayer. It appears from the impugned order and also from the submissions of counsel for respective parties that the order directing DNA test, in the given set of facts and circumstances, is justified in the present case.

7. In the case of **Rohit Shekhar** (*supra*), relied upon by learned counsel for respondent Nos.1 and 2, in paragraph No. 216 of the judgment, Delhi High Court has referred the principles laid down by the Supreme Court as well as the High Courts in several judicial pronouncements, which are reproduced below:

"216. In this background, it would be appropriate to collate the

principles laid down by the Supreme Court as well as the High courts in the several judicial pronouncements noticed hereinabove which are to the following effect:-

- (i) A matrimonial court and the civil court have the implicit and inherent power to order a person to submit himself for medical examination (Re: Sharda)*
- (ii) The court under section 75(e) of the CPC and order XXVI, rule 10A has the requisite power to issue a direction to hold a scientific, technical or expert investigation. (Re: Sharda; Selve)*
- (iii) Passing of an order for medical examination would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution (Re: Goutam Kundu)*
- (iv) The direction for the medical examination can be issued suo motto by the court or upon an application filed by a party (Re: Sharda) The principles of natural justice would require to be complied with.*
- (v) The court would examine that the proportionality of the legitimate aims being pursued are not arbitrary, discriminatory or pointless or which may adversely impact the best interest of the child (for instance, bastradise a child) and that they justify the restrictions on privacy and personal autonomy concerns of the person directed to be subjected to medical examination.*
- (vi) The court should not exercise such power as matter of course or in order to have a roving inquiry (Re: Goutam Kundu) Such power would be exercised if the applicant*

has a strong prima facie case and there is sufficient material before the court (Re: Sharda) The court would consider the age; physical and mental health of the persons involved.

- (vii) No one can be compelled to give a sample of blood for analysis (Re: Goutam Kundu). If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled take the refusal on record and to draw an adverse inference against him (Re: Sharda)*
- (viii) A direction to a person to undergo a medical examination could be made to enable the court to leading the truth; in matrimonial cases also for removal of misunderstanding, bringing a party to terms; for judging competency of a person to be a witness; whether a person/party needs treatment or protection; the capacity of a person/party to protect his interest or defence in litigation; whether the person needs legal aid (Re: Sharda)*
- (ix) In a case involving a paternity claim/denial issue, the conclusive proof standard mandated by Section 112 of the Evidence Act, read with Section 4, admits an extremely limited choice before the Court, to allow evidence of “non access” to a wife by the husband, who alleges that the child begotten by her is not his offspring; it is designed to protect the best interests of the child, and his legitimacy (Re: Goutam Kundu; Rohit Shekhar (Bhat, J – DOJ 23rd December, 2010)*

- (x) *A “paternity” action by the son or daughter of one, claiming the defendant to be his or her biological father, filed in a civil court by an adult plaintiff, or claims paternity, for other reasons, (such as non-consensual sexual relationship the basis of facts, and on the basis of the child's rights/either under Section 125 Cr.P.C., or in a suit for declaration or for maintenance) cannot be jettisoned by shutting out evidence, particularly based on DNA test reports, on the threshold application of Section 112; the Court has to weigh all pros and cons, and, on being satisfied about existence of “eminent need” make appropriate orders; (Re: Goutam Kundu; Bhabhani Jena; Rohit Shekhar (Bhat, J – DOJ 23rd December, 2010)*
- (xi) *In a case involving a parentage issue, the child's best interest shall dominate the consideration by the court. The court may refrain from ordering a test if it considers that this may not be in the child's best interest. The court would also consider the reasons for refusal of the examination of the child by the party having custody and make appropriate orders based on the best interest principle.*
- (xii) *which could include an external and internal examination; a physical and psychological examination of the person. The medical examination may be directed to include and examination of blood, semen, sputum, sweat, hair samples, and finger nails by the use of modern scientific techniques in binding DNA profiling.*

- (xiii) *The medical examination/expert investigation must be by a qualified doctor; qualified psychiatrist/expert in the field (Re: Sharda)*
- (xiv) *The medical examination including the DNA profiling would be ordered by the court if relevant to the specific issue; necessary and relevant to ensure legitimacy of administration of justice; where scientific tests are necessary for discovery, doing justice to all parties; and where the relevant evidence cannot be obtained by any non-instrusive methods.*
- (xv) *The court has the jurisdiction to order DNA testing of blood relatives of a person alleged to be the parent, even though they are not parties to the litigation.*
- (xvi) *The results of the scientific DNA testing shall be produced before the court in sealed cover and kept in a sealed cover.*
- (xvii) *The court would make appropriate direct preservation of the samples and also the confidentiality to be attached to the same.*
- (xviii) *The testing must be undertaken by an accredited laboratory with established and accepted credentials and expertise which meets the publicly sanctioned standards.*
- (xix) *Appropriate directions covering the technical aspects with regard to drawing, preservation, transportation, and integrity of the sample specimen must be made so that integrity and identity of the sample/specimen is*

guaranteed.

(xx) *The court could direct that the report of the DNA test should contain the following :-*

(i) qualifications of the person making the report

(ii) details of identity of the person tested

(iii) circumstances in which and description of sample was taken from each person to whom the report relates and the manner in which the person was separately identified from each person to whom the test relates

(iv) the nature/system in which the test undertaken

(v) the results of the test

(vi) whether the results show that a person is not a natural parent of the child

(vii) whether the blood test carried out on a person does not show that the person is not a natural parent of the child, the report may contain an evaluation of the significance of the results of the test in determining whether that person is a natural parent of the child....."

In light of the above principles, it appears that respondent Nos.1 and 2/plaintiffs have a strong *prima facie* case and there is sufficient material before the court.

8. Admittedly, the first wife of petitioner/defendant No.1, namely

Salubai, had filed a complaint bearing R.C.C. No. 30 of 1987 against petitioner/defendant No.1, respondent No.2/plaintiff and others alleging therein that the petitioner/defendant No.1 has performed second marriage with respondent No.2/plaintiff. In the said criminal proceedings, Salubai has specifically deposed about the second wife i.e. the present respondent No.2/plaintiff, of the petitioner/defendant No.1 and the fact of birth of a girl child out of their wedlock. Respondent No.1/plaintiff No.1 is a young girl of 20 years of age having her entire life ahead and in the best interests of respondent No.1, the trial court has rightly exercised the powers. In the case in hand, the conclusive proof standard mandated by Section 112 of the Evidence Act admits an extremely limited choice before the court.

9. In the light of above discussion and the case laws relied upon by the counsel for respective parties, it is clear that no one can be compelled to give a sample of blood for analysis. Here, in this case, learned Judge of the trial court has directed respondent Nos.1 and 2/plaintiffs and the petitioner/defendant No.1 to remain present before the Civil Surgeon, Beed and make themselves available for taking samples for the purpose of DNA test, and further directed the Civil Surgeon to take necessary samples for the purpose of DNA test and after conducting DNA test, to submit a report on the point whether the petitioner/defendant No.1 is the biological father of

respondent No.1/plaintiff No.1.

10. In view of the above discussion, the impugned order requires some modification. Hence the following order:

O R D E R

- I. The order dated 30.09.2015 passed below Exh.72 by Joint Civil Judge Junior Division, Ashti, District Beed, in Regular Civil Suit No. 04 of 2007, is hereby confirmed with the following modification;

“The petitioner/defendant No.1 cannot be physically compelled or be physically confined for submitting a sample of his blood for DNA test. However, if such refusal on the part of petitioner/defendant No.1 to submit blood sample is willful, *mala fide*, unreasonable and unjust, such refusal may be taken on record. Trial court may consider such refusal on the part of petitioner/defendant No.1 while assessing the evidence by drawing adverse inference.”

- II. With the above modification in the impugned order, Writ Petition is disposed of. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)