

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1373 OF 2015

1. Kalpana w/o Sahebrao Chavan
Age 39 years, Occ. Household,
R/o. Rail, Tq. Kannad,
District Aurangabad
at present N-2, CIDCO,
Aurangabad, District Aurangabad
2. Pratiksha d/o Sahebrao Chavan
Age 12 years, Occ. Education
R/o. As above,
through petitioner No.1 as a guardian
3. Krushna s/o Sahebrao Chavan
Age 7 years, Occ. Education
R/o. As above,
through petitioner No.1 as a guardian ...Petitioners

versus

1. Sahebrao Devrao Chavan
Age 43 years, Occ. Agri. and Service
(Pearls Policy Field Officer),
R/o. Chikalthana, Tq. Kannad,
District Aurangabad
2. Devrao Yashwantrao Chavan
Age 70 years, Occ. Agriculture
R/o. As above ...Respondents

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Advocate for Petitioners : Mr. Devakate Anant R
Advocate for Respondents : Mr. Kasliwal Ajit D.

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CORAM : V. K. JADHAV, J.
DATED : 22nd SEPTEMBER, 2016

JUDGMENT:-

1. Rule. Rule made returnable forthwith. By consent heard

finally, at admission stage.

2. Being aggrieved by the order dated 8.10.2015 passed by the 3rd Judicial Magistrate, First Class, Aurangabad in below Exh.54 in Criminal M.A. No. 2887 of 2013, the original applicants, preferred this criminal writ petition.

3. Brief facts giving rise to the present writ petition are as follows:-

a) Petitioner No.1 got married with respondent Nos. 1 on 5.5.1992 and according to petitioner No.1, petitioner Nos. 2 and 3 born to them out of their marital wedlock. They had enjoyed the marital life till the year 2001. Thereafter, respondent No.1 left the company of the petitioners. In consequence of which, petitioners constrained to institute a civil suit before learned C.J.J.D. Aurangabad bearing R.C.S. No. 221 of 2012 for partition and separate possession in respect of landed as well as house properties.

b) Respondent No.1 has strongly resisted the said suit by filing his written statement and also denied the paternity of present petitioner Nos. 2 and 3. Even in the said suit, respondent No.2 also moved an application at Exh.28 seeking directions to the petitioners

to undergo the D.N.A. Test. The petitioners opposed the said application and learned C.J.J.D. Aurangabad after considering the submissions of both the parties by order dated 3.9.2013 rejected the said application Exh.28 filed in the aforesaid suit.

c) Being aggrieved by the same, present respondent No.1 has approached this Court by filing writ petition No. 1686 of 2014. This Court by order dated 28.2.2014 pleased to dispose of the writ petition with observations that the parties will have to lead the evidence and the respondent has to establish his prima facie case by evidence and then he may make application for referring the petitioners herein to D.N.A. test and such application, if filed, shall be considered by the civil Court on its own merits.

d) Thereafter, the present petitioners filed an application under Section 12 of the Domestic Violence Act bearing Criminal M.A. No. 264 of 2012 before the J.M.F.C. Kannad, District Aurangabad. But later on said application came to be transferred to the J.M.F.C. Aurangabad which is re-numbered as Criminal Misc. Application No. 2887 of 2013. The petitioners in the said proceedings have examined the witnesses and after closure of evidence by the petitioners, respondent No.1 herein moved an application at Exh.54 in the said proceedings, reiterating the contentions as raised in the

application Exh.28 in R.C.S. No. 221 of 2012 as aforesaid. The petitioners also strongly resisted the said application by filing say at Exh.61. However, learned 3rd J.M.F.C. Aurangabad by order dated 8.10.2015 allowed the said application directing the present petitioners to submit themselves to DNA test and make themselves available for collection of blood samples.

4. Learned counsel for the petitioners submits that the order passed by the Magistrate is cryptic and learned Magistrate has not considered the observations made by this Court while disposing of writ petition No. 1686 of 2014. The petitioners have strongly resisted the application Exh.54 by filing their say at Exh.61 wherein in para 19 of the say it has specifically brought to the notice of the learned Judge of the trial court about the observations made by this Court in writ petition No. 1686 of 2014. However, learned Magistrate has not given any reference to the said observations and allowed the application.

5. Learned counsel for the respondents submits that in view of the judgment delivered by the Supreme Court in the case of ***Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another***, reported in ***AIR 2014 SC 932***, learned Magistrate has correctly passed the order. No interference is required. Writ petition is devoid

of any merits and the same is liable to be dismissed.

6. Instead of going into merits of application Exh.54, I am surprised to see that, learned Magistrate has not at all given any reference to the observations made by this Court while disposing of writ petition No. 1686 of 2014. In the Civil Suit between the parties, present respondent No.1 had filed similar application for DNA test of present petitioners by denying the paternity of petitioner Nos. 2 and 3. The learned Judge of the Civil Court has rejected the said application. Being aggrieved by the same, the present respondent No.1 had filed writ petition No. 1686 of 2014. This Court while disposing of said writ petition, in para 6 of the order, has made the following observations:-

“6. The parties have yet to adduce the evidence. The facts on record does not necessitate driving the parties for the D.N.A. test at this stage. The parties will have to lead evidence. The petitioner prima facie has to establish his case by his evidence and then the petitioner may make an application for referring the parties to the D.N.A. Test, which application shall be considered by the Court on its own merits.”

7. Even though the present petitioners have specifically brought these observation to the notice of learned Magistrate, the Magistrate

has not at all given any reference to the same and decided the application Exh.54 by passing such cryptic order. In view of this, I have no other alternative but to remand the matter for deciding application Exh.54 afresh by giving opportunity of being heard to both the parties. Hence, I proceed to pass the following order:-

O R D E R

- I. Criminal writ petition is hereby partly allowed.
- II. The order dated 8.10.2015 passed by 3rd J.M.F.C. Aurangabad below Exh.54 in Cri. M. A. No. 2887 of 2013 is hereby quashed and set aside.
- III. The matter is remanded to the Magistrate with following directions:-

“The Magistrate shall decide application Exh.54 afresh by giving opportunity of being heard to both the parties. All points are kept open.”
- IV. Writ petition is accordingly disposed of. Rule made absolute in the above terms. No costs.

(V. K. JADHAV, J.)