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

WRIT PETITION NO.8923 OF 2017

Mrs. Shraddha Anand. ..Petitioner.
vs.
Mr.Anand Ramkumar ..Respondent.

Mrs. Abha Singh with Santosh Budwani for the petitioner.
Smt. Chitra Phadke with Rutuja Ambekar for the Respondent.

**CORAM: A.S.GADKARI, J.
DATE : 16 AUGUST 2017.**

P.C.:

1] Petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India impugning the order dated 18.7.2017 passed by the 9th Joint Civil Judge, (S.D) Thane, below Exhibit-32 in Matrimonial Petition No.129 of 2017, granting permission to conduct DNA test of the respondent and minor daughter Sia either at Forensic Laboratory, Govt. of India, Hyderabad or at Forensic Science Laboratory, Kalina, Mumbai whichever is convenient to both the parties and the petitioner herein is directed to co-operate and keep daughter Sia present for conducting the said test.

2] Heard the learned Counsel for the Petitioner and the learned Counsel for the respondent at length and perused the record annexed to the petition.

3] The record indicates that, Respondent herein, husband, has filed Matrimonial Petition No.129 of 2017 on 13.2.2017 in the Court of Civil Judge, (S.D.), Thane at Thane under Section 13(1)(i) and (i-a) of the Hindu Marriage Act for divorce. It is pleaded in the said Matrimonial Petition that, prior to marriage, the petitioner herein revealed that she was having affair/relationship with one Viji Vergese for about 7-years. As the petitioner and respondent were in deep love, the respondent told the petitioner to forget about the past and decided to start a new life. The petitioner and respondent got married on 27.1.2008. A daughter by name Sia is born out of the said wedlock on 18.9.2011. That, after the marriage it was revealed to the respondent that the petitioner is having affair with respondent No.2 therein i.e. Samir Bhiwapurkar. That, the petitioner is also accustomed to alcoholic drinks. The pleadings in the said petition specifically and categorically proceeds on the footing that the petitioner was having extra marital

affairs/relations with respondent Nos. 2,3 and 4 mentioned in the said petition. Respondent has categorically averred that the petitioner had been in adulterous relationship with three persons namely the respondent Nos. 2,3 and 4 therein. Respondent has further categorically pleaded that he has not condoned the adulterous behavior of the petitioner and since the time he came to know about the adultery the respondent had no conjugal relations with the petitioner though he continued to live under the same roof along with her for the sake of minor daughter Sia. Apart from the prayer for dissolution of marriage he has prayed that, custody of minor daughter Sia be handed over to him, looking into the behavior pattern of the petitioner and for an order to restrain the petitioner from disturbing the regular schedule of minor daughter Sia from doing any act that will be detrimental to the welfare and interest of minor daughter Sia.

4] The respondent thereafter filed an application dated 10.7.2017 below Exh.32 for conducting DNA test of the respondent and minor daughter Sia. It is stated in the said application that, while filing the marriage petition, the respondent had a impression that he was the biological father of

daughter Sia and petitioner had not started cheating upon him at the relevant time of the conception and birth of Sia. However, upon taxing his memory a lot, he realised that there was no possibility that he was the cause of Sia's birth, as he was using protection whenever petitioner allowed him to be physically intimate with him. As the respondent had apprehension to believe about the debauchery/promiscuity of the petitioner, he conducted DNA test from private reputed/accredited laboratories namely DNA Labs India and Life Forensic Laboratory and the said laboratories have given their reports dated 3.4.2017 and 12.6.2017 respectively with a conclusion that the respondent is excluded as the biological father of the tested child namely Sia. The said reports are annexed to the present petition at pages-73 & 74 respectively.

It is further stated in the said application that, respondent is aware of the rebuttable presumption as contemplated under Section 112 of Indian Evidence Act, about the legitimacy of a child born during the subsistence of a marriage. The respondent has specifically stated that he did had access to the petitioner, but her behaviour towards him had

changed and she was reluctant for physical intimacy with him. He has categorically stated that, it took him six painful long years to realize that he was right in suspecting the petitioner about her unchaste behaviour and that all the well wishers around him were wrong. The respondent has further emphasised that he believes the hallmark of justice “Truth must triumph”, and with a view to know the truth behind the birth of a child Sia, he filed the said application before the Trial Court praying for conducting a DNA test by an independent Forensic Laboratory of Government.

5] Petitioner herein filed her reply-cum written argument dated 13.7.2017 and opposed the said application. The Trial Court after hearing the parties to the said application was pleased to pass Order dated 18.7.2017 below Exh.32 which is impugned herein.

6] Learned Counsel for the petitioner, apart from the pleadings in the said written arguments and petition, submitted that if the said test is allowed to be performed, future life of the child will be devastated and it is for the Court to take into consideration the future of the minor child. The entire gravamen

of the contentions and the arguments of the petitioner are revolving around Section 112 of the Indian Evidence Act which deals with the legitimacy of birth of a person during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man.

Learned Counsel for the petitioner in support of her contentions relied upon two decisions of the Hon'ble Supreme Court namely (1) *Gautam Kundu Vs. State of West Bengal & Anr.* [MANU/SC/0345/1993: AIR 1993 SC 2295 and (1993) 3 SCC 418] and (2) *Shri Banarsi Dass Vs. Mrs. Teeku Dutta & Anr.* [MANU/SC/0333/2005 : (2005) 4 SCC 449]. She submitted that the directions issued by the Trial Court are contrary to the guidelines laid down by the Supreme Court in para-26 in the case of *Gautam Kundu(supra)*. She submitted that the Trial Court after taking into consideration the presumption under Section 112 of Indian Evidence Act ought not have granted such a permission and therefore Order impugned herein is bad in law. She therefore prayed that the impugned Order be quashed and

set aside and the petition may be allowed.

7] In the case of Gautam Kandu (*supra*), the husband had filed an application before the Trial Court for conducting DNA test in a proceedings under Section 125 of Cr. P.C. The Hon'ble Supreme Court has recorded a conclusion that with a view to avoid payment of maintenance the blood test was sought and the said application was therefore made. In the case of *Gautam Kandu(supra)*, the Hon'ble Supreme Court, after analyzing the dicta laid down by the various High Courts and law prevailing till then and also after taking into consideration the provisions of Section 112 of the Indian Evidence Act, in para-26 of the said Judgment, has laid down guidelines for conducting blood test wherein doubt about the paternity is raised. In para-26 of the said Judgment it is held that, the Courts in India cannot order blood test as a matter of course; wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained; there must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act, and the Court must

carefully examine as to what would be the consequence of ordering the blood test.

In para-22 of the said decision, the Hon'ble Supreme Court has held that, it is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate and that access occurred between the parents. That this presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.

8] In the case of *Shri Banarsi Dass (supra)*, the core question involved in the appeal was whether a direction for DNA test can be given in a proceeding for issuance of succession certificate under the Indian Secession Act, 1925. By relying on the decision in the case of *Gautam Kundu (supra)*, the Hon'ble Supreme Court has further elaborated the proposition of law pertaining to conducting DNA test. In para-15 of the said decision, the Supreme Court has held that Section 112 of the Indian Evidence Act was enacted at a time when the modern scientific advancements with DNA as well as RNA tests were not even in contemplation of the legislature. That the result of a genuine DNA test is said to be scientifically accurate. But even

that is not enough to escape from the conclusiveness of Section 112 of the Indian Evidence Act e.g if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. That, this may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. It is further held that, DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given.

9] There cannot be any second opinion or dispute about the guidelines enumerated by the Supreme Court in the case of *Gautam Kundu(supra)*, however, the facts involved in the present case are totally different. The record clearly indicates that, matrimonial petition filed by the respondent/husband before the Family Court proceeds entirely on the footing that the petitioner was/is having extra-marital relationship with respondent Nos.2 to 4 mentioned therein.

10] It is the categorical case of the respondent in his application for conducting DNA test that, his chances being

biological father of the minor child Sia are very blink, as he was using protection whenever petitioner allowed him to be physically intimate with him. The respondent has also placed reliance on two private reputed/accredited laboratories wherein DNA test of respondent and minor daughter Sia was conducted and the reports of the said laboratories in unequivocal term gave its conclusion/result that the respondent is excluded as the biological father of the tested child namely Sia. Thus the respondent has made out a strong prima facie case for conducting DNA test upon himself and daughter Sia. It clearly appears that the presumption of legitimacy has been displaced by a strong preponderance of evidence on record by the respondent and not by a mere balance of probabilities.

11] As has been observed by the Hon'ble Supreme Court in the case of *Shri Banarsi Dass (supra)*, the result of a genuine DNA test is said to be scientifically accurate. It is to be noted here that, as of today due to advent of science, conducting DNA test will certainly throw light on the paternity of the child. The respondent cannot be foisted with paternity of the child, if it is proved by a scientific method that he is not the concerned

person to give birth to the said minor child, though he was having access to the petitioner at the relevant time. The reports of DNA tests from the private laboratories which are produced by the respondent on record, according to this Court, has the evidential value as of a contemporaneous document in support of contention of respondent and the Trial Court has taken into consideration the facts only for the said purpose. The respondent therefore has prayed that DNA test at Government recognize laboratories may be conducted upon himself and minor child Sia for knowing real truth. It is to be noted here that, the Trial Court in para-11 of the impugned Order, recorded that even after knowing that the respondent is not the biological father of Sia, he is praying for availing access to her and has submitted that he has fatherly affection for her.

12] After taking into consideration the entire facts of the present case, this Court is of the considered opinion that, there is no error or illegality either in law or on facts committed by the Trial Court in passing the impugned Order dated 18th July 2017 and interference by this Court under Article 227 of the Constitution of India is therefore unwarranted.

Petition is accordingly dismissed.

13] At this stage, learned Counsel for the petitioner submitted that, petitioner intends to question the correctness of the present order before the Hon'ble Supreme Court and effect of the present Order may be stayed for a period of 6 weeks from today. At the request of learned Counsel for the petitioner, the present Order is stayed for a period of 6 weeks from today.

(A.S.GADKARI, J.)