

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.508 OF 2017
(Sambhaji s/o Murari Bhure Vs. Shankar s/o Sambhaji Bhure and others)

Mr.S.S.Patunkar, Advocate for the petitioner.
Mr.M.S.Adate h/f Mr.N.L.Jadhav, Advocate for respondent No.3.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 25/06/2018

PER COURT :

1. When this Court (Coram : M.S.Sanklecha, J.) considered the submissions of the learned Advocate for the petitioner while issuing notices, the following order was passed on 17/04/2017 :-

“1] Heard learned counsel for the petitioner.

2] Issue notice before admission to respondents returnable on 3.5.2017.

3] This petition challenges the order dated 2.3.2016 passed by the learned Joint Civil Judge (J.D.), Omerga. The impugned order rejects the petitioner’s application for DNA test of respondent nos.1 & 2 (children born in wedlock between the petitioner and the respondent no.3). The impugned order rejected the application for DNA test on the basis of Section 112 of the Indian Evidence Act, which raises a conclusive presumption of legitimacy of a child born during the continuance of a valid marriage. In this case, it is an undisputed position

that the petitioner and the respondent no.3 are married.

4] Mr.Patunkar, learned counsel appearing for the petitioner invites my attention to the decision of this Court in *Namdeo Babasaheb Korde & another v. Babasaheb @ Babarao Ramkrishna Korde & others* **(2015 (1) Mh.L.J., 888)** (prima facie it does not deal with Section 112 of the Evidence Act) and the decision of the Apex Court in *Dipanwita Roy v. Ronobroto Roy* **(2015 AIR (SC) 418)** wherein the Apex Court while dealing with Section 112 of the Evidence Act has observed,

“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 latter must prevail over the former.”

5] Prima facie, the issue seems to be covered in favour of the petitioner by the decision of the Apex Court in the case of *Dipanwita Roy* (supra).

6] *In the above view, there shall be ad interim stay of the order dated 2.3.2016 till the returnable date i.e. 3.5.2017.”*

2. After this Court heard the learned Advocates on 12/06/2018, 15/06/2018 and 19/06/2018, this Court has expressed that if the DNA test of plaintiff Nos. 1, 2 and 3 and defendant No.1 is to be carried out on the request of the petitioner herein and if the said DNA test turns out to be positive resulting in undue harassment to the plaintiffs, would the petitioner compensate by paying Rs.1,00,000/- to each of the three plaintiffs ?

3. Learned Advocate for the petitioner/original defendant No.1 has tendered an affidavit/undertaking that if the DNA test of the 3 plaintiffs are conducted and it is revealed that plaintiff Nos. 1 and 2 are the biological children of plaintiff No.3 and the petitioner, the petitioner would pay Rs.1,00,000/- as compensation to each of the 3 plaintiffs. The said affidavit /undertaking (3 pages) is taken on record and marked as Exhibit “X” for identification.

4. Learned Advocate appearing on behalf of the plaintiffs is agreeable.

5. As such, this petition is allowed in the following terms :-

[a] The impugned order dated 02/03/2016 is quashed and set aside.

[b] Application Exh.22 in RCS No.104/2014 is allowed.

[c] The Trial Court shall issue appropriate orders for directing the DNA test of the 3 original plaintiffs and the petitioner/defendant No.1, to be conducted at Dy.Director, Regional Forensic Science Laboratory Cantonment (Chavani), Aurangabad.

[d] Under the orders of the Trial Court, these 4 persons shall present themselves in the Regional Forensic Science Laboratory Cantonment (Chavani), Aurangabad lab for collecting their blood samples, without any protest or adjournment.

[e] The competent department shall submit the DNA test reports in a sealed envelope to the learned 2nd Joint civil Judge,J.D. Omerga in RCS No.104/2014 within 6 (Six) weeks from the date of collecting the blood samples.

[f] If the DNA test indicates that plaintiff Nos.1 and 2 are the biological children of plaintiff No.3 and defendant No.1, defendant No.1 shall pay an amount of Rs.1,00,000/- to each of the plaintiffs by depositing the said amount within 6 weeks of the result of the DNA test, in the Trial Court, failing which, the Trial Court would strike out the defence of defendant No.1.

[g] The costs of the DNA tests shall be deposited by the petitioner Sambhaji Murari Bhure with the concerned forensic laboratory.

(Ravindra V.Ghugre, J.)