

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

WRIT PETITION NO.3224 OF 2018

Mayuri Amol Hanchnale

...Petitioner

V/s.

Amol Krishna Hanchnale

...Respondent

Mr.Datta H. Pawar for the Petitioner.

Mr.Santosh S. Musale for the Respondent.

CORAM : SMT.BHARATI H. DANGRE, J.

DATE : 06th APRIL 2018

P.C.

1. The present petition challenges the order passed below Exh.19 in HMP No.370 of 2015 by the 03rd Joint Civil Judge, Kolhapur on 15th January 2018, thereby directing the present petitioner to undergo a DNA Test in the light of an application preferred by the husband asking her to be subjected to a DNA test in order to ascertain the paternity of the child.

2. The present case reflects the interesting narration of the facts. The petitioner-husband had filed proceedings for dissolution of Marriage by HMP No.370 of 2015 in the Court of Civil Judge, Senior Division, Kolhapur. By the said petition he sought dissolution

of marriage which was solemnized between the parties on 11th May 2011 on the ground of adultery. The respondent-wife filed a reply on 29th June 2016. In the pending proceedings the respondent-husband moved an application on 04th October 2016 in which he claimed that in November 2014 he was transferred to Kashmir from Meerut and from August 2014 to 17th November 2014, he left the wife at Kapshi, the wife was residing at Kapashi whereas he had moved to Meerut on 11th September 2014. He makes categorical statement that from August 2014 to November 2017 there was no co-habitation between the parties and there was no opportunity of having any sexual intercourse between them.

3. In this backdrop he disputes the paternity of a child which is purported to be born out of the wedlock. He presses that in this peculiar circumstances the respondent-wife should undergo DNA test so as to establish paternity of the child. The wife filed extensive reply to the said application on 03rd April 2017. Almost at the same point of time the proceedings were instituted by the wife under the provisions of the Domestic Violence Act under Section 12 vide MCA No. 13 of 2016 in the Court of Judicial Magistrate First Class, Gadhinglaj. The said proceedings were instituted somewhere in April 2016. The Respondent-husband filed an identically worded

application in the said proceedings on 20th April 2017 seeking directions from the Court directing to the petitioner-wife to undergo the DNA test in view of the facts mentioned in the application.

4. It is noteworthy to mention that the application is ad-verbatimim a reproduction of the application which was filed on 04th October 2016 in the Court at Kolhapur. On 31st October 2017 the J.M.F.C., Gadhinglaj rejected the said application by a detailed order. The Court specifically referred to the settled position of law by the various judgments of the Court and specifically referred to the judgment of *Goutam Kundu vs State Of West Bengal And Anr*¹ and Apex Court in the case of *Nirmaljeet Kaur V/s. State of Punjab*² arrived at conclusion that in light of the observation made by the Apex Court that there is nothing brought on record to raise a suspicion and therefore the direction cannot be issued to the wife to undergo the DNA testing as per whims and fancies of the husband and resultantly, the application came to be rejected.

5. It is to be noted that this application was rejected on 31st October 2017. However, the respondent continued prosecution of his proceedings HMP No.370 of 2015 and application filed in the

1 1993 AIR 2295

2 (2006) 2 SCC (Cri.) 541

said proceedings. This fact of the dismissal of the application of DNA Test by the Court of Gadhinglaj was not brought to the notice of the Court. However, it is a specific case of the applicant that she had specifically brought the fact to the notice of this Court at Kolhapur and she had pointed out that the fact that similar application filed in the proceedings which is pending at Gadhinglaj came to be rejected on 31st October 2017. However, in complete ignorance of the said order passed by the JMFC, Gadhinglaj the Court at Kolhapur passed an impugned order on 15th January 2018 thereby allowing the said application. It is to be noted that the said Court also refers the judgment in the case of *Goutam Kundu vs State Of West Bengal And Anr* and arrive at the conclusion that in the peculiar facts and circumstances narrated in the application the wife should be directed to undergo DNA test, though the test is not granted in normal routine, however, the present peculiar facts warranted that the wife undergo DNA test and the application is allowed.

6. On hearing the learned counsel for the parties it is apparently clear that the issue raised between the same parties namely the issue as to whether the wife is required to undergo a DNA test in the light of the specific facts averred in the application

preferred before the Kolhapur Court on 04th October 2016 and referred before the JMFC, Gadhinglaj Court on 20th April 2017 came to be settled by the JMFC, Gadhinglaj by order dated 31st October 2017. The issue raised was to put to rest by the Court and has been decided by an order dated 31st October 2017. In the peculiar facts of the case the principle of *res judicata* would come into play, where a previous decision of Competent Court on facts which are foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right of the parties act a *res judicata*. A decision on an issue of *res judicata* would be invoked when on the same cause of action, the Court of competent jurisdiction has given a decision and in determining the application of *res judicata* the Court may not concern itself with the correctness of the judgment, suffice it that is issue of pure fact is decided in an earlier proceedings by Competent Court between the same party if recorded and finally decided, cannot be re-opened.

7. In the backdrop of the aforesaid principle when the issue between the same parties, revolving around the similar fact as to whether the similar fact as to whether the wife should undergo DNA test and has been put to rest by order dated 31st October 2017 passed by J.M.F.C. Gadhinglaj. It is not open to the party to

undertake the exercise of forum shopping and to abuse process of law by taking an advantage of an unsuccessful attempt in one court and then attempting to raise the same issue in another Court. Once the issue between parties have been put to rest by order dated 31st October 2017, it was not permissible for the Kolhapur Court to deliberate on the said issue and revisit it once again. In such circumstances the impugned order passed by the C.J.S.D., Kolhapur on 15th January 2018, being hit by principle of *res judicata* in light of judgment dated 31st October 2017 delivered by J.M.F.C., Gadhinglaj, is not sustainable and therefore is quashed and set aside. Writ Petition is allowed. Rule is made absolute.

8. On hearing of the learned counsel for the respondent it is not his case that he was not aware of the passing of the judgment of the J.M.F.C., Gadhinglaj on 31st October 2017 and rather during the course of hearing he made statement before the Court that the parties had intended to file a Review Application before the Court, however, on subsequent instructions the learned counsel makes a statement that no such Review Petition has been filed. This Court is of the clear opinion that the respondent intentionally conceal the decision of the J.M.F.C., Gadhinglaj from the Court at Kolhapur and has abuse the process of law. In such circumstances, the respondent

is levied with the cost of Rs.5,000/- to be paid to the petitioner within a period of four weeks from today.

(SMT.BHARATI H. DANGRE, J.)