

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

CRIMINAL REVISION APPLICATION NO. 196 OF 2017

Mr. Pramod Purushottam Sathe
Age: 55 years, Occ.: Business,
R/at:- Plot No. 15, S.128/2,
Tejashri Apartment, Kothrud,
Pune-411 029.

.. Applicant

Vs.

1. Mrs. Rekha Pramod Sathe
Age: 41 years, Occ.: Housewife.

2. Master Rahul Pramod Sathe,
Age: 18 years, Occ.: Student,
Both R/at: Sainath Apartment,
“B” Wing, Navghar Road, Mulund,
Mumbai.
Permanent Address :
Plot No.15, S. No. 128/2,
Tejashri Apartment, Kothrud,
Pune-411 029.

3. The State of Maharashtra

.. Respondents

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Mr. Girish Agrawal for the Applicant.
Ms. Yashoda Jondhale I/b Jondhale and Co. for Respondent No. 1.
Mrs. N.S. Jain, APP, for the State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 10th July, 2018.

JUDGMENT :-

1. Heard both sides for final disposal. The applicant has invoked the revisional jurisdiction of this Court to challenge the legality of order dated 16th February, 2016 passed below Exhibit-18

in CC No. 36/DV/2015 passed by Metropolitan Magistrate, 27th Court, Mulund, Mumbai as well as the order dated 20th December, 2016 passed by Additional Sessions Judge, Bombay in Criminal Appeal No. 790 of 2016.

2. The relevant facts which are necessary to determine the issue involved in this matter are as follows :-

a) The respondent No. 1 and the revision applicant were known to each other since 1996. Since then they were in a relationship. Subsequently, on 14th February, 2001 their marriage was solemnized. The respondent No. 2 was born on 10th March, 1998.

b) The respondents filed application under Section 12 of the Protection of Women from Domestic Violence Act (hereinafter referred to as “D.V. Act”) which was numbered as 36/DV/2015. The respondents had invoked Sections 12, 18, 19, 20 and 22 of the D.V. Act. The application was filed on 13th March, 2015.

c) The revision applicant filed his reply to the said application on 22nd June, 2015 and denied the contention of respondents.

d) The applicant preferred an application vide Exhibit-18 in the aforesaid proceedings praying that DNA test of respondent No. 2 be allowed to be conducted to establish his paternity by directing the respondent no. 1 and 2 to cooperate and submit themselves for DNA test of respondent no. 2. The said application was preferred on 19th November, 2015.

e) Respondent No. 1 filed her reply vide Exhibit-20 on 16th December, 2015.

f) The learned Magistrate rejected the said application by order dated 16th February, 2016. The said order was challenged by the applicant before the Sessions Court, Mumbai by preferring Criminal Appeal No. 790 of 2016. The respondent No. 1 filed her reply opposing the reliefs in the said appeal on 30th November, 2016. The appeal was dismissed by Sessions Court by order dated 20th December, 2016.

3. In the circumstances, the revision applicant has preferred this application by invoking Section 397 of Criminal Procedure Code challenging the aforesaid impugned orders.

4. The learned Counsel for the applicant put forth following submissions :-

I) The impugned orders are contrary to law. The Courts have misconstrued the provisions of Section 112 of Indian Evidence Act.

II) The presumption enumerated under Section 112 of the Evidence Act is unavailable in the facts of this case.

III) The appellate Court has rejected the appeal without assigning reasons and without discussing the submissions and the judgments relied upon by the applicant.

IV) The investigation in the form of DNA report was just and necessary in view of subsequent information received by the applicant to dispel any doubts for the parties who are litigating.

V) The Courts failed to appreciate that by allowing the DNA test the entire controversy in respect of legitimacy of respondent No. 2 will be proved conclusively.

VI) The Courts below failed to appreciate the observations

made by the Apex Court in several decisions with regards to need for conducting DNA test.

VII) The presumption under Section 112 of the Evidence Act is applicable in the event there was marriage between the parties.

VIII) The Courts failed to appreciate that the applicant is not biological father of respondent No. 2 which fact was disclosed to the applicant by respondent No. 1 herself. She had also named the person who is supposedly the biological father of respondent No.2.

5. The learned Advocate for the applicant has drawn support from the following decisions :-

Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik & Anr.¹
Narayan dutt Tiwari Vs. Rohit shekhar & Anr.² ; Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit and Anr³ ; Dipanwita Roy Vs. Ronobroto Roy⁴ ; Soma Rama Chandram & Ors. Vs. The State of Andhra Pradesh⁵ ; Namdeo Babasaheb Korde & Ors. Vs. Babasaheb @ Babarao R. Korde & Ors.⁶ ; and G.L.

1 (2014) 2 SCC 576

2 (2012) 12 SCC 554

3 (1999) 7 SCCC 675

4 2014 SAR (Civil) 1165

5 2013 ALL MR (Cri.) JOURNAL 205

6 2015 (1) Mh. L. J 888

Mohan Maiya & Ors. Vs. Akshata Bhat.

6. The learned Advocate for respondent Nos. 1 and 2 submitted that, there is concurrent finding of two Courts wherein the claim of the applicant has been rejected. The sole purpose of making such frivolous application is to delay the proceedings. The reliefs sought in the application are not warranted. The applicant and respondent No. 1 were in relationship since 1996 and respondent No. 2 was born on 10th March, 1998. The marriage was thereafter solemnized on 14th February, 2001. The question relating to the paternity has been raised for the first time on 19th November, 2015. The respondent No. 1 has not made any statement with regards to the paternity of the child to the revision applicant and his application is based on concocted version. The respondent No. 1 and 2 cannot be directed to submit themselves for DNA test of Respondent No. 2 to determine the paternity of respondent No. 2. During the pendency of the disputes between the parties, the question of respondent No. 1 disclosing the revision applicant that, he is not biological father of respondent No. 2 does not arise. The Courts below have assigned reasons for rejecting the application preferred by the revision applicant and there is no cause for disturbing and setting aside the said orders.

It is further submitted that, such an application seeking DNA test was not maintainable in the present proceedings. The main object of Domestic Violence Act is Protection of Women from Violence inflicted by a men or a women. The version of the applicant is that on 14th November, 2015, respondent No. 1 had visited the restaurant of the revision applicant and informed him that, respondent No. 2 is not the biological son from the revision applicant and that one Mr. Kulkarni is his father is patently false and difficult to accept. The application is preferred with malafide object of denying maintenance and right of residence to respondent No. 1 and 2. It is further submitted that, the Court must carefully examine as to what would be the consequences of ordering the blood test, whether it will have the effect of brandishing the child as legitimate and the mother has unchaste women. It is thus submitted that, the application be dismissed.

6. Apart from hearing both the sides, I have also perused the documents on record as well as the judicial pronouncements relied upon by the parties. The respondent No. 1 preferred an application under Section 12 of the D.V. Act on 13th March, 2015. In the said application, she has narrated the conduct of opponents therein which according to her amounts to Domestic Violence. The

respondent No. 1 has sought several reliefs in the nature of residence, maintenance etc. The applicant and respondent No. 1 were known to each other prior to their marriage and they were residing together since 1996. It is the contention of Respondent No. 1 that, Respondent No. 2 was born on 10th March, 1998 to them. Subsequently, the marriage was solemnized between them on 14th February, 2001. The application further refers to nature of harassment cause to the respondents by the applicant and his mother. The revision applicant filed his reply to the said application. In paragraph 1, it is stated that, the application under the provisions of Domestic Violence Act is not maintainable for the reason that respondent No. 2 who is the minor son of applicant No.1 and opponent No. 1 cannot be a party to the proceedings and further also for the reason that the applicant and opponent No. 1 therein were not staying together as husband and wife for the last more than 10 years in shared accommodation/house and since opponent No. 1 (applicant) has obtained decree of divorce which has been stayed by the High Court. Thus, the revision applicant, in the reply had admitted that respondent No. 2 is his son. However, in the application preferred on 19th November, 2015, it was contended that, on 14th November, 2015 at about 8.00 p.m. the respondent No. 1 had visited his restaurant and informed him that

respondent No. 2 is not the biological son of the applicant but, he is son of one Mr. Kulkarni. For all these years he was under belief that respondent No. 2 is their son. The applicant thereafter called upon mother of respondent No. 1 and informed her about the information given by respondent No. 1 and asked her as to whether the information is true. The mother of respondent No. 1 also confirmed the said fact. Thus, the applicant prayed that, the DNA test of respondent No. 2 be directed to be conducted in order to elicit the truth regarding paternity of respondent No. 2. In support of his application, he also filed affidavit dated 19th November, 2015. Apparently, since 1996 till 2015, the revision applicant had never doubted the paternity of child.

7. The learned Magistrate while rejecting the said application has observed that, there is conclusive proof that respondent No. 2 is the son of applicant. There is no dispute that applicant accepted his relationship with respondent No. 1 as husband and wife. After applying such evidence in accordance with Section 112 of Indian Evidence Act, the Court may decide whether he is really biological father of respondent No. 2 or not. It is not necessary to carry out DNA test of respondent No. 2. It is required to be proved that when Master Rahul was conceived, the

parties were not having access to each other and after proving the said fact, the Court would decide the paternity of Master Rahul. The Sessions Court has dismissed the appeal by confirming the order of the trial Court. The Sessions Court had observed that, from the submissions it is gathered that, the relationship between the parties is not in dispute and the revision applicant is required to prove that when Master Rahul was conceived, the parties were not having access to each other.

8. In the application preferred by the revision applicant, he has mentioned that, he had no access to respondent No. 1. The trial Court has not closed the doors to the revision applicant and he is permitted to prove the said fact through evidence. Section 112 of the Evidence Act may be a presumption where there is a marital relationship between the parties. The trial Court has also stated that the applicant herein will have to prove that when Master Rahul was conceived parties were not having access to each other. After proving the said fact Court would decide paternity of Rahul. In the facts of this case considering the parties were together in 1996 onwards, the observations of the trial Court cannot be set aside, by interpreting applicability of Section 112 of Evidence act. The question which also arises for consideration is

whether on bald statement of the revision applicant which was made belatedly by preferring an application the respondents be compelled to conduct the DNA test to determine the paternity of respondent No. 2. It is also necessary to note that, the whole object of the Domestic Violence Act is Protection of Women from Violence inflicted by men and a women. It is a progressive Act. The sole intention is to protect the women. The Act is to provide for more effective protection of the rights of women guaranteed under the constitution who are the victims of violence of any kind occurring within the family and/or matters connected therewith or incidental thereto. It is a beneficial and welfare legislation for protecting the right of women, keeping in view the rights guaranteed under Article 14, 15, 19 and 21 of the Constitution of India. The parliament has enacted D.V. Act to provide for a remedy which is intended to protect the women from being victims of Domestic Violence in the Society. The Act not only deals with various Acts and omissions which would be constitute Domestic Violence by laying down an elaborate definition of Domestic Violence is Section 3 of the Act, but also provides for different reliefs that can be obtained by an affected women described and defined as aggrieved person in Section 2(a) and the procedure by which such reliefs can be obtained which provides

for a mechanism for redressal of the grievances of the aggrieved person arising from her being a victim of Domestic Violence.

9. The learned Counsel for the applicant had strongly relied upon the decisions referred to hereinabove, in the case of ***Nandlal Wasudeo Badwaik (Supra)***, it is observed that DNA test reports provides scientifically correct proof. Section 112 provides for presumption of a fact, not for legal fiction. In the said case, the DNA test was conducted pursuant to the directions of the Court and the report had vindicated the husband's stand that he was not father of the child. In the circumstances, the Court held that scientific proof provided by DNA test was acceptable and the presumption of legitimacy of child stands conclusively rebutted. In the said case, at the request of the wife, the DNA test was carried out again and even on the second occasion the husband was excluded from being biological father of child.

10. In the case of ***Narayan Dutt Tiwari (Supra)***, the Supreme Court has dealt with the similar issue. In the said proceedings, the petitioner had shown his unwillingness to subject himself to DNA test. The High Court had directed that the Court can use reasonable force by taking police assistance if blood sample is not willingly given. The Supreme Court dismissed the

said petition and confirmed the orders of the Courts below directing DNA test. In the said proceedings, the husband had denied that he is biological father of the son. The Court analyzed several decisions while adjudicating the issues involved therein relating to DNA test. In the case of ***Dwarika Prasad Satpathy (Supra)***, the Supreme Court has again dealt with the issue of paternity and the question of directing the parties to undergo DNA test. It was observed that, the case relates to the grant of maintenance of Section 125 of Cr.P.C. The husband had denied the paternity of the child, but refused to undergo DNA test and in the circumstances, it was held that such a person is dis-entitled from disputing paternity. In the decision of ***Dipanwita Roy (Supra)***, the Apex Court has observed that, the presumption envisaged under Section 112 is rebuttable and the proof based on DNA test would be sufficient to dislodge a presumption under Section 112 of the Act. It was also observed that the factual matrix of the said decision indicate that the husband's petition for dissolution of marriage on the ground of alleged infidelity of the wife was under consideration. He had also named the person who was the father of the male child born to wife. It is in the process of substantiating his allegation of infidelity, that the husband had made an application before the Court for conducting DNA test,

which would establish whether or not, he had fathered the male child born to wife and the husband feels that it is possible, for him to substantiate the allegations through DNA test without which, it would be impossible for the husband to establish and confirm the assertions made in the pleadings. In these circumstances, the impugned order passed by the High Court directing, holding a DNA test, of the husband and the male child born to the wife was fully justified as such a test is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband and to establish that she had not been unfaithful, adulterous or disloyal. However, in the present case, it is noted that the relationship between the respondent No. 1 was in existence since 1996 and the revision applicant had denied paternity in 2015. It is alleged by him that he is not the biological father of the respondent No. 2, on the basis of the alleged statement made by respondent No. 1. There is no allegation of infidelity against the respondent No. 1. Considering the nature of the proceedings and the nature of application preferred by the revision applicant and the stage at which it was preferred the ratio laid down in the

above decision cannot be applied to the present case. In the case of ***Soma Rama Chandram & Ors. (Supra)***, decided by Andhra Pradesh High Court, it was held that the Right against self-incrimination or testimonial compulsion is available only in purely criminal cases and not applicable in proceedings under Section 125 of Cr.P.C. The maintenance under Section 125 is a measure of social justice falling within constitutional sweep of Article 15(3) and 39 of the Constitution of India. In the said case, the wife had preferred an application for maintenance on the ground that, the respondent therein being husband and father of the child neglected and deserted them without lawful cause while they got no means to maintain themselves. However, the husband claimed that wife is guilty of adultery and the child was not born to him whereas she was born to his wife by virtue of her adultery with a different male person by reason of which he got no responsibility to provide any maintenance. In that context he filed application before the Court below to send the child for DNA test for the purpose of determining as to whether her natural father for awarding necessary maintenance to her. The trial Court held that Court cannot compel the party to go for DNA test and the said application was dismissed. The High Court held that the order passed by the trial Court was improper as the right against self-

incrimination or testimonial compulsion is not available in such proceedings. In the case of ***Namdeo Babasaheb Korde & Ors (Supra)***, decided by this Court it was observed that, when medical science can act in aid of law, Courts must allow truth to prevail. The Court was directed to issue necessary directions for calculating blood samples for seeking DNA test. In the said case, the petitioners had challenged the order passed by the Civil Judge. The respondent had denied the factum of his wedlock with one of the petitioner and therefore the petitioner had moved an application seeking a DNA test of the respondent No. 1 to prove his paternity. The Court relied upon several decisions and held that, when the petitioner No. 1 claiming to be the son and respondent No. 7 (claiming to be daughter) desire that their father needs to be identified, and the law will rush in aid of the duo. It was also observed that, for ascertaining the truth and to avoid evading the clutches of Law, the respondent No. 1 therein needs to undergo the DNA test. No loss or harm of any nature would be caused to him. Thus, the factual aspects of the said matter were different and the same are also not applicable in the present case.

11. Considering the facts germane to present proceedings, it is seen that all of a sudden the applicant had alleged that, the

information was received from the respondent No. 1. The application was preferred by revision applicant denying paternity of respondent No. 2. It is also apparent that, the respondent No. 1 had prayed for interim maintenance and the arguments were heard on that application. When the matter was pending for orders on interim maintenance, the revision applicant preferred the application for DNA test of respondent No. 2 on 19th November, 2015. It is pertinent to note that, the applicant and the respondent No. 1 are acquainted to each other since 1996. They stayed together. During the said period respondent No. 2 was born on 10th March, 2018. The marriage was solemnized in 2001 and after the period of 14 years, the revision applicant on the basis of the alleged information provided by respondent No. 1 seeks DNA test of respondent No. 2 who is aged about 18 years at the moment. The revision applicant is doubting her character after several years of marriage. The respondent No. 1 had brought to the notice of the appellate Court, the photographs showing the respondent No. 2 and the revision applicant in good times and even the mark sheet of respondent No. 2 where the revision applicant had admitted the paternity of child. Thus, suddenly doubting the paternity will not only have the devastated effect on the child but also traumatize the respondent No. 1 as she already under a

trauma as the revision applicant has willfully deserted her by obtaining an ex-parte divorce order. The DNA test cannot be ordered as a matter of course, the Court must carefully examine as to what would be the consequences of order. The blood test whether it will have the effect of brandishing a child as illegitimate and the mother as an unchaste women. The blood group test is a useful test to determine the question of paternity. It can be relied upon by the Courts as a circumstantial evidence which ultimately excludes certain individuals as father of the child. It is for the parties to place their evidence in support of respective claims and established their stand. DNA test is not to be directed in a routine manner and it should be directed only in deserving cases.

12. In the light of the aforesaid circumstances and for the reasons stated hereinabove, no case is made out to interfere in the order passed by the Courts below and hence, the revision application is devoid of merits and the same is required to be dismissed.

(PRAKASH D. NAIK, J.)