

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**WRIT PETITION NO. 8724 OF 2018**

1. Yogesh s/o Kisan Bhokare  
Age: 23 years, Occu. Nil,  
R/o. Wanegaon, Tq. Phulambri,  
Dist. Aurangabad
2. Janabai wd/o Kisan Bhokare  
Age: 58 years, Occu. Household,  
R/o Wanegaon, Tq. Phulambri,  
Dist. Aurangabad

... **Petitioners**  
(Orig.Plaintiffs)

***Versus***

1. Kisan s/o Trimbak Bhokare (died through LRS)  
Satyabhama wd/o Trimbak Bhokare,  
Age; 60 years, Occu: Agriculture,  
R/o Wanegaon, Tq. Phulambri,  
Dist. Aurangabad
2. Kantabai wd/o Kisan Bhokare  
age: 60 years, Occu: Agriculture,  
R/o Wanegaon, Tq. Phulambri,  
Dist. Aurangabad
3. Bhaginath s/o Kisan Bhokare  
Age: 35 years, Occu: Agriculture,  
R/o Wanegaon, Tq. Phulambri,  
Dist. Aurangabad
4. Sharda d/o Kisan Bhokare  
Age: 32 years, Occu: Agriculture,  
R/o. Wanegaon, Tq. Phulambri,  
Dist. Aurangabad.
5. Kalabai w/o Trimbak Daund  
Age: 45 years, Occu: Agriculture,  
R/o Wanegaon, Tq. Phulambri,  
Dist. Aurangabad.

6. Manikrao s/o Trimbak Daund  
Age: 55 years, Occu: Agriculture,  
R/o Panwadod, Tq. Sillod,  
Dist. Aurangabad.
7. Usha d/o Kisan Bhokare  
Age: 28 years, Occu: Agriculture  
R/o Hatnur, Tq. Kannad,  
Dist. Aurangabad.

... Respondents  
(Orig.Defendants)

....

Mr. Chetan T. Jadhav, Advocate for petitioners.  
Mrs Pooja V. Langhe, Advocate for respondent Nos. 2 to 5.  
Mr. D. K. Thote, Advocate for respondent No.6.

....

**CORAM : R. G. AVACHAT, J.**

**Date of reserving the Judgment : 19<sup>th</sup> SEPTEMBER, 2019**  
**Date of pronouncing the Judgment : 07<sup>th</sup> NOVEMBER, 2019**

***JUDGMENT :-***

1. Rule. Rule made returnable forthwith. Heard finally by consent of learned counsel appearing for the parties.
2. The challenge in this writ petition is to the order dated 16.03.2018 passed by the Court of Civil Judge, Junior Division at Phulambri, Dist. Aurangabad, rejecting application Exh.93 in a suit, being Regular Civil Suit No.108/2008. By the impugned order, the application moved by the petitioners-plaintiffs for sibling D.N.A. profiling, came to be rejected.

3. Facts :-

The petitioners filed the suit for partition and separate possession of their share in the property, particularly described in paragraph 1 of the plaint. It is the case of the petitioners/plaintiffs that defendant No.1(deceased) married plaintiff No.2 about 25 years before filing of the suit. Plaintiff No.1/petitioner No.1 is a child born of the said marriage. Pending the suit, defendant No.1 passed away. Defendant No.2 claims to be the widow of defendant No.1. Defendant Nos. 3 and 4 claimed to be the children of defendant Nos. 1 and 2. The defendants denied marital status of plaintiff No.2 with deceased defendant No.1. The defendants also deny plaintiff No.1 to be a son of deceased defendant No.1.

The plaintiffs therefore preferred application Exh.93, asking for D.N.A. test of plaintiff No.1 and defendant Nos. 3 and 4.

4. The defendants-respondents resisted the application on very many grounds. The trial Court was pleased to reject the application with following observations :

*“11. .... Present case relates to the meats and bounds share in coparcenary / joint family property, which is governed by the Hindu Law. Therefore, the degree of the proof in civil cases are*

*limited upto preponderance of probability and not beyond reasonable doubt. ....*

*12. In my opinion firstly parties ought to have avail the recourse of the section 112 and its presumption for determination of the paternity of the plaintiff with the deceased Kisan. D.N.A. test is the conclusive proof and scientific proof of the paternity. However, at this stage both parties under obligation to prove their contention on the basis of evidence available with them. Further plaintiff failed to show strong prima facie case and strong material which compels to the Court for the order of D.N.A. test at this stage. In such circumstances, I come to conclusion that, it would not be proper to order D.N.A. test as prayed by the plaintiff.”*

5. Shri Chetan Jadhav, learned counsel appearing for the petitioners would submit that the respondents-defendants deny the petitioners' relationship with the deceased Kisan (defendant No.1). Kisan passed away during early period of filing of the suit. The petitioners therefore could not prefer application for plaintiff No. 1's D.N.A. profiling to ascertain him to be the biological son of deceased Kisan. Since, the defendants altogether denied the relationship of petitioners with deceased Kisan, it became necessary to move application Exh.93. It is the petitioners who take the risk in preferring such an application. Defendant Nos. 3

and 4 are, admittedly, children of deceased defendant No.1. For the ends of justice, the trial Court ought to have allowed the application.

6. Learned counsel for the respondents, would, on the other hand, submit that the burden of proof is on the petitioners (plaintiffs) to prove their case. Recording of evidence has been over long back. The application came to be moved five years after plaintiff No.1 became major. The learned counsel supported the impugned order.

7. In the case of ***Goutam Kundu v. State of West Bengal and another*** – ***AIR 1993 SC 2295***, the Hon'ble Supreme Court of India has observed:

*"20. In Bhartiraj v. Sumesh Sachdeo & Ors., 1986 AIR Allahabad 2591 held as:-*

*"Discussing the evidentiary value of blood tests for determining paternity, Rayden on Divorce, (1983) Vol.1) p. 1054 has this to say :-*

*"Medical Science is able to analyse the blood of individuals into definite groups: and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves most valuable in determining paternity, that is, the exclusion aspect for once it is*

*determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher: between two given men who have had sexual intercourse with the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father.*

*The position which emerges on reference to these authoritative texts is that depending on the type of litigation, samples of blood, when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a particular parentage set up in the case. But the consideration remains that the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right so to do. The court exercises protective jurisdiction on behalf of an infant. In my considered opinion it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his incapacity; the aim is to ensure that he gets his rights. If in a case the court has reason to believe that the application for blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer."*

21. *The above is the dicta laid down by the various High Courts. In matters of this kind the court must have regard to section 112 of the Evidence Act. This section is based on the well known maxim pater est quem nuptioe demonstrant (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the*

*illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid and that every person is legitimate. Marriage or affiliation (parentage) may be presumed, the law in general presuming against vice and immorality."*

22. *It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.*

23. *In Smt. Dukhtar Jahan v. Mohammed Farooq, AIR 1987 SC 1049 this court held :-*

*Section 112 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at anytime when he could have been begotten. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman."*

24. *This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non- existence of opportunities for sexual intercourse; it does not mean actual cohabitation".*

25. *The effect of this section is this: there is a presumption and a very strong one though a*

*reubttable one. Conclusive proof means as laid down under Section 4 of the Evidence Act.*

26. *From the above discussion it emerges:-*

*(1) that courts in India cannot order blood test as a matter of course;*

*(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.*

*(3) 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.*

*(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.*

*(5) No one can be compelled to give sample of blood for analysis.”*

8. The recording of the oral evidence in the suit was over. The respondents(defendants) denied plaintiff No.1 to be the biological son of deceased Kisan(defendant No.1). Admittedly, defendant Nos. 3 and 4 are the biological children of deceased defendant No.1. Sibling D.N.A. test has been recognised to establish paternity. The defendants-respondents do not acknowledge the petitioner No.1 to be the biological son of deceased Kisan. It is the specific case of the petitioners that petitioner No.2 married Kisan 25 years before presentation of the suit. Petitioner No.1 is stated to be the offspring of the said marriage. Some documentary evidence in the nature of school record, Aadhar

card, ration card have been produced to suggest the relationship of the petitioners with the deceased Kisan. For ascertaining the truth, the trial Court ought to have allowed application Exh.93. In the case of ***Namdeo Babasaheb Korde and anr v. Babasaheb @ Babarao Ramkrishna Korde and others in Writ Petition No. 7402 of 2012*** decided on 21.12.2013, the learned Judge of this Court, in para 17, has observed thus :

*“17. I am, therefore, of the firm view that when the petitioner No.1 (claiming to be the son) and respondent No.7 (claiming to be the daughter) desire that their father needs to be identified, the Law will rush in aid to the duo. For ascertaining the truth and to avoid evading of the clutches of Law, respondent No.1 Babasaheb @ Babarao Ramkrishna Korde, needs to undergo the DNA test. Ultimately, in the eyes of law, truth which is divine, must surface. No loss or harm of any nature would be caused to him. When medical science can act in aid of law, courts must allow truth to prevail.”*

9. Petitioner No.1, by preferring the application, has taken the risk. It is not the case that the father is denying paternity and therefore, asking his wife or his child to undergo D.N.A. test. In such a case, directing the child to undergo D.N.A. test may amount to branding a child as a bastard and his mother an unchaste woman. Such is not the case here.

10. The matter directly and substantially in issue is whether petitioner No.1 is a son of defendant No.1(deceased ). Admittedly,

defendant Nos. 3 and 4 are children of defendant No.1. The defendant No.1 is no more. The issue can therefore be answered by sibling D.N.A. profiling / test.

11. In view of the above, the impugned order dated 16.03.2018 passed by the learned Civil Judge, Junior Division, Phulambri, below Exh.93 in Regular Civil Suit No.108/2008, is quashed and set aside. Application Exh.93 is allowed.

12. The learned Civil Judge, Junior Division, Phulambri, shall issue necessary directions in accordance with law for collecting blood samples of plaintiff No.1 and defendant Nos. 3 and 4 for carrying out D.N.A. test.

13. Needless to mention that defendant Nos. 3 and 4 cannot be compelled to give their blood samples. If they deny/refuse to give their blood samples, the trial Court would be well within its jurisdiction to draw an adverse inference.

14. The writ petition is therefore allowed in aforesaid terms. Rule is made absolute.

[ R. G. AVACHAT, J. ]

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