

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

CRIMINAL WRIT PETITION NO. 832 OF 2018

- 1] Shobha @ Preeti W/o Mukesh Khude,
Age : 28 yrs. Occu:Household,
R/o Hudco, Aurangabad.
- 2] Yash S/o Mukesh Khude
Age : 2/1 yrs. Occu.Minor
U/g mother appellant No.1. ..PETITIONERS

VERSUS

- 1] Mukesh S/o Manikrao Khude
Age : 33 years, Occu : Business
R/o Apratim Gharkul H.No.7
Satara Parisar, Behind Kamal Nayan
Bajaj Hospital, Aurangabad.
- 2] Manikrao Khude
Age : 58 years, Occu : Business,
R/o : As above.
- 3] Sushilabai Manikrao Khude
Age : 54 years, Occu : Business,
R/o : As above. .. RESPONDENTS

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Mr. M.B.Sandanshiy, Advocate for the petitioners.
Mr. P.S.Pawar, Advocate for respondents.

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CORAM : MANGESH S. PATIL, J.
RESERVED ON :09.10.2019
PRONOUNCED ON : 05.11.2019

JUDGMENT :-

Heard both the sides. Rule. Rule is made returnable forthwith. The learned advocate for the respondents waives service. At the request of both the sides the matter is heard finally at the admission stage.

2] The Petitioners are invoking the powers of this Court under Article 227 of the Constitution of India and are challenging the concurrent findings of the two Courts below whereby their complaint under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the D.V.Act) seeking various reliefs under the Act has been dismissed by upholding that the Petitioners have failed to prove firstly, that the Petitioner no.1 is the wife of the Respondent no.1 and secondly, that the Petitioner no.2 is her son born from him.

3] After hearing the advocates of both the sides, when this Court expressed its disinclination to cause any interference in the concurrent findings of the two Courts below as regards the finding that the Petitioner no.1 cannot be said to be either the wife of the Respondent no.1 or even cannot be considered as having any relationship in the nature of marriage, since even according to the Petitioners he was already married and was having a son from the first wife, in the light of the decision of the Supreme Court in the case of Indra Sarma V/s V.K.V. Sarma; (2013) 15 S.C.C.755, the learned advocate for the Petitioners on instructions sought leave to withdraw the Writ Petition to the extent of the Petitioner no.1.

4] In view of the above state of affairs, the issue now stands restricted regarding the paternity of the Petitioner no.2.

5] According to the learned advocate for the Petitioners, even if the Petitioner no.1 cannot be regarded as either the wife of the Respondent no.1 or was having any relation with him in the nature of marriage within the meaning of Section 2(f) of the D.V. Act, there was ample evidence before the two Courts below to suggest that there was some physical relation between them and the Petitioner no.2 was born out of such relation. Though some record was produced before the Magistrate, additional record was allowed to be produced during pendency of the Appeal before the Sessions Court which included discharge card of the Government Medical College and Hospital, Aurangabad wherein the Petitioner no.1 was admitted during pregnancy and delivered the Petitioner No.2 subsequently. There was a certified copy of birth certificate mentioning the name of the Respondent no.1 as the father of the Petitioner no.2. Though the discharge card and the medical papers were not duly proved and could not have been referred to, the birth certificate which was allowed to be produced during the pendency of Appeal, was in fact a certified copy of the extract of the Birth Register and should have been read in evidence being certified copy of a public record. The learned Additional Sessions Judge has refused to refer to and rely upon it on an illegal premise as no evidence was led to prove it. Since this record in the form of birth certificate and entry in the Birth and Death Register of the Health Department of the Government of Maharashtra *prima facie* reads the Petitioner no.1 as the mother and the Respondent no.2 as the father of the Petitioner no.2, it was a strong circumstance to *prima facie* show that there is some substance in the

stand of the Petitioner no.1 that there was a physical relation between the Petitioner no.1 and the Respondent no.1. Ignoring all such material, the learned Additional Sessions Judge has refused to interfere in the judgment and order passed by the Magistrate. This has resulted in depriving the Petitioner no.2 of his legitimate and legal right to get decided his paternity and to claim maintenance.

6] The learned advocate for the Petitioners further submitted that though this is a proceeding under Section 12 of the D.V.Act, since the issue regarding paternity of the Petitioner no.2 is an important issue on which his future life would depend, it would be just and proper to direct a D.N.A. test to be undertaken to settle the dispute once for all. This Court therefore, under the writ jurisdiction should quash and set aside the impugned judgments and orders to the extent of the Petitioner no.2 and let there be a direction for undertaking a D.N.A. test to decide paternity of the Petitioner no.2.

7] The learned advocate for the respondents strongly supported the concurrent findings of the two Courts below. He also strongly opposed the proposal to have a D.N.A. test. The learned advocate would submit that no such request was made before the two Courts below and it is for the first time that such a request is being made before this Court and therefore, it may not be considered.

8] The learned advocate for the respondents further submitted that the evidence on the record does not *prima facie* show that the Petitioner no.2 could have been born from physical relation between the Petitioner no.1 and the Respondent no.1, in the absence of which no direction for undergoing

D.N.A. test be issued.

9] I have carefully gone through the record and proceeding of the two Courts below. Needless to reiterate that even on the Petitioner's own saying, since the Respondent no.1 was already married and having a child the Petitioner no.1 could not have solemnized any marriage with him and even the relation between the two cannot be regarded as relationship in the nature of marriage as interpreted by Supreme Court in the case of Indra Sarma (*supra*).

10] However, in my considered view there is enough material to *prima facie* draw an inference that perhaps the Petitioner no.1 and Respondent no.1 could have been in physical relationship and there is enough material to reasonably believe that the Petitioner no.2 could have been born out of such relation.

11] Needless to state that since there is no marriage between the Petitioner no.1 and the Respondent no.1, the presumption under Section 112 of the Indian Evidence Act would not be available. However, there are certain circumstances which lend credence to an inference in respect of aforementioned fact. Though the marriage between the Petitioner no.1 and Respondent no.1 was not legally possible, one cannot comprehend rather the respondents in their written statement filed before the Magistrate have not come out with any plausible explanation as to why and how the Petitioner no.1 was laying false claim when even she had come to know, may be subsequently, that he was already married. True it is that in a proceeding in the form of complaint filed by her which was registered as Application No.814/2011 before the Women's Grievance Cell, the sisters and brother of

the Petitioner no.1 specifically stated that she was insisting to marry the Respondent no.1 and that no marriage between the two had taken place. But then, there is evidence in the form of birth certificate of the Petitioner no.2 wherein the Respondent no.1 has been shown to be his father.

12] Again it is not the contention of the respondents anywhere, either in their pleading or during recording of evidence that the Petitioner no.1 was having some physical relation with somebody else so that the Petitioner no.2 could be said to have been born from any such relation.

13] It is in view of such state of affairs, in my considered view, there is enough material to *prima facie* draw an inference that the dispute regarding paternity of the Petitioner no.2 is indeed a genuine dispute and needs to be decided once for all, else he will have to lead remainder of his life with a stigma.

14] It is in view of such peculiar state of affairs, the impugned judgments and orders deserve to be quashed and set aside and the matter deserves to be remanded to the Magistrate with a direction to decide the matter afresh to the extent of the Petitioner no.2 by issuing necessary direction for undertaking a D.N.A. test, at the joint expenses of the Petitioner no.1 and the Respondent no.1.

15] The Writ Petition is accordingly partly allowed. The impugned judgments of both the Courts below are quashed and set aside to the extent of Petitioner No.2. The proceeding is remanded back to the Magistrate for decision afresh to the extent of the Petitioner no.2 alone by directing D.N.A.

test to be undertaken at the joint expense of the Petitioner no.1 and the Respondent no.1. The Writ Petition is disposed of as withdrawn to the extent of Petitioner No.1.

16] Parties to appear before the Magistrate on 25/11/2019.

[MANGESH S. PATIL, J.]

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