

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.3342 OF 2016**

Vimalkishore Verma

..... Petitioner.

V/s

Bharti Sagar

..... Respondents

Mr. Hemant Kenjalkar a/w Archana Deshpande and Minal Kamble for the Petitioner

Mr. Pravin Naik a/w Prem Dubey for the Respondent-wife.

Mr. S.S. Hulke, APP for Respondent-State

CORAM: NITIN W. SAMBRE, J.

DATE : 5th February, 2020

JUDGMENT:

1] This Petition is preferred by the husband questioning the order dated 12/08/2016 passed by the Family Court in Interim Application dated 29/05/2010 (Exhibit-12) whereby Family Court has directed the Petitioner to undergo DNA test as was prayed by the Respondent -wife.

2] Facts necessary for deciding the present Petition are as under:-

3] Respondent-wife, a divorcee, claims to be working with Air India, whereas Petitioner is working with Indian Customs Services.

4] After divorce of Respondent-wife, it is alleged that she met with the Petitioner at Bombay Airport and they fell in love with each other and as such got married at Kolkata on 25/05/1998. Out of the said wedlock, daughter Bhagyashree was born at Bombay on 28/07/1999.

5] There appears to be matrimonial discord which has prompted Respondent-wife to initiate maintenance proceedings for child pursuant to the provisions of Section 125 of the Criminal Procedure Code. In the said proceedings, application for directions to the Petitioner to undergo DNA test came to be moved by the Respondent - wife. This application came to be allowed by the impugned order. As such, this Petition.

6] Learned Counsel for the Petitioner would urge that the Family Court has exceeded its power while exercising jurisdiction by ordering DNA test of the Petitioner. According to him, false claim is put-forth by Respondent-wife against the Petitioner, as the Petitioner was never married to Respondent-wife. Atleast, there is no material on record to infer that there was marriage in between the Petitioner and

Respondent No.1 and that being so order of directing the Petitioner to undergo DNA test is not sustainable. Learned Counsel for the Petitioner would urge that the order directing the Petitioner to undergo DNA test is passed by the Family Court mechanically in the absence of supportive evidence and that being so Family Court has exceeded its jurisdiction. Apart from above, according to him, law on the issue of carrying out DNA test is very clear, as the Court cannot mandate a person like the Petitioner to undergo DNA test so as to conclude paternity of the child. So as to substantiate his claim, learned Counsel for the Petitioner would rely on certain judgments.

7] While opposing the claim of the Petitioner, learned Counsel for Respondent-wife would urge that this is almost a third round of litigation before this Court. According to him, initially, order of refusal of payment of maintenance was set aside by this Court by considering detail pleadings and legal provisions as is reflected in the judgment delivered in Criminal Revision Application No. 363 of 2012 on 24/02/2015. According to him, this Court has quashed and set aside the order of Family Court rejecting the prayer for grant of maintenance and has issued directions to first decide application (Exhibit-12)

wherein prayer for directions to the Petitioner to undergo DNA test was made so as to determine paternity of the child Bhagyashree. This Court in the said Judgment further directed the Family Court to proceed thereafter to decide the application for maintenance. As such, according to him, the order impugned is in tune with the Order passed in the said Criminal Revision Application. He would further urge that the order impugned is supported by sufficient reasons and that being so, the Petition is liable to be dismissed. He would also rely on certain judgments for defending the case of Respondent-wife.

8] Considered rival submissions.

9] The record demonstrates that the Petitioner came to be impleaded as Respondent in the proceedings initiated under Section 145 of the Criminal Procedure Code in which simpliciter prayer for grant of maintenance of Rs 30,000/- was made for child Bhagyashree. The said application came to be moved sometime in November, 2009 to which the Petitioner appears to have filed his reply. It appears that the Petitioner has come out with a plea that he was never married to the Respondent-wife and as such disowned the paternity of the child. As a

consequence, Respondent-wife moved an application for grant of interim maintenance i.e. Exhibit-12 wherein direction was prayed against the Petitioner to undergo DNA test.

10] It is the case of Respondent-wife that before marrying with the Petitioner, she was a divorcee and working as an Air Hostess with Air India, whereas Petitioner was working as Additional Commissioner in Customs Department at the Airport. Out of discharge of their duties they became known to each other and out of this acquaintance Respondent No.1 herein married the Petitioner on 25/05/1998 at Kolkata at the Office of Marriage Registrar, Thakur Kukur, Kolkota. It is further claimed that thereafter they have shifted to Mumbai and started residing in the flat owned by mother of Respondent-wife. The marriage between the parties was consummated and daughter Bhagyashree came to be born on 28/07/1999.

11] After transfer of the Petitioner in 2007, it is claimed that Petitioner started showing less interest in Respondent-wife. As such Respondent-wife started facing hardships in view of delayed payment of salary in maintaining her daughter. She claims that the Petitioner

has neglected to maintain her daughter and as such, sought interim maintenance of Rs 30,000/- from the salary of Rs 80,000/- of the Petitioner. So as to substantiate her claim, she has placed on record immovable properties owned by the Petitioner apart from his salary income.

12] The claim was resisted by the present Petitioner by filing his say wherein he has denied marriage and as such also the paternity. He has also denied his signature on the Marriage Registration Application. As such, in the aforesaid backdrop, the learned Family Court vide orders impugned has directed the Petitioner to undergo DNA test and while doing so, Family Court has considered the place of work of the Petitioner and Respondent-wife, their chances of acquaintance and entering into friendship which culminated into their marriage, Marriage Certificate and also the effect of provisions of Section 112 of the Evidence Act.

13] Learned Counsel for the Petitioner has relied on the judgment in the matter of *Goutam Kundu vs. State of West Bengal & Anr* reported in **(1993) 3 SCC 418** so as to claim that Court, in fact, cannot order

blood test as a matter of course and the application made with such a prayer in order to have a roving inquiry cannot be entertained. It is also urged, based on the aforesaid judgment, that there has to be a strong prima facie case and then only Court can pass such an order. He has also relied on the judgment in the matter of *Sharda vs. Dharmpal* reported in **(2003) 4 SCC 493** so as to claim that Court should exercise its powers so as to order DNA test sparingly and with utmost caution and that too only when the claim is supported by a strong prima facie case and sufficient material on record. Learned Counsel for the Petitioner has also invited my attention to the fact that in the absence of specific provision, powers of ordering DNA test cannot be exercised or directions cannot be issued. He then would rely on the judgment in the matter of *Banarsi Dass vs. Teeku Dutta* reported in **(2005) 4 SCC 449** so as to claim that DNA test cannot be ordered as a matter of right or in routine course. Further contention of learned Counsel for the Petitioner is, in the absence of main prayer in the application for grant of maintenance, prayer in Interim Application for ordering DNA test ought not to have been entertained. So as to substantiate the aforesaid contention, he would draw support from the judgment in the matter of *UPSC vs. S. Krishna Chaitanya* reported in **(2011) 14 SCC 227**.

14] While countering the aforesaid submissions, learned Counsel for Respondent-wife has relied on the judgment of Kerala High Court in the matter of *Riyas vs. Haseena*, reported in **2014 CRI.L.J. 4588** as also on the judgment in the matter of *Dwarika Prasad Satpathy vs. Bidyut Prava Dixit and Anr* reported in **AIR 1999 SC 3348** so as to claim that the Court has every power to direct the Petitioner to undergo DNA test and failure on the part of the Petitioner to undergo DNA test would dis-entitle him to dispute the paternity of the child. He would also rely on the judgment in the matter of *Gauri Sahu vs. Bhupendra Kumar Sahu* reported in **2015 CR.L.J. 169** so as to claim that even illegitimate child is entitled for maintenance if there is negligence to maintain him.

15] In the case in hand, Respondent-wife has produced on record enough evidence so as to prima facie convince the Family Court as also this Court to pass an order of directing the Petitioner to undergo DNA test. Amongst other material that was produced by Respondent-wife in support of prayer for ordering DNA test of the Petitioner is, Marriage Registration Certificate, Date of Birth Certificate of daughter

Bhagyashree, various photographs and documentary evidence, so as to demonstrate that, prima facie, plea put-forth by Respondent-wife as that of her marriage with the Petitioner, has some substance.

16] Fact remains that from the judgments cited above by the learned Counsel for the Petitioner, it cannot be disputed that the Court has every power to order DNA test, provided sufficient prima facie material to establish relationship is brought on record. As discussed hereinabove, documentary evidence such as Marriage Registration Certificate, photographs and other material on record has prompted the Family Court as also this Court to form a prima facie view that there appears to be marriage between the Petitioner and Respondent-wife and that being so, Family Court, in my opinion, was justified in recording finding that the Petitioner must undergo DNA test.

17] The contention of the Petitioner that there was no prayer in the main application for grant of maintenance and in Interim Application prayer for DNA test is made and as such prayer itself is not maintainable, is also liable to be rejected for the following reason. The Petitioner in reply to the application for grant of maintenance to the

daughter moved under Section 125 of the Criminal Procedure Code has come out with defence that there was no marriage between the Petitioner and Respondent-wife and as such, he has denied very paternity of the child Bhagyashree. Respondent-wife is a divorcee and claims to be working as an Air Hostess with Air India, whereas Petitioner is alleged to be already married person and working with Customs Department as a Commissioner. Considering the fact that plea for paternity/DNA test is raised based on the defence raised by the Petitioner, the very prayer for ordering the Petitioner to undergo DNA test through Interim Application (Exhibit-12) is based on defence of the Petitioner and that being so, the said prayer is very much justified.

18] Mr. Pravin Naik, learned Counsel for Respondent-wife has rightly placed reliance on the judgment of Delhi High Court in the matter of *Rohit Shekhar vs. Shri Narayan Dutt Tiwari* decided on 27/04/2012 in FAO (OS) No.547 of 2011 wherein Delhi High Court has considered entire position in law as is existed on the date of delivery of the said judgment. The Court while dealing with the prayer of the child in deciding paternity has observed that the child has every right to know his/her birth origin. The child must know his/her biological root and

his/her right to know the same can be enforced through reliable scientific test and same is in the interest of child so as to have social security.

19] Reliance placed by the learned Counsel for the Petitioner on the judgments in the matter of *Sharda* (cited supra) and *Banarsi Dass* (cited supra) would in fact support the case of Respondent-wife that the impugned order directing the Petitioner to undergo DNA test is very much justified.

20] In the aforesaid backdrop, in my opinion, order directing the Petitioner to undergo DNA test passed by the Family Court does not warrant any interference as the same is justified in the facts and circumstances of the case. No case therefore for interference is made out. Petition fails and same stand dismissed.

(NITIN W. SAMBRE, J.)