

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

CRIMINAL APPLICATION NO. 501 OF 2019

- 1) Sahebrao s/o Deorao Chavan,
Age; 49 years, Occ; Agri.
R/o; Chikalthan, Taluka Kannad,
District Aurangabad.
- 2) Deorao s/o Yashwantrao Chavan,
(Deleted as per Order passed below
Exh. 01, dated 03.04.2018)

**...APPLICANTS
(Original
Respondent Nos.1
& 2)**

V E R S U S

- 1) Kalpana w/o Sahebrao Chavan,
Age; 42 years, Occ; Household,
R/o; Rel, Taluka Kannad,
District Aurangabad.
- 2) Pratiksha d/o Sahebrao Chavan,
Age; 17 years, Minor,
Under Guardianship
Respondent No. 1.
- 3) Krushna s/o Sahebrao Chavan,
Age; 10 years, Minor,
Under Guardianship
Respondent No. 1.

**..RESPONDENTS
(Original
Applicants)**

.....
Shri. A.D. Kasliwal, Advocate for Applicants
Shri A.R. Devkate, Advocate for Respondent Nos. 1 to 3
.....

COR AM : M.G. SEWLIKAR, J.

Date of Reserving of the Judgment : 30/01/2021
Date of pronouncement of Judgment : 18/02/2021

JUDGMENT : [PER : M.G. SEWLIKAR, J.]

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally at the admission stage.

2. By this application, respondent husband in Criminal Misc. Application No. 2887 of 2013 is challenging order passed by the learned Judicial Magistrate First Class (Court No. 11), Aurangabad dated 03/01/2019 below Exh. 54, thereby rejecting the application Exh. 54.

3. Facts for the purpose of disposal of this application can be succinctly stated as under :

Applicant No. 1 is the husband of respondent No. 1. Their marriage was solemnized on 5.5.1992. Their marriage is on the rocks therefore, applicant No. 1 and respondent No. 1 filed a petition for divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955. However, the said application did not reach its logical end as the respondent withdraw her consent. Thereafter, respondent No. 1 filed application under Section 18 (a) (f), 19 (f) and (8) and 20 (b) & (d)

of the Protection of Women from Domestic Violence Act, 2005 (DV Act). Respondent No. 1 claims that respondent Nos. 2 and 3 are the children born out of the wedlock.

4. Applicant No. 1 caused his appearance in the said petition under D.V. Act and denied the paternity of respondent Nos. 2 and 3. According to the applicant No. 1, respondent Nos. 2 and 3 were born out of illicit relations of respondent No. 1 with one Pravin Keni, who was living near the house of applicant No. 1. Applicant No. 1 therefore, filed application Exhibit 54 in proceeding No. Criminal Misc. Application No. 2887 of 2013 under D.V. Act for seeking DNA test of respondent Nos. 1 to 3. In the said application applicant No. 1 contended that respondent No. 1 was living in adultery and out of her adulterous relations with the said Pravin Keni she has begotten respondent Nos. 2 and 3.

5. Respondent No. 1 resisted this application contending that applicant No. 1 has admitted in other proceedings that respondent Nos. 2 and 3 are the children born to respondent No. 1 from applicant No. 1. She, therefore, prayed for rejection of the application.

6. This application came to be rejected by the learned Judicial Magistrate First Class (Court No. 11), Aurangabad. This order is impugned in this revision.

7. Heard Shri. A.D.Kasliwal, learned counsel for the applicants and Shri A.R. Devkate, learned counsel for the respondents.

8. Shri Kasliwal, learned counsel for the applicants submitted that in Civil Suit for partition applicant No. 1 had filed an application seeking direction for respondent Nos. 1 to 3 to undergo D.N.A. test. According to Shri Kasliwal, learned counsel for the applicant has all along been contending that respondent Nos. 2 and 3 were not born to respondent No. 1 from him. He contended that this application was allowed by the Civil Court. This order was challenged by respondent No. 1 in Writ Petition No. 1680 of 2014. This Writ Petition was disposed of with a direction that the petitioner (applicant herein) has to establish his case by adducing evidence and then the petitioner may make an application for referring the parties to D.N.A. test which application shall be considered by the Court on its own merits.

9. He further submitted that Exhibit 54 was allowed by the learned Trial Court. This order was challenged before this Court. This Court was pleased to set aside the said order dated 8.10.2015 and the matter was remanded to the Trial Court for deciding the application Exh. 54 afresh by giving opportunity of hearing to both the parties. Thereafter, this application came to be rejected. He submitted that

now applicant No. 1 and respondent No. 1 tendered their respective evidence before the learned Trial Court. Even then application has been rejected. He submitted that in this era of technology and in view of technical advancement, it will not be desirable to rely on the presumption under Section 112 of the Indian Evidence Act. He submitted that the D.N.A. test is accurate and undergoing DNA test will not cause any harm to respondent No. 1. He submitted that learned Trial Court did not correctly apply the law laid down by the Hon'ble Apex Court in **Nandlal Wasudeo Badwik Vs. Lata Nandlal Badwik and another, (2014) 2 Supreme Court Cases 576.**

10. Shri Devkate, learned Counsel for respondent Nos. 1 to 3 submitted that the applicant himself has admitted the paternity of respondent Nos. 2 and 3 in the proceedings for divorce. He submitted that respondent Nos. 2 and 3 are using the name of applicant No. 1 as their father. In the school records the names of respondent Nos. 2 and 3 are shown as children of applicant No. 1. He submitted that in view of this admission, it is not necessary for the Court to direct respondent Nos. 1 to 3 to undergo D.N.A. test. He submitted that applicant No. 1 has raised this issue of paternity only after respondent No. 1 filed suit for partition. Till then applicant No. 1 never denied the paternity of respondent Nos. 2 and 3.

11. In reply Shri Kasliwal learned counsel for the applicant submitted that in divorce proceeding the applicant has admitted the paternity of respondent Nos. 2 and 3 only for the reason that he wanted any how to end the marriage with respondent No. 1. In these circumstances he had admitted the paternity. However, respondent No. 1 then withdrew her consent and the proceedings under Section 13B of the Hindu Marriage Act had to be ultimately dropped. He submitted that admissions can be explained and he has successfully explained the circumstances in which the paternity came to be admitted. In fact he has been denying the paternity of those two children right from their birth. He submitted that in the case of **Nandlal Wasudeo Badwik Vs. Lata Nandlal Badwik and another** (supra) that D.N.A. test was conducted. He submitted that in the era of technology where drawing of presumption is not enough when there is any conflict between legal fiction and scientific proof latter must prevail over the former. He further submitted that in case this Court comes to the conclusion that D.N.A. test is not necessary, in that case the Trial Court be directed to draw adverse inference under Section 114 (g) of the Evidence Act.

12. Section 112 of the Indian Evidence Act, 1872 deals with legitimacy of the child if it is born during the continuation of valid marriage between the mother and any man or within 280 days after his

desertion. Section 112 of the Indian Evidence Act, 1872 is reproduced here under :

"112. Birth during marriage, conclusive proof of legitimacy.—The fact that any 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, the mother remaining unmarried, shall be 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 any time when he could have been begotten."

13. From the plain reading of this Section it is axiomatic that a child born during the continuance of a valid marriage shall be the conclusive proof that the child is the legitimate child of the man to whom the lady giving birth is married. The husband can deny the paternity of the child only if he proves non access with his wife at the time when a child could have been begotten. Thus, what the wife has to prove is that during continuance of valid marriage between her and her husband a child was born or within 280 days after its dissolution a child was born and that she did not re-marry. In that case it is conclusive proof that a child is the legitimate son of that man. The husband to deny the paternity has to approve that he had no access to his wife at any time when a child could have been begotten. Access and non access means the existence or non existence of opportunities for sexual intercourse. It does not mean actual cohabitation. In the case of **Nandlal Wasudeo Badwik Vs. Lata Nandlal Badwik and**

another (supra) it has been held that

“15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl- child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal

conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption."

14. From the allegations made in Exhibit 54 it is clear that applicant No. 2 was born on 16.9.2003 and applicant No. 3 was born on 29.4.2008. It is further alleged in the application that he noticed that respondent No. 1 was leading an adulterous life with said Pravin Keni and he saw her and said Pravin Keni in compromising position in the month of September 2009 in his own house. These allegations themselves show that respondent Nos. 2 and 3 were born during continuance of valid marriage between him and respondent No. 1. Applicant No. 1 has admitted in the divorce proceeding under Section 13B of the Hindu Marriage Act that respondent Nos. 2 and 3 were

begotten to respondent No. 1 from him. It is an admitted fact that in the school record applicant No. 1 is shown to be the father of respondent Nos. 2 and 3.

15. This clearly shows that applicant did not object to mentioning in the School record his name as father of respondent Nos. 2 and 3. It seems that he raised this issue for the first time only after respondent No. 1 filed a Civil Suit for partition. In view of this admitted position giving of directions to under go DNA test is completely unwarranted and therefore, the learned Trial Court was perfectly justified in rejecting the application of husband. It is worth noting that in the case of **Nandlal Wasudeo Badwik Vs. Lata Nandlal Badwik and another** (supra) the husband never admitted the paternity of the daughter. He had all along maintained that daughter was not born from him to his wife. In the case at hand the applicant husband has admitted in divorce proceeding that respondent Nos. 2 and 3 are his children. Therefore, in view of these admissions it is not necessary for the Court to give directions as sought. The learned Trial Court did not commit any error in rejecting the application. So far as, submission to draw adverse inference is concerned no such direction can be given.

16. In view of aforesaid discussion application is devoid of any substance hence it is dismissed.

17. Observations in this judgment are made only for the disposal of this application and the trial Court shall not get influenced by these observations during trial and come to its independent conclusion.

18. Rule is discharged.

**(M.G. SEWLIKAR)
JUDGE**

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