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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 7077 OF 2021

APARNA AJINKYA FIRODIA

....PETITIONER

V/s.

AJINKYA ARUN FIRODIA

.....RESPONDENT

**Mr. Rohan Cama a/w Ayushi Anandpara i/b Sapana Rachure for the
Petitioner**

**Mr. Rohan Rajadhyaksha a/w Ms. Percis Ankresaria a/w Mr.
Anupam Sambhus i/b AZB Partners for the Respondent**

CORAM : NITIN W. SAMBRE, J.

DATE: NOVEMBER 22, 2021.

P.C.:

1] Petitioner-wife has questioned the order dated 12/08/2021 passed by Principal Judge Family Court, Pune in Petition No. PA-639 of 2017 initiated by Respondent seeking divorce.

2] Petitioner and Respondent got married on 23/11/2005. Master Hridaan elder son was born on 21st December 2009 whereas Arjun was born to Petitioner on 17/07/2013.

3] Respondent husband alleging adulterous life of Petitioner with Defendant No. 2 before the family court, knowledge about which was known on 14/09/2016, initiated divorce proceedings on 01/06/2017 under Section 13 (1) (i), (i-a) of the Hindu Marriage Act 1955. In the said proceedings, Respondent had taken out Application Exhibit 84 on 09/11/2020 praying that younger son Arjun be subjected to DNA test and Petitioner-wife should co-operate in the said process. Vide order impugned dated 12/08/2021 Principal Judge Family Court, Pune allowed the said application wherein following order came to be passed.

“ORDER

- 1] The application at Exh. 84 is allowed.
- 2] It is hereby directed that the DNA test of younger minor child shall be conducted at the Government Central Forensic Laboratory on 14/10/2021.
- 3] The respondent no.1 shall accompany her child to the laboratory at 11.00 a.m. when the petitioner herein will also be present and the DNA samples of the child and the petitioner shall be obtained by the laboratory in presence of both the petitioner and the respondent no.1.
- 4] The expenses for the procedure shall be borne by the

petitioner and the result will be forwarded by the laboratory as expeditiously as possible to this Court.

5] In addition, prior to 14/10/2021, the petitioner shall deposit a sum of Rs.1,00,000/- (Rupees One Lakh only) with this Court, which will stand forfeited and made over to the respondent no.1 in the event the paternity test on the basis of the DNA results shows the petitioner to be the father of the child. In the event, the result reveals that the petitioner is not the father of the child, the money will be refunded by the Court to the petitioner.

6] In case, the respondent no.1 declined to comply with the directions issued by this Court, the allegations would be determined by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof.

7] Inform this order to Central Forensic Laboratory, Pune.”

4] While questioning the impugned order, counsel for the Petitioner wife would urge that order impugned is not sustainable in the eyes of law as same is contrary to law and facts on record. According to him, Respondent has failed to demonstrate prima facie case which warrants carrying out DNA test of younger son Arjun. He would invite attention of this court to far-reaching consequences of

said DNA test on the entire life of the Petitioner so also child who is ordered to be subjected to DNA test as it is claimed that welfare of the innocent child so also his interest will be jeopardized for entire life. It is further claimed that the order impugned is contrary to the very presumption provided under section 112 of the Indian Evidence Act and the provisions of Hindu Marriage Act. Submissions of learned counsel for the Petitioner are, parties cannot be compelled to go for DNA test as same is contrary to fundamental rights guaranteed under Article 21 of the Constitution of India. According to him, once provisions of 112 of Indian Evidence Act is available, court should be extra slow, and in extraordinary cases only, powers are to be exercised for ordering DNA test. My attention is invited to the fact that Respondent has permitted use of his status as father to son Arjun whose DNA test is ordered. As such according to him, Respondent husband has admitted the paternity before this court so also so before other authorities that is police officials in statement recorded under section 161 of Code of Criminal Procedure, 1973. In the aforesaid background, drawing support from the judgement of apex court in the matters of **Goutam Kundu V/s. State of West**

Bengal and another¹, Sahebrao s/o Deorao Chavan and another V/s. Kalpana w/o Sahebrao Chavan and ors² and also Judgment of Apex Court in the matter of **Dipanwita Roy V/s. Ronobroto Roy³**, the submissions of counsel for the Petitioner is, order impugned is not sustainable.

5] While countering the aforesaid submissions, learned counsel for the Respondent would invite attention of this court to non-joinder of necessary party to the Petition. According to him, Defendant with whom present Petitioner has lived adulterous life and child Arjun is born is not impleaded. As such contentions raised in the proceedings against said Defendant No. 2 needs to be considered to be admitted and as such it has to be inferred that said Defendant has not denied the paternity of son Arjun to have born from the Petitioner. He would further claim that presumption under section 112 of the Indian Evidence Act about child being born out of the marriage is rebuttable and one of the mode available in rebutting such presumption is, scientific evidence i.e. DNA test. Learned counsel would urge that

1 (1993) 3 Supreme Court Cases 418

2 Cri. Application No. 501 of 2019 [Aurangabad Bench]

3 Civil Appeal No. 9744 of 2014 (Arising out of SLP(C) No. 5694 of 2013)

even today Respondent has sought custody of both children which speaks of absence of intention or desire to disparage the paternity of minor child Arjun as he love him dearly. He would claim that so as to establish the ground of adultery, DNA test is necessary in the facts of the case and as such according to him, Court below is justified in granting order of DNA test. As such, according to him, Petition is liable to be dismissed.

6] I have considered rival submissions.

7] Marriage with Respondent and birth given by the Petitioner to two children namely Hridaan and Arjun is not a fact in dispute. Respondent has come out with a specific plea before the Family Court of infidelity on the part of the Petitioner and has gone to the extent of impleading the person with whom the Petitioner alleged to have lead adulterous life leading to birth of younger son Arjun. He has also specifically pleaded about having received initial information about such adulterous life of Petitioner with Defendant No. 2 on 14/09/2016. He would further claim that after confronting the

Petitioner and Defendant No. 2, both claimed to have admitted such relationship and birth of child Arjun out of the same.

8] Of course, such contentions of Respondent are subject to scrutiny before the Family Court as same can be looked into in the light of pleadings and evidence brought on record.

9] However, this court is required to be sensitive to the provisions of Section 112 of the Indian Evidence Act and also scientific evidence over which Respondent intends to rely so as to establish his case of infidelity of the Petitioner.

10] Aforesaid contentions are raised by the Respondent specifically in the proceedings for grant of divorce under Section 13 (1) (i), (i-a) of the Hindu Marriage Act 1955 on the ground of adultery and cruelty against the Petitioner.

11] In categorical terms he has clarified that though he is not

biological father of Master Arjun, he has sought custody of both the children from the Petitioner with specific pleadings that he has no intention or desire to disparage the paternity of Arjun and he considers to be his son and whom he loves dearly.

12] However in the backdrop of claim put forth by the Respondent in the divorce proceedings as he has come out with specific case of adulterous life of the Petitioner with Defendant No. 2, he has taken out Application for ordering DNA test. Such Application was substantiated with knowledge received from mobile and confrontation with Petitioner and Defendant No. 2 on or about 14/09/2016 about living adulterous life. Apart from above, it appears that Respondent has carried out DNA test of Arjun from DNA Labs India and has produced on record report dated 24/11/2016. As such, the very foundation for taking recourse to moving an application for direction for DNA test on son Arjun is expressly and strongly laid down by the Respondent.

13] In the aforesaid background, this Court is required to consider

whether order of DNA test impugned in the Petition anywhere encroaches on the rights, legal or Constitutional, of the Petitioner.

14] Even if the Petitioner claims that order impugned is in violation of Article 21 of the Constitution of India, the fact remains that the DNA test ordered by the court below is scientifically approved, accuracy of the same is also endorsed. The fact remains that fundamental right of the Petitioner guaranteed under Article 21 of the Constitution of India are always subject to reasonable restrictions.

15] In the aforesaid background, even though the Petitioner has relied on the judgement of the Apex Court in the matter of **Goutam Kundu** [cited supra], said law has undergone change as is apparent from judgements of the Apex Court which are considered by the Family Court.

16] Circumstances which were existing in the matter of delivery of the judgement in the matter of **Goutam Kundu** [cited supra] if

appreciated, in the backdrop of law laid down in the case of **Sharda Vs. Dharmpal**⁴ Apex Court has observed that matrimonial Court has power to direct a person to undergo medical test and such order is not in violation of personal liberty granted under Article 21 of the Constitution of India. As such, the claim that order impugned violates personal liberty of the Petitioner under Article 21 of the Constitution of India cannot be inferred from material available on record.

17] Section 112 of the Indian Evidence Act provides for presumption of conclusive proof of legitimacy. Of course, such presumption is rebuttable. In my opinion one of the way of rebutting such presumption is by pleading and establishing strong prima facie case like the one which is demonstrated in the facts of case in hand warranting an order of DNA test. Scientific recognition granted to such medical test is also recognised in Court of law. Apex Court in the above Judgment has already observed that Section 112 of the Indian Evidence Act does not create legal fiction but only provides for rebuttable presumption.

4 2003 (4) SCC 493

18] In the case in hand Respondent has gone to the extent of naming the person who is the father of male child born to the Petitioner and in addition has placed on record report of DNA test carried out by him in support of such strong foundation. This Court is required to be sensitive to the fact that but for the medical/DNA test, it is impossible for the Respondent to establish and form assertions on which he has pleaded in the case in hand. DNA testing is already held to be most legitimate and scientifically perfect means which can be used by a party to establish assertions, in this case of infidelity. While ordering DNA test, Family Court so also this Court is sensitive to the statement of the Respondent that he is not disowning the son Arjun and has prayed for the custody of the said child. As such, interest of said child is not jeopardized.

19] Of course, lever is given to the Petitioner to comply or disregard the order of Family Court which is impugned in the Petition. Consequences of non compliance of the order impugned is already provided, as the Court can draw a presumption of the nature

contemplated under section 114 (h) of the Indian Evidence Act.

20] All the contentions raised by the Petitioner are duly addressed by the Family Court. in the light of observations in foregoing paragraphs, in my opinion, no error could be noticed in the order of the Family Court which warrants interference in extraordinary jurisdiction of this court.

21] That being so, no case for interference is made out. Petition fails, stands dismissed.

[NITIN W. SAMBRE, J.]

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