

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

**WRIT PETITION NO.12821 OF 2018
WITH CIVIL APPLICATION NO.1202 OF 2021**

- 1) Kachraji s/o Santuka Kavale,
Age: 65 years, Occu: Agriculture,
R/o: Zalegaon, Taluka Umri,
District Nanded
- 2) Rukhmaji s/o Kachraji Kavale,
Age: 30 years, Occu: Agriculture,
R/o: Zalegaon, Taluka Umri,
District Nanded
- 3) Santuka @ Santosh s/o Kachraji Kavale,
Age: 28 years, Occu: Agriculture,
R/o: Zalegaon, Taluka Umri,
District Nanded

... Petitioners

Versus

- 1) Prayagbai Jayram Kavale,
Age: 70 years, Occu: Household,
R/o: Daregaon, Taluka Mudkhed
District Nanded
- 2) Bhagirathbai Maroti Gadhe,
Age: 50 years, Occu: Agriculture,
R/o: Daregaon, Taluka Mudkhed
District Nanded
- 3) Raubai Baburao Kumbhre,
Age: Major, Occu: Agriculture,
R/o: Hunda (G.P) Taluka Umri,
District Nanded

... Respondents

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Advocate for Petitioners : Mr. S. S. Gangakhedkar
Advocate for Respondent No.1 : Mr. V. S. Panpatte
Advocate for Respondent Nos. 2 and 3 : Mr. G. A. Gadhe

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CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 25th MARCH, 2022

PRONOUNCED ON : 08th APRIL, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.
2. This petition is directed against the order dated 11-10-2018, passed by the learned Civil Judge Junior Division, Umri, below Exhibit-68 in R.C.S. No.35/2015, thereby allowing the application filed by respondent and directing the petitioners to undergo DNA test.
3. The petitioners are the original defendant Nos. 2 to 4 in the suit filed by respondent Nos. 1 to 3 i.e. original plaintiffs. The plaintiffs filed the said suit for partition and separate possession of the suit property and for cancellation of ownership of defendant Nos. 2 and 3 on the suit property. In the plaint it is contended by the plaintiffs that original defendant No.1 is husband of plaintiff No.1 (respondent No.1 herein) and father of plaintiff Nos. 2 and 3 (respondent Nos. 2 and 3 herein). Original defendant No.2 (petitioner No.1 herein) is real brother of defendant No.1 and defendant Nos. 3 and 4 (petitioner Nos. 2 and 3 herein) are sons of defendant No.2.

4. The defendants resisted the suit by filing common written statement where the relation of the plaintiffs with defendant No.1 was admitted. However, it is averred that defendant Nos. 3 and 4 are sons of defendant No.1 and in the revenue record produced by the plaintiffs in the Court, they are shown to be sons of defendant No.1. So it was specifically denied that defendant Nos. 3 and 4 are sons of defendant No.2 and it is claimed that they are the sons of defendant No.1.

5. On the basis of the pleadings issues were framed. Issue No.2 is that, “Do the plaintiffs prove that defendant Nos. 3 and 4 are children of defendant No.2 ?”

6. Plaintiff No.1 led her evidence. Thereafter, the application Exhibit-68 is filed by plaintiff No.1 contending that as per issue No.2 burden is casted upon the plaintiffs to prove that defendant Nos. 3 and 4 are sons of defendant No.2. For establishing the paternity of defendant Nos. 3 and 4 it is necessary to conduct their DNA test which will bring true and correct position before the Court. Hence, the defendant No.2, his wife Sheshabai and defendant Nos. 3 and 4 be directed to undergo DNA test.

. This application was strongly opposed by the petitioners/defendants contending that to prove that defendant Nos. 3

and 4 are sons of defendant No.1 Aadhar Card, Voter ID card, School T.C. and Ration card are placed on record. Earlier plaintiff No.1 had filed R.C.S. No.103/1997 against defendant No.1. In that suit defendant No.1 had specifically contended that defendant Nos. 3 and 4 are sons of plaintiff No.1 and him. Evidence to that effect was also given on oath by defendant No.1. It was, therefore, stated that the said application is not tenable and be dismissed. The trial Court allowed the application Exhibit-68 and directed defendant Nos. 2, his wife Sheshabai and defendant Nos. 3 and 4 to subject themselves to DNA test. The petitioners/defendants are aggrieved by this order.

7. Heard Mr. S. S. Gangakhedkar, learned advocate for petitioners, Mr. V. S. Panpatte, learned advocate for respondent No.1 and Mr. G. A. Gadhe, learned advocate for respondent Nos. 2 and 3.

8. By relying on *Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and Another [(2010) 8 SCC 633]* and *Ashok Kumar Vs. Raj Gupta and Others [2021 SCC OnLine SC 848]*, the learned advocate for petitioners assailed the impugned order contending that the trial Court has committed a serious error in mechanically allowing the application filed by the respondents. According to him merely for asking, the said application is allowed. He

further states that by directing the petitioners to undergo DNA test their right to privacy is violated. In the facts of the present case the trial Court ought not to have allowed the application filed by the respondents. He, therefore, submitted that the impugned order is liable to be quashed and set aside.

9. The learned advocate for respondents on the other hand supported the impugned order. According to him, since the suit is filed by the respondents for partition and separate possession and it is a specific pleading of the respondents that petitioner Nos. 2 and 3 are sons of petitioner No.1, therefore, paternity of petitioner Nos. 2 and 3 is prime and most important issue involved in the suit. By relying on the record of voters' list of Bhokar Legislative Assembly Constituency the learned advocate argued that the name of petitioner No.3 is shown as Kavale Santosh Kachraji, therefore, it is clear that petitioner No.3 is son of petitioner No.1. The documents placed on record before the trial Court by the petitioners are contradictory to each other. He, therefore submitted, that there is no substance in the petition. Hence, the petition may be dismissed.

10. The learned advocate for respondent Nos. 2 and 3 adopted the arguments of the learned advocate for respondent No.1. In addition,

he relied on *Jaswinder Pal Kaur Vs. Surjit Kaur (deceased through L.Rs. And Others [2019(1) HLR 516]*.

11. Admittedly, the issue No.2 casts burden upon the respondents/plaintiffs to prove that defendant Nos. 3 and 4 are sons of defendant No.2. The plaintiff No.1 has led her evidence. In cross examination many admissions are given by her to the effect that, “it is true to say that in the present suit I have not added sons and daughters of defendant No.2”. She has admitted that defendant No.2 has five daughters and four sons and in the school record and in Ration card defendant No.1 Jayram is shown as father of defendant Nos. 3 and 4. She has further admitted that she has not filed any document on record to show that defendant Nos. 3 and 4 are sons of defendant No.2.

12. It is not in dispute that defendants have filed various documents including Aadhar card, Voter ID card, School T.C. and Ration card in support of their stand that defendant Nos. 3 and 4 are sons of defendant No.1. It also appears from record that in R.C.S. No.103/1997 filed by plaintiff No.1, the defendant No.1 husband had specifically pleaded and also gave evidence that defendant Nos. 3 and 4 are his and Prayagbai’s (plaintiff No.1) sons. It further appears from record that after the plaintiffs led their evidence and the evidence of defendant No.3

was over, the application Exhibit-68 was moved. The trial Court though referred the Hon'ble Supreme Court's ruling in ***Bhabani Prasad Jena*** (supra) and the decisions of the Coordinate Bench of this Court in ***Writ Petition No.7756/2017 (Ramesh s/o Eknath Alatar Vs. Geeta Shankarao Vyavhar and Others)*** and ***Kalpana Sahebrao Chavan Vs. Sahebrao Devrao Chavan***, however, has erroneously proceeded to allow the said application without properly appreciating the ratio in the said judgments. The trial Court has erroneously come to a conclusion that the plaintiffs have adduced the evidence and the defendants have countered the same and have also relied on the documents i.e. Voter ID card, Aadhar card, School T.C. and Ration card and if the issue of paternity of these defendant Nos. 3 and 4 is not decided at this stage, then it would be difficult to decide their rights in the suit property and also that of plaintiffs'. It is further held that no prejudice will be caused to the defendants by undergoing the DNA test and hence, the application deserves to be allowed.

13. The tenor of the impugned order indicates that merely for asking, the impugned order is mechanically passed without appreciating the settled legal position in ***Bhabani Prasad Jena*** (supra), wherein it is held by the Hon'ble Apex Court that:

“It should not be directed as a matter of course or in a

routine manner, as and when requested – Diverse aspects, including presumption under Section 112 of Evidence Act, pros and cons of such order and test of eminent need whether it is not possible to reach the truth without use of such Test.”

“14. There is no conflict in the two decisions of this Court, namely, Goutam Kundu¹ and Sharda². In Goutam Kundu¹, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda² while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court.”

14. The trial Court has misread and misconstrued the above ratio while allowing the application. The said decision is rendered in the

matrimonial dispute. By passing the impugned order the trial Court has granted the prayer for DNA test ignoring the fact that there is no *prima facie* case made out by the respondents to seek the same. The trial Court appears to be oblivious to the consequences of ordering the blood test. Record in the present matter does not indicate that the respondents had made a strong *prima facie* case and brought sufficient material before the trial Court to show that DNA test is necessary in the matter. In this view of the matter, the impugned order cannot be sustained.

15. In ***Ashok Kumar*** (supra) the Hon'ble Apex Court held that:

“7. The question therefore is, whether in a declaratory suit where ownership over coparcenary property is claimed, the plaintiff, against his wishes, can be subjected to the DNA test. The related question is whether the plaintiff without subjecting himself to a DNA test, is entitled to establish his right over the property in question, through other material evidence. The timing of the application is equally relevant. The plaintiff has already led evidence from his side to prove relationship between the parties and at this stage whether the High Court should have directed the plaintiff to undergo the DNA test. Another issue of concern is whether in the absence of consent, a party can be forced to provide sample for a DNA test.”

“12. In circumstances where other evidence is available to prove or dispute the relationship, the court should ordinarily refrain from ordering blood tests. This is 3(2015) 1 SCC 365 because such tests impinge upon the right of privacy of an individual and could also have major societal repercussions. Indian law leans towards legitimacy and frowns upon bastardy. The presumption in law of legitimacy of a child cannot be lightly repelled. This Court, in *Kamti Devi v. Poshni Ram* while determining the question of

standard of proof required to displace the presumption in favor of paternity of child born during subsistence of valid marriage held:

“10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favor of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be 4 2001(5) SCC 311 answered in the light of what is meant by access or non-access as delineated above.”

16. In the yet to be decided suit, the plaintiff has led evidence through sworn affidavits of the Respondents, his School Leaving Certificates and his Domicile Certificate. Significantly, the respondent No.1, who is one of the 3 siblings (defendants) had declared in her affidavit that the Plaintiff was raised as a son by her parents. Therefore, the nature of further evidence to be adduced by the plaintiff (by providing DNA sample), need not be ordered by the Court at the instance of the other side. In such kind of litigation where the interest will have to be balanced and the test of eminent need is not satisfied our considered opinion is that the protection of the right to privacy of the Plaintiff should get precedence.

17. Having answered these questions, additional issue to be resolved is whether refusal to undergo DNA Testing

amounts to 'other evidence' or in other words, can an adverse inference be drawn in such situation. In *Sharda vs. Dharmpal* a three judges bench in the opinion written by Justice S.B. Sinha rightly observed in paragraph 79 that "if despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference" can be made out against the person within the ambit of Section 114 of the Evidence Act. The plaintiff here has adduced his documentary evidence and is disinclined to produce further evidence. He is conscious of the adverse consequences of his refusal but is standing firm in refusing to undergo the DNA Test. His suit eventually will be decided on the nature and quality of the evidence adduced. The issue of drawing adverse inference may also arise based on the refusal. The Court is to weigh both side's evidence with all attendant circumstances and then reach a verdict in the Suit and this is not the kind of case where a DNA test of the plaintiff is without exception.

18. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.

19. The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the evidence adduced by the other side. When the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy. Seen from this perspective, the impugned judgment merits interference and is set aside. In consequence thereof, the order passed by the learned Trial Court on 28.11.2017 is restored. The suit is ordered to proceed accordingly."

16. The impugned order does not stand to the scrutiny of the

aforesaid principles laid down by the Hon'ble Apex court.

17. In *Ramakrishnan and Others Vs. Ramadas and Others, [2010(1) KHC 263]*, the learned Single Judge of Kerala High Court has held that the trial Court has implicit power to direct the parties to undergo DNA test, if it finds that it will lead to the truth of the matter to be unravelled in the suit. In the facts of the present case this Court is of the considered view that direction to undergo DNA test issued by the trial Court is unwarranted and uncalled for.

18. The other rulings relied upon by the learned advocate for respondent Nos. 2 and 3 are rendered in different facts and do not advance the case of the respondents.

19. For aforesaid reasons the impugned order is unsustainable in law and facts of the case and the same is hereby quashed and set aside. The writ petition is allowed in terms of prayer clause 'B'.

20. Needless to mention that the trial Court shall decide the suit on the basis of evidence led before it and shall not be influenced by the observations made in this order.

21. Rule is made absolute in the above terms. No costs.

22. The civil application is also accordingly disposed off.

(NITIN B. SURYAWANSHI, J.)