

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 787 OF 2020

Gajanan @ Ganpat Bhimaji Doke ...Petitioner
vs.
Sushila Devram Vahawal & Ors. ...Respondents
Mr.U.B. Nighot for Petitioner.

CORAM : ROHIT B. DEO, J.

DATED : 15 JULY 2022

P.C. :

1. Regular Civil Suit 53/2013 is instituted by the plaintiffs seeking a decree of declaration, partition and separate possession.
2. Plaintiffs are sisters and claim to be the daughters of defendant 1 born from wedlock with defendant 3. According to the plaintiffs, defendant 2 is the illegitimate son of their father.
3. Defendant 1 preferred an application, Exhibit 66, seeking a direction that the DNA profiling of defendant 1, defendant 3 and the plaintiffs be done. The application concedes that the defendant 1 did marry defendant 3 in 1962. However, defendant 1 further contends that defendant 3 deserted his company within two days and since there was no cohabitation as husband and wife, the plaintiffs cannot conceivably be children born from such wedlock.
4. Defendant 1, however, admits that he did permit the plaintiffs to use his name as their father in the official record. The admission is

qualified by the statement that this was done in order to save the family from embarrassment and social stigma.

5. The learned trial court has rejected the application seeking DNA profiling noting that there is material enough to suggest that the plaintiffs are children of defendant 1. Illustratively, in mutation proceeding defendant 1 has referred to the plaintiffs as his daughters. The school records the name of defendant 1 as the father of the plaintiffs. The learned trial Judge was alive to the position of law that DNA profiling ought to be directed in exceptional situations and not at the mere askance.

6. In **Gautam Kandu vs. State of West Bengal**¹, the Supreme Court considered the provisions of Section 112 of the Indian Evidence Act and observed thus :

“24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non- existence of opportunities for sexual intercourse; it does not mean actual “cohabitation”.

25. The effect of this section is this: there is a presumption and a very strong one though a rebuttable one. Conclusive proof means as laid down under Section 4 of the Evidence Act.

26. From the above discussion it emerges -

- (1) that courts in India cannot order blood test as a matter of course;
- (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the

¹ (1993) 3 SCC 418

Evidence Act.

- (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
- (5) No one can be compelled to give sample of blood for analysis.”

7. Similar view is taken by a learned Single Judge in **Sunil Eknath Trambake vs. Leelavati Sunil Trambake**² and the relevant observations in the said decision read thus :

“6. Merely because either of the parties have disputed a factum of paternity does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference or adverse inference on the basis of such evidence on record or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the Court can direct such test. DNA test, in any case, cannot be directed as a matter of routine. The Courts should record reasons as to how and why such test in the case is necessary to resolve the controversy and is indispensable. That is necessary since a result of such test, in matrimonial and succession cases, being negative will have an effect of branding a child as a bastard and the mother as an unchaste women as noted in *Goutam Kundu v. State of West Bengal and Anr.* (1993) 3 SCC 418. That may also adversely affect the child psychologically. The Courts, however, should not hesitate to direct DNA test if it is in the best interest of a child.

7. In the present case, the respondent-wife is seeking DNA test not in the interest of the child but in her own interest to establish that the petitioner-husband lives in adultery and is, therefore, not entitled for divorce. The learned Judge has not recorded the reasons as to why DNA is indispensable and that

² 2006 (2) Mh.L.J.654

the other evidence produce on record is not sufficient to draw an inference or adverse inference in favour or against either of the parties. In the present case the documentary evidence in the form of birth certificate and school record is already produced on record which, according to the respondent, reflects that the petitioner and Meena are parents of child - Rupesh. The learned Judge has not recorded its opinion in respect of that evidence. I do not wish to express any opinion on merits of the case. However, in my opinion, in the absence of sufficient reasons for holding the DNA test necessary, to resolve the controversy involved in the matter the impugned order is liable to be set aside.”

8. The learned Counsel for the Petitioner is, however, relying on the decision by a learned Single Judge in **Namdeo Babasaheb Korde vs. Babasaheb @ Babanrao Ramkrishna Korde**³ to buttress the submission that having denied paternity, the defendant 1 is entitled to the DNA test, particularly since no loss or harm would be caused to the plaintiffs and their mother.

9. In my considered view, the decision in **Namdeo Babasaheb Korde** (supra) cannot be understood as laying down a broad proposition that DNA profiling does not cause any loss or injury as such. Notably, DNA profiling was sought in that case by the son since the father denied the paternity. The facts which are culled out in the said decision are not really elaborate and it is difficult to ascertain whether it was even argued in that case that there is no material on record to otherwise determine the issue of paternity, and that determination of paternity will be next to impossible.

10. The decision in **Namdeo Babasaheb Korde** (supra) turns on the facts of the case.

3 2015 (1) Mh.L.J. 888

11. I do not see any error in the view taken by the learned trial Judge. Needless to observe if after the parties adduce evidence the learned trial Judge considers it necessary to direct DNA profiling in order to ensure that the truth surfaces, and obviously such direction can be given only in the absence of other material on record, nothing shall preclude the trial court from considering the issuance of such direction.

12. Subject to the observation supra, the petition is dismissed.

(ROHIT B. DEO, J.)