

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

CRIMINAL WRIT PETITION NO. 1420 OF 2021

Madhukar Kisan Chokhande,
Age : 50 years, Occu. Agri,
R/o. Samsherpur, Tq. Akole,
Dist. Ahmednagar

.. Petitioner

Versus

1. Neeta w/o Madhukar Chokhande,
Age : 43 years, Occu. : Service
2. Sarthak s/o Madhukar Chokhande
Age : 14 years, Occu. : Education
Both r/o Samsherpur, Tq. Akole
Dist. Ahmednagar
Through Natural Guardian (mother)
Neeta w/o Madhukar Chokhande
3. The State of Maharashtra
4. The Deputy Director
Forensic Science,
Laboratory, Nashik

.. Respondents

Mr. Rajendra K. Temkar, Advocate for the Petitioner.

Mr. A. B. Nehe, Advocate for Respondent Nos. 1 and 2.

Mr. P. N. Kutti, APP for Respondent Nos. 3 and 4.

CORAM : KISHORE C. SANT, J.

DATED : 12th JANUARY, 2023.

ORAL JUDGMENT :-

. Heard.

2. This is a petition by respondent in the proceeding filed under Protection of Women from Domestic Violence Act (for short “Domestic Violence Act”). The husband-present petitioner had filed an application below Exhibit-46 requesting the Court of learned J.M.F.C. to direct the parties to go for DNA test so as to decide the fraternity of the child-respondent No. 2. This application Exhibit-46 was allowed by the learned Trial Court by order dated 05.03.2013. The said order reads as below :

- “1. The application Exh. 46 is hereby allowed.
2. The applicants and respondent are directed to appear before the Medical Officer of the Government approved DNA test centre for collection of their respective blood samples, nails, samples of hair and plasma etc. for determination of the DNA test.
3. The Medical Officer of the Government approved DNA Test Centre, Hyderabad is directed to collect the blood samples, nails, samples of hair and plasma etc. of the applicant Nita Chokande, Sarthak Chokhande as per DNA test rules and to submit his report to this Court confidentially as early as possible.
4. The respondent is directed to deposit the DNA test charges as per rules in the Court on the next date positively.
5. On depositing the aforesaid charges, issue letter accordingly.”

3. The learned Trial Court had specifically directed the parties to

get the DNA test done by sending the samples to the laboratory at Hyderabad. The said order attained finality till this Court. In the order dated 19.06.2015, this Court in Criminal Writ Petition No. 1452/2014, after hearing the parties, was pleased to pass an order directing the test to be conducted as per the order passed on Exhibit-46. The test was to be conducted in the laboratory at Hyderabad and the learned J.M.F.C. was directed further to pass necessary orders. Clause (03) of the order dated 19.06.2015 reads as under :

“3. In the result the petition is allowed. The order made by the learned J.M.F.C., Akole below Exh. 68 in Cri. M. A. No. 26/2011 is hereby set aside. The D.N.A. test is to be carried out as per the order made on Exh. 46 at Hyderabad. Further orders are to be made by the learned J.M.F.C. In those terms, the petition is disposed of.”

4. Before that, an application was filed by the husband below Exh. 68 wherein, it was a specific case of the husband that the test be conducted in a laboratory at Mumbai. It is pertinent to note that this application below Exh.- 68 was opposed by the wife at that time. Therefore, again application below Exh. 73 was filed by the husband seeking some time to pay the requisite charges for the test and that was not allowed. It is against that the order referred earlier in Writ Petition No. 1452/2014 came to be passed. Further, it is seen that, the laboratory at Hyderabad sent a communication to the learned J.M.F.C.

giving the procedure and charges for conducting DNA test. In the test details the laboratory communicated that the sample Buccal Swab is required of all the parties. It is in view of this, the sample of Buccal Swab was sent to the laboratory at Hyderabad. The report was received by letter dated 07.03.2017 wherein, it was reported that, “the alleged father is excluded from paternity in the following systems : FGA, D8S1179, D21S11, D16S539, TH01, TPOX, CSF1PO, Penta D, F13A01, Penta E, FESFPS, Penta C. These results indicate that MADHUKAR KISAN CHOKHANDE is not the biological father of the child, SARTHAK MADHUKAR CHOKHANDE.” Thus, the test report shows that the husband is not the biological father of the child. Till the date the wife did not object to any procedure, nor she objected that the laboratory at Hyderabad is not proper laboratory where DNA samples can be tested. It is only thereafter, by an application dated 27.09.2017 for the first time the wife made an application to the Court of learned J.M.F.C. that the test is not properly conducted and she prayed for further DNA test with direction to the husband to bear the expenses of the same. It is written in the application that the wife does not believe in the report of the laboratory at Hyderabad. There is no proper compliance of the order passed by the learned Trial Judge on an application below Exh. 46 etc.

5. The learned Trial Judge by its order dated 08.03.2018 observed that, as per the specification given by the laboratory the samples were collected of Buccal Swab of all the concerned parties and DNA test was conducted. It is considered that, the samples were collected as required by the laboratory. The wife could not show as to in what manner the DNA test report is not reliable and rejected the application. It is against this order the wife filed Criminal Revision Application No. 06/2018. The learned Sessions Judge, Sangamner by its order dated 20.09.2021 allowed the revision application by observing in paragraph No. 13 that, laboratory at Hyderabad is not Government approved DNA centre and the sample should have been sent to the Government laboratory. The order passed by the learned J.M.F.C at Exh. 140 was quashed and set aside directing the parties to implement the directions in the order dated 05.03.2013 below Exh. 46 in its letter and spirit and **compel the parties** to follow the directions as early as possible. It is this order dated 20.09.2021 is challenged in this petition.

6. It is the submission of the husband-petitioner that the learned Sessions Judge has not properly considered the matter in hand and has committed illegality by directing the parties to go for testing again. Once the DNA testing is done under the orders of the Court which was confirmed till this Court, there is no question of directing the parties to

go again for the same test. When husband had filed an application Exh. 68 with a request to modify the order passed below Exh. 46, it was the wife who opposed that application. By application below Exh. 68 it was prayed by the husband that the DNA sample be sent for test at Mumbai. He thus submits that, now it is not open for the wife after receipt of the report and on finding that it is not in her favour, to challenge the procedure and to say that the laboratory at Hyderabad is not approved laboratory or Government laboratory.

7. Learned advocate for the petitioner relies upon the judgment of the Hon'ble Apex Court in a case of **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another** reported in **(2014) 2 SCC 576** wherein, the Hon'ble Apex Court has observed that when scientific tests are available those should be preferred. When accurate tests are available those should be accepted. The Hon'ble Apex Court has considered the DNA test report vis-a-vis Section 112 of the Evidence Act.

8. Learned advocate for respondents vehemently argued that, on an application below Exh. 46 the order was passed in which the learned J.M.F.C. has used the word Government approved DNA test centre and the Court had specifically directed to collect the blood samples, nails, samples of hair and plasma etc. It was on the part of the Magistrate to sent these samples. There is no reference of the word Buccal Swab for

the test to the laboratory. This was against the letter and spirit of the order below Exh. 46. He relies upon the judgment of the of this Court in a case of Prakash s/o Dhansing Chavan Vs. State of Maharashtra reported in 2022 ALL MR (Cri) 1249 to submit that in view of Section 293 of the Code of Criminal Procedure (for short “Cr.P.C.”) only the reports of certain scientific experts can be accepted. The laboratory at Hyderabad does not come under Section 293 of the Cr.P.C. and therefore, the report cannot be accepted.

9. This Court finds that his objection is too late. The wife had accepted all the orders passed by the Court in earlier round and did not raise any challenge to the same on the contrary. She has given her own Buccal Swab when was directed to do so. Now, it is not open for such a party to turn back and deny everything what she has already accepted. The reliance is placed on Section 293 of the Cr.P.C. is also misplaced as Section 293 of the Cr.P.C. only prescribes that the reports of certain laboratories can be accepted without formal proof of the expert. It does not mean that the report of other laboratories cannot be accepted. The only requirement would be to prove it like any other document in the case. In this case, it is found that, the wife accepted to send the sample to the laboratory at Hyderabad. It is not open for her now to challenge the same. It is clear that, only because the report has gone

against her, now she has raised the objection.

10. In this case also, it needs to be observed that the, learned Sessions Judge while passing the order seems to have lost the site of the fact that the wife had time and again accepted the order and the procedure adopted earlier. At no point of time she opposed or protested sending the sample to the laboratory at Hyderabad. As a matter of fact, she has also given sample on her own.

11. Further, the learned Sessions Court seems to have lost the site that the order passed by the learned J.M.F.C. on an application below Exh. 46 was confirmed till this Court. Though earlier the wording were appearing that the blood sample etc. was to be sent for test, but what needs to consider ultimately that it is the laboratory which would decide which sample is the best one for conducting the DNA test. To that extent certainly the order can be modified as the Court is not an expert about which sample is required to be sent and what procedure needs to be followed by the laboratory. It is for the expert to decide the manner in which the test is to be conducted and to decide which sample is required for testing. Further it is seen that, in clause No. (3) of the order, the learned Additional Sessions Judge has used the word that the parties be **compelled** to follow the directions as early as possible. The learned Court certainly lost the site that the party cannot

be compelled to give the sample for testing to laboratory against his wish. At the most, adverse inference can be drawn when the party refuses to go for particular test.

12. By considering from this angle, it finds that the learned Additional Sessions Judge has committed an error.

13. With this, a case is made out to call for interference in the order passed by the learned Additional Sessions Judge, Sangamner dated 20.09.2021 in Criminal Revision Application No. 06/2018. Consequently, the writ petition is allowed. The order dated 05.03.2013 passed by the learned J.M.F.C. Akole, is restored.

14. Rule is made absolute in terms of prayer clause (B).

(KISHORE C. SANT, J.)

PS.B.