

AGK

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

WRIT PETITION NO.8894 OF 2021

Prajakta Dnyaneshwar Kadam ... Petitioner

V/s.

Dnyaneshwar Navnath Kadam & Anr. ... Respondents

Mr. Shriram S. Chaudhari for the petitioner.

Mr. Sudhir Hardikar for the respondents.

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CORAM : AMIT BORKAR, J.

DATED : JANUARY 19, 2023

P.C.:

1. The petitioner is challenging order dated 11th November 2021 passed by the learned Judge, Family Court No.5, Pune below Exhibit 21 in P.A. No.630 of 2019. By the impugned order, the Family Court has directed DNA test of son Shree to be carried out.

2. Facts giving rise to the filing of the application in short are as under. On 30th April 2015, marriage between the petitioner and respondent no.1 was solemnized. On 17th November 2016 male child was born. The record discloses that on 5th September 2018 respondent no.1 carried out DNA test on himself and his son. The DNA report excluded the respondent no.1 as biological father of the tested child. Based on the said test obtained from analysis of DNA loci, it was concluded that the probability of paternity is (0) zero.

3. Respondent no.1 on 14th May 2019 filed divorce petition on the ground of unchastity of petitioner thereby causing mental cruelty under section 13(1)(i)(ia) of the Hindu Marriage Act, 1955. In paragraph 20 of the petition, the petitioner has challenged paternity of the child. In the petition, respondent no.1 has pleaded instances of unchastity. It is also averred in the petition that the report of DNA test conducted on 5th September 2018 discloses that the respondent no.1 is not the biological father of the son.

4. The petitioner contested the said petition by filing written statement and counter-claim. Respondent no.1 on 28th February 2020 filed his reply to the counter-claim. On 28th February 2020 respondent no.1/husband filed an application for carrying out DNA test of the child (Shree). The petitioner contested the application by filing reply.

5. Learned Family Court No.5, Pune by the impugned order allowed application below Exhibit 21 and directed that DNA test of the son to be carried out at Poona Hospital and Research Centre, Pune.

6. Being aggrieved by the said order, the petitioner has filed present writ petition.

7. It is submitted on behalf of the petitioner that the impugned order is contrary to the settled principle of law that no party can be forced to undergo DNA test. It is submitted that for considering the issue involved in this petition, DNA test is not required. In support of his submission, learned advocate for the petitioner

relied on the judgments of the Apex Court in **Ashok Kumar v. Raj Gupta & Ors.** reported in (2022) 1 SCC 20; **Goutam Kundu v. State of West Bengal & Anr.** reported in (1993) 3 SCC 418; **Kamtidevi (Smt) & Anr. v. Poshni Ram** reported in (2001) 5 SCC 311; and unreported judgment of the Apex Court in **Inayath Ali v. State of Telangana & Anr.** in Special Leave Petition (Criminal) No.4946 of 2017 dated 15th September 2022.

8. Per contra, learned advocate for the respondents submitted that considering the issue involved and the allegation of unchastity made by the petitioner against respondent no.1, DNA test is of eminent need. Respondent no.1 had made out strong prima facie case by producing on record earlier DNA test conducted by the respondent no.1 concluding that the probability of respondent no.1 of being father of the son is (0) zero. He submitted that there is sufficient material before the Court to allow the application.

9. I have given anxious consideration to the submissions made on behalf of both the sides.

10. At this stage, it would be profitable to refer to the judgment of the Apex Court in **Ashok Kumar** (supra). The appellant therein had filed a suit for declaration of ownership over immovable property. The essential question before the Court was of ownership over co-parcenary property and, therefore, the Apex Court was considering the question as to whether the appellant without subjecting himself to DNA test is entitled to establish his right over the property in question through other material. In the light of the said fact, the Apex Court relying on the earlier

judgments of the Apex court in **Banarsi Dass vs. Teeku Dutta** reported in (2005) 9 SCC 449, and **Bhabani Prasad Jena v. Orissa State Commission for Women** reported in 2010 (8) SCC 633 held that in the facts of the said case considering the subject matter of the suit, the issue involved can be proved by other evidence.

11. In the case of **Bhabani Prasad Jena** (supra), the Apex Court laid down three (3) parameters for permitting DNA Test: (i) strong prima facie case and consequences of ordering the blood test; (ii) sufficient material before the Court; and (iii) if such direction satisfies the test of “eminent need”.

12. While adverting to the factors referred above, the Apex court in paragraph 7 observed that in such kind of litigation the interest will have to be balanced and if the test of eminent need is not satisfied considering right of privacy of the plaintiff, it is observed that the appellant could well succeed or fail on the basis of other evidence adduced.

13. In the facts of the present case, to prove the test of prima facie case, respondent no.1 (husband) has placed on record DNA test report carried out before the laboratory at Hyderabad which concludes that the probability of respondent no.1 being father of the alleged son is (0) zero. Such DNA report obtained by the petitioner, in my opinion, would form prima facie and sufficient material to conclude that the direction for undergoing DNA test can be issued.

14. The second parameter is “eminent need”. The averments in

the petition indicate that unchastity of the petitioner is the main ground pleaded by respondent no.1/husband for getting divorce. DNA test report would be of material bearing to prove the fact whether respondent no.1 is the father of son named in the petition. Considering the allegations made in the petition, it would be difficult to get conclusive evidence to prove such allegation, except DNA report. The petition is based on the allegations of unchastity made against the petitioner/wife. Result of DNA test would establish the allegations in the petition. Therefore, in my opinion, the respondent no.1 satisfied the parameter of “eminent need” required to be taken into consideration by the Court while passing order of undergoing DNA test.

15. In so far as judgment in **Inayath Ali** (supra) is concerned, considering the dispute involved between the parties in relation to offences under sections 498A, 323, 354, 506 and 509 of the Indian Penal Code, 1860, the Apex Court was of the opinion that the substance of complaint was not related to the paternity of child of the respondent no.2 and, therefore, it was held that such direction to undergo test could not have been issued. In the facts of the present case, the petition for divorce is based on the allegations of unchastity made against the petitioner.

16. In the case of **Kamti Devi & Anr.** (supra), the respondent had filed a civil suit for declaration that he was not father of the child as he had no access to the appellant during the period when the child was begotten. In the facts of the said case, the Apex Court was considering the issue of conclusiveness of presumption under section 112 of the Evidence Act, 1872. DNA test was already

carried out. The Court was more concerned with the degree of proof in support of the case pleaded.

17. In the case of **Goutam Kundu** (supra) the petition before the Apex Court arose out of proceedings under section 125 of the Code of Criminal Procedure, 1973. In the said case, the Apex Court refused relief to the petitioner on the ground that such application to undergo DNA test was an attempt to avoid payment of maintenance without making out any ground whatsoever to have recourse to the test.

18. For the aforesaid reasons, in my opinion, the Family Court was justified in passing the order of carrying out DNA test. I find no reason to interfere with the impugned order.

19. The writ petition stands dismissed. No costs.

(AMIT BORKAR, J.)