



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 269 OF 2024

(SAU. ABHILASHA BHUSHANSINGH SOLANKI..VS.. BHUSHANSINGH KISHORSINGH SOLANKI)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri J.R.Kidilay, Adv. a/w Shri S.P. Pawar, Advocate for Petitioner.
Dr. Ulhas Dupare, Advocate for Respondent.

CORAM : ANIL S. KILOR, J.
DATED : APRIL 23, 2024.

1. Heard.
2. This writ petition takes exception to the order dated 11/10/2022 passed below Exh.60 by Family Court No.4, Nagpur allowing the application filed by the respondent seeking DNA Test of the child for the purpose of determination of his paternity.
3. I have heard the learned counsel for the respective parties.
4. The learned counsel for the petitioner submits that the order passed by the Family Court is cryptic one and without taking into consideration the relevant provisions namely Section 112 of the Indian Evidence Act, 1872 without recording sufficient reasons for allowing the application, particularly when the Hon'ble Supreme Court of India in the case of *Aparna Ajinkya Firodia .vs.. Ajinkya Arun Firodia*, reported in (2023) 4

SCR 680, considered the consequences of such test the impugned order came to be passed. Therefore, it is submitted that the order is erroneous and is liable to be quashed and set aside.

5. On the other hand, the learned counsel for the respondent supports the impugned order and submits that no illegality or perversity has been committed by the learned Family Court in allowing the application Exh.60.

6. In light of the rival contentions, I have perused the record and the impugned order.

7. From the impugned order it is apparent that despite the objection taken by the petitioner that the application is not supported by an affidavit, without recording the reasons to discard such argument, the order was passed and the application was allowed. The reasons recorded for allowing the application are as follows :

“6] Upon hearing the ld. Advocates appearing for both the sides, I have gone through the entire record and the reliance placed on record by the ld. Advocate for the respondent. It is not in dispute that the petition husband has filed this petition under section 13(1)(i-a)(i-b) r/w section 12 of the Hindu Marriage Act, 1955 for grant of divorce. He has raised an objection of paternity of child. His case is based on the allegation of premarital pregnancy of respondent. Looking to the serious allegations raised for DNA test, it would be

better to the petitioner to know his biological root and to decide the issue involved in this petition and same can be enforced through the reliable scientific test. ...

8. Apparently, the learned Family Court has not taken into consideration Section 112 of the Indian Evidence Act, 1872 which says that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

9. Moreover, the Hon'ble Supreme Court of India in the case of *Aparna Firodia* (supra) has observed thus :

*“23. ‘Illegitimate’- a term that brands an individual with the shame of being born outside wedlock, casts a shadow on one’s identity. Times change and attitudes may change, but the impact of growing up with the social stigma of being illegitimate, does not. The Courts must hence be inclined towards upholding the legitimacy of the child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimisation of the child would result in rank injustice to the father, vide *Dukhtar Jahan vs. Mohammed Farooq*, (1987) 1 SCC 624.*

24. Questions as to illegitimacy of a child, are only incidental to the claim of dissolution of marriage on the ground of adultery or infidelity. Allowing DNA tests to be conducted on a routine basis, in order to prove adultery, would amount to redefinition of the maxim, “Pater est quem nuptiae demonstrant” which means, the father is he whom the nuptials point out. While dealing with allegations of adultery and infidelity, a request for a DNA test of the child, not only competes with the presumption under Section 112, but also jostles with the imperative of bodily autonomy.

25. Another aspect that needs to be considered in the instant case is whether, for a just decision in the divorce proceedings, a DNA test is eminently necessary. This is not a case where a DNA test is the only route to the truth regarding the adultery of the mother. If the paternity of the children is the issue in a proceeding, DNA test may be the only route to establish the truth. However, in our view, it is not so in the present case. The evidence of DNA test to rebut the conclusive presumption available under Section 112 of the Evidence Act, can be allowed only when there is compelling circumstances linked with 'access', which cannot be liberally used as cautioned by this Court in Dipanwita Roy.”

10. In the above referred backdrop, I have no hesitation to hold that the order allowing the application Exh.60 is cryptic and without recording the reasons for allowing such application by taking into consideration the relevant Law in this regard.

11. I that view of the matter, I pass the following order:

- i) The writ petition is partly allowed.
- ii) The impugned order dated 11/10/2022 passed below Exh.60 by Family Court No.4, Nagpur in Petition No. A-150 of 2017 is hereby quashed and set aside.
- iii) The matter is remanded back to the Family Court to decide the same afresh after taking into consideration the observations made herein above.

The Writ Petition is **disposed of** accordingly.
No order as to costs.

JUDGE