



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.2399/2024

Umakant s/o Ganpatrao Rakhunde,
Aged about 31 years, Occ. Labour,
R/o Mhada Quarter No.86,
Behind Matoshri Mangal Karyalaya,
Pipri (Meghe), Wardha,
Tah. And Dist. Wardha.

... PETITIONER

...VERSUS...

Shital w/o Umakant Rakhunde,
Aged about 26 years, Occ. Housewife,
R/o C/o Pramod Abaji Dhawale,
Near Milind Square, Maulana Azad Ward,
At Post and Tah. Ballarpur,
Dist. Chandrapur.

...RESPONDENT

Shri Vedant Vyawahare, Advocate a/w Shri Nitin Vyawahare,
Advocate for petitioner
Shri Nirbhay A. Chawhan, Advocate for respondent

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 10/02/2025

DATE OF PRONOUNCING THE JUDGMENT: 25/02/2025

JUDGMENT

Heard learned Counsel for petitioner and learned

Counsel for respondent. By consent matter is taken up for final disposal at admission stage.

2. The petitioner is aggrieved by the order below exh. 15 dated 23.02.2024 passed by learned Joint Civil Judge, Senior Division, Wardha, in H.M.P No. 260/2023, thereby rejecting the application filed by the petitioner to conduct a DNA test to decide the paternity of the child.

3. The facts of the case is as under:-

Petitioner and Respondent's marriage was solemnized on 17.02.2022 at Ballarpur, District Chandrapur as per Hindu rights and customs. After the solemnization of the marriage, the respondent came to reside at the parental house of the petitioner and resided there intermittently till 15.01.2023. On 30.07.2022, the respondent complained about some pain in her abdomen, therefore, the petitioner took her to Kasturba Hospital, Sewagram, for her medical checkup. On the very same day i.e., on 30.07.2022, the respondent gave birth to a child at Kasturba hospital Sewagram by way of Cesarean. At that time, the petitioner settled all the expenses incurred at the time of delivery and even thereafter, as the

respondent as well as the child were admitted in the Hospital for about 3 weeks after the delivery of the child. In the medical checkup, it was observed that on the date of the checkup, i.e. on 30/07/2022, the respondent was already 8 months pregnant. This fact is clearly mentioned in the Discharge Summary Report of the respondent issued by Kasturba Hospital, Sewagram. The petitioner and his family are simple, illiterate people. As the medical report was in English, they could not understand what was written in it as even the doctors did not explain the contents of the said report to the petitioner.

4. After the discharge, the petitioner brought both, the respondent and the child to his house. That, after a few days the respondent started misbehaving and started to quarrel with the petitioner and his parents and she left the house of the petitioner on 15.01.2023 and went to reside with her parents.

5. Due to the aforementioned incidents, the petitioner instituted divorce proceedings on 05.06.2023 bearing H.M.P No. 260/2023 before the Joint Civil Judge, Senior Division, Wardha, against the respondent on the ground of cruelty. It is contended by

the petitioner that neither the respondent nor her parents had told him about the pregnancy of the respondent before marriage. It is a fact that the marriage of the petitioner solemnized on 17/02/2022 and that the respondent delivered a child on 30/07/2022. The respondent delivered a child just after 5 months and odd days. Petitioner contended that there was no physical contact between him and the respondent before the solemnization of the marriage. Hence, he disputed the paternity of the child on the ground that the respondent got impregnated by someone else and not him. The petitioner, therefore, sought a declaration in his petition that he is not the biological father of the child born to the respondent on 30/07/2022.

6. The respondent filed her reply and denied the allegations. She has submitted that the petitioner had physical relationship with her even before the marriage and hence, denied that the child is not born out of their relationship. In order to prove his claim, the petitioner moved application exh. 15 dated 09/11/2023 in H.M.P. No. 260/2023 praying that a DNA test of the petitioner, respondent and the child be directed to be concluded.

The respondent filed reply exh. 20 to the said application on 30.11.2023. In the said reply, the respondent though denied allegation, agreed to take the test at Government Medical College, Nagpur. The learned trial court by observing that the case is essentially one relating to dissolution of marriage on the ground of cruelty and the paternity of child is not directly related to the allegations and rejecting the application filed by the petitioner. The aforesaid order is the subject matter of challenge in the present writ petition.

7. Learned counsel for the petitioner contended that the learned trial court should have thoroughly appreciated the discharge summary report produced by the petitioner along with his petition, which clearly and specifically mentions that on the date of the delivery, the petitioner was 8 months pregnant and thus, the child could not have been begotten from the petitioner, therefore, DNA test was important. It is further contended that learned trial court grossly misconceived the issue by introducing the point of adultery in its reasoning. The petitioner could not have raised the ground of adultery as it was the case of the petitioner that the

respondent got impregnated by someone else before their marriage was solemnized. This fact can also be asserted by appreciating that on the date of delivery, the respondent was 8 months pregnant whereas on the same date their marriage was just 5 months and odd days old. Hence, this order needs interference by this court and which needs to be set aside.

8. Learned Counsel for petitioner relied on following citations:

- 1) *Madanaiah Durgam Chinna Kande Vs. Kande Omkar Kande Madanaiah 2023 (4) Mh.L.J. (Cri.) 101*
- 2) *Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia (2024) 7 SCC 773*
- 3) *Priyanka Janardhan Patil Vs. Janardhan Raghunath Patil in Special Leave to Appeal No.5554/2020 of the Hon'ble Supreme Court.*
- 4) *Sau. Abhilasha Bhushansingh Solanki Vs. Bhushansingh Kishorsingh Solanki in Writ Petition No.269/2024 of this Court.*

9. Learned counsel for the respondent supported the order passed by the lower courts and contended that the lower court has rightly taken into consideration that the paternity is not directly in issue but is merely collateral to the proceeding and hence

rejected the application which needs no interference and which needs to be confirmed.

10. Heard learned counsel for both the parties at length, perused application, reply to the application and impugned order. Admittedly, the petitioner has filed a petition for divorce asking for two relief, that is to pass a decree of divorce and dissolve the marriage in between petitioner and respondent solemnized on 17.02.2022. This relief is claimed under Section 13 (1) (i-a) read with Section 12(1) (i-d) of the Hindu Marriage Act. He also claimed for passing of the decree of declaration under Section 38 of the Specific Relief Act that the petitioner is not at all father of Ku. Maheswari borned to the respondent on 30.07.2022.

11. It appears that the marriage of the petitioner and respondent was performed on 17.02.2022. On 30.07.2020, the respondent complained about some pain in her abdomen. Petitioner took her to the Kasturba Hospital Sevagram for her medical checkup. In the medical checkup, it was observed that on the date of the check-up that is on 30.7.2020, the respondent was already eight months pregnant. This fact is mentioned in the discharge

summary (page 13 – A). Thus, child is delivered after five months and odd days after marriage.

12. In reply to the main petition, the respondent denied the allegation of the petitioner that he had no physical relationship with her even before the marriage and hence denied that the child was not borned out of their relationship. It is alleged by the respondent in her reply that the petitioner had been to her father's house, when one of the respondent's friend Manisha Lonare was getting married on 22.12.2021, at that time, there was sexual intercourse between petitioner and respondent. This allegation is denied by the petitioner. However, even considered the date as alleged by the respondent, the child was borned within seven months and eight days. Whereas a summary report shows that at the time of delivery, she was eight months pregnant. In view of the denial by the respondent, the allegation made by the petitioner and also in view of the fact that there is sufficient reason to suspect the petitioner being the biological father of child Maheswari, present petitioner filed an application for ordering a DNA test of the petitioner, respondent and her child Maheswari. The said

application came to be rejected on the ground that the petition is essentially for the grant of divorce on the ground of cruelty as prescribed under Section 13 (1) (i-a) of the said Act.

13. It is held that it is not the case of the petitioner that the respondent after the solemnization of the marriage had voluntary sexual intercourse with any person other than him. Divorce is not sought on the grounds of adultery. It is held that the legitimacy or illegitimacy of the daughter has nothing to do with the alleged cruelty on the part of the respondent. It is further held that the Court would not be justified in mechanically directing a DNA test of a child, in a case where the paternity of a child is not directly in issue, but is merely collateral to the proceeding.

14. Learned Counsel for the petitioner relied on ***Aparna Ajinkya Firodia (supra)***, in this matter, the Hon'ble Apex Court laid down certain guidelines on how to deal with the application wherein a DNA test of a minor child may be directed to be conducted. Learned Counsel for the petitioner relied on paragraph No. 43.4 which reads as under:

“43.4. Merely because either of the parties have

disputed a factum of paternity, it 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 based on such evidence, 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.”

However, in the said matter the respondent sought direction for a DNA test only to prove that the wife was in an adulterous relation. In my considered opinion, here there is no question of adultery but it is the contention of the petitioner that in spite of knowledge of pregnancy, it was suppressed by the respondent.

15. Learned Counsel for the petitioner relied on ***Sau. Abhilasha Bhushansingh Solanki (supra)***, wherein this Court held as under:

“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 legitimization 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.”

16. The learned Counsel for the respondent relied on ***Madanaiah Durgam Chinna Kande (supra)***, wherein this Court denied directions to conduct a DNA test as it was found that the petitioner is trying to avoid his liability to pay the maintenance to the child. In order to deny the right to get maintenance, he has seeking the son to undergo the DNA test.

17. The learned Counsel for the petitioner relied on the judgment in ***Special Leave to Appeal No. 5554/2020*** dated 19.11.2019 by the Hon’ble Apex Court wherein it is observed as under:

“Prima facie, it appears to this Court that the application of the respondent-husband for DNA Test of the child has been prompted by suspicion of the respondent-husband. Learned counsel appearing on behalf of the petitioner points out that the petitioner and the respondent got married on 05.02.2014 and the marriage consummated on 09.02.2014. She became pregnant. was On 27-28th June, 2014, the petitioner underwent medical tests in Singapore after which the doctor opined that the foetus carried by the petitioner was about 21 weeks old. The time gap between 09.02.2014 and 27- 28.06.2014 is about 20 weeks, whereas the doctor opined that the foetus was about 21 weeks old. The difference, if any, is only of

one week. The opinion is based on estimation which can never be absolutely accurate. The child was born on 28.10.2014 after 261 days, i.e., after almost 9 months from 09.02.2014. the child was born about 17 days earlier. In other words, There was no reason to presume that the petitioner was pregnant when she married the respondent.

Be that as it may, to resolve the dispute once and for all, this Court refrains from interfering with the direction for paternity/DNA Test. The paternity/DNA test may be conducted at the All India Institute of Medical Sciences, New Delhi, for which the petitioner and the respondent shall give samples as required. It is made absolutely clear that if on testing, it is found that the allegations are based on suspicion and the respondent is, in fact, the father of the child, the respondent shall pay compensation of Rs.30,00,000/- (Rupees thirty lakhs only) to the petitioner, in addition to usual maintenance and other costs and charges as the respondent may be directed to pay for the petitioner and for the child.”

18. In my considered opinion, the petitioner filed a petition for declaration also that the petitioner is not at all the father of Kumari Maheswari borned to the respondent on 30.07.2022. As such, as held by the Hon’ble Apex Court, it would be appropriate to resolve the issue once for all. Even on perusal of the reply, it appears that the respondent in paragraph 13 considered that if

Hon'ble Court orders of DNA test, in that event, the respondent objecting to conduct a test by Kasturba Medical Hospital Sevagram or Datta Meghe Hospital Sevagram. It is her contention that DNA test to be conducted by Government Medical College, Nagpur or National Institute at the expenses of the petitioner. There is no dispute that the petitioner has filed a petition under Section 13 (1) (i-a) read with Section 12(1) (i-d) of the Hindu Marriage Act as well as he has raised the question of paternity of the child. His case is based on premarital pregnancy of the respondent. Even on perusal of dates, there is *prima facie* reason to suspect the paternity. As such the issue can be resolved by directing to conduct a DNA test as prayed. The order passed by the learned Joint Civil Judge, Senior Division, Wardha, apparently appears to be on assumption that the application is only for divorce and as such DNA test will not assist to the petitioner is not sustainable. Accordingly, I proceed to pass the following order:

ORDER

- (i) The Writ Petition is allowed.
- (ii) The order dated 23.02.2024 passed by learned Joint Civil

Judge, Senior Division, Wardha in H.M.P No.260/2023 is hereby quashed and set aside.

(iii) The petitioner, respondent and her child Maheswari are directed to undertake a DNA test as per request of the respondent at Government Medical College, Nagpur within one month as per the date fixed by learned Joint Civil Judge, Senior Division, Wardha.

(iv) The Petitioner to bear cost of test and cost to respondent for presenting herself and child for test.

The petition stands disposed of accordingly. No order as to the costs.

R.S. Sahare

(Smt. M.S. Jawalkar, J.)