IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 271 OF 2017

Namdeo s/o. Digambar Giri .. Petitioner
Age.30 years, Occ. Agri., [ori. non-
R/o. Borgaon (Old), Tq. Gevrai, applicant]
Dist. Beed.

Versus

1. Seema Divorced wife of Namdeo Giri, .. Respondents
Age. 28 years, Occ. Labour, [original
R/o. Sawargaon, Tq. Ashti, Dist. Beed. applicant]

2. Kum.Shrawani alleged daughter of Namdeo Giri,
Age.05 years, Occ. Nil,
R/o. Sawargaon, Tq. Ashti, Dist. Beed.
[Under Guardian of Respondent No.1.)

Mr.Ravindra V. Gore, Advocate for the petitioner.
Mr.Sandip R. Andhale, Advocate for the respondents

CORAM : KISHORE C. SANT, J.
RESERVED ON : 15.11.2022
PRONOUNCED ON: 07.01.2023

J U D G M E N T :-

01. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally at the admission stage.

02. A challenge in this petition is to the order passed by the learned Additional Sessions Judge, Beed dated 30.11.2016, passed in Criminal Revision No.138 of 2015, thereby dismissing the revision application. The revision was filed challenging the judgment and order passed by the learned Judicial Magistrate, First Class, Ashti dated 29.09.2015 in Criminal Misc. Application No.38 of 2013. By the said order, the learned JMFC had granted maintenance under section 125 of the Criminal Procedure Code to respondent Nos.1 and 2 i.e. husband and daughter at the rate of Rs.2000/- and Rs.1000/- per month respectively.

03. Respondent No.1-wife filed an application under section 125 of the Cr.P.C. seeking maintenance for herself and daughter, who was aged 5 ½ months at the time of filing of the application. It is case of the wife that the husband did not maintain her well and driven her out of the house on 20.04.2012. There was demand of Rs.25,000/- to buy a bullock cart. The wife was required to file complaint under section 498-A of the Indian Penal Code. She delivered a daughter on 15.08.2012. However, inspite of that the petitioner-husband is not taking care to maintain the wife and the daughter. The petitioner lives in a joint family having 16 acres land at village Umapur

and 24 acres land at Kumbe Jalgaon, in which the husband has 1/5th share. Out of the said property, the petitioner-husband is getting income of Rs. 2 lakhs per year. In addition to that the father of the husband is a priest in a temple at Borgaon. The temple is having 10 acres of land, that is looked after by the father of the husband and from that land also family gets considerable income.

04. The husband appeared and filed say. The main allegation is that the girl child of the respondent wife is not from him and he is not a biological father of the child. Inspite of this, he had made attempts to bring wife to home, but it is the wife, who is not ready to come for co-habitation. She had relations with some other person. Thus, case of the petitioner-husband is that he is not liable to pay maintenance.

05. After recording the evidence and after hearing the parties, the learned JMFC was pleased to hold that the husband has failed to prove that the wife is living an adulterous life. It is held that the husband has refused and neglected to maintain the wife and child without sufficient reason. It is held that the applicant is not capable to maintain herself. Lastly, it is held that

she is entitled to receive maintenance and awarded maintenance at the rate of Rs.2000/- and Rs.1000/- per month each to wife and the child. The learned Trial Court has held that there is no sufficient evidence to show that the husband is not a biological father of the child. The Trial Court placed reliance on section 112 of the Evidence Act to hold that the child is born during the subsistence of the marriage and therefore the child is presumed to be born from the husband. The husband has failed to prove that after dissolution of the marriage, the child is born after 280 days. In this case, there is ultimately no dissolution of marriage. The petitioner-husband relied upon judgment of the Hon'ble Apex Court in the case of **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik & Another 2014 AIR (SC) 932**.

06. The order passed by the Trial Court is challenged by the husband by filing revision in the Court of learned Sessions Judge, Beed, bearing Criminal Revision No.138 of 2015. In the said revision, the husband had specifically taken a ground No.5 in respect of finding by the learned Trial Court that the petitioner is presumed to be a biological father of the child. It is specific ground that the respondent-wife had refused to go for DNA test. The learned Sessions Judge after considering the material on record dismissed

the revision. The learned Sessions Judge also considered the judgment in the case of **Nandlal (Supra)**. The Sessions Court observed that the Hon'ble Apex Court has laid down in the said judgment that presumption under section 112 of the Evidence Act is rebutable presumption and the burden lies on the husband to disprove the paternity of the child. In para 23 of the judgment the learned Sessions Judge has observed that the wife was admittedly residing away from the husband from 20.04.2012 and had given birth to the child on 15.08.2012 and did not accept the case of the husband. The learned Sessions Judge considered the judgment in the case of **Kamti Devi Vs. Poshi Ram 2001(5) SCC 311** and rejected the contention of the husband holding that in view of presumption of paternity, the Trial Court has rightly passed an order in favour of the wife and confirmed the order passed by the JMFC.

07. This petition is, therefore, filed in this Court. The case of the petitioner is mainly based on the case of **Nandlal (Supra)**. It is vehemently argued by the learned Advocate for the petitioner that so far as the maintenance to the wife is concerned, it is not seriously disputed. However, the petitioner has strong objection to pay maintenance to the girl child, for the reason that he is not a biological father of the child. It needs to be noted that

at one point of time, terms and conditions of the compromise between the petitioner and the respondent were placed on record, wherein it was agreed that the petitioner would pay Rs.3 lakhs as lump sum alimony to the respondent. The wife had no objection to allow the writ petition in lieu of settlement amount. The settlement was placed on record on 16.03.2022. However, earlier Court by its order dated 16.03.2022 expressed reservation to accept the settlement, as it found that the compromise may not be in the best interest of the minor child and refused to endorse the compromise. It is, thus, the matter is heard by this Court.

08. Now the main dispute revolves around legitimacy of the child. The petitioner has placed reliance on the judgment of **Nandlal (supra)**. In the said judgment, the facts were that the husband had refused to accept paternity of the child, since the wife had stayed away from the husband for long time. According to the husband since 1991 there was no physical relation between husband and the wife and the child was born much after that. It was case of the wife that in the year 1996 she had come to stay with the husband and at that time she got pregnant and thereafter for delivery she went to her parents' house, where she delivered child. The learned JMFC accepted the theory of

the wife and had granted maintenance to the wife as well as to the child. The matter was taken to the High Court and after rejection of petition to the Hon'ble Apex Court.

09. It is seen that during maintenance proceeding itself, the husband had filed application for referring the child for DNA test and the same was refused. Against that order the SLP was filed praying for sending the child for DNA test. It is on this, the DNA test was directed to ascertain the paternity of the child. The husband and wife both made a joint application to the Forensic Science Laboratory for conducting such test. The report of Forensic Lab has excluded the father to be a biological father of the child. The wife, therefore, made request for re-testing. Second time the test was conducted, which again confirmed that the husband was not a biological father of the child. Again at the request of the wife, DNA test was directed to be conducted at the Central Forensic Laboratory, Ministry of Home Affairs, Government of India at Hyderabad. Again the said report confirmed that the husband was not a biological father of the child. Thereafter, it was the argument of the wife that the direction for DNA test ought not to have been given and the report of the test needs to be proved by pressing reliance on the case of **Goutam Kundu Vs.**

State of W.B. (1993) 3 SCC 418. In that case, ultimately the Hon'ble Apex Court held that when the husband proved that when there was no access with the wife, the result of DNA test is not enough to escape from the conclusiveness of Section 112 of the Act and ultimately held that the husband was not liable to pay maintenance to child. Thus, in the said case, there was testing and re-testing under the directions of the Hon'ble Apex Court. The said SLP, however, was filed against the order of rejection of a prayer to refer the child and the father to the laboratory for DNA test. In this case, no such application was ever filed by the husband.

10. Paragraph Nos.14,15 and 16 of Nandlal (Supra) are reproduced as under :-

> "14. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl- child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.
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> 15. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of

> conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.
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> 16. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

11. The learned Advocate for the petitioner further relied upon judgment in the case of **Dipanwita Roy Vs.Ronobroto Roy, (2015) 1 SCC 365**, where again question of presumption under section 112 of the Evidence Act was considered. In this case also DNA test was conducted and it was found that the husband was not a biological father of the child. This judgment is delivered after considering judgment in the case of **Nandlal (Supra)** and other cases. In that case, the respondent-husband had moved an application for DNA test before the Family Court and same was dismissed. Said order was

carried to the High Court. The High Court of Calcutta was pleased to allow the CRA of the applicant and thus the matter was carried to the Hon'ble Apex Court. It was held that the DNA test is most legitimate and scientifically perfect means to establish an assertion of infidelity.

12. The petitioner further relied upon judgment of this Court in the case of **Bilal Isak Shaikh and Another Vs. State of Maharashtra & Ors., 2018 DGLS (Bom.) 749**, which was arising out of proceedings under the Maharashtra Village Panchayats Act and the party had alleged that the candidate contesting the election had four children on the date of election and therefore he was disqualified from contesting the election to the village panchayat. It was the allegation that fourth child is born after the cut-off date. On that fact, it was directed to carry DNA test.

13. The respondents on the other hand relied upon judgment in the case of **Ashok Kumar Vs. Raj Gupta and Others, 2022(1) SCC 20**. In that case, a civil suit was filed for declaration and ownership of the property, in which three daughters of late couple were added as defendants. The plaintiff

claimed himself to be son of the deceased couple. The defendants sisters denied the plaintiff's status as son of their parents and asserted that the plaintiff is not entitled to any share in the property. In the suit, the defendants had filed application for DNA test of the plaintiff and either of the defendants to establish biological link of the plaintiff to the defendants' parents. The said application was opposed by the plaintiff. The Trial Court had taken a view that the plaintiff cannot be forced to provide DNA sample. It recorded that the onus is on the plaintiff that he is coparcener of the defendants and burden does not shift on the defendants and it is on that count, the application was dismissed. The High Court in the revision ordered that DNA test be conducted. Said order was carried to the Hon'ble Apex Court. The Hon'ble Apex Court after considering various judgments has held that refusal to undergo DNA test amounts to 'other evidence' and adverse inference can be drawn and observed that the suit eventually will be decided on the nature and quality of the evidence adduced by the parties and allowed the SLP by setting aside the order of the High Court.

14. The respondent thereafter relied upon judgment in the case of Deorao Ramaji Waikar Vs. Shobha Deorao Waikar and Another, 2006 (1)

Mh.L.J. (Cri) 303. In the said case, Misc. Criminal Application was filed by the wife for maintenance. In the said case there was no question of DNA test.

15. Next judgment relied upon by the respondents is in the case of Kusum @ Ujwala Abasaheb Waghmare and another Vs. Dharu @ Abasaheb Sukhdeo Waghmare and another, 2016 (1) Bom.C.R. (Cri) 689. In the said case this Court has considered the effect of section 112 of the Evidence Act. The Court has held that the party could not show that there was total non-access between the parties for one year. In that case, there was no record to show that the husband had applied to the Court to undergo DNA test and in that view the Court held that the child cannot be branded as illegitimate merely on the allegation of the husband.

16. The last judgment relied upon by the respondents is in the case of Kachraji s/o. Santuka Kavale & Others Vs. Prayagbai Jayram Kavale & Ors., 2022 DGLS(Bom.) 3568, in which the order directing DNA test passed by the Trial Court was under challenge. This Court considered various cases of the Hon'ble Apex Court and in para 13 of the judgment, it is held that merely for

asking, DNA test cannot be conducted unless circumstances exist to show that the respondent has no access to wife. Unless prima facie case is made out, no such order can be passed.

17. On this background, this Court is required to consider this petition. It needs to be seen that since beginning it is case of the petitioner-husband that respondent No.2 child is not his child. Even in the say filed in the Trial Court, he had taken this ground. The Trial Court while deciding the application considered the presumption under section 112 of the Evidence Act. The Trial Court had considered the case of **Nandlal (Supra)**. Thus, it is clear that before the Trial Court, it was defence of the husband that the child is not born to him. After considering all the aspects, the learned Trial Judge allowed the application and ordered to grant maintenance. The petitioner, thereafter, challenged the order passed by the Trial Court by filing revision in the Sessions Court. In the Sessions Court, specific ground is taken about legitimacy of the child. Not only that the petitioner has justified as to why he has not filed application for DNA test but also relied upon answer given by respondent-wife that she is not ready to go for DNA test. In the next ground in the revision he has also said that he is ready for DNA test. Rather bold

stand is taken, if DNA report goes against the petitioner he would not prosecute the revision. However, still no separate application is filed by the petitioner-husband. The learned Sessions Court in the judgment has considered this aspect and again relied upon presumption under section 112 of the Evidence Act. It is specifically observed by both the Courts that no case is made out by the husband that he had absolutely no access to respondent No.1-wife.

18. Thus, as on today, in this petition also though vehemently arguments are advanced saying that the petitioner husband is ready go for DNA test, still no separate application is filed for DNA test. Mere submission that question was asked in cross-examination to wife that whether she is ready to go for DNA test, where she has answered that she is not ready itself would not be sufficient to draw adverse inference against the wife. Now, the only question remains whether at this stage DNA test can be ordered merely for asking. His entire argument is that the respondent No.2 is not his biological daughter cannot be now accepted, firstly, there is no separate application filed by him neither in the Trial Court, nor before the Revisional Court; secondly, no case is made out by the petitioner-husband to direct DNA test. Both the

Courts below have rightly observed that no case is made out by the husband to show that for the period of 280 days before the delivery of child, there was no access to him with his wife respondent No.1.

19. In view of the facts and the discussion made above, the petition fails and thus hereby dismissed. Rule discharged.

[KISHORE C. SANT, J.]

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