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

WRIT PETITION NO.3499 OF 2020

Petitioners : 1. S[redacted]

2. [redacted]

– Versus –

Respondent : [redacted] S[redacted]

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Mr. M.P. Kariya, Advocate for the Petitioners.
Mr. S.S. Bhalerao, Advocate for the Respondent.

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CORAM : R.M. JOSHI, J.
DATE : 1st JULY, 2025.

ORAL JUDGMENT :

01. By consent of both sides, heard finally at the stage of admission.

02. This petition takes exception to the order dated 17/02/2020 passed by the Family Court below Exh.51 in Petition No.A-457/2023 accepting the request made by the respondent-husband of conducting DNA Profiling Test to decide legitimacy of the child born on 27/07/2013.

03. The facts which led to filing of this petition can be narrated in

brief as under :

i. Petitioner No.1 got married with the respondent on 18/12/2011. On 19/01/2013, when she left the matrimonial home, she was carrying pregnancy of three months. The respondent issued notice to the petitioner on 28/01/2013 calling upon her to come back to the matrimonial home for cohabitation. The respondent on 08/02/2013 filed petition bearing No.A-139/2013 for judicial separation before the Family Court, Nagpur. Petitioner No.1 also filed petition bearing No.A-4457/2013 for seeking restitution of conjugal rights under Section 9 of the Hindu Marriage Act. The husband though withdrew the proceedings filed for judicial separation, filed petition for decree of divorce on the ground of adultery, cruelty and desertion. This petition was numbered as Petition No.A-199/2014. Both these petitions are being heard together by the Family Court.

ii. The child was born on 27/07/2013. The respondent-husband filed petition by making allegations against petitioner No.1 doubting her chastity. Similarly an application came to be filed for conducting DNA Test of the

child, before the Judicial Magistrate First Class, Nagpur in R.C.C. No.912/2014. The said application, however, was rejected on 19/11/2016.

iii. In the light of these facts, when the proceedings are at the stage of recording evidence, application [Exh.51] came to be filed by the respondent-husband for seeking DNA Profiling Test for deciding legitimacy of the child.

iv. This application came to be allowed. The wife being aggrieved by this order, the present petition is filed.

04. The Counsel for the petitioner submits that the Family Court has committed error in allowing the application essentially on the ground of the alleged admission given by petitioner No.1 during her cross-examination. He drew attention of this Court to the portion of the said cross-examination, wherein it is accepted by the wife that if the Court directs the DNA test of the child, she would abide by the same. It is the contention of the Counsel for the petitioner that on the basis of this statement, it cannot be construed that there is consent of the wife and on such presumption said application [Exh.51] ought not to have been allowed. He opposes the impugned order on the count that only in exceptional cases, conducting of DNA Profiling Test in order to deciding the paternity can be directed and present case is not exceptional. It is his submission that in the facts of the case, more particularly, when

husband does not deny access to wife during relevant period, no such direction is required for want of any genuine issue involved herein. In order to substantiate his contention, he has drawn attention of this Court to the notice issued by the respondent dated 28/01/2013, wherein there was no allegation made against petitioner No.1 about she being unchaste and in fact it indicates that it was within knowledge of the respondent that his wife is carrying three months pregnancy. It is his submission that at no point of time, it is the case of the respondent that at the relevant time he had no access to the wife and that there were no physical relationships between them. On these amongst other submissions, he seeks interference in the order impugned.

05. The Counsel for the respondent-husband supported the impugned order with help of the judgment of the Hon'ble Supreme Court in the case of ***Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and Another***[1]. Similarly, he placed reliance on two other judgments in the case of ***K. Sugandha Kumar vs. Smt. K. Vijaya Laxmi***[2] and ***Rajesh Francis vs. Preethi Roslin***[3]. He also took this Court through the observations made by the Hon'ble Supreme Court in the judgments cited supra in order to submit that the provisions of Section 112 of the Indian Evidence Act were enacted much before the scientific advancement and when the scientific full-proof method is

1 2014 2 SCC 576
2 AIR 2016 HYDERABAD 87
3 III (2012) DMC 228 (DB)

available in order to decide the paternity of the child, such request should not be declined. He has also taken pains to draw attention of the Court to the judgment of the Division Bench of the Kerla High Court in the case of *Rajesh Francis (supra)*. In order to submit that the access as contemplated by Section 112 of the Indian Evidence Act needs to be considered and understood in the present context. It is his submission that when the DNA test is available, there is no justification in not directing such test. He further submits that the Family Court has already taken care of payment of the compensation, if required to be paid to the petitioner. He makes a statement that he is ready to deposit an amount of Rs.1,00,000/- as directed by the Family Court by way of compensation, if it is ultimately found that the paternity test confirms he being father of the child. At the outset, it must be necessary to take note of the provision of Section 112 of the Indian Evidence Act, which reads thus :

> *"112. Birth during marriage, conclusive proof of legitimacy. —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."*

According to this provision, a person born within two hundred eighty days of marriage between his mother and any man, shall be conclusive

proof of legitimacy of the child. The presumption of conclusive proof of legitimacy of child, casts greater burden on the man to show that parties to the marriage had no access to each other at any time when he could have been begotten. The presumption of legitimacy, therefore, must be challenged with specific plea of no access for parties to each other during relevant period. Unless case is sought to be made out to that effect, legitimacy of a child could not be challenged.

06. The judgments of the Supreme Court cited supra in no uncertain terms lay down the law that there cannot be a straitjacket formula with regard to allowing or rejecting DNA test and it would depend upon the facts and circumstances of each case. The Supreme Court also cautions the Court that only if the test is eminently needed then such test can be directed to be conducted. It is also expected that the Court is required to balance the interest of both the parties.

07. Apart from judgments (*supra),* it would be fruitful to take note of the latest judgment of the Hon'ble Supreme Court in the case of ***Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia***[4]**,** wherein after taking into consideration the entire law on the subject and also taking into consideration right of the child, has held on the point of Section 112 read with Section 4 of Indian Evidence Act, as under :

4 (2024) 7 SCC 773

*"**18.** The principle underlying Section 112 is to prevent an unwarranted enquiry as to the paternity of the child whose parents, at the relevant time had "access" to each other. In other words, once a marriage is held to be valid, there is a strong presumption as to the children born from that wedlock as being legitimate. This presumption can be rebutted only by strong, clear and conclusive evidence to the contrary. Section 112 of the Evidence Act is based on the presumption of public morality and public policy vide Sham Lal vs. Sanjeev Kumar[5]. Since Section 112 creates a presumption of legitimacy that a child born during the subsistence of a marriage is deemed to be legitimate, a burden is cast on the person who questions the legitimacy of the child.*

***19.** Further, "access" or "non-access" does not mean actual cohabitation but means the "existence" or "non-existence" of opportunities for sexual relationship. Section 112 refers to point of time of birth as the crucial aspect and not to the time of conception. The time of conception is relevant only to see whether the husband had or did not have access to the wife. Thus, birth during the continuance of marriage is "conclusive proof" of legitimacy unless "non-access" of the party who questions the paternity of the child at the time the child could have been begotten is proved by the said party.*

***20.** 8.3. It is necessary in this context to note what is "conclusive proof" with reference to the proof of the legitimacy of the child, as stated in Section 112 of the Evidence Act. As to the meaning of "conclusive proof" reference may be made to Section 4 of the Evidence Act, which provides that when one fact is declared to be conclusive proof of another, proof of one fact, would automatically render the other fact as proved, unless contra evidence is led for the purpose of disproving the fact so proved. A conjoint reading of Section 112 of the Evidence Act, with the*

5 (2009) 12 SCC 454

*definition of "conclusive proof" under Section 4 thereof, makes it amply clear that a child proved to be born during a valid marriage should be deemed to be a legitimate child except where it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten or within 280 days after the dissolution of the marriage and the mother remains unmarried, that fact is the conclusive proof that the child is the legitimate son of the man. Operation of the conclusive presumption can be avoided by proving non-access at the relevant time.*

***21.*** *The latter part of Section 112 of the Evidence Act indicates that if a person is able to establish that the parties to the marriage had no access to each other at any time when the child could have been begotten, the legitimacy of such child can be denied. That is, it must be proved by strong and cogent evidence that access between them was impossible on account of serious illness or impotency or that there was no chance of sexual relationship between the parties during the period when the child must have been begotten. Thus, unless the absence of access is established, the presumption of legitimacy cannot be displaced.*

***22.*** *Thus, where the husband and wife have cohabited together, and no impotency is proved, the child born from their wedlock is conclusively presumed to be legitimate, even if the wife is shown to have been, at the same time, guilty of infidelity. The fact that a woman is living in adultery would not by itself be sufficient to repel the conclusive presumption in favour of the legitimacy of a child. Therefore, shreds of evidence to the effect that the husband did not have intercourse with the wife at the period of conception, can only point to the illegitimacy of a child born in wedlock, but it would not uproot the presumption of legitimacy under Section 112.*

***23.*** *The presumption under Section 112 can be drawn only if the child is born during the continuance of a valid marriage and not otherwise. "Access" or "non-access" must be in the context of sexual intercourse that is, in the sexual sense and therefore, in that narrow sense. Access may for instance, be impossible not only when the husband is away during the period when the child could have been begotten or owing to impotency or incompetency due to various reasons or the passage of time since the death of the husband. Thus, even though the husband may be cohabiting, there may be non-access between the husband and the wife. One of the instances of non-access despite co-habitation is the impotency of the husband. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy.*

***24.*** *Thus, "non-access" has to be proved as a fact in issue and the same could be established by direct and circumstantial evidence of an unambiguous character. Thus, there could be "non-access" between the husband and wife despite co-habitation. Conversely, even in the absence of actual co-habitation, there could be access.*

***25.*** *Section 112 was enacted at a time when modern scientific tests such as DNA tests, as well as ribonucleic acid tests ("RNA tests" for short), were not in contemplation of the legislature. However, even the result of a genuine DNA test cannot escape from the conclusiveness of the presumption under Section 112 of the Evidence Act. If a husband and wife were living together during the time of conception but the DNA test reveals that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. What would be proved, is adultery on the part of the wife, however, the legitimacy of the child would still be conclusive in law. In other words, the conclusive presumption of paternity of a child born during the subsistence of a valid marriage is that the child is that of the husband and it cannot be rebutted by a mere DNA test report. What is necessary to rebut is the proof of non-access at the time*

*when the child could have been begotten, that is, at the time of its conception vide Kamti Devi vs. Poshi Ram*[6]*."*

08. In the light of this mandate, if the facts of the present case are considered, then it reveals following undeniable position:-

**i.** That the marriage between the petitioner and the respondent is performed on 18/12/2011.

**ii.** The child was born on 27/07/2013.

**iii.** It is not a specific case of the respondent that he had no access to wife during relevant period.

**iv.** That, at the time when petitioner No.1 left matrimonial home, it was within the knowledge of the respondent that she was carrying pregnancy of three months.

**v.** He sends notice dated 28/01/2013 to petitioner No.1, however, does not make any allegation in respect of she being not pregnant out of the relationships between them.

**vi.** He files proceedings before the Family Court for judicial separation without making any such allegation, wherein also no allegation is made that the respondent is not the father of the child.

**vii.** At no point of time, in any proceeding, a plea is raised that he is not father of the child.

6 (2001) 5 SCC 311

**viii.** In petition for divorce, though allegations are made about adulterous behaviour of wife, no challenge is made to paternity of child.

09. In the backdrop of the above facts, the cross-examination conducted by the petitioner in respect of the paternity of the child needs to be ignored for the reason that any amount of evidence sans pleading deserves to be discarded. Apart from this, merely because a witness states that if any order is passed, she would abide by such order, it cannot be construed as a consent recorded by her for DNA test of her child. Even, if it is accepted for the sake of argument that the wife conceded the said request, still it was absolutely obligatory for the Court to consider best interest of the child. As held by the Hon'ble Supreme Court *(supra)*, no one can be compelled to undergo blood test. In case of a minor child, he/she is not capable of taking decision of agreeing to the test or refusal thereof. More particularly, when the parents of such child are fighting against each other and most of the times, the child is a tool, in such fight, the Court must become the custodian of rights of minor child. There would be more responsibility on the Court than to just decide the lis/disputed questions between parties. The Court is undoubtedly required to consider pros and cons before calling upon minor to undergo blood/DNA text.

10. Herein this case, the allegation of the respondent is that he is

entitled for decree of divorce for the reason that his wife i.e. petitioner No.1 is /was living an adulterous life. A question arises as to whether, this is an eminent case for passing order of DNA test. The candid answer to the same would be emphatic no.

11. The reason for that is, unless the respondent-husband disputes that he is not the father of the child and makes out a specific case of having no access to wife and rebuts presumption under Section 112 of the Indian Evidence Act, question of determining the paternity of the child does not arise. Though, the judgment cited supra indicates importance and even accuracy of scientific DNA Profiling Test, still question arises as to whether the presumption of conclusive proof of legitimacy can be dislodged on this ground, when father does not satisfy the condition of he having no access to mother of the child during relevant time. Secondly, if there is allegation against the wife that she lives adulterous life, the said fact can be proved by any other evidence than calling upon the child to undergo the paternity test. The Supreme Court *(supra)* has held that the test can not be directed unless it is eminent to do so. The said test, therefore, must be passed in order to call upon undergoing of DNA test by a child. The Family Court in paragraph 19 of the Order has proceeded to hold that parties to perform DNA test for deciding legitimacy of child. In none of the proceedings, the respondent-husband has even denied paternity of the child. This Court had called upon Counsel for

the respondent to point out from plea from any of the proceedings initiated or even from notice, to show that at any time the respondent has denied to be father of the child. He was not able to refer to any plea raised in this regard. Thus, father does not dispute the paternity, question of child undergoing the same doe not arise.

12. By following the dictum of the Hon'ble Supreme Court in the judgments cited supra on behalf of the respondent and in the facts of the case, this is not a fit case wherein the direction could have been issued for conducting the DNA test of child. The Family Court, therefore, has clearly erred in facts as well as law while passing the order impugned. Hence, the petitioner has made out a case to cause interference in the order impugned.

13. The impugned order, therefore, stands set aside. Application [Exh.51] stands dismissed.

14. The petition is allowed.

(R.M. Joshi, J.)

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