P.W.D.V.A. No. 10/2023
Jaya V/s Surendra
CNR NO. MHWS080002652023

ORDER BELOW EXH-18

Non applicant no.01 filed this application for holding the D.N.A. test of applicant along with little kid Sujay through Government agency. According to him, the marriage in between him and the applicant is solemnized on dated 06.05.2018. Nothing was demanded by him or any body as the financial position of applicant's father was so so. During marriage ceremony and after, the applicant was very unhappy. Since the date of marriage, applicant was not allowing him for access. She was not liking him. She was reluctant for sexual relations. So there was no access in between him and the applicant.

02 She was never liking him as she was not willing to marry with him. She did not have access with him. So, she never conceived from him and Sujay is not begotten from him. He was/is not the biological father of alleged Sujay. This application is Bona-fide and filed with due diligence. So, he prayed for D.N.A. test of applicant along with her little kid Sujay through Government agency otherwise serious prejudice would be caused to his legal rights.

03 On the other hand, applicant filed written say vide exh. 33 to this application. According to applicant, her marriage is solemnized on 06.05.2018 with non-applicant no. 01. She denied all his allegations. According to her, the non-applicants admitted that she is wife of non-applicant no.01. The relations are admitted. There is no necessary of holding D.N.A. test. Her son namely Sujay is born during the continuance of valid marriage between her and non-applicant no.01. It is the conclusive proof that, Sujay is the legitimate son of the non-applicant no.01 under section 112 of Evidence Act. The courts of India cannot order blood test as a matter of course.

04 The birth certificate of Sujay shows the non-applicant no.01 as his father. The non-applicant no.01 neither filed any complaint in any court nor give any notice regarding the objection of the birth of Sujay even after a period of more than 2 years since the applicant became pregnant or after the birth of Sujay. There is no strong prima facie case for D.N.A. test. The non-applicant no.01 is not came with clean hands. This application is filed only to deprive her and her son from the right of maintenance and to prolong the matter. As the application is not tenable, she prayed for its dismissal with cost.

05 Heard both the parties at length. Non-applicant no. 01 filed written notes of arguments vide exh.39 and repeated the contents in the application and his W.S.cum Say to main application. Both the parties filed several documents on record. Applicant filed documents relating to her marriage with Non-applicant no. 01 like marriage card and marriage certificate, Adhar Cards, FIR no. 32/2023 and 7/12 extract. On the other hand non-applicant filed various medical documents showing treatment given to the applicant, photo copies and mobile screenshot.

06 Learned advocate for non-applicant argued that the applicant is not willing to marry with non-applicant no.01. Her behavior is very rude and unwelcome. She is living adulterous life. This fact is observed by non-applicant no.01 and his mother. But their doubt is confirmed when they actually saw applicant with her so called friend in a very obscene condition. Non-applicant no. 01 obtained some photographs from the mobile phone of applicant and the same is filed on record. So it is the contention of non-applicant that he is not the biological father of Sujay.

07 They also relied upon the judgment dated 06.01.2014 in **Nandlal Wasudeo Badwaik V/s Lata Nandlal Badwaik and another AIR 2014 SC 932** stating that though there is presumption under section 112 of the Indian Evidence Act,but it 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 presumption of conclusive proof on satisfaction of conditions enumerated therein but the same is rebuttable. The presumption may offered legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield 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. When there is conflict between 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.

08 They also relied upon **Bhabani Parasd Jena Etc. V/s Convenor Secretary Orissa State commission for Women and Anr. AIR 2010 SC 2851** stating that when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directly by the court as a matter of a course or a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under section 112 of the Indian Evidence Act, pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.

09 On the other hand learned advocate for applicant argued that the marriage is admitted. The wedlock is still intact. The marriage is

valid one. So there is presumption under section 112 of the Indian Evidence Act about the paternity of Sujay. The alleged photographs are fake and fabricated. Only to prolong the matter and to avoid the maintenance, this application is filed.

10 They also relied upon **Goutam Kundu V/s State of W.B. (1993) 3 SCC 418,** the section requires the party disputing the paternity to prove non-access in order to dispel the presumption. Access and Non-access mean the existence or non existence of opportunities for sexual intercourse. It does not mean actual cohabitation. The courts in india cannot order blood test as a matter of course. Whenever applications are made for such prayer in order to have roving inquiry, the prayer for blood test cannot be entertained. There must be strong prima facie case in that the husband must established non-access in order to dispel the presumption arising under section 112 of the Indian Evidence Act. The court must carefully examined as to what would be the consequences of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste women. No one can be compelled to give sample of blood for analysis.

11 They also relied upon **Madanaiah Durgam Chinna Kande V/s Kande Omkar Kande Madanaiah Cri W.P. No. 66 of 2022 decided on 10th March 2023** stating that the children have right not to have the legitimacy questioned frivolously in courts of law. The DNA test cannot be order on the assumption that the mother, who equally knows the truth about the paternity, should not hesitate for a minute to come forward and express her willingness for the DNA test. In such a matter , the child is on the test and not the mother. In such case the absolute need and necessity for such test , to adjudicate upon the serious issue,must be made out. The father who is gainfully employed is trying to avoid his liability to pay the maintenance to the unfortunate child. In order to deny the right to get maintenance, he has been asking the son

to undergo the DNA test. The order directing the DNA test must be need based and has to be passed in an exceptional case.

12 Considering the submission of both the parties and record it appears that the marriage in between the applicant and non-applicant no.01 is solemnized on dated 06.05.2018. According to non applicant since the date of marriage, applicant was not allowing him for access. she was reluctant for sexual relations, as the was not liking him. As there was no access in between them, she was never conceived from him and Sujay is not begotten from him. He is not the biological father of alleged Sujay. But applicant denied the allegations. She stated that the Sujay is the son of non-applicant no. 01 and born out of wedlock. Only to avoid maintenance, this application is filed.

13 It also appeared from the record that the marriage is still in subsistence between parties. The marriage is not disputed. This case is filed on dated 24.02.2023. Non applicant no. 01 appeared and contested the matter by engaging lawyer. Along with the matter one another matter for maintenance under section 125 of Cr.P.C. is also filed in this case which is on today's board. In both the matters applicant demanded maintenance from non-applicant no. 01. It also appears that both the parties contested the matter by tooth and nail.

14 Perusal of adhar card filed on record reveals that the Sujay is born on dated 19.09.2020. It also appeared from record that no any independent complaint is filed by non-applicant no. 01 questioning the paternity of Sujay. This application is filed only in response to the maintenance cases filed by the applicant. In both the cases, applicant Jaya moved application for providing interim maintenance to her and her child Sujay till the decision of the cases. Per contra, learned advocate for the non-applicant prayed for decision on this application first. Considering the rival contentions of both the parties, both the applications are taken for decision at once.

15 Non-applicants relied upon some photographs filed on record stating that it shows the illicit relations of applicant with person other than non-applicant no. 01. On the contrary, learned advocate for applicant Jaya stated that the photos are fabricated and fake by using various advanced mixing apps like photo-shop. There is no any other proof on record till today. The medical documents are relating to the medical treatment given to the applicant Jaya for her illness and pregnancy.

16 As per Section 112 of the Indian Evidence Act, 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. Thus, a child born during the continuance of a valid marriage shall be a conclusive proof that a child is a legitimate child of the man to whom the lady giving birth is married.

17 The provision makes the legitimacy of the child to be a conclusive proof, if the conditions in section 112 is satisfied. It can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten. The combine reading of section 04 and 112 of Indian Evidence Act shows that once the party questioning the legitimacy of the birth of child shows that the parties to the marriage had no access to each other, then the benefit of section 112 is not available to the other party invoking section 112 of the Indian Evidence Act. So the party claiming DNA test has to established that their was no access to the other party to the marriage.

18 Access or no access does not mean actual co-habitation but means the existence or non-existence of opportunities for sexual relationship. Section 112 refers to point of time of birth as a 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 the 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.

19 Conclusive proof is that when one fact is declared to be conclusive proof of another, the proof of one fact, would automatically render the other fact as proved unless contrary evidence is led for the purpose of disproving the fact so proved. Considering the above discussion and facts of the case, the condition precedent for invocation of section 112 of Evidence Act is prima facie established. In such situation the non-applicant no.01 has to prove non access with applicant.

20 Though the DNA test is scientifically approved, but this is the case of seeking matrimonial relief and maintenance. The case is at primary stage. The interim application is yet to be decided. It appears from record that non-applicant no.01 is serving in the reputed company at Pune. His salary certificate also brought on record. The marriage between parties is solemnized in the year 2018. the alleged birth of Sujay this taken place at 19.09.2020. This case is filed in the year-2023. This application is moved on dated 12.06.2023. Since birth of child Sujay, there is no any objection taken by non-applicant no.01 till filing this application.

21 Moreover as per the judgment of Bombay High Court in Madanaiah case was held that the children have right not to have the legitimacy questioned frivolously in courts of law. The DNA test cannot be order on assumption that the mother who equally knows the truth about the paternity. In case of DNA test, the child is on the test and not the mother. The absolute need and necessity for such test to adjudicate upon a serious issue, must be made out. The order directing DNA test

must be need based and has to be passed in an exceptional cases.

22 So considering above discussion I think at this primary level the evidence and documents filed on record are not sufficient to prove the extreme need and exceptional case. So the citations relied by non-applicants are with due respect of those citations are not found to be applicable to the case in hand as the facts are different. But the ratio led down in the citations relied by applicant Jaya is found to be prima facie applicable to the case in hand. Mere copies of photographs filed on record are not sufficient for holding DNA test at this stage of the case. So further evidence and extreme need is required. So I pass following order.

ORDER

The application is rejected at this stage.

Sd/-
(Y.D. Koinkar)
Judicial Magistrate F.C., Risod

Date: 19.04.2024

CERTIFICATE

I affirm that the contents of this P.D.F. File Judgment/Order are same word to word, as per the original Judgment/Order.

Name of the Stenographer	:	Harshali A. Uchade (Stenographer L.G.)
Name of court	:	C.J.J.D.& JMFC;Risod
Date	:	19.04.2024
Judgment/Order signed by the Presiding Officer	:	19.04.2024
Judgment/Order uploaded on	:	19.04.2024