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

CRIMINAL WRIT PETITION NO. 66 OF 2022

PETITIONER : [redacted]
(Ori. N.A.)

//VERSUS//

RESPONDENT : [redacted]
(Ori. Applicant)

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Mr. Anil A. Dhawas, Advocate for the Petitioner.
Mr. Nirbhay Chauhan, Advocate for the Respondent.

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CORAM : G. A. SANAP, J.
DATED : 10th MARCH, 2023.

ORAL JUDGMENT

Rule. Rule made returnable forthwith. The petition is heard finally by consent of the learned advocates for the parties.

02] In this criminal writ petition, filed under Articles 226 and 227 of the Constitution of India, challenge is to the order

dated 16th November, 2021 passed by the learned Additional Sessions Judge, Chandrapur, whereby the learned Additional Sessions Judge allowed the revision filed by the respondent and quashed and set aside the order dated 26th March, 2021 passed by the learned Judicial Magistrate First Class, Rajura, District Chandrapur. The learned Judicial Magistrate First Class, Rajura by his order dated 26th March, 2021 was pleased to allow the application made by the petitioner at Exh.16 in MCA No.70/2014 and directed the petitioner and the respondent to undergo the DNA test at Regional Forensic Science Laboratory, Gourakshan Road, Dhantoli, Nagpur.

03] The facts relevant for the decision of this petition can be summarized as follows:

The respondent [redacted] (hereafter referred to as the "applicant") through his mother and natural guardian [redacted] has filed an application under Section 125 of the Code of Criminal Procedure, 1973 (Cr.PC) seeking maintenance from the petitioner (hereinafter referred to as the "non-applicant"). It is the case of the applicant that non-applicant is his father. The non-applicant married with Sandhya Rani on 10th February, 2005 as per Hindu Rites and

Customs. The marriage was registered in the office of the Sub-Registrar of Marriage at Rajura on 15th April, 2006. It is stated that the mother of the applicant is legally wedded wife of the non-applicant. The applicant was born on 27th April, 2007 in the wedlock between the non-applicant and his mother. It is further stated that during the subsistence of marriage, the discord and dispute started on account of illicit extramarital relations of his father with one [redacted] in the year 2009. The mother of the applicant was, therefore, forced to leave the matrimonial home and stay with the applicant at some other place.

04] It is stated that the non-applicant is in the employment of WCL as Cook. His monthly salary is Rs.30,000/-. The applicant has no source of income. He is studying. His mother is spending for his education, tuition fee etc. He, therefore, claimed maintenance of Rs.5,000/- per month from the non-applicant.

05] It is stated that before filing the application, by notice dated 10th March, 2014, the applicant demanded maintenance from the non-applicant. The non-applicant despite receipt of the notice neither replied the said notice nor paid the maintenance. Therefore, through his mother, he filed the application.

06] The non-applicant appeared before the learned Magistrate and filed his reply. The non-applicant opposed the application. He denied the material facts pleaded in the application. He has contended that the allegations made in the application are false and frivolous. [redacted] is not his legally wedded wife. [redacted] is doing service in WCL as Cleaner. She is getting monthly salary of Rs.50,000/- to 60,000/-. She is liable to maintain the applicant. It is his contention that the applicant is not his son. According to him, the mother of the applicant had no sexual relationship with him. He has contended that he is not biological father of the applicant. It is his contention that in order to establish the paternity of the applicant, he is ready to undergo the DNA test. He expressed his readiness to bear the expenses of such test.

07] After filing the reply, the non-applicant made an application at Exh.16 and prayed before the learned Magistrate that for the purpose of a concrete proof of the paternity of the applicant, the DNA test be directed. In this application, he has reiterated the facts stated in his reply, filed in the main application. It is his contention that he is damn sure that he is not the father of the applicant, inasmuch as there was no sexual relationship

between him and the mother of the applicant.

08] This application was opposed by the applicant on the ground that the DNA test is very delicate matter and, as such, it needs to be considered on the basis of the facts and documents placed on record. In order to substantiate his contention that his mother is legally wedded wife of the non-applicant, he has filed on record the documentary evidence. They lived together as husband and wife. He was born within two years from the date of marriage. The non-applicant, according to the applicant, therefore is not allowed under law to challenge his paternity. If such test is allowed, it may destroy the entire future of the applicant. The applicant, therefore, prayed for rejection of the application.

09] The learned Magistrate for the reasons recorded in the order dated 4th August, 2016 initially rejected the application. The revision was filed against this order. The learned Additional Sessions Judge, Chandrapur allowed the revision application *vide* order dated 10th April, 2017 and also allowed the application at Exh.16 made by the non-applicant. The applicant preferred a Criminal Application (APL) No.540/2017 in this Court. This Court (Coram: Z.A. Haq, J.) by order dated 14th December, 2018, allowed the application and thereby set aside the order passed by

the learned Additional Sessions Judge, Chandrapur. This Court restored the application made at Exh.16 to file with a direction to the learned Magistrate to first proceed with the main application under Section 125 of the Cr.PC and decide the application at Exh.16 after recording the evidence of both the parties.

10] After recording the evidence of the parties, the non-applicant revived his prayer made in application at Ext.16. The learned Magistrate by his order dated 26th March, 2021 allowed the said application and directed the applicant to undergo the DNA test. The applicant challenged the said order by filing a revision in the Sessions Court. The learned Additional Sessions Judge, Chandrapur by his order dated 16th November, 2021 allowed the revision application, set aside the said order passed by the learned Magistrate and rejected the application at Exh.16. The non-applicant is, therefore, before this Court against the said order.

11] I have heard the learned advocates for the parties. Perused the record and proceedings.

12] The learned advocate for the non-applicant submitted that the order passed by the learned Additional Sessions Judge, Chandrapur is not in accordance with law. The learned advocate submitted that considering the nature of challenge raised by the

non-applicant, it was necessary to allow the DNA test. The learned advocate submitted that the presumption provided under Section 112 of the Indian Evidence Act, 1872 (for short "the Evidence Act") is rebuttable and, therefore, in order to rebut the said presumption, the non-applicant cannot be denied an opportunity to get the DNA report. The learned advocate submitted that the Court has to ensure that the truth as far as possible be brought on record and, therefore, the approach of the learned Additional Sessions Judge is not consistent with this basic principle. The learned advocate submitted that the learned Additional Sessions Judge has applied the considerations, which are totally untenable in law while rejecting the prayer made by the non-applicant. The learned advocate submitted that the DNA test is the scientifically approved accurate method to decide the paternity. The learned advocate submitted that, therefore, the non-applicant for untenable reason cannot be foisted with the liability to accept the applicant as his son. In order to substantiate his submission, the learned advocate has placed heavy reliance on a decision in the case of *Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and Another [(2014) 2 SCC 576]*.

13] The learned advocate for the applicant submitted that the application made by the non-applicant, in the teeth of the

undisputed facts, was not at all tenable, in view of Section 112 of the Evidence Act. The learned advocate submitted that there is hardly any dispute by the non-applicant about cohabitation with his mother from his marriage in 2005 till 2009. The learned advocate submitted that the applicant was born on 27th April, 2007 in the wedlock between the non-applicant and his mother [redacted]. The learned advocate submitted that there is ample evidence to show that he was born during the continuance of valid marriage between his father and mother and, therefore, the same is conclusive proof of he being a legitimate son of the non-applicant. The learned advocate submitted that in view of the proof of this fact, the non-applicant has no right to deny his paternity and insist for the DNA test. The learned advocate took me through the evidence and submitted that the factual foundation has been laid to satisfy the first part of Section 112 of the Evidence Act and, therefore, the application was not at all maintainable. The learned advocate took me through the evidence and pointed out that the non-applicant is blowing hot and cold from the same pipe. It is pointed out that, in the reply, he has denied his marriage with [redacted] It is pointed out that during the course of his evidence, he has admitted his marriage with [redacted], but denied the paternity of the applicant. The learned advocate

submitted that this Court by order dated 14th December, 2018 had set aside the earlier order, because this Court was hopeful that the evidence adduced by the parties would crystallize certain important aspects. The learned advocate submitted that the purpose behind this order was to consider the application made by the non-applicant in totality of the facts, circumstances and the evidence. The learned advocate submitted that the learned Additional Sessions Judge, Chandrapur was right in rejecting the application. In order to substantiate his submission, the learned advocate has placed heavy reliance on a decision of the Hon'ble Apex Court in the case of ***Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia [Civil Appeal No.1308/2023 (Arising out of SLP © No.9855/2022) dated 20.02.2023***]

14] It is to be noted that considering the nature of the issue involved in this application, the Court has to trade this difficult path very carefully and find out solution to the delicate problem. The decision against the non-applicant may not have a cascading effect. However, the decision against the applicant will have a cascading effect and can ruin his future. This delicate issue is, therefore, required to be addressed keeping in mind the facts, circumstances and the settled legal position. It is to be noted that keeping the mandate of law, particularly Section 112 of the

Evidence Act in mind, this Court initially was inclined to set aside the order directing the DNA test of the applicant. This order was passed with a particular purpose and object in mind. As per this order, the learned Magistrate was directed to record the evidence of the parties and then decide the application made by the non-applicant at Exh.16. The object behind this order was to crystalize the relevant factual aspects and then decide the question of applicability of Section 112 of the Evidence Act to the crystalized facts of the case. It is to be noted that the parties have adduced the evidence. Witness No.1 is the mother of the applicant. The non-applicant has examined himself as a sole witness. It is, therefore, crystal clear that the application at Exh.16 has to be considered and decided in the backdrop of the evidence brought on record and the *prima facie* conclusion, which is possible vis-a-vis the applicability of Section 112 of the Evidence Act. Before I proceed to appreciate the material on record at the outset, it would be necessary to consider the settled legal position.

15] The learned advocate for the non-applicant has placed heavy reliance on the decision in the case of ***Nandlal Wasudeo Badwaik*** (supra). The decision in the case of ***Nandlal Wasudeo Badwaik*** (supra) has been considered by the Hon'ble Apex Court

in a subsequent decision in the case of ***Aparna Ajinkya Firodia*** (supra). In this case, therefore, the provisions of Sections 4 and 112 of the Indian Evidence Act need to be considered and applied. The Hon'ble Apex Court in the case of ***Aparna Ajinkya Firodia*** (supra) has considered this issue of DNA test of a child in matrimonial dispute from all possible angles. The Hon'ble Apex Court has analysed the provisions of Sections 4, 112 and 114 of the Evidence Act. The legal scheme and placement of the Sections have been discussed. The relevant observations are from paragraphs 8 to 8.7 of the reported decision in the case of ***Aparna Ajinkya Firodia*** (supra). It would be profitable to reproduce these paragraphs. The same reads as under:

> *"Legal Scheme:*
>
> *8. For an easy and immediate reference, the relevant provisions of the Evidence Act are extracted hereinunder:*
>
> > *"4. 'Conclusive proof'.—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.*
> >
> > *x x x*
> >
> > *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.

x x x

114. Court may presume existence of certain facts. — The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

The Court may presume —

xxx

(h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him; ……."

8.1. According to Sarkar on Law of Evidence, 20th Edition, in the interest of health, order and peace in society, certain axiomatic presumptions have to be drawn. One such presumption is the conclusive presumption of paternity under Section 112 of the Evidence Act. Section 112 embodies the rule of law that the birth of a child during the continuance of a valid marriage or within 280 days (i.e., within the period of gestation) after its dissolution shall be "conclusive proof" that the child is legitimate unless it is established by evidence that the husband and wife did not or could not have any access to each other at any time when the child could have been conceived. The object of this provision is to attach unimpeachable legitimacy to children born out of a valid marriage. When a child is born during the subsistence of lawful wedlock, it would mean that the parents had access to each other. Therefore, the Section speaks of "conclusive proof" of the legitimate birth of a child during the period of lawful wedlock.

The latter part of the Section is with reference to proof of the non-access of the parents of the child to each other. Thus, the presumption of legitimacy of the birth of the child is rebuttable by way of strong evidence to the

contrary.

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 v. Sanjeev Kumar, (2009) 12 SCC 454****. 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.*

8.2. Further, "access" or "non-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 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 them paternity of the child at the time the child could have been begotten is proved by the said party.

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 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.

8.4. 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.

Thus, where the husband and wife have co-habited 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.

8.5. 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.

8.6. 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.

8.7. Section 112 was enacted at a time when modern scientific tests such as DNA tests, as well as Ribonucleic acid tests ('RNA', 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 v. Poshi Ram, (2001) 5 SCC 311****."*

16] After considering the legal scheme as above, the Hon'ble Apex Court has laid down the law on the subject. The Hon'ble Apex Court on analysing the legal scheme, has laid down the law in this decision from paragraphs 36 to 39. Paragraphs 36 to

39 are reproduced below:

> *"36. It is interesting to note that the Evidence Act does not include legitimacy of birth during marriage, either under the category of a fact which "may be presumed" or under the category of a fact which "shall be presumed". On the contrary, the Act places birth during marriage as "conclusive proof" of legitimacy. But Section 112 keeps a window open, enabling a party to the marriage who questions the legitimacy of the child, to show that he/she had no access to the other, when the child could have been begotten.*
>
> *37. We have seen that under Section 4, when one fact is declared by the Act to be conclusive proof, the Court shall, on proof of that one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. This is why Section 112 does not use the word "proved" or "disproved". Section 112 uses the words "unless it can be shown".*
>
> *38. A combined reading of Section 4 and Section 112 would show that once the party questioning the legitimacy of the birth of a 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 party invoking Section 112. In other words, if a party to a marriage establishes that there was no access to the other party to the marriage, then the shield of conclusive proof becomes unavailable. If on the contrary, such a party is not able to prove that he had no access to the other party to the marriage, then the shield of Section 112 protects the other party to such an extent that it cannot be pierced by any amount of evidence in view of the prohibition contained in Section 4.*
>
> *39. In contrast, Section 114 on which heavy reliance is placed by Shri Kapil Sibal, learned senior counsel for the respondent, deals only with facts which the Court "may presume". The existence of any fact which the Court may presume to have likely to have happened, turn on three things, namely, (i) common course of natural events; (ii) common course of human conduct; and (iii) common*

> *course of public and private business. Since natural events, human conduct, etc. are not always consistent, the presumption regarding the existence of any fact with regard to these things, are placed only under the category of facts which "may be presumed".*

17] The Hon'ble Apex Court has thus held that the combined reading of Section 4 and Section 112 shows that once the party questioning the legitimacy of the birth of a 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. It is held that, in other words, if a party to a marriage establishes that there was no access to the other party to the marriage, then the shield of conclusive proof becomes unavailable. It is further held that if on the contrary, such a party is not able to prove that he had no access to the other party to the marriage, then the shield of Section 112 protects the other party to such an extent that it cannot be pierced by any amount of evidence in view of the prohibition contained in Section 4. In my view, this legal position would be required to be applied to the facts, which are *prima faci*e established on the basis of the oral and documentary evidence in this case.

18] It is to be noted that, in this case, the Hon'ble Apex Court on analysing number of earlier decisions on the point of use

of DNA profile technology in such a matter, has made a candid observation. The Hon'ble Apex Court on considering the earlier judicial pronouncements on the subject, culled out the principles on the subject. The principles culled out have been set out in paragraph 12 of the decision. In my view, the reproduction of paragraph 12 has become absolutely necessary in this case. Paragraph 12 is reproduced below:

> *"12. Having regard to the aforesaid discussion, the following principles could be culled out as to the circumstances under which a DNA test of a minor child may be directed to be conducted:*
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> > *i. That a DNA test of a minor child is not to be ordered routinely, in matrimonial disputes. Proof by way of DNA profiling is to be directed in matrimonial disputes involving allegations of infidelity, only in matters where there is no other mode of proving such assertions.*
> >
> > *ii. DNA tests of children born during the subsistence of a valid marriage may be directed, only when there is sufficient prima-facie material to dislodge the presumption under Section 112 of the Evidence Act. Further, if no plea has been raised as to non-access, in order to rebut the presumption under Section 112 of the Evidence Act, a DNA test may not be directed.*
> >
> > *iii. A 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.*
> >
> > *iv. 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.*
>
> *v. While directing DNA tests as a means to prove adultery, the Court is to be mindful of the consequences thereof on the children born out of adultery, including inheritance-related consequences, social stigma, etc."*

19] It is to be noted that all these factors need to be borne in mind and applied while deciding the application made by a party for DNA test in matrimonial dispute. In my view, all these factors cannot be excluded or sidetracked while deciding the application made for DNA test of a child in matrimonial dispute. In this case, the Hon'ble Apex Court has touched upon the issue of best interest of the unfortunate child in such a dispute between the parents. In my view, in order to address this issue in a proper perspective, it would be necessary to reproduce paragraphs 22, 22.2 and 22.3. These paragraphs read thus:

> *"Best interests of a child:*
>
> *22. The phrase "mankind owes to the child the best it has to give" clearly underlines our duties towards children, and it entitles them to the best that mankind can give. This implies that the interest of the child should be given primary consideration in actions involving children.*

This idea has been effectively expressed in Article 3 of the Convention on the Rights of Child which reads as under:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".*

22.2 This Court has consistently invoked the principle of best interest of child, particularly, in disputes concerning custody of children.

22.3. It is undeniable that a finding as to illegitimacy, if revealed in a DNA test, would, at the very least adversely affect the child psychologically. It can cause not only confusion in the mind of the child but a quest to find out who the real father is and a mixed feeling towards a person who may have nurtured the child but is not the biological father. Not knowing who one's father is creates a mental trauma in a child. One can imagine, if, after coming to know the identity of the biological father what greater trauma and stress would impact on a young mind. Proceedings which are in rem have a real impact on not only the child but also on the relationship between the mother and the child itself which is otherwise sublime. It has been said that parents of a child may have an illegitimate relationship but a child born out of such a relationship cannot carry the stamp of illegitimacy on its forehead, as, such a child has no role to play in its birth. An innocent child cannot be traumatised and subjected to extreme stress and tension in order to discover its paternity. That is why Section 112 of the Evidence Act speaks about a conclusive presumption regarding the paternity of a child, subject to a rebuttal, as provided in the second part of the Section.

In today's world, there can even be a race to claim paternity of a child so as to invade upon its rights, particularly, if such a child is endowed with property and wealth. There could also be exclusions in a testament doubting the paternity of a child or an evasion in

performance of parental obligations such as payment of maintenance or living and educational expenses by simply doubting the paternity of a child.

In many cases, this would cast a doubt on the chastity of the mother of a child when no such doubt could arise. As a result, the reputation and dignity of a mother of a child would be jeopardised in society. What is of utmost importance for a lady who is the mother of a child is to protect her chastity as well as her dignity and reputation, in that, she would also preserve the dignity of her child.

No woman, particularly, who is married can be exposed to an enquiry on the paternity of a child she has given birth to in the face of Section 112 of the Evidence Act subject to the presumption being rebutted by strong and cogent evidence. Section 112 particularly speaks about birth of a child during marriage and raises a conclusive presumption about legitimacy. Section 112 has recognised the institution of marriage i.e., a valid marriage for the purpose of conferring legitimacy on children born during the subsistence of such a marriage.

As to children born outside a valid marriage, the personal law of respective parties would apply. But in the cases of children born from a relationship in the nature of marriage and when the parents are in a domestic relationship or those born as a result of a sexual assault or to those who are in a casual relationship or to those forced or subjected to render sexual favours and beget children, the problem of their legitimacy gets complex and is serious.

A child should not be lost in its search for paternity. Precious childhood and youth cannot be lost in a quest to know about one's paternity. Therefore, the wholesome object of Section 112 of the Evidence Act which confers legitimacy on children born during the subsistence of a valid marriage, subject to the same being rebutted by cogent and strong evidence, is to be preserved.

Children of today are citizens and the future of a nation. The confidence and happiness of a child who is showered with love and affection by both parents is totally distinct

from that of a child who has no parents or has lost a parent and still worse, is that of a child whose paternity is in question without there being any cogent reason for the same. The plight of a child whose paternity and thus his legitimacy, is questioned would sink into a vortex of confusion which can be confounded if Courts are not cautious and responsible enough to exercise discretion in a most judicious and cautious manner.

Further, questions surrounding paternity have a significant impact on the identity of a child. Routinely ordering DNA tests, particularly in cases where the issue of paternity is merely incidental to the controversy at hand, could, in some cases even contribute to a child suffering an identity crisis. It is also necessary to take into account that some children, although born during the subsistence of a marriage and on the desire and consent of the married couple to beget a child, may have been conceived through processes involving sperm donation, such as intrauterine insemination (IUI), in-vitro fertilisation (IVF). In such cases, a DNA test of the child, could lead to misleading results. The results may also cause a child to develop a sense of mistrust towards the parents, and frustration owing to the inability to search for their biological fathers. Further, a child's quest to locate its biological father may compete with the right to anonymity of the sperm donor. Having regard to such factors, a parent may, in the best interests of the child, choose not to subject a child to a DNA test. It is also, antithetical to the fundamentals of the right to privacy to require a person to disclose, in the course of proceedings in rem, the medical procedures resorted to in order to conceive.

The reasons for the parent's refusal may be several, and hence, it is not prudent to draw an adverse inference under Section 114 of the Evidence Act, in every case where a parent refuses to subject the child to a DNA test.

Therefore, it is necessary that only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, the Court can direct such test. Further, a direction to conduct DNA test of a child, is to be

> *ordered even rarely, in cases where the paternity of a child is not directly in issue but is merely collateral to the proceeding, such as in the instant case."*

20] In the backdrop of the above settled principle dealing with the subject from all possible angels, the Court is required to be very careful and cautious. The Court must be satisfied initially as to the proof of the facts, which are germane, to answer first part of Section 112, which speaks about the conclusive proof of the legitimacy of a child vis-a-vis the father. When the evidence on record is sufficient to prove this fact, then by applying the basic principle and the mandate of the second part and the language of second part of Section 112, the DNA test cannot be allowed in a routine manner. The Court has to visualize the cascading effect of such a test on the future of the child. It is to be noted that the interest of the child should be the focus of attention of the Court. The child in such cases is vulnerable and innocent, having no control over all the happenings before the birth. The result of the paternity test after DNA analysis, if found negative, then the unfortunate child has to face the traumatising consequences throughout his life. The child can be left in the quest to find an answer to his pertinent question that who is his father. One can visualize the trauma of living bastardized life in one's lifetime.

21] The facts, which are *prima facie* established, having bearing with the limited issue, need to be stated. In this case, in order to crystalize the fact situation, the evidence adduced by the parties would be of immense help in deciding the issue. In this case, therefore, apart from the pleadings, the main focus while deciding the issue, one way or the other, would be on the evidence adduced by the parties. The fate of the application will have, therefore, to be decided by keeping the oral evidence in mind. In the reply filed by the non-applicant to the application made by the applicant for maintenance, he has audacity to even deny the marriage between him and Sandhya Rani, who is the mother of the applicant. Fortunately, for this applicant that marriage was registered as per law. The birth of the applicant was also registered. In the birth register, Sandhya Rani is shown as his mother and the non-applicant is shown as his father. The non-applicant after submitting his affidavit of examination-in-chief was subjected to gruelling cross-examination. In his cross-examination, he has admitted that he has no objection about his relationship with Sandhya Rani as his wife. However, he has stated that he has objection to accept the applicant as his son.

22] The applicant has produced on record number of documents to establish the facts pleaded by him. Witness No.1

examined by the applicant is his mother. In her evidence, she has narrated in detail the events from the date of the marriage till she was driven out of the house in 2009 and that too after the birth of the applicant in 2007. According to her, she married with the non-applicant on 10th February, 2005 at Rammandir Rajura. According to her, the marriage was registered at office of Sub-Registrar of Marriage at Rajura. Exh.64 is the registration certificate of the marriage dated 15th April, 2006. The applicant was born at Agrawal Maternity and Nursing Home, Chandrapur. The birth certificate is at Exh.65. It was issued from the said hospital. His birth was registered at village Cram Panchayat Subai. Exh. 66 is the said birth registration certificate. This documentary evidence would *prima facie* prove that Sandhya Rani and the non-applicant were married on 10th February, 2005. Their marriage was registered and the registration certificate was issued on 15th April, 2006. It has come on record that the mother of the applicant and the non-applicant are gainfully employed. It has come on record that while they were working in WCL, they came into contact and thereafter their love story blossomed and culminated in marriage. On the basis of the oral and documentary evidence *prima facie,* the applicant has proved the basic requirement of first part of Section 112 of the Evidence Act. The presumption of his legitimacy as a

son of the non-applicant has been established on the basis of this material.

23] The prime question that needs to be answered is whether the non-applicant has shown any material to insist for DNA test and DNA report, to rebut the presumption. In my view, if the evidence of the non-applicant is appreciated properly for this limited purpose, it would show that it falls short to make out a case, to insist for the DNA test of the applicant. In his affidavit of examination-in-chief, he has not denied his marriage with Sandhya Rani. What he has stated is that, the applicant is not his son though born to the Sandhya Rani. He has stated that he is damn sure about it and is ready to face the DNA test. So, he has deviated from his basic defence of denial of marriage, registration of marriage and the paternity of the applicant. He was subjected to cross-examination. His cross-examination has illuminated certain other aspects. He has made every possible attempt to deny the claim of the applicant. However, it must be mentioned that cross-examination is such a weapon that if handled properly, it can make the truth to surface.

24] He has denied even the service of notice though it has been separately proved. The notice dated 10th March, 2014 was served upon him. He did not reply the said notice. By the said

notice, the applicant through his mother had called upon the non-applicant to pay maintenance to him. Consistent with the conduct of the man of ordinary prudence, the non-applicant armed with such a defence would have made it loud and clear to the applicant that he is not his son and, therefore, no right to claim the maintenance. He has admitted that in the hospital record as well as in the Gram Panchayat record, he has been shown as father of the applicant. In the cross-examination of the mother of the applicant, she has admitted that all the hospital charges at the time of birth of the applicant were paid by the non-applicant. Further perusal of his evidence would show that he is not denying the stay of Sandhya Rani with him from marriage till 2009. His evidence is silent about even adulterous or illicit relations of Sandhya Rani with any other person. He was required to state it on oath. Simply saying that the applicant is not his son, would not be sufficient. In his cross-examination, he has admitted that 12 to 13 years prior he got acquainted with Sandhya Rani. He has denied suggestion that after birth of the applicant, he suspected the character of Sandhya Rani. This fact would make the issue crystal clear. It would show that he had no doubt about the fidelity or character of the applicant. His cross-examination is, therefore, *prima facie* sufficient to conclude that this application is not genuine. The pleading of the non-

applicant and his evidence if tested on the anvil of law, then it is clear that the same does not satisfy the basic requirements of the law.

25] In my view, therefore, all these facts cannot be brushed aside while deciding the application. The children have right not to have the legitimacy questioned frivolously in Courts of law. The DNA test cannot be ordered 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. It is to be noted that, in such a matter, the child is on test and not the mother. Therefore, in such cases, the absolute need and necessity for such test, to adjudicate upon a serious issue, must be made out. In this case, 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. In my view, keeping in mind the cascading consequences that could ensue, the Court should in every possible manner thawart such an attempt at the very inception. The order directing the DNA test in such matters must be need-based and has to be passed in an exceptional case.

26] In the facts and circumstances, in my view, the learned Additional Sessions Judge was absolutely well within the parameters of law laid down in the decision in the case of ***Aparna Ajinkya Firodia*** (supra). In my view, the legal position has been sufficiently settled and illuminated in this decision. The decision in the case of ***Nandlal Wasudeo Badwaik*** (supra) has been considered and distinguished on facts. In my view, the facts in the case of ***Nandlal Wasudeo Badwaik*** (supra) and the facts of the case on hand are totally different. In this case, the decision in the case of ***Aparna Ajinkya Firodia*** (supra) would be the guiding factor for this Court, to adjudicate upon this issue. In my view, keeping in mind the law laid down in the case of ***Aparna Ajinkya Firodia*** (supra), this is a fit case to dismiss the petition.

27] Accordingly, the petition is **dismissed**. Rule stands discharged.

(G. A. SANAP, J.)

Vijay