

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3938 OF 2015
(Chabu Laxman Chandane and another Vs. Laxman Eknath
Chandane and others)

Mr.G.K.Thigale (Naik), Advocate for the petitioners.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 10/08/2017

PER COURT :

1. The petitioners are aggrieved by the order dated 15/11/2014 passed by the Trial Court by which application Exh.115 filed by the petitioners seeking a paternity test by resorting to the DNA test has been rejected. The petitioners are the original plaintiffs in RCS No.286/2007.

2. All the respondents have been served by Court notice, as per the report of the office on 02/04/2016. Since then, though the matter was adjourned on a few occasions, none has appeared for the respondents.

3. The petitioners, who are original plaintiffs, are son and mother respectively. Contention is that petitioner No.2 Sakhubai is the wife of defendant No.1 Laxman. Petitioner No.1 Chabu claims to be the

son of Laxman. The suit pending before the Trial Court is for partition and separate possession of the properties in the name of Laxman. Vide the written statement, Laxman has specifically denied having any relation with petitioner No.2 and has also denied that petitioner No.1 is his son.

4. In the above backdrop, the petitioners preferred application Exh.115 seeking a DNA test so as to establish the parenthood of petitioner No.1. By the impugned order, the Trial Court has rejected the application on the ground that there are other ways of proving paternity and DNA test is not the only solution. Another ground for rejecting the application is that the suit is pending for 8 years and hence the prayer for DNA test is an attempt to delay the trial in the matter.

5. In my view, if the paternity of a person is to be established, whether a DNA test would consume time or not cannot be the decisive factor. In order to ensure that justice is done, the Court cannot show haste in completing the trial in the matter only for the reason that the suit is about 8 to 10 years old.

6. This Court, in the matter of Namdeo Babasaheb Korde and

another Vs. Babasaheb @ Babarao Ramkrishna [2015(1) Mh.L.J.888] has relied upon the judgment delivered by Justice Sauders in the matter of Buckly Vs. Rice Thomas [1554] 1 Plowden 118]. While deciding the case of Namdeo (supra), I have considered the observations of Justice Sauders which would indicate that medical science can be called in aid of law, so as to ensure that the truth surfaces. It would be apposite to reproduce my observations in paragraph Nos.8 to 17 of the judgment in the case of Namdeo Babasaheb (supra) as under :-

“8. It is a mis conception that only a valid and legal marriage leads to parenthood. A biological child would equally be an offspring as like a child born out of a legal wedlock. A child born out of relationship between a male and a female will render both to parenthood. Therefore, in the present case, whether there was any legal marriage performed between petitioner No.2 and respondent No.1 would not be significant when it came to a DNA Test to be performed for establishing paternity of respondent No.1 qua petitioner No. 1 and respondent No. 7.

9. DNA means '*deoxyribonucleic acid*'. DNA structure varies amongst each individual. It necessarily happens to be a basic genetic material in all living humans. It carries a genetic code which can be used for proving human character, body characteristics, behaviour etc. DNA can be found in the human body and samples from semen, hair, blood, flesh can

establish a DNA matching with the DNA of another human being.

10. In the case of **Buckly v. Rice Thomas [(1554) 1 Plowden 118]**

(as quoted by M.Jagannadha Roa, Chief Justice, Kerala High Court, as he then was, in 1993(1) KLT 19) Justice Saunders held, “....if matters arise in our law which concerns others sciences or faculties, we commonly apply for the aid of that science or faculty to which it concerns. This is an honourable commendable thing in our Law. We approve of them and encourage them as things worthy of commendation”. Each human being has a unique DNA pattern which is acquired by inheriting it from the biological parents. It is so identifiable as it carries great similarities to their molecular structure and their genetic code. It is for these reasons that a DNA test is utilised as it can conclusively determine a biological relationship.

11. Attention of the Court is drawn to the impugned order dated 20/06/2012 which is on page No.35 of the petition paper book. It appears that the learned Court has got carried away by the contention that the petitioners No.1 and respondent No.7 are not born out of valid wedlock and the Apex Court in the case of **Banarasidas Vs.Teeku Dutta and another (2005[4] SCC 449**, has concluded that a DNA test is not to be directed as a matter of routine course and can be directed only in deserving cases.

12. Directions given in the **Goutam Kundu Vs.State of Bengal (1993) 3 SCC 418** have also been gone into and the Court has considered as to what would be the consequences of ordering a blood test. The effect of branding a child as a bastard and a mother as a unchaste woman is not intended by Law. It was, in these circumstances that the learned Civil Judge, J.D. rejected the application and has concluded that respondent No.1 can not be compelled to give his blood samples for analysis in order to undergo the DNA Test. It needs to be noted that the Apex Court in Kundu's case (supra) has not banned or altogether prohibited a DNA test.

13. A similar case fell for the consideration of the Division bench of the Delhi High Court in the case of **Rohit Shekhar Vs.Narayan Dutt Tiwari and another, FAO(OS) No. 547/2011** decided on 24/04/2012. The facts of the said case are quite similar to the matter in hand. In the said case, Mr.Narayan Dutt refused to accept the identity of a lady to whom the petitioner Rohit Shekhar was born. Consequentially, paternity of Rohit Shekhar was denied by Mr.Tiwari. The DNA Test was resisted and the plea that absence of any valid marriage between the lady and Mr.Tiwari, would preclude Mr.Rohit Shekhar from claiming to be a son. Therefore, neither could a DNA test be ordered nor can Mr.Tiwari be ordered to give his blood samples.

14. The Delhi High Court allowed the petition filed by Rohit Shekhar and observed in para No. 26 as under :

“Though in the light of what we have held, it is not strictly relevant, but we are unable to restrain ourselves from recording what the Court of Appeal (Civil Division) observed in Re H and A (children) (Paternity : Blood Tests) [2002] EWCA Civ 383 :-

Over thirty years ago in his speech in S Vs. Mc C Lord Hodson said : “The only disadvantage to the child which is put forward as an argument against the use of a blood test, not for therapeutic purposes but to ascertain paternity, is that the child is exposed to the risk that he may lose the protection of the presumption of legitimacy.

Without seeking to depreciate the value of this presumption it is, I think, fair to say that whatever may have been the position in the past the general attitude towards illegitimacy has changed and the legal incidents of being born a bastard are now almost non-existent. I need not dilate upon this, for I recognise that it is impossible to say that there is no stigma of bastardy even though it be no more than the indirect stigma of the imputation of unchastity to the mother of the child so described. On the other hand, it is difficult to conceive of cases where, assuming illegitimacy in fact, it is to the advantage of the child that this legal status of legitimacy should be preserved only perhaps to be displaced by firm evidence of illegitimacy decided later in his or her life from a blood test.

The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be

best served by the suppression of truth. Scientific evidence of blood groups has been available since the early part of this century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of (FAO (OS) No.547/2011 page 21 of 31) paternity. Why should the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong ?”

15. Mr.Tiwari carried the matter to the Apex Court. By its order in the case of **Narayan Dutt Tiwari Vs. Rohit Shekhar, reported at 2012(12) SCC 554**, the view of the Delhi High Court was upheld. Observations of the Apex Court in para No. 49 read thus :-

“We may further observe that the injunction directing DNA testing falls in the category of an order in aid of disposal of the suit and deciding the rights of the parties to the suit i.e. the right asserted by the appellant to have such DNA testing done and the right asserted by Respondent 1 to not submit thereto. Once such rights had been adjudicated by the suit court and the appeal there against had been dismissed and the application for stay having been rejected by the Apex Court, it was not open to the suit court to again entertain the said question. If such practices were to be permitted, it will have dangerous consequences. It is rarely that the entire suit is decided by the same Judge. If it were to be permissible for each successive Judge presiding over a court to take a different view, it will

not only lead to the litigants and the counsel urging the same issues repeatedly each time on change of roster but also be contrary to the rule of Law.”

16. Shri Jitendra N.Bhatt, Judge, Gujarat High Court in his Article printed in (2003) 8 SCC (Journal) 25, has written which read thus :

“In Western countries, DNA test and profile is now widely employed. In a country like ours, such a test and profile may, hardly, be emphasised Systematic programme and scientific planning ought to be started for the use of DNA test and profile. Orientation, seminars, workshops, publications ought to be carried out and methods for its utility, importance and awareness on the part of one and all concerned and functionaries in the criminal and civil justice delivery system in general and for police, courts and correctional institutions in particular.

In many developed countries, DNA test, genetic testing techniques and “RACMIZATION” - testing based on systematic examination of teeth and bite-marks has proved to be very useful. No doubt, “RACMIZATION” technique is currently used in Japan and Germany. It has potential to replace the traditional method which took into account the eruption and/or fusion and falling sequence of teeth.”

17. I am, therefore, of the firm view that when the petitioner No.1 (claiming to be the son) and respondent No.7 (claiming to be the daughter) desire that their father

needs to be identified, the Law will rush in aid to the duo. For ascertaining the truth and to avoid evading of the clutches of Law, respondent No.1 Babasaheb @ Babarao Ramkrishna Korde, needs to undergo the DNA test. Ultimately, in the eyes of law, truth which is divine, must surface. No loss or harm of any nature would be caused to him. When medical science can act in aid of law, courts must allow truth to prevail.”

7. Learned Advocate for the petitioners has relied upon a recent judgment delivered by the Court of England in the matter of Spencer Vs Spencer and others [(2016)3 WLR 905] in support of his contention that allover the world, the DNA test is considered to be almost perfect so as to test the claim of parenthood.

8. The petitioner has further relied upon a similar judgment delivered by the Court of England in the matter of Regina Vs.B. [(2013) 1 WLR 320]. It would be apposite to reproduce the observations of the Court in the case of Regina (supra) in paragraph No.5 as under :-

“5. The DNA evidence (using the phrase compendiously to cover all the evidence relating to the DNA samples and the circumstances in which they were obtained and retained) appears to be reliable, substantial and highly probative. Indeed, on the face of it, it is plainly compelling evidence.

Although reserving the defendant's position in the event of any order for a retrial, no issue has been taken in argument before us on this aspect of the case."

9. Considering the above, since the person who claims to be the son and the lady who claims to be the wife of Laxman having themselves come forward stating that they are willing to undergo the DNA test so as to establish the parenthood of the son, I am of the view that the Trial Court should have allowed the application Exh.115.

10. Considering the above, the impugned order dated 15/11/2014 is quashed and set aside. Exhibit 115 is allowed. The Trial Court is directed to issue appropriate directions for collecting the blood samples of plaintiff Nos.1, 2 and defendant No.1 as per the procedure in order to ensure that the DNA test is conducted by a Government approved laboratory, as expeditiously as possible and preferably within a period of 6 (six) weeks from today.

11. The petitioners and original defendant No.1 Laxman shall bear the costs and expenses of the said DNA test in equal proportions (50% by the plaintiffs and 50% by Laxman) considering the fact that

petitioner No.2 is litigating even for seeking maintenance from Laxman and is in abject poverty. They shall deposit the amount with the Trial Court as may be ordered by the Court. In the event, Laxman does not deposit the costs, the Trial Court may consider striking of the defence of Laxman.

12. The Trial Court would also issue directions to the authorized hospital/lab that the report of the DNA test shall be submitted to the Court in a sealed envelope and thereafter the Court may issue copies of the same to the litigating sides.

(Ravindra V.Ghuge, J.)