

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CR No.6239 of 2015(O&M)
Date of Decision-10.01.2017**

Raghubir

... Petitioner

Versus

Bharto Devi and others

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. V.B. Aggarwal, Advocate for the petitioner.

Mr. Gaurav Tyagi, Advocate for respondent No.1.

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed order dated 17.08.2015 passed by Civil Judge (Junior Division), Kurukshetra whereby application for giving direction for DNA profile of plaintiff-Bharto Devi with Chander Bhan sought by defendants No.2, 4 to 10, 12 to 17, 20, 21, 23 to 32 was declined.

[2]. Plaintiff-Bharto Devi filed a suit for declaration and joint possession with a consequential relief of permanent injunction on the ground that father-in-law of the plaintiff namely Bullu Ram was owner in possession of the land in question. Said Bullu Ram died on 06.12.1969. Mutation of inheritance was sanctioned in favour of his sons and daughters. Plaintiff was widow of pre deceased son of Bullu Ram namely Ram Sarup who died in the year 1965. Plaintiff being widow of pre deceased son of Bullu Ram was entitled to 1/8th

share in the property left by Bullu, but in the mutation, the name of the plaintiff was not entered as legal heir of Bullu. In this way, she was deprived of her 1/8th share in the property of Bullu in both the villages namely Kanipala and Shadipur Sahidan. Revenue record was also assailed by the plaintiff.

[3]. Moden son of Bullu and Bakhtawari, Bhagti and Sona have also died. Defendants No.4 to 7 are legal heirs of deceased Moden, defendants No.8 to 14 are legal heirs of deceased Bhagti daughter of Bullu, defendants No.15 to 19 are legal heirs of deceased Bakhtawari and defendants No.20 to 22 are legal heirs of deceased Sona daughter of Bullu.

[4]. Bhagti, Sona and Bakhtawari have transferred their shares in favour of defendants No.1 to 3 and deceased-Moden by Civil Court decree dated 06.04.1978. Mutation was also sanctioned on the basis of said civil court decree. Plaintiff has also assailed the aforesaid civil court decree being illegal and not binding upon her 1/8th share in the property left by Bullu Ram. With the aforesaid background, the suit in question came to be filed by plaintiff Bharto Devi widow of Ram Sarup son of Bullu Ram.

[5]. The said suit was contested by defendants No.2, 4 to 7, 23 to 29, 31 and 32.

[6]. Plaintiff claimed herself to be legally wedded wife of Ram Sarup who died in the year 1965. Thereafter, she got married with Jagdish. Chander Bhan took birth on 15.10.1968. Applicants-

defendants claimed that Chander Bhan was the real son of Bharto from the loin of Jagdish as he was born after 3 years of death of Ram Sarup, therefore, DNA profile was sought to be established in order to prove the aforesaid fact.

[7]. **In Goutam Kundu Vs. State of West Bengal and another, (1993) 3 SCC 418,** it was held by the Hon'ble Apex Court that the test cannot be held as a matter of course, nor the same can be done in order to have roving inquiry. There must be a strong *prima facie* case where the husband must establish non access in order to dispel the presumption arising under Section 112 of the Evidence Act The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman. Nobody can be compelled to give sample of blood for analysis.

[8]. **In Sharda Vs. Dharmpal, AIR 2003 SC 3450,** the Hon'ble Apex Court explained that the ratio of **Goutam Kundu's case (supra)** was not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. If the directions are in the interest of the minor, then such directions ordinarily be made. In matrimonial disputes, where divorce is sought on the ground of impotency etc., then without any medical

examination, it would be very difficult to conclude as to whether allegation made by the spouse is correct or not. In such situation, the party would always insist on medical examination. The avoidance thereof on the plea of right to privacy or of personal liberty under Article 21 of the Constitution of India would make the same impossible for any conclusion. Such a course would make the ground of divorce to be nugatory, therefore, right to privacy having not been conferred by Article 21 of Constitution of India and its interpretation has to be read in consonance with personal liberty. Therefore, cumulatively, it cannot be treated to be an absolute right and would be subject to some limitations to be imposed where two competing interests clash. Right to seek divorce on the ground of impotency would directly come in conflict with so called right to privacy of the respondent. Therefore, the Court has to reconcile by way of balancing the competing interests of the parties.

[9]. In **Bhabani Prasad Jena Vs. Convenor Secretary Orissa State Commission for Women and another, 2010 (4) RCR (Civil) 53**, it was pointed out by the Hon'ble Apex Court with reference to earlier precedents in **Sharda's case (supra)** and **Goutam Kundu's case (supra)** that in case where paternity of a child is in question before the Court, the use of concept of DNA would be extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, then there should not be any hesitation to use the same. The other view is that the Court must be reluctant to use such scientific

mechanism which may result in invasion of right to privacy of an individual and even may have devastating effect on the child and may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. The 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 must be coherently decided and the Court must exercise its discretion only after balancing the interests of the parties. The Court would consider whether for a just decision, DNA profile is eminently needed. DNA profile in a matter relating to paternity of a child should not be directed as a matter of course or in a routine manner. The Court has to consider diverse aspects including presumption under Section 112 of the Evidence Act and other pros and cons of the situation.

[10]. **In Selvi Vs. State of Karnataka, (2010) 7 SCC 263**, the Hon'ble Apex Court held that no individual should be forcibly subjected to any of the techniques whether investigation in criminal cases or otherwise as it would amount to an unwarranted intrusion into personal liberty. However, there was a room for voluntary administration of the techniques when party gives consent to undergo any of these tests, the test result by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the Administration of the test. However, any information or material that is subsequently

discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872.

[11]. **In Rohit Shekhar Vs. Narayan Dutt Tiwari and another, 2011(2) CivCC 88**, it was noticed that conclusive proof standard mandated by Section 112 of the Evidence Act, read with Section 4, admits an extremely limited choice before the Court, to allow evidence of non access to a wife by the husband, who alleges that the child begotten by her is not his offspring; it is designed to protect the best interests of the child and his legitimacy. The Court also covered the area where paternity is claimed by the children on attaining majority, for other reasons i.e. on the basis of right of the children under Section 125 Cr.P.C or in a suit for declaration or for maintenance. The Court pointed out the areas where the Court has weighed all pros and cons on the basis of eminent need for making appropriate orders. The Court also pointed out that with enactment of Hindu Adoptions and Maintenance Act, 1956, Criminal Procedure Code, 1973, Family Courts Act 1984 and the right of the children to know about her or his natural parentage, the proposition has attained new dimensions where the concept of paternity or a claim thereof cannot be ousted by Section 112 of the Evidence Act.

[12]. **Hon'ble Apex Court in Krishan Kumar Malik Vs. State of Haryana, 2011(7) SCC 130** has observed that with the incorporation of Section 53-A in the Criminal Procedure Code w.e.f 23.06.2006, it has become necessary for the prosecution to go for

DNA profile to facilitate the prosecution to prove the case against the accused.

[13]. In **Nandlal Wasudeo Badwalk Vs. Lata Nandlal Badwalk and another, (2014) 2 SCC 576**, the Hon'ble Apex Court has embarked upon the modern technology provided for possibility of proof of fact which was not available at the time when Section 112 of the Evidence Act enacted. The presumption may not be attracted where truth or fact is known. The interest of justice will be best served by ascertaining the truth. The Court should be furnished with best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. The presumption in such a situation was held to be rebuttable and must yield to proof. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, then the latter must prevail over the former.

[14]. **In Dipantwita Roy Vs. Ronobroto Roy, (2015) 1 SCC 365**, the Hon'ble Apex Court held that prayer of the husband for conducting a DNA test to establish the alleged adulterous behavior of wife and incidental legitimacy of son would not be strictly covered by Section 112 of the Evidence Act. The alleged infidelity of wife would not be established without DNA, which is the most legitimate and scientifically proved mechanism to establish the assertion of infidelity. The test could also be used by the wife to rebut assertion of

husband to establish that she had not been unfaithful, adulterous or disloyal to the husband. In case of acceptance by the wife to submit for DNA test, the same would conclusively determined the veracity of accusation leveled against her and in case of her denial to comply with the direction, the allegation would be determined by the Court by drawing an adverse inference against her in terms of Section 114(h) of the Evidence Act. DNA evidence has assumed great significance and legally recognized phenomenon. Scientific investigations are need of our. DNA is a scientific test and its accuracy is 99.99 % and therefore, it can be used as evidence not only in sexual assault and criminal cases, but also in civil cases involving question of paternity and succession.

[15]. Section 112 of the Indian Evidence Act, 1872 is based on presumption of public morality and public policy. The law presumes against vices and immorality in a civilized society where it is imperative to presume legitimacy of a child born during the continuation of a valid marriage between his mother and any man or within 280 days after its dissolution, if the mother remained unmarried. Such legitimacy has presumption of conclusiveness, unless 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. This presumption cannot be displaced by mere probability or doubt. The presumption can only be rebutted by a strong and conclusive evidence. Once the validity of marriage is proved, then there is a strong presumption about the legitimacy of children born out of that

wedlock. It is also settled proposition of law that the law does not presume anything odious or dishonourable. The presumption of conclusive proof can be rebutted by strong and clear conclusive evidence.

[16]. Section 45 of the Evidence Act does not pose any legal impediment to the admissibility of DNA profile as an evidence.

[17]. Some of the High Courts have hinted that subjecting the accused to DNA test is not violative of Article 20(3) of Constitution of India. Obtaining samples from the accused for DNA profile does not violate right against self-incrimination. There is no infringement of any privacy or right against self-incrimination as it is by now trite that in course of investigation, DNA test can be conducted. The privilege of Article 20(3) of Constitution of India is applicable only in testimonial evidence. In a criminal case, obtaining DNA profile will not violate right against self incrimination. The privilege applies only in evidence i.e. testimony in essence taken under duress. The right against self-incrimination is just a prohibition on the use of physical or moral compulsion to extort testimonial evidence from a person, not an exclusion of evidence taken from his body when it may be material and thus, the Court can compel a person male or female to submit for DNA test after incorporation of Section 53-A in Criminal Procedure Code, DNA test of accused is unavoidable in case of rape.

[18]. In view of aforesaid precedents, DNA can be ordered in order to establish relationship by means of modern techniques, but at the same time, a person cannot be compelled to give evidence against himself and it would be extremely delicate and sensitive aspect as it may lead to invasion of right to privacy that may have devastating effect on the mind of the child or the person. The proposition has to be considered in the light of facts of individual case. It is true that in these days of modern science, modern technology provided for possibility of proof of fact has to be given precedence over Section 112 of the Indian Evidence Act as these modern facilities were not available when Section 112 of the Indian Evidence Act was enacted. The law laid down in **Nandlal Wasudeo Badwalk's case (supra)** can be referred on the aforesaid proposition. The proposition has to be tested with reference to facts on record.

[19]. The issue is with regard to birth of Chander Bhan, whether he took birth from the wedlock of Bharto Devi with Ram Sarup or from the Karewa wedlock of Bharto Devi with Jagdish. In order to establish Chander Bhan being son of Jagdish, proof of marriage between Bharto Devi and Jagdish was *sine qua non*. No evidence of marriage between Bharto Devi and Jagdish has come forth on record. In such an eventuality, even if DNA profile of Chander Bhan with Jagdish is established that would lend nowhere for want of lawful Karewa between Bharto Devi and Jagdish. Even though, incidental legitimacy of Chander Bhan would be on

explanatory note in terms of Section 112 of the Indian Evidence Act that would not be put to any roving inquiry in respect of infidelity of Bharto Devi in the absence of any proof of Karewa marriage between Bharto Devi and Jagdish.

[20]. In view of aforesaid, the Court has rightly observed that there is no eminent need for leading such an evidence at this juncture. Allegation of infidelity cannot be appreciated in the light of stand taken by Bharto Devi herself wherein she has denied maternity viz-a-viz Chander Bhan. The legitimacy of Chander Bhan viz-a-viz relationship of Bharto Devi with Jagdish cannot be established by way of DNA profile in the absence of proof of marriage between Bharto Devi and Jagdish, therefore, trial Court was justified in observing that the parties may lead their substantive evidence.

[21]. In view of refusal of Bharto Devi from undergoing DNA profile, the Court would be at liberty to act in accordance with law in the event of finding existence of lawful marriage between Bharto Devi and Jagdish. Bullu Ram father-in-law of the plaintiff and father of Ram Sarup died on 06.12.1969. Mutation Nos.950/240/218 were sanctioned in respect of properties left by Bullu Ram considering that plaintiff-Bharto Devi was wife of Jagdish. In Civil Court Decree dated 06.04.1978, mutations were held to be correct. Now dispute is with regard to property of Ram Sarup for which petitioner-defendant No.2 being brother of Ram Sarup staked claimed on the ground that plaintiff was not entitled to separate 1/8th share which was of Ram

Sarup as she was married to Jagdish. Plaintiff-Bharto Devi denied the relationship with Jagdish. Karewa of plaintiff-Bharto Devi with Jagdish has not been proved on record. Secondly, Chander Bhan has not been impleaded as party to the suit against whom DNA profile is being sought. Application under Order 1 Rule 10 CPC is statedly pending.

[22]. In view of aforesaid, filing of application at this stage would be wholly premature and no conclusive adjudication can be made even in the light of precedents discussed hereinabove. At this stage, this Court does not see any lawful justification to interfere with the impugned order dated 17.08.2015 passed by Civil Judge (Junior Division), Kurukshetra. This revision petition is accordingly dismissed at this stage.

(RAJ MOHAN SINGH)
JUDGE

10.01.2017
Prince

Whether reasoned/speaking	Yes/No
Whether reportable	Yes/No