

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No.756 of 2018**

Vidya Verma, W/o Shankar Verma aged about 24 years, R/o Village Jhaal, Tehsil and District Bemetara (CG)

---- Petitioner**Versus**

Shankar Verma @ Sheetal Verma, aged about 25 years, Profession Agriculture, R/o Village Jiya, Tehsil and District Bemetara (CG)

---- Respondent

For Petitioner	:	Mr.Sunil Otwani, Advocate
For Respondent	:	Mr.R.K.Pali, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****23/10/2018**

1. The petitioner/plaintiff filed the petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter called as "the Act of 1955") for restitution of her conjugal rights against her husband respondent/defendant stating inter-alia that husband without reasonable cause has withdrawn her from society and therefore, a decree for restitution of conjugal rights be granted in her favour. In that proceedings, at the later stage of the trial, the respondent/defendant filed an application for DNA test of their only son Hardik stating inter-alia that he is not his son out of wedlock with the plaintiff. Learned Family Court by its impugned order granted that application holding that it is not evident from record whether Hardik is son of the defendant or not, it is imperative and granted that

application. Questioning the said order permitting DNA test of Master Hardik, the instant writ petition under Article 227 of the Constitution of India has been filed by the petitioner/plaintiff.

2. Mr.Sunil Otwani, learned counsel for the petitioner/plaintiff, would submit that in the instant case, paternity of Hardik is not an issue before the Family Court, it is only an application for restitution of conjugal rights filed by the petitioner/plaintiff and even said minor Hardik is not party in the said proceedings and merely because the defendant has disputed the factum of paternity, he would not be entitled for DNA test. The Family Court is absolutely unjustified in directing for DNA test. Therefore, the impugned order is liable to be set aside.
3. On the other hand, Mr.R.K.Pali, learned counsel for the respondent/defendant, would submit that against the impugned order, remedy of the petitioner is to file criminal revision or first appeal before appropriate forum, but it cannot be subject-matter of petition under Article 227 of the Constitution of India before this Court. He would further submit that learned Family Court is absolutely justified in directing for DNA test as it will establish that Hardik is not son of the respondent/defendant out of wedlock with the petitioner/plaintiff. Therefore, the Family Court is absolutely justified in granting that application, as such, the writ petition deserves to be dismissed.
4. I have heard learned counsel for the parties and considered their rival

submissions made hereinabove and also went through the records with utmost circumspection.

5. The preliminary objection raised on behalf of the respondent that writ petition is not maintainable deserves to be rejected as the order impugned is not a final order and it is only an interlocutory order and against an interlocutory order appeal or revision is barred under Section 19(1) and 19(5) of the Family Courts Act, 1984.
6. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. [Please See para-34 of the judgment of the Supreme Court in the matter of Dharam Deo Yadav v. State

of U.P.^{1]}.

7. In the matter of Goutam Kundu v. State of West Bengal and Another² the Supreme Court has held that Courts in India cannot order blood test as a matter of course and whenever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained. It was further held that 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 and therefore no person can be compelled to give sample of blood for analysis.
8. The Supreme Court in the matter of Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another³ has considered as under:-

“21. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.”

1 2014(4) Scale 730

2 (1993) 3 SCC 418

3 (2010) 8 SCC 633

9. In the matter of Dipanwita Roy v. Ronobroto Roy⁴ the Supreme Court has followed the principle laid down in **Bhabani Prasad Jena** (supra) and also considered the decision rendered in **Goutam Kundu** (supra) and finally held as under:-

“14. A similar issue came to be adjudicated upon by this Court in **Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another** (supra), wherein this Court held as under: (SCC pp.642-43, paras 21-24)

“21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, 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 interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the 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.

23. There is no conflict in the two decisions of this

4 (2015) 1 SCC 365

court, namely, Goutam Kundu v. State of West Bengal (supra) and Sharda v. Dharmpal⁵. In Goutam Kundu, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda, while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prime facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. *Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court.*"

(emphasis supplied)

It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties."

10. Reverting to the facts of the present case in light of the

⁵ (2003) 4 SCC 493

principles of law laid down by the Supreme Court in above-stated judgments (supra), it is quite vivid that the present is a case of restitution of conjugal rights in which one of the parties (defendant/respondent herein) has disputed the factum of paternity, it would not mean that the Family 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, if they wish and only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, the Court can direct such test. DNA test, in any case, cannot be directed as a matter of routine as held by the Supreme Court in **Bhabani Prasad Jena** (supra).

11. In the present case, paternity of minor Hardik is not an issue before the Family Court. The respondent/husband is seeking DNA test not in the interest of the child but in his own interest to establish that the petitioner/wife lived in adultery and therefore, not entitled for a decree for restitution of conjugal rights, as such, the Family Court is absolutely unjustified in directing for DNA test of minor Hardik.

12. There is one more reason for not upholding the impugned order. Minor Hardik is not party to restitution proceedings, he was not present in the said proceeding and the impugned order has been passed behind his back which is clearly in violation of principles of natural justice. The Family Court cannot direct for DNA test or any other test without hearing a person concerned irrespective of the fact

whether he is minor or major. If such a person is minor, he should be heard through natural guardian.

13. In view of that, the impugned order cannot be sustained and it is hereby set aside. However, the respondent/defendant is at liberty to prove the issue involved in the proceeding in accordance with law.

14. The writ petition is allowed to the extent indicated hereinabove.
No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-