

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1091 OF 2018

SHAIKH BABA SHAIKH GULAB
VERSUS
MOHD IQBAL MOHD ISAQ AND OTHERS

...
Advocate for the Petitioner : Shri Tribhuwan Nitin T.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 31st January, 2018

Per Court:

1 The Petitioner/ original Defendant No.1 is aggrieved by the order dated 13.11.2017 by which, the application Exhibit-73 filed by the Plaintiffs, seeking a direction that Defendant Nos.1 and 2 should undergo a DNA test along with one of the Plaintiff, has been allowed.

2 The Petitioner contends that the DNA test is unnecessary and unwarranted in the facts and circumstances of the case. It would cause grave hardship to the Petitioner as he will have to undergo the said test for no reason. If there was a justifiable cause, the test could have been ordered. The Trial Court has casually ordered the DNA test.

3 It is further contended that there are strangers to the proceedings and the DNA test cannot be so directed merely to find out whether, the DNA strand matches amongst the litigating sides.

4 Having considered the submissions of the learned Advocate for the Petitioner, I have gone through the petition paper book with his assistance.

5 The Plaintiffs have specifically stated in the plaint as regards the relations between the Plaintiffs and the Defendants. The Plaintiffs are real brothers and real sisters, whereas, Defendant Nos.1 to 3 are also real brothers and real sisters. The deceased Ujalabi wife of Shaikh Vazir was the original owner of the land, which is the subject matter of the suit. All the Plaintiffs are the biological children of Mahemudabi @ Mahemoodbi wife of Mohammad Isaq, who was the daughter of Ujalabi and who has passed away on 01.01.1973. Defendants Nos.1 to 3 are the biological children of Bholanbi wife of Shaikh Gulab, who was the daughter of Ujalabi and who has passed away on 03.11.2007.

6 The Plaintiffs have filed the application Exhibit-73 seeking a direction to Defendant Nos.1 and 2 to undergo a DNA test with any of the Plaintiffs. As such, the Petitioner herein, who is Defendant No.1, admits that he is the son of Bholanbi. What is noted by the Trial Court in the impugned order is that Defendant Nos.4 and 5, who are subsequent purchasers of the part of the suit property, are denying relationships of Defendant Nos.1 and 2 with the Plaintiffs. Similarly, all the Defendants 1 to 3 have stated in their written statement that they deny the relationship of Bholanbi and Mahemudabi, who according to the Plaintiffs are real

biological sisters and biological daughters of Ujalabi.

7 This Court, in the matter of Namdeo Babasaheb Korde and another vs. Babasaheb @ Babarao Ramkrishna Korde and others, 2015 (1) Mh.L.J. 888, has taken a view by relying upon the judgments of the Honourable Supreme Court that when the law finds it difficult to identify the actual relationship and when the siblings or blood relations deny the relationship amongst themselves, the medical science will rush in aid to the law for ascertaining the truth. Relevant observations of this Court, which are based on the ratio laid down by the Honourable Supreme Court, are as under :-

- "8. *It is a misconception 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 Souders 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 their 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."*

8 Considering the above and the peculiar facts that the biological children of Bholanbi, who admit that their grandmother was Ujalabi and have denied that Bholanbi was in fact a real sister of Mehmudabi or that her biological children are not related to the Defendants, there can be no embargo of law in taking the aid of medical science.

9 In the light of the above, I do not find that the impugned order of the Trial Court dated 13.11.2017 can be termed as being perverse

or erroneous or likely to cause gross injustice to the Petitioner in the light of the law laid down by the Honourable Supreme Court in the matters of *Syed Yakoob v/s K.S.Radhakrishnan*, **AIR 1964 SC 477** and *Surya Dev Rai v/s Ram Chander Rai*, **AIR 2003 SC 3044**.

10 This Writ Petition being devoid of merit is, therefore, dismissed.

kps

(RAVINDRA V. GHUGE, J.)