

HON' BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.4093 of 2018

ORDER:

This revision is filed by the petitioner/defendant, aggrieved by the order dated 04.06.2018 in I.A.No.498 of 2015 in O.S.No.259 of 2015 passed by the III Additional Junior Civil Judge, Nellore.

2. The above suit is filed by the respondent/plaintiff herein to declare that she is the daughter of the petitioner/defendant herein. The mother of the plaintiff by name, Pushpakala, by virtue of marriage between plaintiff's mother and defendant on 29.10.1989 at Tirupati as per Hindu rites and customs. It is stated that in that wedlock, she was born at Samatha Clinic, Mulapeta, Nellore on 18.08.1992. It is no doubt averred that the defendant deserted the plaintiff's mother, Pushapakala supra and contracted marriage with one Kamakshi, D/o Narayana and through that second wife, the defendant blessed with two children, a male and a female.

3. It is, during the trial of the suit in progress under contest by disputing the paternity of the defendant to the plaintiff, from the evidence of PW.1 completed, the plaintiff filed an application in I.A.No.498 of 2015 to direct the

defendant to submit for the DNA test to determine the defendant's paternity to her.

4. The lower Court, by the impugned order dated 04.06.2018, allowed the application, which order is running in 11 pages with 8 paras. Aggrieved by the same, the defendant filed this revision.

5. The grounds urged in the revision are that the impugned order of the learned Junior Civil Judge is not only exceeding the jurisdiction vested in that Court but also failure of justice, contrary to law, hit by principles of *resjudicata* from the finding in O.S.No.22 of 2001, a suit for partition filed on behalf of the plaintiff against the defendant for partition of the properties covered by the plaint schedule as joint family coparcenary properties with claim of she is one of the coparceners under the Andhra Pradesh Hindu Succession Amended Act, 13/1986. In that suit, no doubt, there was a finding of the plaintiff is the defendant's illegitimate child and thereby, not entitled to consider as a coparcener to claim by birth right of unmarried daughter over the coparcenary property against her father. The other contention is that once that finding is there, the present application is barred by *resjudicata* and if at all the petitioner wants to rely on the same, she can rely on that

finding. Leave about in that suit O.S No.22 of 2001, a similar application for DNA examination filed was ended in dismissal and confirmed in C.R.P.No.4076 of 2010 dated 25.10.2010 in holding once illegitimate child not entitled to coparcener properties by birth but for share as a successor and for no any self acquired property that too during life time of his father, question of conducting DNA test against the defendant does not arise was the conclusion in the revision order supra. It is also the contention that the order of the learned Junior Civil Judge in now allowing the application for DNA examination otherwise on merits being extracted remedy without even factual foundation for no other piece of evidence is unsustainable. It will not be correct in saying one way relying upon the finding in O.S No.22 of 2001, the plaintiff is born to the defendant in saying illegitimate. Once such is the foundation, there is some factual foundation. The other contention in the grounds of revision is the very suit itself is not maintainable and the question of sending for DNA examination does not arise and in a suit for declaration of the status DNA test examination is only irregular and irrelevant.

6. The counsel for the revision petitioner/defendant reiterated the above and also placed reliance on the

expression of this Court in *Davu Gopal Lunani v. Siva Gopal Lunani*¹ particularly at para-44 of exercising of jurisdiction during trial in progress, in ordering DNA test is erroneous instead of waiting till such time plaintiff has produced necessary evidence to convince the Court that the 1st defendant in the suit did really marry the 2nd defendant, the mother of the plaintiff, and gained access to her for such DNA examination to order and thereby, in observing as premature in remanding the matter for fresh consideration on some material other than that as a foundation for ordering DNA examination.

7. The learned counsel for the respondent/plaintiff supported the order of the lower court including by placing reliance on the expression of the Apex Court in *Nandlal Wasudeo Badwaik v. Lata Nandial Badwaik*² and observation of this Court in *Banoth Krishna v. Banoth Vimala*³ referring to *Nandlal Wasudeo Badwaik* (supra) among other expressions right from *Gountam Kundu v. State of West Bengal*⁴.

8. Heard and perused the material on record.

¹ 2014(1) ALT 396

² 2014(2) SCC 576

³ 2015(1) ALT (CrI.) 81 AP

⁴ 1993(3) SCC 418

9. Now, within the limited scope of the revision against the impugned order allowing for DNA examination in the suit of the plaintiff for declaration of her status as daughter of the defendant, whether there is any factual foundation for ordering such examination.

10. Undisputedly, in the earlier suit for partition while dismissing O.S No.22 of 2001, by judgment dated 30.05.2011, there was a finding of plaintiff was born to the defendant, however, not out of lawful wedlock of plaintiff's mother to the defendant, but as illegitimate. From this, the expression placed reliance of Davu Gopal Lunani (supra) has no application, as the present case is not one with no even a little foundation in this regard as earlier suit findings supra shows the foundation. In fact, in Davu Gopal Lunani (supra), referred the expressions of the Apex Court in Gountam Kundu (supra) of 1993 by a three Judge Bench in Sharda v. Dharmpal⁵, wherein, it was observed that Gountam Kundu (supra) is not an authority for the proposition that under no circumstances Court can direct that blood tests by collecting and having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such orders. It is there from

⁵ AIR 2003 SC 3450

discussed the subsequent judgment referred to Sharda (supra) in Banarsi Dass v. Teeku Dutta⁶ that even the result of a genuine DNA may not be a sole ground to escape from the conclusion of the presumption against the paternity to dispute once there is subsistence of lawful marriage, when paternity is questioned by the so called father. Above observation is made in saying once there is lawful marriage proved, the child is presumed as born to him in the wedlock and it is a conclusive proof unless non-access shown to claim as not born to him or to claim as illegitimate child. The subsequent expression of the Apex Court in Ramkanya Bai v. Bharatram⁷ and Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Anr.⁸ are in saying the issues are delicate and sensitive and Court has to consider various aspects including mainly the presumption under Section 112 of the evidence Act and the pros and cons of the order if at all against such presumption in the absence of the test of “eminent need”. What caution even from these expressions is, once lawful wedlock is proved DNA examination by disputing the paternity of the so

⁶ 2005(4) SCC 449

⁷ 2009(8) SCJ 849

⁸ AIR 2010 SC 2851

called father cannot ordinarily be ordered. It is to say the Court shall presume as legitimate and not vice versa.

11. In this background, coming to the expression in *Nandlal Wasudeo Badwaik* (supra), the Apex Court referred *Gountam Kundu*, *Banarsi Dass*, *Bhabani Prasad Jena* referred supra, in detail. No doubt, it also referred one more earlier expression of the Apex Court in *Kanti Devi v. Posha Ram*⁹, wherein it was observed that even there is a negative result of the DNA examination it will not overweigh the statutory presumption of conclusiveness under Section 112 of the Evidence Act. However, by referring all, in *Nandlal Wasudeo Badwaik* (supra), it was held that the DNA examination is a scientific reliable substantial evidence and the Court has taken note of the fact that DNA is scientifically accurate. It is further observed that we hasten to add in none of the cases referred to above, this Court was confronted with a situation in which DNA test report, in fact, was available and none was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act.

12. Having regard to the above, the law as it stands as on date is DNA examination is scientifically accurate and

⁹ 2001(5) SCC 311

reliable and can be ordered to determine where the legitimacy is in dispute.

13. In Banoth Krishna (supra), this Court referred all the expressions supra including Nandlal Wasudeo Badwaik (supra) and observed that when the paternity is in dispute by the husband and the child sought DNA examination in view of the scientifically accurate evidence, the DNA test is to be ordered.

14. Having regard to the above and because of the factual foundation of the plaintiff was born to the defendant is the finding on proved facts arrived in O.S.No.22 of 2001, undisputedly, said judgment is the subject matter of the pending appeal in A.S.No.537 of 2011 before this Court, this Court has no reason to interfere with the impugned reasoned order for DNA examination when same is scientifically accurate to rely that too when the child is seeking the relief and the so called father who disputes paternity no way can refused but for to submit and the else to draw necessary adverse inference against his said defence of not the father of the child.

15. Accordingly, the Civil Revision Petition is dismissed, confirming the order dated 04.06.2018 in I.A.No.498 of 2015 in O.S.No.259 of 2015 passed by the III Additional Junior Civil

Judge, Nellore, which is without prejudice to the contest of both sides in the suit.

16. Consequently, miscellaneous petitions, if any shall stand closed. No order as to costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 17.09.2018

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