

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for orders on :22/11/2019

Order passed on :19/12/2019

WP227 No. 837 of 2019

- Shyamal Mallik S/o Late Shri Santosh Mallik, Aged About 54 Years, R/o Durpa Road, Korba, Tahsil and District Korba, Chhattisgarh., District : Korba, Chhattisgarh (Defendant)

---- Petitioner

Versus

1. Mamta Das D/o Late Shri C.R. Das, Aged About 41 Years, Caste Panika, R/o Indira Market, Behind Sector-6, Balko Nagar, Tahsil and District Korba, Chhattisgarh. Mobile No. 8103296136, District : Korba, Chhattisgarh
2. Mimansha Mallik D/o Shri Shyamal Mallik Aged About 12 Years Minor, Represented Through Natural Guardian Mamta Das D/o Late Shri C.R. Das, Aged About 41 Years, R/o Indira Market, Behind Sector-6, Balko Nagar, Tahsil and District Korba, Chhattisgarh. Mobile No. 8103296136, District : Korba, Chhattisgarh

---- Respondents

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- Shyamal Mallik S/o. Late Shri Santosh Mallik, Aged About 54 Years, R/o. Durpa Road, Korba Tahsil and District Korba Chhattisgarh, District : Korba, Chhattisgarh

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Versus

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2. Minor Mimansha Mallik D/o. Shri Shyamal Mallik, Aged About 12 Years Represented Through Natural Guardian Mamta Das, D/o. Late Shri C.R. Das, Aged About 41 Years, R/o. Indira Market, Behind Sector-6, Balko Nagar, Tahsil and District Korba Chhattisgarh Mobile No.8103296136, District : Korba, Chhattisgarh

---- Respondents

For Petitioner – Shri Malay Kumar Bhaduri and Shri Shubham Dev Mallick, Advocates.

For Respondents– Dr. N.K. Shukla, Sr. Advocate with Priyenkesh Chandraker, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Order

19-12-2019

1. In WP227 No.837/2019 the petitioner is challenging the order dated 22-10-2019 in Case No.71A/2017 by which the learned Judge, Family Court, Korba has rejected the application filed by the petitioner under Section 151 of the CPC praying for deferred hearing on the application pending for DNA examination. In WP227 No.839/2019 the petitioner is challenging the same order by which the application filed for DNA examination regarding parentage of respondent No.2 has been allowed.
2. It is submitted that the respondents have filed a civil suit under Section 7 of the Family Court Act praying for relief of declaration that respondent No.2 is illegitimate child of the petitioner/applicant and respondent No.1. The applicant is contesting the suit and in support of his pleading he filed an application praying for deferred hearing of DNA test application regarding parentage of respondent No.2, which has been arbitrarily dismissed by the learned Family Court.

Reliance has been placed on the Order of Madhya Pradesh High Court passed in **W.P. No.15345/2016** (Badri Prasad Jharia Vs. Smt. Seeta Jharia) on 21-04-2017.

Reliance has also been placed on the judgment of Bombay High Court delivered in the matter of **Sunil Eknath Trambake Vs. Leelavati Sunil Trambake**, AIR 2006 Bom 140 and it is submitted that DNA test can be ordered by a Court when controversy could not be resolved without the DNA test.

Reliance has also been placed on the judgment of Hon'ble the Supreme Court in the matter of **Goutam Kundu Vs. State of West Bengal and Anr.**, (1993) 3 SCC 418 : 1993 AIR 2295 and on the judgment of Hon'ble the Supreme Court in **Civil Appeal Nos. 6222-6223 of 2010** (Bhabani Prasad Jena Vs. Convenor Secretary, Orissa

State Commission for Women and Anr.) decided on 3 August, 2010 in which it is held that 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.

3. It is further submitted that the application of the respondents has been allowed at a very early stage. Both the parties have opportunity to lead evidence and prove their case in accordance with provisions of law. In **Goutam Kundu Vs. State of West Bengal and Anr.** (supra) it is held that courts cannot order DNA test as a matter of course for the reason that the husband has opportunity to disprove the contention of the other side by bringing evidence rebutting presumption under Section 112 of the Evidence act and also that nobody can be compelled to submit himself to DNA test. Hence, the order impugned is against the provisions of law and also the established principles of law. Hence, the petitions be allowed and the impugned orders be set aside.
4. Learned counsel for the respondents in both the cases submits that the learned Family Court has not committed any error. Praying for DNA examination is not restricted under law. The parentage of respondent No.2 is main issue in this case and therefore, the DNA examination report regarding the parentage of respondent No.2 is a very essential evidence which is required to be obtained in this case. Therefore, both the petitions are without substance which may be dismissed.
5. Heard learned counsel for the parties and perused the documents.
6. Hon'ble the Supreme Court in the matter of **Goutam Kundu Vs. State of West Bengal and Anr.** (supra) has held in para 22, 26 and 27 that:

22. It is a rebuttable presumption of law, that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong

preponderance of evidence, and not by a mere balance of probabilities.

26. From the above discussion it emerges:-

- (1) that courts in India cannot order blood test as matter of course;
- (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- (3) There must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.
- (4) 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.
- (5) No one can be compelled to give sample of blood for analysis.

27. Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Additional Chief Judicial Magistrate, Alipore in rejecting the application for blood test. We find the purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test. Accordingly Criminal Appeal will stand allowed. Crl, M.P.No. 2224 of 1993 in SLP(Crl.) No. 2648 of 1992 filed by Respondent No. 2 will stand allowed. She is permitted to withdraw the amount without furnishing any Security.”

7. It has been held in the matter of **Badri Prasad Jharia Vs. Smt. Seeta Jharia** (supra) the M.P. High Court that the application for DNA test was filed by the petitioner at an early stage of the proceeding of the suit. Evidence of the parties have yet to be recorded and the petitioner shall have opportunity to make request for DNA test after recording of evidence and in case of refusal by other side for submitting DNA test then it can be prayed to the Court to draw adverse interference against the opposite party under the provisions of Section 114 of the Indian Evidence Act. Therefore, it was held that any DNA examination prior to the recording of the evidence is not permissible.
8. After considering on the submissions made from both the sides, I am of this view that in the instant case the parties have to lead evidence in support on their pleadings and recording of evidence is yet to start,

therefore, according to the settled view, it is found that the application brought by the respondents for DNA test to determine parentage of respondent No.2 is premature. Hence, after recording of the evidence of the parties respondents have entitlement to move a repeat application for DNA examination if the circumstances so require. Therefore, for these reasons I feel inclined to allow both the petitions. The petitions are disposed off at the motion stage. The impugned order dated 22-10-2019 dismissing the application under Section 151 of the CPC is set aside and the said application is allowed and the prayer of the petitioner is allowed that the DNA examination as prayed for by the respondents shall remain deferred till completion of evidence from both the sides. At the same time the order allowing the application for DNA examination is set aside and it is directed that this application shall remain alive to be considered and decided after completion of evidence from both the sides.

Sd/-
(Rajendra Chandra Singh Samant)
Judge