

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

**Civil Revision No.4907 of 2016 (O&M)
Date of Decision:17.09.2019**

Manjeet KaurPetitioner
Vs
Sukhwinder Kaur and othersRespondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Viney Sharma, Advocate with
Mr. Rakesh Chaudhary, Advocate
for the petitioner.

Mr. Arihant Jain, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

CM No.11641-CII of 2019

For the reasons mentioned in the application, the same is allowed. Accompanying documents are taken on record subject to all just exceptions.

Civil Revision No.4907 of 2016 (O&M)

[1]. Petitioner has preferred this revision petition against the order dated 24.05.2016 passed by the Civil Judge (Jr. Divn.) Malerkotla, vide which the application filed by the petitioner under Section 45 of the Evidence Act for directing the defendants to give blood samples for DNA test with blood sample of the plaintiff/petitioner was dismissed.

[2]. Brief facts are that plaintiff/petitioner filed a suit for declaration and permanent injunction against the defendants/respondents claiming herself to be daughter of Jeet Singh. Plaintiff claimed 1/6th share in the total land. Defendants No.2 to 5 are brothers and sister of the plaintiff. After the death of Jeet Singh, the entire property was inherited by the parties in equal shares to the extent of 1/6th share each.

[3]. In the written statement filed by the defendants, relationship of the plaintiff with Jeet Singh was denied, rather she was pleaded to be the daughter of Didar Singh son of Udham Singh, resident of village Jandauli, Tehsil and District Hoshiarpur and her entitlement in the property of Jeet Singh was denied.

[4]. Plaintiff claimed that her relationship with Jeet Singh was intentionally denied so as to usurp her share by the defendants. In order to prove herself as daughter of Jeet Singh, an application under Section 45 of the Evidence Act was filed wherein she sought to get test of DNA profile conducted by way of blood samples of herself and defendant No.1 with that of other defendants. The plaintiff seeks determination of her paternity by way of DNA profile test as the controversy cannot be solved by means of substantive, oral or documentary evidence.

[5]. The defendants have contested the application on the premise that the test can only be conducted in rare of the rarest case so as to prevent bastardization of the child/person. Generally this test is conducted in order to convict offenders in criminal cases after establishing their identity.

[6]. The application has been declined by the trial Court vide the impugned order. That is how the present revision came to be filed before this Court.

[7]. I have considered the submissions made by learned counsel for the parties.

[8]. 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 conducted as a matter of course, nor the same can be done in order to have roving inquiry. A strong *prima facie* case has to be made out where the husband must establish non access in order to dispel the presumption arising out of Section 112 of the Evidence Act. The Court must take into consideration as to what would happen and what would be the consequence of such a test i.e. whether it will have the effect of branding the child as a bastard or it will have the effect of declaring the mother as an unchaste woman. Nobody can be compelled to give sample of blood for analysis against

his/her wishes.

[9]. **In Sharda vs. Dharmpal, AIR 2003 SC 3450**, the Hon'ble Apex Court explained the ratio of **Goutam Kundu's** case (supra) and held that the aforesaid case was not an authority for the proposition that under no circumstances, the Court can direct the blood test 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 difficulty to conclude as to whether the allegations 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 the 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 it 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.

[10]. In **Bhabani Prasad Jena vs. Convenor Secretary Orissa State Commission for Women and another, 2010(4) R.C.R. (Civil) 53**, the Hon'ble Apex Court by referring to earlier precedents in **Goutam Kundu** and **Sharda's** cases (supra) held that where paternity of the child is in question, the Court would consider concept of DNA to be extremely delicate and sensitive issue. 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/her 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 by the Court. 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 or not. 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.

[11]. 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 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.

[12]. In **Rohit Shekhar vs. Narayan Dutt Tiwari and another, 2011(2) CivCC 88**, it was noticed that conclusive proof of 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 the different enactments that gives the right to the children to know about her or his natural parentage. This proposition has attained new dimensions where the concept of paternity or a claim thereof cannot be ousted by Section 112 of the Evidence Act.

[13]. In **Nandlal Wasudeo Badwalk vs. Lata Nandlal Badwalk and another, (2014) 2 SCC 576**, the Hon'ble Apex Court has held that 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 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 determine 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 hour. 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 a settled proposition of law that the law does not presume anything odious or dishonourable. The presumption of conclusive proof can only be rebutted by strong and clear conclusive evidence.

[16]. **Civil Revision No.4730 of 2016** titled '**Hawa Singh and others vs. Maiperson and another**' and **Civil Revision No.6239 of 2015** titled '**Ragbir vs. Bharto Devi and others**' both decided by this Court on 10.01.2017 were on different footings. This Court has acknowledged the legal position with reference to aforesaid precedents, but in view of facts and circumstances of those cases the permission was not granted. In **Hawa Singh and others**' case (supra), the plaintiffs/petitioners filed a suit for declaration to the effect that plaintiff No.1 was owner in possession of 1/8th share and plaintiffs No.2 to 5 were owners in possession of 1/8th share each on the suit land. Plaintiffs also sought other declaration qua different shares in the suit property. Plaintiffs claimed that the suit property was inherited by Ramji Lal and Risala from their father Baksha, who had inherited the same from his father Masaniya. Ramji Lal was married to Sarti. Risala was married to Bhurli. Defendants in that case were born from the wedlock of Risala and Bhurli. Plaintiffs in that case asserted that Ramji Lal was in Army and he did not visit the village from the years 1940 to 1946. His whereabouts were not known. Thereafter wife of Ramji Lal started living with Risala as his wife. Plaintiffs of that case took birth from that wedlock of Risala and Sarti. Ramji Lal was in Army and he had returned to village in the year 1946 and

thereafter again started living with Ramji Lal. In that scenario, the plaintiffs claimed that they are sons of Risala and Sarti. Factum of Hawa Singh and Jai Singh being sons of Risala was denied, rather they were claimed to be sons of Ramji Lal.

In view of the facts involved in the aforesaid case paternity of Hawa Singh and Jai Singh was core issue involved between the parties and the same was sought to be solved by way of test of DNA profile. The dispute was with regard to the property of Risala. The issue involved in the said case was that Sarti again united with Ramji Lal in the matrimonial house. Ramji Lal never declared to be civilly dead and, therefore, there was no occasion for Sarti to be treated as *Karewa* wife of Risala. *Inter se* comparison of blood samples of both the parties would not have given any conclusive fact to establish that the plaintiffs were in fact the sons of Risala out of marriage of Risala with Sarti. Ramji Lal died on 24.08.1972 and paternity was not ascertained for more than 65 years in that case. No objection was raised by Risala and Ramji Lal during their life time. Marriage between Sarti and Ramji Lal was never dissolved, nor Ramji Lal was ever declared to be civilly dead. He returned to the village in the year 1946 and cohabited with Sarti resulting in birth of third son Manphool and daughter Maichandi.

Thus in the facts and circumstances of the aforesaid

case, this Court held that there was a valid presumption of lawful marriage between Ramji Lal and Sarti from whose wedlock the plaintiff took birth. Secondly the biological kins of Risala could have been established with the blood sampling of both the sides. Blood sampling of plaintiffs in order to establish plaintiffs being sons of Risala was a far fetched proposition in view of the fact that Ramji Lal was alive upto the year 1972. It was only on the basis of facts involved in the aforesaid case, this Court distinguished the case from applicability of modern mechanism and held that the DNA profile cannot be granted.

In **Ragbir vs. Bharto Devi and others'** case (supra), this Court was dealing with issue where the question was yet to be established in respect of existence of lawful marriage between Bharto Devi and Jagdish. The plaintiff in the aforesaid case i.e. Bharto Devi had denied relationship with Jagdish. Karewa of plaintiff-Bharto Devi with Jagdish was not proved on record. Secondly, Chander Bhan was not impleaded as party to the suit against whom DNA profile was sought to be conducted and the application under Order 1 Rule 10 CPC was pending. In view of clear facts of the aforesaid case, this Court held that the application was premature and no conclusive adjudication could have been done in the light of precedents as have been cited in the present case. The aforesaid case was dismissed at that

stage only.

[17]. In the instant case, there is no such proposition involved. The plaintiff herself has come forward to establish her identity on the basis of DNA profile with her mother in order to establish that she is daughter of Jeet Singh. The claim is for a share in the property of Jeet Singh. The legal proposition involved on the issue is settled by now. The presumption under Section 112 of the Evidence Act is the subject matter of public morality and public policy and the same was aimed not to brand an innocent child as bastard which may have devastating effect on the mind of the child. The effect of such a test even in the light of stand taken by the defendants would not be having any issue, nor possibility of branding plaintiff to be a bastard as the defendants have already taken a stand that she is not daughter of Jeet Singh. In such a scenario the application for test of DNA profile can be allowed. The ratio(s) of **Sharda vs. Dharampal;** **Bhabani Prasad Jena;** **Selvi vs. State of Karnataka;** **Rohit Shekhar vs. Narayan Dutt Tiwari and another;** **Krishan Kumar Malik vs. State of Haryana, 2011(17) SCC 130;** **Nandlal Wasudeo Badwalk** and **Dipantwita Roy's** cases (supra) are fully attracted in the present case.

[18]. Perusal of reliance placed by learned counsel for the respondents upon **CR No.1673 of 2015** titled **Mamta vs.**

Parshant' decided on 01.11.2017 would show that the ratio of **Goutam Kundu's** case (supra) was relied in the said case, however the case law as narrated above describing the pros and cons of situation were not brought to the notice of the Co-ordinate Bench. In view of nature of litigation between the parties, determination of paternity of the plaintiff would be an imminent need for making appropriate orders for test of DNA profile. The plaintiff has right to know about her paternity. Since the issue has acquired new dimension, therefore, the concept of paternity and claim thereunder cannot be ousted by the presumption under Section 112 of the Evidence Act.

[19]. For the reasons recorded hereinabove, I deem it appropriate to accept this revision petition. Consequently, the impugned order dated 24.05.2016 passed by the Civil Judge (Jr. Divn.) Malerkotla is set aside. If the defendant No.1/respondent No.1 refuses to get her blood sampling done, in such situation the Court would be at liberty to draw adverse inference against the defendants.

September 17, 2019

Atik

Whether speaking/reasoned
Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No
Yes/No