

parents/defendant Nos.1 and 2 and father/defendant No.3/respondent No.3, contending that plaintiff Nos. 1 and 2 are daughters of respondent of No.3/defendant No.3, and they are born out of wedlock of defendant No.3 with mother of plaintiff Nos.1 and 2, namely Pushpabai. After marriage of defendant No.3, with mother of plaintiff Nos.1 and 2, namely Pushpabai, she cohabited 9 to 10 years, however, she was driven out by defendants after giving ill-treatment. Thereafter, Pushpabai came to her maternal house and started staying there. After some years, Pushpabai performed second marriage. Thereafter, plaintiff Nos.1 and 2 remained at maternal house of their mother under the guardianship of grandmother. Marriage of plaintiff No.1 was performed by maternal grandmother, after obtaining loan. Defendants never maintained plaintiff Nos. 1 and 2. Suit was partly decreed and petitioners/plaintiff Nos.1 and 2 were granted 1/9th share in the suit property. Defendants were also directed to pay Rs.38,000/- towards marriage expenses of petitioners/plaintiff No.1.

3. Respondent Nos.1 to 3 challenged the said judgment and decree by filing Regular Civil Appeal No. 30 of 2010. At the time of final arguments, application exhibit-30 is filed by

respondents seeking permission to lead additional evidence in the form of conducting Deoxyribonucleic Acid test (for short, 'DNA' test) of petitioners/original plaintiff Nos.1 and 2. The Appellate Court after hearing parties has allowed the application. Petitioners are aggrieved by this order.

4. Heard learned advocate for petitioners and learned advocate for respondents. Perused the writ petition memo, annexures thereto, impugned order and citations relied upon by both the sides.

5. Admittedly, suit is filed by petitioners/plaintiffs for partition and separate possession of ancestral property. In written statement, defendants have specifically denied that plaintiff Nos.1 and 2 are daughters of defendant No.3. Defendant No.3 has specifically averred that plaintiff Nos.1 and 2 are not his daughters, and therefore, they are not for partition, and he is not liable to pay their marriage expenses. Trial Court has partly allowed the suit by relying upon on School leaving certificate of plaintiff Nos.1 and 2, wherein name of defendant No.3 appears as their father.

6. Defendant No.3 has filed application Exhibit-30 with a specific contention that advocate for representing him in the

suit and appeal is relative of plaintiffs and defendants. In the suit, his advocate has failed to produce documentary evidence of marriage of defendant No.3, which took place at Shri Nagnath Sanstha Vishwast committee, Aundha Nagnath as well as birth certificate and School record of plaintiff Nos. 1 and 2. Said documents were not deliberately produced in the suit by his advocate, due to which suit is decreed. Even the copy of notice issued by advocate on behalf of defendant No.3 to Pushpabai at that point of time was not produced by his advocate in the suit. So also, copy of paper publication, which throws light on the dissolution of marriage of defendant No.3 with Pushpabai, was not placed in the suit. It is further contended that after the marriage of defendant No.3 and Pushpabai was dissolved, plaintiff Nos.1 and 2 were born to Pushpabai from her second marriage. He, therefore, prayed for conducting of DNA test of himself and plaintiff Nos.1 and 2.

7. In the backdrop of aforesaid facts, the Appellate Court has rightly allowed the application observing that, "*The application though is not covered under the two exceptions, in the interest of justice production of the evidence of DNA testing can be allowed. The reasons given in the application seeking direction against the plaintiff Nos. 1 and 2 to submit*

to DNA testing at appellate stage are sufficient. The application is squarely within the ambit of Section 107 read with Order XLI Rule 27 of the C.P.C., and also under Section 151 of the C.P.C. and in order to avoid multiplicity of proceeding and to secure ends of justice, the application deserves to be granted."

8. Considering the peculiar facts of the present case, in my view, the Appellate Court is justified in allowing the application. The result of DNA test would assist the Appellate Court to arrive at a just decision in adjudicating the dispute between the parties.

9. Learned advocate for the petitioners has placed reliance on *Ashok Kumar Vs. Raj Gupta and others, 2022 (1) SCC 20*, wherein it is held:

"16. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.

17. The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the

evidence adduced by the other side. When the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy. Seen from this perspective, the impugned judgment merits interference and is set aside. In consequence thereof, the order passed by the learned Trial Court on 28.11.2017 is restored. The suit is ordered to proceed accordingly."

This decision is distinguishable on facts.

10. In ***Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia***, ***MANU/SC/0148/2023***, it is held:

"25. Another aspect that needs to be considered in the instant case is whether, for a just decision in the divorce proceedings, a DNA test is eminently necessary. This is not a case where a DNA test is the only route to the truth regarding the adultery of the mother. If the paternity of the children is the issue in a proceeding, DNA test may be the only route to establish the truth. However, in our view, it is not so in the present case. The evidence of DNA test to rebut the conclusive presumption available under Section 112 of the Evidence Act, can be allowed only when there is compelling circumstances linked with 'access', which cannot be liberally used as cautioned by this Court in Dipanwita Roy."

11. In the case in hand, the decision depends on the issue, whether original plaintiffs/respondent Nos.1 and 2 (present petitioners) are legitimate daughters of appellant No.3. Considering the pleadings of parties, leading of additional evidence would help the Appellate Court to resolve the dispute between the parties, and enable it to arrive at a just decision.

12. For the aforesaid reasons, no illegality or perversity is found in the order impugned in the present petition. No case is made out by petitioners to exercise extraordinary writ jurisdiction. Writ Petition being devoid of merit is dismissed.

[NITIN B. SURYAWANSHI]
JUDGE

S.P. Rane