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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7488 OF 2018

Gangadhar Bhaurao Pawar and Others

PETITIONERS

VERSUS

Parshram Bhaurao Pawar

RESPONDENT

.....

Mr. Bhausahab S. Deshmukh, Advocate for the petitioners

Mr. Krushna N.Bhosale, Advocate for respondent (appointed)

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 11th OCTOBER, 2023

ORDER :

1. Leave to correct prayer clause.
2. This petition challenges order passed by learned Civil Judge, Junior Division, Shevgaon, District – Ahmednagar, below Exhibit-133 in Regular Civil Suit No. 185 of 2010, thereby rejecting the application filed by defendant No.1, for conducting DNA test.
3. Respondent – plaintiff filed Regular Civil Suit No.185 of 2010 against the petitioners – defendants, for partition and separate possession of the suit property. Petitioners – defendants opposed the suit by filing written statement, wherein

they have specifically contended that respondent – plaintiff is not son of parents of defendant No.1, namely Bhaurao and Anjanabai and called upon respondent – plaintiff to prove the said fact. They, therefore, denied claim of respondent – plaintiff. In the written statement, averments are also made to the effect that in the school leaving certificate, name of respondent – plaintiff is mentioned as Parsharam Bapurao Suryawanshi. In some of the sale deeds executed, real name of plaintiff is mentioned as Parsharam Baburao Suryawanshi, resident of Ghotan. It is further averred that plaintiff's real mother Shantabai expired in 1949 at Bhusawal, therefore, it is clear that plaintiff is not son of Bhaurao Pawar and Anjanabai Pawar (parents of defendant No.1). Even in the election identity card, name of plaintiff is mentioned as Parsharam Baburao Suryawanshi. Name of wife of plaintiff in the voters' list is mentioned as Prayaga Parsharam Suryawanshi and his children's names, Baban, Sanjivani and Ashok s/o Parsharam Suryawanshi are mentioned. Trial Court framed issues and both the parties led their evidence.

4. Petitioners thereafter filed application Exhibit-133, contending that since the issue involved in the suit is whether plaintiff is real brother of defendant No.1, it is necessary to

conduct DNA test to ascertain whether plaintiff and defendant No.1 are siblings and whether they both are born to same parents. This application is opposed by plaintiff contending that paternity of plaintiff is not challenged by defendant No.1. Blood samples of Bhaurao or Anjanabai are required, to ascertain whether plaintiff and defendant No.1 are real brothers or not. Trial Court rejected the application on the ground that paternity of plaintiff is not challenged by defendant No.1. It is observed that *"When it is stand of defendant No.1 that, plaintiff is not his real brother then why defendant No.1 is not challenging the paternity of plaintiff?, this question remains unanswered. Furthermore, defendant No.1 failed to show under which provision of Law he has submitted present application for conducting DNA test for proving that, plaintiff and defendant No.1 are not brothers or siblings"*. On these grounds, Trial Court has rejected application being not maintainable. Hence the present petition.

5. Heard learned advocate for petitioners and the learned advocate appointed for respondent. Perused memo of writ petition, its annexures and the impugned order, so also the citations relied on by both the parties.

6. For resolving the real controversy between the parties,

Trial Court will have to first ascertain whether plaintiff is biological son of Bhaurao and Anjanabai and sibling of defendant No.1. Claim of plaintiff that he is son of Bhaurao and Anjanabai, is specifically denied by defendant No.1 in the written statement. Various documents are placed on record by both the parties. In some of the documents, name of plaintiff is Parsharam Bhaurao Pawar and in some his name is shown as Parsharam Baburao Suryawanshi. In view of these two sets of documents, it would not be possible for Trial Court to arrive at a conclusion, whether plaintiff is biological son of Bhaurao and Anjanabai and sibling of defendant No.1.

7. Since valuable rights of parties in immovable properties are involved in the present matter, for effective adjudication of the dispute, in the interest of justice and for just decision of the case, it is desirable to allow prayer of defendant No.1.

8. Trial Court has erroneously observed that defendant No.1 is not challenging paternity of plaintiff. Said observation is contrary to the averments made in written statement. While making the observation that the application is not maintainable Trial Court has ignored provisions of section 151 of Civil Procedure Code and thereby failed to exercise jurisdiction vested in it.

10. In "**Radheshyam V/s Kamla Devi and Others**" 2021 DGLS (MP) 126, learned Single Judge of MP High Court, in similar facts, has held :

"9. It is true that under Section 112 of Indian Evidence Act birth during marriage, is conclusive proof of legitimacy, therefore bars DNA testing but when blood relation of siblings is being challenged, there shall be no bar under Section 112 of Indian Evidence Act. In the present case a question arose as to whether petitioner / plaintiff and respondent No.1 / defendant are brother and sister or not, this fact has been denied by brother / petitioner Radheshyam, as such the aforesaid fact can very well be decided by carrying out DNA test. Therefore, in my considered view, the trial Court has not committed any error in passing the order impugned".

I respectfully agree with the above view.

11. Learned advocate for respondent has placed reliance on decision of this Court in Writ Petition No.12821 of 2018, wherein this Court has set aside the order passed by Trial Court, thereby directing the parties to undergo DNA test.

In the said case, sufficient documentary evidence was placed on record, on the basis of which Trial Court could have decided the issue of paternity. In view of two sets of documents placed on record in the case in hand, this decision is of no help to respondent's case.

12. For the aforestated reasons, impugned order cannot be

sustained and the same is liable to be quashed and set aside.

Hence, the following order:

ORDER

- A. Writ petition is allowed.
- B. Order dated 10th April, 2018 passed by learned Civil Judge, Junior Division, Shevgaon, below Exhibit-133 in Regular Civil Suit No.185 of 2010 is hereby quashed and set aside.
- C. Application Exhibit-133 is allowed.
- D. Fees, payable to learned advocate appointed to represent the respondent is quantified at Rs.5000/-, which shall be paid by Legal Aid Services Sub Committee, High Court, Aurangabad within a period of four weeks from today.

[NITIN B. SURYAWANSHI]
JUDGE