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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7940 OF 2020

Santosh Shriram Bua (Suryawanshi) and Another PETITIONERS

VERSUS

Shriram Uddhav Bua (Suryawanshi) and Others RESPONDENTS

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Mr. K. R. Doke, Advocate for the petitioners

Mr. Nikhil S. Tekale, Advocate for respondents No.1 to 3

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 9th AUGUST, 2023

ORDER :

1. Leave to correct prayer clause. Correction to be carried out forthwith.
2. Order passed by learned Joint Civil Judge, Junior Division, Bhoom, below Exhibit-94 in Regular Civil Suit No. 21 of 2009, is assailed in the present petition, filed under Article 227 of the Constitution of India.
3. The petitioners - plaintiffs have filed the suit for partition and separate possession. The respondents – defendants opposed the suit by filing written statement denying paternity of plaintiff No.1 and any relation of defendant No.1 with plaintiff No.2. It is

further contended that the plaintiffs have not come before the Court with clean hands and the birth record of plaintiff No.1 is doubtful, as is held by the Court in Criminal Application No. 23 of 1991. DNA test of plaintiffs and defendant N.1 was conducted at Medical College, Ambajogai and also at Hyderabad. In the said DNA test also it is proved that plaintiff No.1 is not a biological son of defendant No.1. It is further averred that even today, defendant No.1 is ready to undergo DNA test. It is categorically averred that father of plaintiff No.1 is Gayasing Gujar, who is husband of plaintiff No.2.

4. Issues are framed in the said suit. Plaintiffs have led their evidence and before beginning of the evidence of the defendants, application Exhibit-94 is filed by the plaintiffs seeking DNA test of plaintiff No.1 and defendant No.1.

5. The defendants objected the said application on the ground that the application is not tenable. They have filed certified copy of the judgment in Criminal M.A. No. 23 of 1991 at Exhibit-18. DNA test is already conducted and hence no case is made out for again conducting the DNA test. IT is further contended that the application is moved for prolonging the suit and hence the same be rejected. The Trial Court rejected the application. Hence, the present writ petition.

6. Heard learned advocate for the petitioners and learned advocate for the respondent No.1. Perused the memo of writ petition, its annexures and the impugned order.

7. Perusal of the documents placed on record indicates that the defendants have categorically accepted in their written statement that defendant No.1 is ready to undergo DNA test. The Trial Court has rejected the application, by placing reliance on the observations in the judgment in Criminal M.A. No. 23 of 1991, filed by the plaintiffs under section 125 of the Criminal Procedure Code, to hold that DNA test is already done. Such reliance is misplaced and misconceived, as in para 6 of the said judgment it is observed that, the plaintiff No.1 and defendant No.1 were referred to a pathologist at Medical College, Ambajogai, namely Dr. Abdul Khalique for blood group sampling and after the analysis, he has given a report at Exhibit-62, opining, that defendant No.1 cannot be excluded from the categories of the persons who could be father of plaintiff No.1 and it is also clear from his evidence that his findings are not conclusive. He, however, had opined and referred plaintiff No.1 and defendant No.1 for DNA finger printing test to be made at Hyderabad, to have a conclusive opinion. Even this medical evidence cannot be said to be of any help and cannot be

conclusive proof of the defendant No.1 being father of plaintiff No.1.

8. It is obvious that the Trial Court has misread the above observations and has erroneously held that "*On perusal of certified copy of Judgment it appeared that DNA test of plaintiff and defendant was held.*" Said finding needs to be termed as perverse as it is contrary to the record. Non application of mind on the part of the learned Trial Court, in passing the impugned order, is writ large on the face of record.

9. Learned advocate for the respondents, vehemently opposed the petition, by placing reliance on section 112 of the Indian Evidence Act, contending that, first, plaintiff No.2 will have to prove that she is legally wedded wife of defendant No.1 and then only the question of conducting DNA test would arise. This argument cannot be accepted as defendant No.1 himself has agreed to undergo DNA test.

11. The Trial Court has further failed to appreciate the judgment relied on by the petitioners, which supports the case of the petitioners.

12. For the aforesaid reasons, the impugned order is unsustainable in law and facts of the case. It is made clear that

the Trial Court shall consider the rival contentions and admissibility of the evidence, on its own merits, in accordance with law.

10. In the result, following order

ORDER

- A. Writ petition is Allowed in terms of prayer clause "C".
- B. Impugned order dated 18th December, 2019 passed by learned Joint Civil Judge, Junior Division, Bhoom, below Exhibit-94 in Regular Civil Suit No. 21 of 2009, is hereby quashed and set aside.
- C. Exhibit-94 is allowed.

[NITIN B. SURYAWANSHI]

JUDGE