

CR-52-2023 (O&M)

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

CR-52-2023 (O&M)
Reserved on : 10.05.2023
Date of Decision : 29.05.2023

Vijay Kumar Garg @ Dee Cee GharianwalaPetitioner

VERSUS

Kajal @ Nicky and AnotherRespondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Sherry K. Singla, Advocate for the petitioner.

Mr. Surinder Garg, Advocate for the respondents.

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ALKA SARIN, J.

1. The present revision petition has been preferred by the defendant No.1-petitioner against the impugned order dated 21.12.2022 passed by the Principal Judge, Family Court, Mansa allowing a DNA test of the defendant No.1-petitioner alongwith the plaintiff-respondent No.1.

2. The brief facts relevant to the present *lis* are that the plaintiff-respondent No.1 filed a suit for declaration to the effect that she is the daughter of defendant No.1-petitioner and defendant No.2-respondent No.2 and hence defendant No.1-petitioner herein being the father of the plaintiff-respondent No.1 is bound to accept her as daughter. In the plaint it has been averred that defendant-respondent No.2 i.e. Rani was married to Kaka Singh and during the life time of Kaka Singh the defendant-respondent No.2 was in a live-in relationship with the defendant No.1-petitioner and out of the said relationship

the plaintiff-respondent No.1 herein was born on 15.12.1996. Kaka Singh is stated to have died in September 2013 and the defendant No.1-petitioner and defendant-respondent No.2 continued to live together. It has further been averred that the plaintiff-respondent No.1 has always been treated as a daughter by the defendant No.1-petitioner as also by the society. It is further the averment in the plaint that in February 2015 relations between the defendant No.1-petitioner and defendant-respondent No.2 became strained and an application was filed by the defendant-respondent No.2 under Section 125 of the Code of Criminal Procedure, 1973 for maintenance. On 15.12.2014 the plaintiff-respondent No.1 attained majority and since the defendant No.1-petitioner was not ready to accept her as his daughter hence the cause of action arose. The present suit was filed on 28.10.2017. During the pendency of the suit, an application (Annexure P/3) for DNA test of the defendant No.1-petitioner was filed to prove the parentage of the plaintiff-respondent No.1. The application was not pressed and remained pending and only when the evidence of both the parties had been concluded the said application for DNA was taken up for decision by the Trial Court. The application was contested by the defendant No.1-petitioner and vide the impugned order dated 21.12.2022 the same was allowed by the Trial Court. Hence, the present revision petition.

3. Learned counsel for the defendant No.1-petitioner has contended that despite the entire evidence having been led not a single document has been filed in evidence which would even remotely show the plaintiff-respondent No.1 to being the daughter of the defendant No.1-petitioner. Learned counsel has referred to the application under Section 125 CrPC filed by the defendant-respondent No.2 against the defendant No.1-petitioner which was dismissed

vide order dated 04.05.2018 (Annexure P/7). Learned counsel has also referred to a petition filed by the plaintiff-respondent No.1 for protection of her life and liberty before the District and Sessions Judge, Mansa (Annexure P/9) wherein the plaintiff-respondent No.1 has been shown as daughter of Kaka Singh. Learned counsel has further pointed out to the complaint (Annexure P/12) filed by the defendant-respondent No.2 under Section 323, 504, 506 IPC wherein it has been stated that the complainant therein started residing with one Gurwinder Singh son of Uggar Singh after the death of her husband Kaka Singh. Learned counsel has further referred to an affidavit (Annexure P/13) wherein defendant-respondent No.2 gave an affidavit before the Municipal Council mentioning therein the plaintiff-respondent No.1 as being one of the daughters of Kaka Singh. Learned counsel would further contend that on 16.01.2014 the plaintiff-respondent No.1, alongwith her sisters, had given an affidavit (Annexure P/14) when the brother of the plaintiff-respondent No.1 had applied for compassionate appointment in place of their father as Sweeper with the Municipal Council, Mansa stating therein that they had no objection if the brother, Satnam Singh, was given compassionate appointment. He has also relied on a self-declaration letter (Annexure P/15) given by the plaintiff-respondent No.1 wherein she has described herself as daughter of Kaka Singh and stated that she has no objection if the job is given to her brother, Satnam Singh, on compassionate grounds. Learned counsel has further contended that a person cannot be compelled to undergo a DNA test. In support of his arguments the learned counsel has relied upon judgments of the Supreme Court in **Goutam Kundu Vs. State of West Bengal [1993 (2) RCR (Criminal) 497]**; **Ashok Kumar Vs. Raj Gupta & Ors. [(2022) 1 SCC 20]** and judgments of

this Court in **Manjit Kaur Vs. Inderjit Singh & Ors. [2022 (4) RCR (Civil) 525]; Sukhdev Singh & Ors. Vs. Jaswinder Kaur [2022 (4) RCR (Civil) 341]; Mamta Vs. Parshant [CR-1673-2015 decided on 01.11.2017]**.

4. *Per Contra*, learned counsel for the respondents has contended that the plaintiff-respondent No.1 is the daughter of the defendant No.1-petitioner and no prejudice would be caused in case the DNA test is carried out to prove the parentage of the plaintiff-respondent No.1 and rather the said test would enable the Trial Court to decide the suit properly.

5. I have heard learned counsel for the parties.

6. The issue in the suit before the Trial Court is whether the plaintiff-respondent No.1 is a daughter of the defendant No.1-petitioner and defendant-respondent No.2 herein. While the plaintiff-respondent No.1 has asserted that she is their daughter, the defendant No.1-petitioner has denied the allegations. Both the parties have led their evidence. The Court vide the impugned order has ordered a DNA test of the defendant No.1-petitioner in order to prove the parentage of the plaintiff-respondent No.1. In a recent decision by the Hon'ble Supreme Court in the case of **Ashok Kumar Vs. Raj Gupta & Ors. [(2022) 1 SCC 20]** it has *inter-alia* been held as under :

“7. The pleadings were exchanged quite early in Civil Suit No.53 of 2013, but only after closure of the plaintiff's evidence, the defendants filed application on 19-4-2017 for subjecting the plaintiff to a DNA test. The question therefore is, whether in a declaratory suit where ownership over coparcenary property is claimed, the plaintiff, against his wishes, can be subjected to the DNA test. The related

question is whether the plaintiff without subjecting himself to a DNA test, is entitled to establish his right over the property in question, through other material evidence. The timing of the application is equally relevant. The plaintiff has already led evidence from his side to prove relationship between the parties and at this stage whether the High Court should have directed the plaintiff to undergo the DNA test. Another issue of concern is whether in the absence of consent, a party can be forced to provide sample for a DNA test.

8. *This Court in Banarsi Dass v. Teeku Dutta [Banarsi Dass v. Teeku Dutta, (2005) 4 SCC 449] had declared that DNA test is not to be directed as a matter of routine but only in deserving cases. A petition was filed in that case for grant of succession certificate in respect of properties of the deceased. The plaintiff claimed to be the deceased's daughter and the only Class 1 legal heir, under the Hindu Succession Act, 1956. The deceased had died intestate, leaving behind 5 brothers. The Delhi High Court denied [Teeku Dutta v. State, 2004 SCC Online Del 31] one of the brother's applications for conducting the DNA test of the daughter to establish her paternity. Arijit Pasayat, J. upheld the decision of the High Court in the following passage of the judgment : (SCC p. 454, para 10)*

“10. In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim pater est quem nuptiae demonstrant (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.”

9. *In Bhabani Prasad Jena v. Orissa State Commission for Women [Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501 : (2010) 3 SCC (Cri) 1053], R.M. Lodha, J., while reconciling two earlier decisions [Goutam Kundu v. State of W.B., (1993) 3 SCC 418 : 1993 SCC (Cri) 928], [Sharda v. Dharmpal, (2003) 4 SCC 493] of this Court on the point, had rightfully prescribed that : (SCC p. 643, para 23)*

“23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu [Goutam Kundu v. State of W.B., (1993) 3 SCC 418 : 1993 SCC (Cri)

928] and Sharda [Sharda v. Dharmpal, (2003) 4 SCC 493]. In Goutam Kundu [Goutam Kundu v. State of W.B., (1993) 3 SCC 418 : 1993 SCC (Cri) 928] it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda [Sharda v. Dharmpal, (2003) 4 SCC 493] while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.”

The learned Judge while noting the sensitivities involved with the issue of ordering a DNA test, opined that the discretion of the court must be exercised after balancing the interests of the parties and whether a DNA test is needed for a just decision in the matter and such a direction satisfies the test of "eminent need".

10. *The above decision in Bhabani Prasad Jena [Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501 : (2010) 3 SCC (Cri) 1053] was considered and approved in Dipanwita Roy v. Ronobroto Roy [Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365 : (2015) 1 SCC (Civ) 495 : (2015) 1 SCC (Cri) 683], where the Court noticed from the facts that the husband alleged infidelity against his wife and questioned the fatherhood of the child born to his wife. In those circumstances, when the wife had denied the charge of infidelity, the Court opined that but for the DNA test, it would be impossible for the husband to establish the assertion made in the pleadings. In these facts, the decision [Ronobroto Roy v. Dipanwita Roy, 2012 SCC Online Cal 13135] of the High Court to order for DNA testing was approved by the Supreme Court. Even then, J.S. Khehar, J., writing for the Division Bench, considered it appropriate to record a caveat to the effect that the wife may refuse to comply with the High Court direction for the DNA test but in that case, presumption may be drawn against the party.”*

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14. *It was also the view of the Court that the normal rule of evidence is that the burden is on the party that asserts the positive. But in instances where that is challenged, the burden is shifted to the party, that pleads the negative.*

Keeping in mind the issue of burden of proof, it would be safe to conclude that in a case like the present, the court's decision should be rendered only after balancing the interests of the parties i.e. the quest for truth, and the social and cultural implications involved therein. The possibility of stigmatising a person as a bastard, the ignominy that attaches to an adult who, in the mature years of his life is shown to be not the biological son of his parents may not only be a heavy cross to bear but would also intrude upon his right of privacy.

15. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India [K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India, (2019) 1 SCC 1], wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued i.e. whether the same are not arbitrary or discriminatory whether they may have an adverse impact on the person and that they justify the

encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test.

16. It cannot be overlooked that in the present case, the application to subject the plaintiff to a DNA test is in a declaratory suit and the plaintiff has already adduced evidence and is not interested to produce additional evidence (DNA), to prove his case. It is now the turn of the defendants to adduce their evidence. At this stage, they are asking for subjecting the plaintiff to a DNA test. Questioning the timing of the application the trial court dismissed the defendants' application and we feel that it was the correct order.

17. In the yet to be decided suit, the plaintiff has led evidence through sworn affidavits of the respondents, his school leaving certificates and his domicile certificate. Significantly, Respondent 1, who is one of the 3 siblings (defendants) had declared in her affidavit that the plaintiff was raised as a son by her parents. Therefore, the nature of further evidence to be adduced by the plaintiff (by providing DNA sample), need not be ordered by the court at the instance of the other side. In such kind of litigation where the interest will have to be balanced and the test of eminent need is not satisfied our considered opinion is that the protection of the right to privacy of the plaintiff should get precedence.

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19. 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”

7. The law regarding DNA is well settled. Courts in India cannot order blood test as a matter of course. In the present case the parties have admittedly already led their evidence in support of their respective stands as taken in the Court. The defendant No.1-petitioner cannot be compelled to adduce evidence in support of the case set up by the plaintiff-respondent No.1. The burden lies on the litigating party to prove his or her case by adducing evidence in support of his or her plea and a party cannot be compelled to prove the case in the manner as suggested by the contesting party. A DNA test cannot be ordered so as to lead to a roving enquiry. The plaintiff-respondent No.1 has failed to make out a strong prima facie case for ordering the DNA test alongwith that of the defendant No.1- petitioner.

8. In view of the above, the present revision petition is allowed, the impugned order dated 21.12.2022 ordering the DNA test is set aside and the application for DNA test (Annexure P/3) stands dismissed. Pending applications, if any, also stand disposed off.

29.05.2023
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(ALKA SARIN)
JUDGE

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : Yes/No