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

**CR-2641-2022 (O&M)
Reserved on : 03.02.2023
Decided on : 08.02.2023**

Sukhwinder Kaur

....Petitioner

VERSUS

Gurmit Singh

....Respondent

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Sarbjit Singh, Advocate for the petitioner.

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ALKA SARIN, J.

The present revision petition has been preferred by the plaintiff-petitioner under Article 227 of the Constitution of India challenging the order dated 04.04.2022 whereby the application filed by the plaintiff-petitioner for conducting a DNA test of the defendant-respondent has been dismissed.

The brief facts relevant to the present case are that the plaintiff-petitioner filed a suit for declaration to the effect that the defendant-respondent has wrongly been mentioned in the revenue record as son of Sharam Singh while sanctioning mutation No.1087 of inheritance regarding the estate of Sharam Singh as described in the plaint. It has been averred that Sharam Singh had died on 18.04.2005 leaving behind the plaintiff-petitioner as the only daughter and legal heir. Kulwant Kaur mother of the

plaintiff-petitioner was alive at the time of death of Sharam Singh and that she also died on 26.02.2012. It is further the case set up that the defendant-respondent is the real son of Iqbal Singh and Sawinder Kaur but he wrongly claims to being the son of Sharam Singh and Kulwant Kaur. During the course of evidence being led by the plaintiff-petitioner, the present application was moved for conducting a DNA test of the defendant-respondent with that of the plaintiff-petitioner as well as the alleged mother of the defendant-respondent Sawinder Kaur. The said application was dismissed. Hence, the present revision petition.

Learned counsel for the plaintiff-petitioner would contend that in order to determine the controversy in hand it is essential to get the DNA test conducted.

Heard.

It has been noticed in the order passed by the Trial Court that the defendant-respondent had denied his willingness to get the DNA test conducted. The plaintiff-petitioner has come to the Court alleging herself to being the daughter of Sharam Singh and Kulwant Kaur and further that the defendant-respondent had no connection with Sharam Singh and Kulwant Kaur and that he was actually the son of Iqbal Singh and Sawinder Kaur. The onus to prove her case lies upon the plaintiff-petitioner. Two witnesses have been examined till now.

The Supreme Court in the case of **Ashok Kumar vs. Raj Gupta & Ors. [2022 (1) SCC 20]** inter-alia has 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 [Ronobrto 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.

11. In circumstances where other evidence is available to prove or dispute the relationship, the court should ordinarily refrain from ordering blood tests. This is

because such tests impinge upon the right of privacy of an individual and could also have major societal repercussions. Indian law leans towards legitimacy and frowns upon bastardy. The presumption in law of legitimacy of a child cannot be lightly repelled.”

In Ashok Kumar’s case (*supra*) it was further held that :

“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.”

The law regarding a DNA test is well settled. The plaintiff-petitioner is yet to lead her evidence in support of her case. It is trite that the plaintiff-petitioner has to stand in his or her own legs. Further, the defendant-respondent cannot be compelled by the plaintiff-petitioner to undergo a DNA test. A Court cannot order a DNA test as a matter of course and such a prayer cannot be granted so as to lead to a roving inquiry. The plaintiff-petitioner has failed to make out a strong prima facie case for ordering a DNA test of the defendant-respondent.

In view of the above, this Court finds no illegality or error in the exercise of jurisdiction by the Trial Court while passing the impugned

order. The present civil revision petition, which is wholly devoid of any merit, is accordingly dismissed. Pending applications, if any, also stand disposed off.

Any observations made in the present order shall not have any bearing on the decision of the suit on merits.

08.02.2023

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(ALKA SARIN)

JUDGE

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : YES/NO