

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 1915 of 2019

**Sri Sitaram Khan
Vs
Sri Prabir Khan**

For the petitioner	:	Mr. Sukumar Bhattacharyya Ms. Iundrilla Chatterjee Ms. Puja Sonkar
For the opposite party	:	Mr. Pinaki Ranjan Chakraborty
Heard on	:	21.02.2024
Judgment on	:	12.03.2024

Ajoy Kumar Mukherjee, J.

1. This application under Article 227 of the Constitution of India has been directed against order no. 80 dated 28th March 2019 passed by learned Civil Judge (Senior Division), 1st Court, Chinsurah. Petitioner herein as plaintiff filed suit for partition being Title Suit No. 208 of 2008 *inter alia* praying for a declaration that plaintiff and defendant Smt. Puspa Rani Khan, who is the wife of the brother of plaintiff Late Dibakar Khan, has 8 anas share each in the suit property. In the said suit defendant did not contest the suit. Said suit was decreed ex-parte on 28th May 2010. Thereafter, Sri Prabir Kumar Khan, the opposite party no 2 herein, claiming himself as son of defendant Puspa Rani filed an application under Order I Rule 10 of the

Code of Civil Procedure for adding him as a party and also for setting aside ex-parte decree. Plaintiff/petitioner filed written objection against the said applications, but learned Trial Court by an order dated 2nd February 2013 allowed the application for setting aside ex-parte decree and also added Sri Prabir Khan as defendant no.2 in the suit.

2. In the month of February 2013, defendant no 1 i.e. aforesaid Puspa Rani Khan filed an affidavit stating that her husband Dibakar Khan died on 6th May 2006 leaving behind their only son, the added defendant no. 2. Accordingly aforesaid added defendant no. 2, Prabir Khan filed written statement on 17th May 2013, denying the allegations made in the plaint, together with a counter claim to the effect that the deed dated 20th April 2008, executed by the mother of plaintiff in favour of plaintiff is void ab initio.

3. The plaintiff filed written statement against the counter claim filed by aforesaid Prabir and in the said written statement plaintiff contended that added defendant no.2, Prabir is not the son of defendant no. 1 Puspa Rani Kahn and her husband Dibakar Khan. Plaintiff specifically pleaded that defendant no. 2 has got no relation with Khan family and he is totally a stranger and he was not even adopted by his brother Dibakar or his wife i.e. defendant no. 1. In the said suit sister of the plaintiff filed affidavit-in-chief as PW-2, who stated that her brother Dibakar died without any issue.

4. Plaintiff/petitioner herein in the said suit filed an application under Order XXVI Rule 10 A of the Code read with Section 112 of the Indian Evidence Act denying the paternity of the added defendant and prayed for DNA test. The added defendant filed written objection to the aforesaid

application along with his Voter Card, Ration Card, PAN Card etc. By the impugned order the Court below rejected the said application with a cost of Rs. 1000/- to be paid to the defendant no. 2.

5. Being aggrieved by that order, Mr. Sukumar Bhattacharya, learned Counsel appearing on behalf of the petitioner submits that the Court below acted illegally in exercising its jurisdiction by rejecting the aforesaid application observing that since defendant no. 2 has filed Voter Card, Ration Card, Pan Card etc. in support of his identity as the son of deceased Dibakar Khan, the question of holding DNA test does not arise. He further submits that though the Court below has made prima facie observation regarding paternity of Prabir, while disposing application for adding him as a party and also while setting aside the order of ex-parte decree, but such finding cannot be said to be final. He further submits that the impugned order is based on perverse finding that since Dibakar died it is not possible to ascertain the paternity of defendant no. 2 by way of DNA test. In fact the Court below has misinterpreted the judgement of the Hon'ble Apex Court and he ought to have appreciated that in the modern age, when a simple medical test can resolve the issue without doubt, it is not necessary to dwell on other aspect. He ought to have considered that since the plaintiff and the sister of deceased Dibakar have clearly stated that defendant no. 1 never gave birth of any child nor has adopted the added defendant No.2 as their son so this is a fit case for allowing DNA test to ascertain paternity of Prabir. Accordingly, he has prayed for setting aside the order impugned. In this context, he relied upon a judgment passed by the Hon'ble Apex Court in ***Dipanwita Roy Vs. Ronobroto Roy*** reported in **(2015) 1 SCC 365** and

another judgment of this Court passed by a Co-ordinate Bench in **C.O. 1915 of 2019**.

6. Mr. Pinaki Ranjan Chakraborty learned Counsel appearing on behalf of the opposite party, raised strong objection contending that the opposite party herein has filed documents like Voter Card, Ration Card, Pan Card and he has also filed School Certificate in support of his claim and the Court below while disposing his application was also of prima facie view that the opposite party no.2 is the son of Dibakar and as such the DNA test is not at all required. Moreover, mother of defendant no. 2 by swearing affidavit has also stated that Dibakar is her son and no application for DNA test can be allowed in such proceeding to bastardize a person or to declare a woman as unchaste woman. In this context, he relied upon **Goutam Kundu Vs State of West Bengal & Anr** reported in **1993 (3) SCC 418**. Accordingly, he has prayed for rejection of the present application having no merit at all.

7. I have considered submissions made by both the parties.

8. The only grievance of the petitioner in the present application is that by the order impugned, the Trial Court refused to have a DNA test of added defendant no.2, despite the specific assertion of the petitioner herein in her petition that the said defendant no.2 is no one in the khan family and he is a complete stranger who is claiming share in the property and also seeking cancellation of the deed in favour of the plaintiff.

9. It is not in dispute in the present context that the plaintiff/petitioner herein filed the aforesaid suit against defendant no.1/Puspa Rani Khan claiming half share of the suit property left by deceased, Renuka Bala Khan. It is not in dispute that Puspa Rani being the wife of deceased brother of the

petitioner namely Dibakar Khan inherited half share of the suit property from her husband. However, said Puspa Rani Khan did not contest the suit and as such suit was earlier posted for ex parte hearing against her. But in the said suit said Puspa Rani filed one affidavit which discloses that she has declared defendant no.2 as her son. The trial of the suit has just started and defendant no.2 Prabir khan claiming himself as the son of late Dibakar khan and Puspa rani khan, has filed documents like voter identity card, Ration Card, and copy of certificate issued by headmaster Goai Ramchandra Pal Institution to show that deceased Dibakar khan was his father. On the contrary petitioner herein has merely stated on oath that the defendant no.2 is not the member of the khan family.

10. The Apex Court in ***Goutam Kundu Vs. State of West Bengal (supra)*** has laid down the circumstances where such prayer for DNA test can be allowed. Paragraph 26 of the judgment runs as follows:-

“26. From the above discussion it emerges—

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.”

11. From the aforesaid observation of the apex court it is clear that in order to get an order for DNA test in such cases, the petitioner must make out a strong prima facie case that the husband had no access to the wife at the material point of time in order to dispel the presumption arising under

section 112 of the Evidence Act. Here no case at all far from strong prima facie case has been set out by the petitioner to get an order in his favour. It is merely a doubt expressed by the petitioner that the opposite party no. 2 is not the son of Dibakar and Puspa Rani. Even in the evidence, PW-2 Manarama Bera could not say as to whether defendant no.2 had studied in the Ram Chandra Pal Institution or not She also admitted that it is a fact that the plaintiff never challenged the documents disclosing the paternity of defendant no.2 anywhere nor such documents have been declared as cancelled anywhere.

12. Learned court below while disposing opposite party no. 2/Prabir's application for adding him as a party in the suit had observed that Prabir Khan in support of his prayer submitted PAN card, Ration Card, Voter ID Card, and the certificate issued by the concerned institution to show that he is the son of Dibakar Khan and the court specifically held that he compared the address written on the documents which tallies with the address of deceased Dibakar and Puspa and the court below clearly noted that he had gone through the original of all those documents.

13. While Dibakar's prayer for setting aside ex-parte order dated 25.05.2010 and his further prayer for acceptance of counter claim came up for hearing before the court below, he observed that the plaintiff has not challenged orally all the documents filed by Dibakar but he has only insisted for Dibakar's birth certificate though petitioner as PW-1 has admitted in his cross-examination that even he also does not have his birth certificate. In the said order dated 13.03.2014, the court below specifically held that prima facie he found that the plaintiff suppressed the fact that Dibakar Khan has a

child, which amounts to prima facie fraud practised upon the court. Such findings of the court below were never challenged by the petitioner herein, even though those findings are prima facie in nature.

14. In **K.S. Puttuswami Vs. Union of India** reported in **2019 (1) SCC 1** the right to privacy has been declared a constitutionally protected right and accordingly while considering such prayer the court is also required to keep in mind to have an adverse impact on the person and whether there is any justification in encroachment upon the privacy and personal autonomy of the person being subjected him to the DNA test apart from social and cultural implications involved in the test.

15. It has also been held in **Puttarajan Vs. State of Tamilnadu**, reported in **(2019) 4 SCC 771** that DNA test is not infallible in nature.

16. Furthermore the petitioner herein as plaintiff cannot compel the defendant no. 2 to prove the plaintiff's case if any. It is the burden on the plaintiff to prove his case adducing evidence in support of his plea and the court should not compel the opposite party to prove plaintiff's case in the manner suggested by the plaintiff. As I have already stated that the defendant no. 2 has filed his domicile certificates as well as school leaving certificate and that defendant No.1 had declared in her affidavit that he is her son. Therefore, the nature of further evidence to be adduced by the plaintiff by providing DNA sample at his instance, when such prayer is opposed by opposite party No.2, such test may not require in such kind of litigation, where the interest will have to be balanced and the test of eminent need is not satisfied. I am of the view that the protection of the right to privacy of the plaintiff should not be encroached in such a case.

17. The case law cited by the petitioner herein in **Dipanwita Roy's Case (supra)** is not applicable in the facts and circumstances of the present case because the court was of the clear view that in that case section 112 of the Evidence Act does not attract because, in the absence of DNA test it was not possible for husband to establish the alleged infidelity of wife. That is not the case here. Defendant no.2 Dibakar filed certain documents in support of his claim and the plaintiff has sufficient scope by way of oral and documentary evidence to disprove contents of all these documents, including the School Certificate.

18. The judgment referred by the petitioner passed by a co-ordinate bench of this court in **C.O. 3590 of 2012** is also factually distinguishable, since allegation in the said case is against the wife where husband claimed that the son is not born due to their wed-lock. In the present context the case is reverse. Mother Puspa Rani has already filed one affidavit disclosing that defendant no.2 Prabir is her son. There is nothing to show that Dibakar had no access to Puspa Rani at the relevant point of time, as required under section 112 of the evidence Act.

19. In view of the aforesaid discussion I conclude that the court below has properly appreciated the facts and circumstances of the case and was quite justified in dismissing the application. There appears to be no material irregularity or illegality in the impugned order, warranting interference by this court. Accordingly present application being **C.O. 1915 of 2019** is dismissed.

20. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)