**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 26th OF JULY, 2022

WRIT PETITION No. 4131 of 2017

Between:-

SMT. URMILA SINGH W/O LATE SHRI KAPTAN SINGH, AGE 68 YEARS, OCCUPATION: HOUSEHOLD, R/O MAALI MATA KI GALI, GOSPURA NO. 1, GWALIOR (MADHYA PRADESH)

….....PETITIONER

(BY SHRI P.C. CHANDIL-ADVOCATE)

AND

1. **SAUDAN SINGH S/O LATE SHRI NATTHI SINGH, AGE 69 YEARS**
2. **LAXMI NARAYAN SINGH S/O LATE SHRI NATTHI SINGH, AGE 63 YEARS**
3. **PANNA LAL S/O LATE SHRI NATTHI SINGH, AGE 50 YEARS,**

ALL RESIDENTS OF MAALI KI GALI, GOSPURA, NO. 1, GWALIOR (MADHYA PRADESH)

….....RESPONDENTS

(NONE FOR THE RESPONDENTS)

This petition coming on for hearing this day, the Court passed the

following:

ORDER

This petition under Article 227 of the Constitution of India has been filed against the order dated 12.05.2017 passed by Twelth Civil Judge, Class II, Gwalior in Civil Suit No.17-A/2014 by which the application filed by the petitioner for conducting DNA test of Hemlata Yadav has been rejected.

2- The necessary facts for disposal of present petition in short are that the husband of the petitioner, namely Late Kaptan Singh had filed a civil suit against the respondents/defendants for partition. During the pendency of this suit, the husband of the petitioner died. As a result, an application for bringing the petitioner as legal representative on record was moved. An objection was raised by respondent No.2 to the application by alleging that the petitioner has not impleaded Hemlata Yadav as legal representative of Late Kaptan Singh, whereas she is the daughter of Late Kaptan Singh. Thereafter, the petitioner moved an application under Order 26 Rule 10 (A) CPC read with Section 45 of Indian Evidence Act on the ground that the petitioner who is the wife of Late Kaptan Singh had never given birth to any child and Hemlata Yadav is the daughter of respondent No.2-Laxmi Naryan Singh, and accordingly, it was prayed that the DNA test of Hemlata Yadav may be conducted so that it can be ascertained that Hemlata Yadav is not the daughter of Late Kaptan Singh. By the impugned order, the said application has been rejected.

3- Challenging the order passed by court below, it is submitted by counsel for petitioner that where the question of property is involved and the paternity of the person is also in dispute, then a direction for DNA

test may be issued. To substantiate his submission, counsel for petitioner has relied upon the judgment passed by a Coordinate Bench of this Court in the case of **Radheshyam Vs. Kamla Devi & Others**, reported in **2022 (2) MPLJ 38**.

4- None for the respondents though served.

5- Heard the learned counsel for the petitioner.

6- The Supreme Court in the case of **Banarsi Dass vs. Teeku Dutta (Mrs.) & Another**, reported in **2005 (4) SCC 449** has held that the courts in India cannot order blood test as a matter of course. There must be a strong *prima-facie cas*e to the effect that the husband had no access in order to dispel the presumption arising under Section 112 of Evidence Act and the court must carefully examine as to what would be the consequence of ordering the blood test i.e. whether it will have the effect of branding a child as a illegitimate child or mother as an unchaste woman.

7- Directions for conducting the DNA test is also violative of privacy of a individual.

8- The Supreme Court in the case of **Ashok Kumar Vs. Raj Gupta** and Others, reported in **(2022) 1 SCC 20** has held as under :

> **"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 Kunduv.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 Kunduv.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 Jenav. 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.

12. This Court in Kamti Devi v. Poshi Ram [Kamti Devi v. Poshi Ram, (2001) 5 SCC 311 : 2001 SCC (Cri) 892] , while determining the question of standard of proof required to displace the presumption in favour of paternity of child born during subsistence of valid marriage held : (SCC p. 316, para 10)

> "10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

13. The presumption of legitimacy of a child can only be displaced by strong preponderance of evidence, and not merely by balance of probabilities. The material portion of the Court's opinion is produced hereinbelow : (Kamti Devi case [Kamti Devi v. Poshi Ram, (2001) 5 SCC 311 : 2001 SCC (Cri) 892] , SCC p. 316, para 11)

> "11. … But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatised. If a court declares that the husband is not the father of his wife's child, without tracing out its real father the fallout on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband."

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."

9- Section 112 of the Evidence Act reads as under :

> **112. Birth during marriage, conclusive proof of legitimacy**.-The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

10- It is not the case of the petitioner that Hemlata Yadav was born prior to her marriage with late Kaptan Singh. The presumption as provided under Section 112 of Evidence Act is a rebutable presumption and the petitioner will get every opportunity to rebut the said presumption in the trial.

11- Accordingly, this Court is of the considered opinion that the Trial Court did not commit any jurisdictional error by rejecting the application for compelling Hemlata Yadav to undergo a DNA test.

12- The petition fails and is hereby **dismissed**. The interim relief granted on earlier occasion stands vacated.

(G.S. AHLUWALIA)
JUDGE

Aman