

<i>be no bar under Section 112 of Indian Evidence Act.</i>	
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ORDER
(Passed on 31st July, 2021)

This petition is preferred under Article 227 of the Constitution of India against the order dated 9.1.2020 (Annexure P/1) passed by First Civil Judge Class-2, Ambah, District Morena in Case No. 90A/2017 RCS, whereby the application filed by the respondent No.1 under Section 151 CPC for carrying out DNA test of defendant Kamla Devi and petitioner/plaintiff has been allowed.

2. The facts of the case in nutshell are that a suit for title declaration and permanent injunction has been filed by the petitioner/plaintiff against the respondents/defendants in respect of agricultural land situated in village Barbai Tehsil Porsa, District Morena. The land bearing survey No. 869/2062 is under absolute ownership and possession of the petitioner. The petitioner's family tree has been given in para 2 of the plaint. The respondent No.1 is not the family member of plaintiff, therefore, no share can be given to respondent

Kamla Devi. Some Bhu-mafia persons of the village filed an appeal before the Sub-Divisional Officer, Ambah showing respondent No.1-Kamla Devi to be daughter of Betal Singh while Betal Singh has no legal heirs and in fact Kamla Devi is daughter of Hubbalal, who has died. The Sub-Divisional Officer, Ambah allowed the appeal by order dated 25.10.2017 and held that Kamla Devi is the daughter of Betal Singh having 1/3rd share in the property. The said order dated 25.10.2017 was challenged before the Commissioner, Chambal Division, Morena. Since during the aforesaid period respondent No.1-Kamla Devi was trying to sell out the property, therefore, the suit has been filed for restraining them not to alienate the property and also to declare the petitioner/plaintiff to be the owner of ½ share and also for declaring the order of Sub-Divisional Officer Ambah dated 25.10.2016 to be null and void. The respondent No.1 filed her written statement claiming herself to be the daughter of Betal Singh. The trial Court framed the issues and fixed the case for recording of evidence. The respondent No.1 filed an application under Section 151 CPC with the prayer that the DNA test

of defendant Kamla Devi and plaintiff be carried out. The said application has been opposed by the petitioner on the ground that as per resolution of Village Panchayat, plaintiff is the son of Betal Singh, and the defendant No.1 had not raised any objection. Moreover, DNA test is not the conclusive evidence and the respondent No.1 is bound to prove her case through evidence. Despite, the trial Court has allowed the said application by the order impugned. Being aggrieved by the impugned order, the petitioner has preferred the present petition.

3. Learned counsel for the petitioner has submitted that the order impugned is perverse and against the provisions of law. It is further submitted that in the light of the judgment passed in **Shri Banarsi Dass vs. Mr. Teeku Dutta and Another (S.L.P.(C) No. 17427 of 2004, decided on 27.4.2005)**, wherein earlier judgment in **Gautam Kandu vs. State of West Bengal and another (1993) 3 SCC 418** was relied on, no order could be passed for conducting DNA test. Hence, learned counsel for the petitioner prays to set aside the impugned order Annexure P/1.

4. Per contra, learned counsel for the respondents have opposed the petition and submitted that the present case speaks of 'inheritance of property'. The petitioner is denying the fact that respondent Kamla Devi is the member of his family despite the fact that Kamla Devi is his real sister. Therefore, prays for dismissal of the present petition. Learned counsel for the respondents have placed reliance on **Rohit Shekhar vs. Narayan Datt Tiwari, AIR 2012 DELHI 151.**

5. Heard learned counsel for the parties and perused the available record.

6. Present matter relates to inheritance of property of Hindu Undivided Family and dispute is alleged to be between brother and sister. Petitioner Radheshyam has denied the fact that respondent Kamla Devi is his real sister.

7. Hon'ble Apex Court in **Shri Banarsi Dass vs. Mr. Teeku Dutta and Another (S.L.P.(C) No. 17427 of 2004, decided on 27.4.2005)**, relying upon earlier judgment in **Gautam Kandu vs. State of West Bengal and another (1993) 3 SCC 418**, has held as under :-

"(1) That courts in India cannot order

blood test as 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 case prima facie case in in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act and
(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.”

8. In the aforesaid judgment passed by Hon'ble Apex Court paternity was required to be decided on the basis of DNA test, and the Hon'ble Apex Court held that it was against the provisions of Section 112 of Evidence Act.

9. It is true that under Section 112 of Indian Evidence Act birth during marriage, is conclusive proof of legitimacy, therefore bars DNA testing but when blood relation of siblings is being challenged, there shall be no bar under Section 112 of Indian Evidence Act. In the present case a question arose as to whether petitioner/plaintiff and respondent No.1/defendant are brother and sister or not, this fact has been denied by brother/petitioner Radheshyam, as such, the aforesaid

fact can very well be decided by carrying out DNA test. Therefore, in my considered view, the trial Court has not committed any error in passing the order impugned.

10. Resultantly, the petition fails and is hereby dismissed being devoid of merit.

(yog)

(Rajeev Kumar Shrivastava)
Judge.