

HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

BEFORE HON. SHRI JUSTICE ALOK VERMA,J

M.Cr.C. No.981/2014

Dr. Dheeraj Gada

Vs.

State of M.P. and others

Shri Amit Agrawal, learned counsel for the applicant.

Shri Yogesh Mittal, learned G.A. for the respondent No.1/State.

Shri Yogesh Gupta, learned counsel for respondent no.2.

Shri Ajay Bagadia, learned counsel for the intervenor.

ORDER

(Passed on 17/08/2015)

This application under section 482 of Cr.P.C. is directed against the order passed by the learned Chief Judicial Magistrate, Indore dated 10.12.2013 whereby the learned Chief Judicial Magistrate dismissed the application for getting DNA test of respondent No.2 Rajesh Jain and Ridam Gada son of respondent No.3 and also of respondent No.3.

2. The relevant facts giving rise to this application are that the applicant is father-in-law of respondent No.3. The marriage of respondent No.3 was solemnized with son of the applicant Kunhj Gada on 08.12.2003. On 04.06.2005 a female child Aneri Gada was born and thereafter on 14.02.2009 a

male child Ridam Gada was born. The husband of respondent No.3 Kunhj Gada got suspicious about her relationship with respondent No.2 Rajesh Jain, and therefore, he installed an electronic software in the mobile telephone instrument of respondent No.3 on 30.09.2012. The conversation between respondents No.2 and 3 was transmitted via an electronic call recording software and was got transcribed by Kunhj Gada. The conversation between the two, revealed illicit relationship between them. On 18.12.2012 DNA test of Kunhj Gada and son Ridam was performed in which it was found that Kunhj Gada was not biological father of Ridam. On 22.02.2013, First Information Report at police station Tukoganj was filed which was registered at Crime No.130/2013 under sections 406, 120-B and 497 of IPC. On 11.03.2013, the prosecution filed an application before the Judicial Magistrate First Class seeking DNA test of respondents No.2 and 3 and Ridam Gada. This application was decided by the Chief Judicial Magistrate by impugned order dated 10.12.2013. The application was dismissed on the ground that under section 497 Cr.P.C. it is not disputed whether Ridam is son of Kunhj Gada and, therefore, distinguishing the facts of judgment of Delhi High Court in OS No.547/2011 **Rohit Shekhar vs. Narayan**

Dutt Tiwari, the learned Chief Judicial Magistrate dismissed the application.

3. The respondent No.2 during the investigation approached this Court. While granting bail he gave an undertaking before this Court that he will not object to in giving sample for DNA test if desired by the prosecution.

4. Aggrieved by the order passed by the learned Chief Judicial Magistrate, this application is filed on the ground, inter-alia, that the learned Court erred in not considering that the respondent No.2 had already given the undertaking before the High Court for giving his cooperation for DNA test. The learned Court also failed to take into consideration the principles laid down in the case of **Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and Anr.; (2014) 2 SCC 576** dated 06.01.2014 in which it was held that the conclusive presumption under section 112 of Evidence Act must yield to the proof of DNA test which disturbed the presumption. The learned Court failed to appreciate that respondent No.3 had no locus-standi to object as she cannot be punished under section 497 Cr.P.C. The Court also failed to appreciate that reply filed by the Sheetal Gada was aimed at

protecting the respondent No.2 and not her son Ridam Gada. The learned Court failed to appreciate that in this case paternity of the child is in question as that will prove the ingredients under section 497 Cr.P.C.

5. In reply, the respondent No.3 submitted that in this case, the father-in-law of the respondent No.3, the present applicant Dhiraj Gada has no locus-standi as under section 198(2) Cr.P.C. No persons other than the husband of the woman shall deem to be an aggrieved person. The FIR in this section, is not sustainable in law and therefore no order can be passed on it. In this case, after passing of the impugned order charge-sheet was filed and the investigation was complete. No order of further investigation can be issued by the Court under section 173(8) of the Cr.P.C., because the prosecution has not protected the right under section 173(8) Cr.P.C. for further investigation. The master Ridam Gada and Kunhj Gada are not accused in the present case so far as section 497 IPC is concerned and therefore they cannot be compelled to give sample for DNA test and DNA test cannot be ordered in routine manner. On these grounds, the respondent No.3 submits that no order can be passed to compel her to give a

sample for conducting of DNA test.

6. Respondent No.2, however, submits that he had given an undertaking before the Court and, therefore, he is ready to give all the samples.

7. Learned counsel for the respondent also raised an objection that the applicant approached this Court directly under section 482 Cr.P.C. without filing an application for revision under section 397 Cr.P.C. In response the learned counsel for the applicant citing the case of **Madhu Limaye vs. State of Maharashtra** reported in **AIR 1978 SC 47** and submits that the order passed by the learned Chief Judicial Magistrate was of interim nature and further it was passed when the charge-sheet was not filed and, therefore, it would not be a revisable order and, therefore, the remedy lies only under section 482 Cr.P.C. After going through the impugned order and nature thereof, I find that it is indeed an interim order and in considered opinion of this Court, revision does not lie in this order and therefore, only remedy is available of the present applicant is under section 482 Cr.P.C. Thus, this application without taking recourse to section 391 Cr.P.C. is maintainable in this case.

8. Learned counsel for the applicant placed reliance on judgment of Hon'ble Apex Court in **Ushaben vs. Kishorebhai Chunnilal Talpada and others; (2012) 6 SCC 353**. In this case the Hon'ble Apex Court held that when the complaint contends allegations of commission of offences both under section 498-A IPC as well as section 494 ICP the court can take cognizance thereof even on police report. In para 17 the Hon'ble Apex Court concluded thus :-

“17. Above provisions, lead us to conclude that if a complaint contains allegations about commission of offence under Section 498A of the IPC which is a cognizable offence, apart from allegations about the commission of offence under Section 494 of the IPC, the court can take cognizance thereof even on a police report.”

9. Therefore, in this case also the offence under section 406 IPC is cognizable and, therefore, applying the principles laid down in case of **Ushaben (supra)** a cognizance can be taken under section 497 IPC when the same is non-cognizable. However, in the mind of this Court a suspicious arises that, so far as the offences under section 406 and 497 are concerned, the provisions of section 223 IPC may create a bar in trying the two offences together, however, since this matter was not

raised before the learned Magistrate, I keep this issue open and it may be raised before the trial Judge in due course and for the present held that in light of principles laid down by Hon'ble Apex Court in **Ushaben case (supra)**, the bar created by section 198 (2) Cr.P.C. will not come in way of taking cognizance by the Magistrate.

10. Now, coming to the main question whether Court can order for lifting of samples from persons of respondent No.2 Rajesh Jain, respondent No.3 Sheetal Gada and son Ridam Gada on this aspect provisions of section 53 Cr.P.C. as amended by Act 25 of 2005 are relevant. The explanation appended to the section states as under :-

“(a) “examination” shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) “registered medical practitioner” means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 and whose name has been entered in a State Medical Register.”

11. Therefore, the spirit behind the section 53 is that the

person who is accused in a case can be compelled to allow samples for DNA test be taken from his body. However, due to peculiar facts of this case the respondent No.3 is not accused, so far as section 497 IPC is concerned, and so is her son Ridam Gada and, therefore, it is to be decided whether compelling them for giving DNA samples from their body is permissible or not. Before proceedings further, it may be mentioned here that an application was filed before the learned family court, Indore. The learned family court passed an order directing samples to be taken from the person of respondent No.2 and the child Ridam Gada and also from the respondent No.3. The matter travelled to this Court in W.P. No.1132/2015 under Article 227 of Constitution of India. The co-ordinate Bench of this Court placing reliance on judgment of Hon'ble Apex Court **Nandlal Wasudeo Badwaik (supra)** and also in case of **Dipanwita Roy vs. Ronobroto Roy; (2015) 1 SCC 365** ordered that the family court had not committed any error for issuing direction in respect of DNA test.

12. So far as DNA test for purpose of proving the ingredients of section 497 IPC is concerned, the learned counsel for the applicant placed reliance on judgment of

Nandlal Wasudeo Badwaik (supra) in which the Hon'ble Apex Court examined the conclusive presumption created by section 112 of Evidence Act and held that as modern scientific method of DNA test displaces the presumption created by section 112 of Evidence Act, therefore, in matrimonial cases it is permissible.

13. So far as the criminal case is concerned as observed above section 53 of IPC permit taking samples from the body of the accused persons for the purpose of conducting DNA test and so the ratio of **Nandlal Wasudeo Badwaik case (supra)** applies on criminal cases as well. Similarly, in **Dipanwita Roy case (supra)** the same principles was reiterated and, therefore, now it is established principles that for ordering DNA test to ascertain paternity of a child, the presumption under section 112 Evidence Act is not a bar in an appropriate cases. However, it appears from the observations of the Hon'ble Apex Court that such order should not be passed mechanically.

14. Thus, in this case if we apply the principles laid down in the case of **Nandlal Wasudeo Badwaik case (supra)** and also the case of **Dipanwita Roy case (supra)**, to establish whether there was adulterous relationship between respondent

No.3 and respondent No.2 such a test is necessary. It is also clear that in criminal matters also in appropriate cases such a test can be ordered.

15. Now, we reach to the question whether such order can be passed after filing of charge-sheet. The charge-sheet in this case was filed on 10.02.2014, however, the prosecution had not protected its right for further investigation under section 173(8). Such protection of this right of further investigation by the prosecution is not a prerequisite of section 173(8) of Cr.P.C. Only it may be said that after filing of charge-sheet the permission of the Court is required. In this case, however, the application was filed prior to filing of charge-sheet and the same was decided by the Chief Judicial Magistrate prior to filing of charge-sheet and, therefore, now if this Court directs such DNA test to be conducted, the report of such test has to be filed before the Court by way of supplementary charge-sheet under section 173(8) of Cr.P.C. which is permissible. In my considered opinion, if such a test is required and forms the best evidence for the case this must be done even if it means that the supplementary charge-sheet had to be filed by the prosecution.

16. Accordingly, this application is allowed. Impugned order passed by the Chief Judicial Magistrate is set aside. It is directed that the respondent No.2 who is bound by his undertaking in M.Cr.C. No.2016/2013 to give body samples for DNA test and also the body samples from master Ridam Gada may also be taken. If the child is under custody of respondent No.3, she is directed to keep the child present for taking the samples for DNA. So far as the respondent No.3 is concerned, following the dictum of **Dipanwita Roy case (supra)**, it is directed that she has an option to give her body samples for conducting the test of DNA. In case she opt for not giving her body samples for conducting of DNA test, the Court will draw an adverse presumption as contemplated by section 114 of Evidence Act establishing in terms of illustration (h) thereof.

17. With the direction and observation as aforesaid, this application stands disposed of.

(ALOK VERMA)
JUDGE