Before Raj Mohan Singh, J.

HAWA SINGH AND OTHERS—*Petitioners*

versus

MAIPERSON AND ANOTHER—*Respondents*

CR No.4730 of 2016

January 10, 2017

Constitution of India, 1950—Art. 20(3)—Indian Evidence Act, 1872—S.45, 112—Subjecting the account to DNA test—Court cannot allow the use of scientific mechanism which would lead nowhere in the facts and circumstances of the case—Legitimacy cannot be questioned as long as the marriage subsisted—Prayer for DNA profile cannot be granted—Petition dismissed.

Held that, perusal of the facts and circumstances of the case would lead to a conclusion that even though DNA profile can be ordered in the present modern technology provided for possibility of proof of fact which was not available at the time when Section 112 of the Evidence Act enacted, but the Court cannot allow to the use of such scientific mechanism which would lead nowhere in the facts and circumstances of the case.

(Para 23)

Further held that, the proposed action would definitely yield no substantive breakaway in the facts and circumstances of the case. The facts are being noticed only for the purpose of deciding the present case, without meaning anything on the ultimate merits of the case. Nothing expressed hereinabove would be construed to be an opinion on merits of the case in any manner.

(Para 24)

Further held that, in the peculiar facts and circumstances of the case, prayer for DNA profile cannot be granted. This revision petition is accordingly dismissed.

(Para 25)

Mani Ram Verma, Advocate
for the petitioners.

Akshay Kumar Goel, Advocate
for the respondents.

P.B. BAJANTHRI, J. oral

(1) Petitioners are aggrieved of order dated 03.02.2016 passed by Additional Civil Judge (Sr. Division), Tosham vide which application for DNA profile test of the defendants was rejected.

(2) Plaintiffs-petitioners filed a suit for declaration to the effect that plaintiff No.1 was owner in possession of 1/8th share. Plaintiffs No.2 to 5 were owners in possession of 1/8th share each in the land comprised in khewat No.40 total measuring 259 bighas, 3 biswas. Plaintiffs also sought declaration that plaintiff No.1 was owner in possession of 1/4th share and plaintiffs No.2 to 5 were owners in possession of 1/4th share each in agricultural land comprised in khewat No.48 total measuring 24 bighas and 0 biswa. Plaintiffs also sought declaration that plaintiff No.1 was owner in possession of 1/600th share and plaintiffs No.2 to 5 were owners in possession of 1/600th share each in agricultural land comprised in khewat No.115 total measuring 2023 bighas, 10 biswas. Plaintiffs also sought declaration that judgment and decree dated 08.11.1985 passed in Civil Suit No.659 of 1985 titled as Maiperson Vs. Risala and consequent mutation No.1603 sanctioned on the basis of aforesaid Civil Court judgment and decree were wrong, without consideration and were not binding upon the rights of the plaintiffs.

(3) Plaintiffs claimed that the suit land was inherited by Ramji Lal and Risala from their father Baksha. Baksha had inherited the same from his father Masaniya. The land comprised in khewat No.48 was purchased by Risala from the funds generated from Joint Hindu Family Property. Baksha son of Masaniya had two sons namely Ramji Lal and Risala. Ramji Lal was married to Sarti. Risala was married to Bhurli. Defendants were born from the wedlock of Risala and Bhurli.

(4) Plaintiffs-petitioners also asserted that Ramji Lal was in Army and he did not come to village from 1940 to 1946. His whereabouts could not be known. Thereafter, Sarti wife of Ramji Lal started living with Risala as his wife. Plaintiff No.1-Hawa Singh and father of plaintiffs No.3 to 5 Jai Singh took birth from this wedlock of Risala and Sarti. Ramji Lal who was in I.N.A had returned to village in the year 1946 and thereafter Sarti again started living with Ramji Lal. Plaintiff No.1 Hawa Singh and father of plaintiffs No.3 to 5 resided with Risala. In nutshell, it was sought to be projected that Hawa Singh and Jai Singh were sons of Risala and Sarti.

(5) The suit was contested by the defendants. The factum of

Hawa Singh and Jai Singh being sons of Risala was denied, rather they were claimed to be sons of Ramji Lal.

(6) The dispute in respect of paternity of Hawa Singh and Jai Singh was the core issue between the parties and the same was sought to be ascertained by means of DNA profile of the parties. The dispute is in respect of property of Risala. The paternity of the plaintiffs was sought to be ascertained by way of DNA profile as the same cannot be resolved by means of substantive, oral or documentary evidence. The rights have been claimed by the plaintiffs in the property of Risala whereas the same have been denied. The legitimacy of the child is not in dispute, but the dispute is with regard to property of Risala which is to be inherited by successors.

(7) The application was contested by the defendants on the ground that the DNA profile helps in establishing the paternity when alleged father is alive. The test is only conducted in rare cases so that the person may not be called as Bastard. Generally, this test is conducted in order to apprehend offenders in the criminal case after establishing their identity. As per facts disclosed in the plaint, Sarti was married to Ramji Lal who was in Army. Ramji Lal was not heard from 1942 to 1946. Thereafter, Sarti lived with Risala. Bhurli was alive at that time, so presumably there cannot be a Karewa without proving civil death of Ramji Lal.

(8) Risala died on 14.04.1995. Ramji Lal died on 24.08.1972. Sarti died long back and Bhurli also died in the year 1985. Now comparison is sought to be made between Hawa Singh, Jai Singh with Maiperson and Mai Singh. In the year 1947, Ramji Lal came back and there was re-union between Ramji Lal and Sarti. From this re-union, third son namely Manphol and daughter namely Maichandi took birth. Now issue would be to see the veracity of test to be conducted when Risala is already dead. The conclusiveness of test would have to be judged in the context of comparison that cannot be made with alleged biological father of both the sides i.e. Risala.

(9) In the application for DNA profile filed by the plaintiff, prayer has been made that the defendants should be directed for DNA profile by giving their blood samples to establish paternity with the plaintiffs. In view of stand taken by both the sides, paternity of both the sides viz-a-viz Risala has to be borne on record. The inter se status of both the sides in order to establish that both the sides had taken birth from the loin of Risala would be a far fetched proposition when Ramji Lal returned to the matrimonial house in the year 1947 and thereafter,

Sarti again united with Ramji Lal in the matrimonial house. Ramji Lal was never declared to be civilly dead, therefore, there was no occasion for Sarti to be treated as Karewa wife of Risala and Section 16 of Hindu Marriage Act would be on explanatory note.

(10) The inter se comparison of blood samples of both the parties would not lead to any conclusive fact to establish that plaintiffs were in fact sons of Risala out of lawful marriage of Risala with Sarti. It appears that both the sides have become sluggish in their approach. Birth of Manphol and Maichandi after the year 1947 would further strengthen the case that the plaintiffs were sons of Ramji Lal and Sarti. Ramji Lal died only on 24.08.1972. The paternity was not assailed for more than 65 years of age by anyone. During their lifetime, Risala and Ramji Lal never raised any objection in respect of aforesaid facts. The paternity of Hawa Singh and Jai Singh is being assailed by the plaintiffs themselves. The property of Ramji Lal is statedly with the plaintiffs. In a way, the filing of application is an act of self incrimination inasmuch as that instead of showing themselves to be sons of Ramji Lal, plaintiffs have staked claim over the property of Risala by claiming themselves to be sons of Risala and Sarti.

(11) It is not in dispute that Sarti was married to Ramji Lal. The marriage was never dissolved as Ramji Lal was never declared to be civilly dead, even though his whereabouts were not known from 1942 to 1946. There was no sufficient period of 7 years during which he was not heard. Even otherwise, Ramji Lal returned to house in the year 1947 and cohabitated with Sarti, resulting in birth of third son Manphol and daughter Maichandi. In view of aforesaid, there was presumption of valid marriage between Ramji Lal and Sarti and there could not be any presumption of Karewa of Sarti with Risala. DNA profile even if allowed, would not dislodge the presumption of valid marriage between Ramji Lal and Sarti.

(12) In ***Goutam Kundu*** versus ***State of West Bengal and another***[1], it was held by the Hon'ble Apex Court that the test cannot be held as a matter of course, nor the same can be done in order to have roving inquiry. There must be a strong prima facie case where the husband must establish non access in order to dispel the presumption arising under Section 112 of the Evidence Act 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

[1] (1993) 3 SCC 418

bastard and the mother as an unchaste woman. Nobody can be compelled to give sample of blood for analysis.

(13) In ***Sharda*** versus ***Dharmpal***[2], the Hon'ble Apex Court explained that the ratio of ***Goutam Kundu's*** case (supra) was not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. If the directions are in the interest of the minor, then such directions ordinarily be made. In matrimonial disputes, where divorce is sought on the ground of impotency etc., then without any medical examination, it would be very difficult to conclude as to whether allegation made by the spouse is correct or not. In such situation, the party would always insist on medical examination. The avoidance thereof on the plea of right to privacy or of personal liberty under Article 21 of the Constitution of India would make the same impossible for any conclusion. Such a course would make the ground of divorce to be nugatory, therefore, right to privacy having not been conferred by Article 21 of Constitution of India and its interpretation has to be read in consonance with personal liberty. Therefore, cumulatively, it cannot be treated to be an absolute right and would be subject to some limitations to be imposed where two competing interests clash. Right to seek divorce on the ground of impotency would directly come in conflict with so called right to privacy of the respondent. Therefore, the Court has to reconcile by way of balancing the competing interests of the parties.

(14) In ***Bhabani Prasad Jena*** versus ***Convenor Secretary Orissa State Commission for Women and another***[3], it was pointed out by the Hon'ble Apex Court with reference to earlier precedents in ***Sharda's case*** **(supra)** and ***Goutam Kundu's case (*****supra)*** that in case where paternity of a child is in question before the Court, the use of concept of DNA would be extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, then there should not be any hesitation to use the same. The other view is that the Court must be reluctant to use such scientific mechanism which may result in invasion of right to privacy of an individual and even may devastating effect on the child and may bastardise an innocent child even though his mother and her

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[2] AIR 2003 SC 3450

[3] 2010 (4) RCR (Civil) 53

spouse were living together during the time of conception. The apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth must be coherently decided and the Court must exercise its discretion only after balancing the interests of the parties. The Court would consider whether for a just decision, DNA profile is eminently needed. DNA profile in a matter relating to paternity of a child should not be directed as a matter of course or in a routine manner. The Court has to consider diverse aspects including presumption under Section 112 of the Evidence Act and other pros and cons of the situation.

(15) ***In Selvi*** versus ***State of Karnataka***[4], the Hon'ble Apex Court held that no individual should be forcibly subjected to any of the techniques whether investigation in criminal cases or otherwise as it would amount an unwarranted intrusion into personal liberty. However, there was a room for voluntary administration of the techniques when party gives consent to undergo any of these tests, the test result by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the Administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872.

(16) In ***Rohit Shekhar*** versus ***Narayan Dutt Tiwari and another***[5], it was noticed that conclusive proof standard mandated by Section 112 of the Evidence Act, read with Section 4, admits an extremely limited choice before the Court, to allow evidence of non access to a wife by the husband, who alleges that the child begotten by her is not his offspring; it is designed to protect the best interests of the child and his legitimacy. The Court also covered the area where paternity is claimed by the children on attaining majority, for other reasons i.e. on the basis of right of the children under Section 125 Cr.P.C or in a suit for declaration or for maintenance. The Court pointed out the areas where the Court has weighed all pros and cons on the basis of eminent need for making appropriate orders. The Court also pointed out that with enactment of Hindu Adoptions and Maintenance Act, 1956, Criminal Procedure Code, 1973, Family Courts Act 1984 and the right of the children to know about her or his

[4] (2010) 7 SCC 263
[5] 2011(2) CivCC 88

natural parentage, the proposition has attained new dimensions where the concept of paternity or a claim thereof cannot be ousted by Section 112 of the Evidence Act.

(17) Hon'ble Apex Court in Krishan Kumar Malik Vs. State of Haryana, 2011(7) SCC 130 has observed that with the incorporation of Section 53-A in the Criminal Procedure Code w.e.f 23.06.2006, it has become necessary for the prosecution to go for DNA profile to facilitate the prosecution to prove the case against the accused.

(18) *In* ***Nandlal Wasudeo Badwalk*** versus ***Lata Nandlal Badwalk and another***[6], the Hon'ble Apex Court has embarked upon the modern technology provided for possibility of proof of fact which was not available at the time when Section 112 of the Evidence Act enacted. The presumption may not be attracted where truth or fact is known. The interest of justice will be best served by ascertaining the truth. The Court should be furnished with best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. The presumption in such a situation was held to be rebuttable and must yield to proof. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, then the latter must prevail over the former.

(19) In ***Dipantwita Roy*** versus ***Ronobroto Roy***[7], the Hon'ble Apex Court held that prayer of the husband for conducting a DNA test to establish the alleged adulterous behavior of wife and incidental legitimacy of son would not be strictly covered by Section 112 of the Evidence Act. The alleged infidelity of wife would not be established without DNA, which is the most legitimate and scientifically proved mechanism to establish the assertion of infidelity. The test could also be used by the wife to rebut assertion of husband to establish that she had not been unfaithful, adulterous or disloyal to the husband. In case of acceptance by the wife to submit for DNA test, the same would conclusively determined the veracity of accusation leveled against her and in case of her denial to comply with the direction, the allegation would be determined by the Court by drawing an adverse inference against her in terms of Section 114(h) of the Evidence Act. DNA evidence has assumed great significance and legally recognized phenomenon. Scientific investigations are need of our. DNA is a

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[6] (2014) 2 SCC 576

[7] (2015) 1 SCC 365

scientific test and its accuracy is 99.99 % and therefore, it can be used as evidence not only in sexual assault and criminal cases, but also in civil cases involving question of paternity and succession.

(20) Section 112 of the Indian Evidence Act, 1872 is based on presumption of public morality and public policy. The law presumes against vices and inmorality in a civilized society where it is imperative to presume legitimacy of a child born during the continuation of a valid marriage between his mother and any man or within 280 days after its dissolution, if the mother remained unmarried. Such legitimacy has presumption of conclusiveness, unless it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. This presumption cannot be displaced by mere probability or doubt. The presumption can only be rebutted by a strong and conclusive evidence. Once the validity of marriage is proved, then there is a strong presumption about the legitimacy of children born out of that wedlock. It is also settled proposition of law that the law does not presume anything odious or dishonourable. The presumption of conclusive proof can be rebutted by strong and clear conclusive evidence.

(21) Section 45 of the Evidence Act does not pose any legal impediment to the admissibility of DNA profile as an evidence.

(22) Some of the High Courts have hinted that subjecting the accused to DNA test is not violative of Article 20(3) of Constitution of India. Obtaining samples from the accused for DNA profile does not violate right against self-incrimination. There is no infringement of any privacy or right against self-incrimination as it is by now trite that in course of investigation, DNA test can be conducted. The privilege of Article 20(3) of Constitution of India is applicable only in testimonial evidence. In a criminal case, obtaining DNA profile will not violate right against self incrimination. The privilege applies only in evidence i.e. testimony in essence taken under duress. The right against self-incrimination is just a prohibition on the use of physical or moral compulsion to extort testimonial evidence from a person, not an exclusion of evidence taken from his body when it may be material and thus, the Court can compel a person male or female to submit for DNA test after incorporation of Section 53-A in Criminal Procedure Code, DNA test of accused is unavoidable in case of rape.

(23) Perusal of the facts and circumstances of the case would lead to a conclusion that even though DNA profile can be ordered in the present modern technology provided for possibility of proof of

fact which was not available at the time when Section 112 of the Evidence Act enacted, but the Court cannot allow to the use of such scientific mechanism which would lead nowhere in the facts and circumstances of the case. The admissibility of such a test can be seen in the light of Ramji Lal being alive after 1947 and gave birth to third son Manphol and daughter Maichandi. There was no valid divorce between Ramji Lal and Sarti earlier to 1947, nor any Karewa can be presumed in the absence of civil death of Ramji Lal from 1942 to 1946.

(24) Firstly, there was a valid presumption of lawful marriage between Ramji Lal and Sarti from whose wedlock plaintiffs took birth. Secondly, biological kins of Risala are to be established with the aid of blood sampling of both the sides. Blood sampling of the plaintiffs in order to establish plaintiffs being son of Risala would be a far fetched proposition in the light of Ramji Lal being alive upto the year 1972. The status of the plaintiffs would be on questionable note, if they are found to be not sons of Ramji Lal. The legitimacy of the plaintiffs cannot be questioned so long as marriage between Ramji Lal and Sarti subsisted. In any case, there cannot be any roving enquiry for establishing any fact not relevant to the controversy. The proposed action would definitely yield no substantive breakaway in the facts and circumstances of the case. The facts are being noticed only for the purpose of deciding the present case, without meaning anything on the ultimate merits of the case. Nothing expressed hereinabove would be construed to be an opinion on merits of the case in any manner.

(25) In the peculiar facts and circumstances of the case, prayer for DNA profile cannot be granted. This revision petition is accordingly dismissed.

Amit Aggarwal