Ashok Kumar vs Smt. Raj Gupta on 1 October, 2021

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Bench: Hrishikesh Roy, R. Subhash Reddy

[REPOR

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6153 OF 2021
(Arising out of SLP(C) No.11663 of 2019)

ASHOK KUMAR …APPELLANT(S)

VERSUS

RAJ GUPTA & ORS. …RESPONDENT(S)

J U D G M E N T

Hrishikesh Roy, J.

Leave granted.

2. Heard Ms. Sunieta Ojha, the learned counsel for the appellant (plaintiff). Also heard Mr. Rameshwar Singh Malik, the learned Senior Counsel appearing for the respondents (defendants).

3. The appellant Ashok Kumar filed CS No. 53/2013 seeking declaration of ownership of property, left behind by late Trilok Chand Gupta and late Sona Devi. He arrayed the couple's three daughters as defendants in the Suit and claimed himself to be the son of Trilok Chand Gupta and Sona Devi. In their written statement, the defendants denied that the plaintiff is the son of their parents (Trilok Chand Gupta and Sona Devi), and as such he is disentitled from any share in their parental property. The defendants also set up an exclusive claim on the property based on the Will dated 16.4.1982 (registered on 25.4.1982) executed by their late mother Sona Devi.

4. In course of the proceedings before the learned Addl. Civil Judge (Sr. Division), Kalka, on closure of the plaintiff's evidence, when the suit was slated for the other side's evidence, the defendants filed an application on 19.4.2017 seeking direction from the Court to conduct a Deoxyribonucleic Acid Test (for short "DNA test") of the plaintiff and either of the defendants, to establish a biological link

of the plaintiff to the defendants parents i.e. late Trilok Chand Gupta and Smt. Sona Devi.This application was opposed by the plaintiff with the projection that the defendants' application is an abuse of the process of law and that there are adequate evidences placed before the Court by the plaintiff to show that he is the son of Trilok Chand Gupta and Sona Devi. The plaintiff in his opposition had specifically pleaded that the mother of the plaintiff and the defendants had submitted sworn affidavit before the Municipal Committee, Kalka to transfer the Property No. 496, Pahari Bazar, Kalka in her name, mentioning the name of the plaintiff as her son. The copy of the concerned affidavit was duly placed on record in the suit proceedings. Similarly, sworn affidavits of the three defendants regarding transfer of the property No. 496, Pahari Bazar, Kalka, where again the plaintiff was admitted to be the son of late Trilok Chand Gupta and late Smt. Sona Devi, were also brought on record in the suit. With such projection of admission on his linkage to the defendants' parents, the plaintiff opposed the DNA test suggested in the defendants' application and offered to rely on the already adduced evidence to prove his case.

5. The defendants' application for conducting the DNA test for the plaintiff (at the cost of the defendants) was disposed of by the Court by referring to the fact that the CS No. 53/2013 is for declaration of ownership of property left behind by late Trilok Chand Gupta and late Sona Devi where the defendants have denied that the plaintiff is their brother or the son of their parents. The learned Judge noted that the evidence was already led by the plaintiff to prove his case and the application of the defendants was filed at that stage of the Suit when it was their turn to lay their evidence. Taking these aspects into account, the Court opined that onus is on the plaintiff to prove that he is a coparcener amongst the defendants by way of his birth in their family and such burden does not shift to the defendants. Since the plaintiff had refused to give the DNA sample, the view taken was that the Court cannot force the plaintiff to provide DNA sample and accordingly the defendants' application came to be dismissed by the order dated 28.11.2017 by the learned Trial Judge.

6. Thus aggrieved, the defendants moved the High Court by filing a Revision Petition against the order dated 28.11.2017. The parties were heard and the learned judge upon due consideration observed that a DNA test is a double

-edged weapon and is a vital test to determine the relation of a party and the plaintiff who is claiming to be the son of late Trilok Chand Gupta and Sona Devi, should not shy away from the DNA test suggested by the defendants. The plea for conducting the DNA test on the plaintiff was accordingly allowed by interfering with the contrary view taken by the trial Court. Taking exception to the revisional order of the High Court, the aggrieved plaintiff is before this Court.

7. The pleadings were exchanged quite early in the Civil Suit No. 53/2013, but only after closure of the plaintiff's evidence, the defendants filed application on 19.4.2017 for subjecting the plaintiff to a DNA test. The question therefore is, whether in a declaratory suit where ownership over coparcenary property is claimed, the plaintiff, against his wishes, can be subjected to the DNA test. The related question is whether the plaintiff without subjecting himself to a DNA test, is entitled to establish his right over the property in question, through other material evidence. The timing of the application is equally relevant. The plaintiff has already led evidence from his side to prove

relationship between the parties and at this stage whether the High Court should have directed the plaintiff to undergo the DNA test. Another issue of concern is whether in the absence of consent, a party can be forced to provide sample for a DNA test.

8. This court in Banarsi Dass V. Teeku Dutta1 had declared that DNA test is not to be directed as a matter of routine but only in deserving cases. A petition was filed in that case for grant of succession certificate in respect of properties of the deceased. The Plaintiff claimed to be the deceased's daughter and the only Class 1 legal heir, under the Hindu Succession Act, 1956. The deceased had died intestate, leaving behind 5 brothers. The Delhi High Court denied one of the brother's applications for conducting the DNA test of the daughter to establish her paternity. Justice Arijit Pasayat upheld the decision of the High Court in the following passage of the judgment: -

> "10. In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim pater is est quem nuptiae demonstrant (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality." 1 2005(4) SCC 449

9. In Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women &Anr.2, Justice R.M. Lodha, while reconciling two earlier decisions of this Court on the point, had rightfully prescribed that;

"23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu [(1993) 3 SCC 418 : 1993 SCC (Cri) 928] and Sharda [(2003) 4 SCC 493] . In Goutam Kundu [(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 [(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 2(2010) 8 SCC 633 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 (supra) was considered and approved in Dipanwita Roy vs. Ronobroto Roy3, 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 of the High Court to order for DNA testing was approved by the Supreme Court. Even then, Justice J.S. Khehar, 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.

11.1 In circumstances where other evidence is available to prove or dispute the relationship, the court should ordinarily refrain from ordering blood tests. This is 3(2015) 1 SCC 365 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. This Court, in Kamti Devi v. Poshi Ram4, while determining the question of standard of proof required to displace the presumption in favor of paternity of child born during subsistence of valid marriage held:

> "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 favor 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 4 2001(5) SCC 311 answered in the light of what is meant by access or non-access as delineated above." 11.2. 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 herein below:
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> "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 illegitimatized. 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."

12. It was also the view of the Court that 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 stigmatizing 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.

13. 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 v. Union of India5, 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, 52019 (1) SCC 1 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. It cannot be overlooked that in the present case, the application to subject the Plaintiff to a DNA Test is in a declaratory suit and the plaintiff has already adduced evidence and is not interested to produce additional evidence (DNA), to prove his case. It is now the turn of the defendants to adduce their evidence. At this stage, they are asking for subjecting the plaintiff to a DNA test. Questioning the timing of the application the trial Court dismissed the defendants application and we feel that it was the correct order.

14. In the yet to be decided suit, the plaintiff has led evidence through sworn affidavits of the Respondents, his School Leaving Certificates and his Domicile Certificate. Significantly, the respondent No.1, who is one of the 3 siblings (defendants) had declared in her affidavit that the Plaintiff was raised as a son by her parents. Therefore, the nature of further evidence to be adduced by the plaintiff (by providing DNA sample), need not be ordered by the Court at the instance of the other side. In such kind of litigation where the interest will have to be balanced and the test of eminent need is not satisfied our considered opinion is that the protection of the right to privacy of the Plaintiff should get precedence.

15. Having answered these questions, additional issue to be resolved is whether refusal to undergo DNA Testing amounts to 'other evidence' or in other words, can an adverse inference be drawn in such situation. In Sharda vs. Dharmpal6 a three judges bench in the opinion written by Justice S.B. Sinha rightly observed in paragraph 79 that "if despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference" can be made out against the person within the ambit of Section 114 of the Evidence Act. The plaintiff here has adduced his documentary evidence and is disinclined to produce further evidence. He is conscious of the adverse consequences of his refusal but is standing firm in refusing to undergo the DNA Test. His suit eventually will be decided on the nature and quality of 6 2003(4) SCC 493 the evidence adduced. The issue of drawing adverse inference may also arise based on the refusal. The Court is to weigh both side's evidence with all attendant circumstances and then reach a verdict in

the Suit and this is not the kind of case where a DNA test of the plaintiff is without exception.

16. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.

17. The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the evidence adduced by the other side. When the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy. Seen from this perspective, the impugned judgment merits interference and is set aside. In consequence thereof, the order passed by the learned Trial Court on 28.11.2017 is restored. The suit is ordered to proceed accordingly.

18. With the above order, the appeal stands allowed leaving the parties to bear their respective cost.

... ... J . [R . S U B H A S H R E D D Y]
.....J. [HRISHIKESH ROY] NEW DELHI OCTOBER 1, 2021