

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench - IV:

Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Jamal Khan Mandokhail

Civil Petition No.2414-L of 2015.

(Against the judgment of the Lahore High Court, Lahore
dated 02.09.2015, passed in Writ Petition No.6669/2011)

Muhammad Nawaz

... Petitioner

Versus

Addl. District & Sessions Judge, etc.

... Respondents

For the petitioner: Mian Abdul Quddus, ASC.

For the respondents: Malik Mushtaq Ahmad, ASC.

Date of hearing: 05.04.2023

JUDGEMENT

Syed Mansoor Ali Shah, J.- The petitioner seeks leave to appeal against an order of the Lahore High Court, dated 02.09.2015, ("impugned order") whereby the High Court has dismissed his writ petition filed against an order of the revisional court, dated 02.06.2010. By the said order, the revisional court had reversed the order of the trial court, dated 03.02.2010, and allowed the application of the respondents for DNA test of one Taj Din and his wife Zubaida Bibi as well as of the petitioner to determine the parentage of the petitioner.

2. Briefly, the facts necessary to state for the decision of the present petition are that the respondents asserting themselves to be the legal heirs of the deceased Muhammad Hussain, being his nephews, instituted a suit to challenge a gift mutation, purportedly got sanctioned by Muhammad Hussain in favour of the petitioner, wherein the petitioner was mentioned as the son of Muhammad Hussain. The respondents asserted in the plaint that their uncle, Muhammad Hussain, died issueless and the petitioner was not his son, and that the petitioner had got sanctioned the gift mutation fraudulently.

3. The trial court framed issues for trial and recorded the evidence of both parties. After the close of the petitioner's evidence, the respondents made an application alleging therein that the petitioner was the son of one Taj Din and his wife Zubaida Bibi, and prayed for

the DNA test of the petitioner and of the said Taj Din and Zubaida Bibi, to rebut the evidence produced by the petitioner regarding his parentage. The trial court dismissed the said application by its order dated 03.02.2010 with the observation that *"the matter can easily be ascertained with the evidence available on record"*. But the revisional court, on a revision petition of the respondents, allowed the said application by its order dated 02.06.2010, holding that the parentage of the petitioner *"can be determined through DNA test of Muhammad Nawaz [petitioner], Taj Din as well as Zahida Begum"*. The petitioner challenged the order of the revisional court in the High Court by filing a writ petition, which was dismissed by the impugned order. Hence, he has filed the present petition for leave to appeal.

4. We have heard the learned counsel for the parties, read the case law¹ cited by them and examined the record of the case.

5. At the very outset, it is astonishing that the revisional court ordered the DNA test of two persons, namely, Taj Din and his wife Zubaida Bibi, who are not privy to the proceedings of the suit either as a party or witness; who were not heard in the matter; and no law was referred under which such an order could have been made, without their consent. The High Court has maintained the order through the impugned judgement, again without providing any opportunity of hearing to them and without pointing out and relying upon any law under which the DNA test of a person can be ordered, without his consent, in a civil case. We find that both the revisional court and the High Court have failed to consider that the conducting of the DNA test of a person, without his consent, infringes his fundamental rights to liberty and privacy guaranteed by Articles 9 and 14 of the Constitution of the Islamic Republic of Pakistan ("Constitution").²

6. The *right to privacy* involves the protection of individuals from unwarranted intrusion into their personal lives. It safeguards an individual's personal information, communications, family life, and other aspects of their private sphere from unjustified interference by the government, organizations, or other individuals. Privacy is crucial for

¹ Salman Akram Raja v. Govt. of Punjab 2013 SCMR 203; Ghazala Tehsin v. Ghulam Dastagir PLD 2015 SC 327; Laila Qayyum v. Fawad Qayum PLD 2019 SC 449; Hamim Akhtar v. ADJ, Gujranwala PLD 2015 Lah 500; Sardar Begum v. Azhar Masood PLD 2022 Sindh 565.

² Salman Akram Raja v. Govt. of Punjab 2013 SCMR 203; Laila Qayyum v. Fawad Qayum PLD 2019 SC 449.

maintaining personal autonomy, as it allows individuals to make choices and engage in activities without fear of surveillance, judgment, or unauthorized disclosure of their personal information. Though the right to privacy is an integral part of the right to life and liberty³, it has been elevated to a separate and independent fundamental right by Article 14 of our Constitution. Privacy, which is the ultimate expression of the sanctity of a person, represents the core of the human personality. It recognises the ability of each person to make choices and to take decisions on matters intimate and personal to him, and thus protects for him a zone of choice and self-determination. We may also underline that the expression, "privacy of home", used in Article 14 is not restricted to the physical house of a person but covers the entire treasure of his personal life, as the privacy attaches to the person, not to the place where it is associated.⁴

7. The unauthorized collection of someone's DNA can be considered a violation of their privacy, autonomy and freedom because it involves the collection of sensitive personal information without their knowledge or consent. This intrusion can lead to potential misuse or unauthorized disclosure of the individual's genetic information, which may have significant implications for their personal and professional lives.

8. The *right to liberty* guaranteed by Article 9 of the Constitution does not mean merely freedom from physical constraint but assures freedom to do what a person wants to or does not want to, unless a law enacted by the legislature in public interest provides for otherwise. The right to liberty thus includes freedom from all arbitrary or purposeless encroachments and restraints sought to be made by the State or its instrumentalities, on individual autonomy. The right to liberty is a fundamental human right that protects the freedom of individuals to live their lives without unreasonable or unjust restrictions from governments or other authorities. It is a core principle of democratic societies and is enshrined in various international human rights instruments, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The right to liberty also protects individuals' privacy, including

³ Ibid.

⁴ Justice Qazi Faez Isa v. President of Pakistan PLD 2021 SC 1 per Justice Syed Mansoor Ali Shah; Benazir Bhutto v. President of Pakistan PLD 1998 SC 388.

their personal information, communications, and family life, from unjustified intrusion or surveillance.

9. DNA testing has raised significant concerns regarding the right to liberty and privacy. As DNA contains a wealth of personal information about an individual, such as their genetic predispositions, familial relationships, and ethnicity, its collection, storage, and use have implications for privacy rights. DNA testing is sometimes used to establish paternity or other family relationships. While this can provide important information for legal and personal reasons, it can also raise privacy concerns when individuals are tested without their knowledge or consent.

10. *Bodily autonomy* is protected by both the fundamental rights; right to liberty and right to privacy. Individuals have the right to control their own bodies, make decisions about their healthcare, and refuse unwanted medical interventions. Unauthorized DNA collection could be seen as violating this principle, as it involves taking a sample of an individual's biological material without their permission.

11. These fundamental rights, are subject to law and can only be interfered with if so regulated by law made by the legislature. Further, as per the constitutional command of Article 4 of the Constitution, no action detrimental to the liberty, body or reputation of a person can be taken except in accordance with the law, nor can a person be compelled to do that which the law does not require him to do. This being the constitutional mandate, any executive or judicial act taken in respect of the rights to liberty, privacy, body or reputation of a person must be backed by some law. A court order for the DNA test of two persons as a means of identifying their genetic relationships interferes with their right to privacy and liberty. This test can be ordered only either with the consent of the persons concerned or without their consent if permissible under a law. We are aware of certain provisions of criminal law⁵ which permit the DNA test of an accused person without his consent, but no civil law has been brought to our notice which allows this test in civil cases without the consent of the person concerned.

⁵ Section 164A and 164B of the Code of Criminal Procedure 1898, inserted in the Code by the Criminal Law (Amendment) (Offences Relating to Rape) Act. 2016.

12. It may be pertinent to mention here that in a civil case, if the person upon whom the onus to prove his genetic relationship with another person lies, does not give consent for his DNA test, and thus withholds such evidence, the court may draw an adverse presumption against the claim of such person and presume that such evidence, if produced, would be unfavourable to him, as per Article 129(g) of the Qanun-e-Shahadat 1984. But the court cannot draw such an adverse presumption if a person, who is not a party to the proceedings before it, does not give his consent and present himself for his DNA test. Further, the presumption under Article 129(g) of the Qanun-e-Shahadat 1984 being permissive, not obligatory, in nature, the court may or may not draw such presumption in the peculiar facts and circumstances of a case.⁶ In this regard, we may observe that the court should ordinarily draw and act upon such presumption only where the evidence produced by both parties is so evenly balanced that it cannot come to a conclusion on the basis thereof or where the party upon whom the onus lies has not produced any evidence. But where the evidence on record is sufficient to decide the matter either way on the standard of preponderance of probability applicable in civil cases, the court should generally prefer to decide the matter on the basis of that evidence rather than merely relying on presumption. It must also be remembered that civil proceedings are primarily adversarial and in such proceedings, it is for the party concerned to prove his assertion by adducing sufficient evidence of his choice. The court should not compel a party in a civil case to prove his assertion in the manner suggested by his opponent.⁷

13. In the present case, neither the petitioner nor the said Taj Din and his wife Zubaida Bibi have given consent for their DNA test. The petitioner has preferred to prove his relationship with the deceased Muhammad Hussain on the basis of other evidence produced by him. And while dismissing the application of the respondents for the DNA test of the petitioner, the trial court has observed that "the matter can easily be ascertained with the evidence available on record". The revisional court was thus not legally justified to order the DNA test of the petitioner as well as of the said Taj Din and his wife Zubaida Bibi, without their consent.

⁶ Muhammad Ramzan v. State PLD 2007 Kar 1.

⁷ Ashok Kumar v. Raj Gupta (2022) 1 SCC 20.

14. It is also important to note that Article 128 of the Qanun-e-Shahadat 1984 declares that the fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate child of that man, unless the husband had refused, or refuses, to own the child. In the present case, the deceased Muhammad Hussain is not alleged to have refused to own the petitioner as his son during his lifetime. Therefore, if the petitioner proves that the deceased Muhammad Hussain's wife, Rashidaan Bibi, was his mother and he was born during the continuance of a valid marriage between his mother and the deceased Muhammad Hussain, this fact shall conclusively prove that he is the son of the deceased Muhammad Hussain and no evidence, including the evidence of DNA test, can be accepted to negate the statutory declaration made by Article 128 of the Qanun-e-Shahadat 1984. Further, it is worth noting that the mutation under challenge is not that of the inheritance of the deceased Muhammad Hussain but rather of a gift allegedly made by the deceased Muhammad Hussain in favour of the petitioner. And as a valid gift can be made by a person of his property in favour of any person, whether the donee is his legal heir or not, the main issue in the present case is whether or not the deceased Muhammad Hussain made a valid gift in favour of the petitioner. The issue, whether the petitioner is the real or adopted son of the deceased Muhammad Hussain, would assume importance only when the petitioner fails to prove the validity of the challenged gift.

15. Given the legal position stated above as to the DNA test of a person in civil cases and the fact that neither the petitioner nor the said Taj Din and his wife Zubaida Bibi had given consent for their DNA test, we find that there was no jurisdictional error in the order passed by the trial court, which could have justified interference therewith by the revisional court under Section 115 of the Code of Civil Procedure 1908. The revisional court had, in reversing the order of the trial court, acted without lawful authority and its order was thus of no legal effect. The High Court, therefore, should have exercised its constitutional jurisdiction under Article 199 of the Constitution to so declare the order of the revisional court. But by dismissing the writ petition of the petitioner and maintaining the order of the revisional court, the High Court has committed a legal error, which requires correction by this Court. The present petition is therefore converted into an appeal and

the same is allowed. The impugned judgment is set aside and the writ petition of the petitioner is accepted. The order of the revisional court is declared to have been made without lawful authority and is of no legal effect, and consequentially the order of the trial court is restored.

Judge

Islamabad
5 April 2023
Approved for reporting
Sadaqat

Judge