HIGH COURT OF KERALA

Bench: Justice C. Jayachandran

Date of Decision: 20th May 2024

ORIGINAL PETITION (CIVIL) NO. 2833 OF 2023

AGAINST THE ORDER IN OS NO. 225 OF 2017

GANGADHARAN …PETITIONER/1st RESPONDENT/1st DEFENDANT

VERSUS

SREEDEVI AMMA AND SARADHA …RESPONDENTS/PETITIONER & 2nd RESPONDENT/PLAINTIFF AND 2nd DEFENDANT

Legislation:

Indian Evidence Act, 1872

Hindu Marriage Act, 1955

Subject: Original petition challenging the trial court's order allowing a sibling DNA test in a suit for partition.

Headnotes:

Civil Procedure – DNA Test for Establishing Paternity in Partition Suit – Kerala High Court Decision on Strong Prima Facie Case Requirement.

DNA Test – Suit for partition involving claim of paternity – Plaintiff seeks sibling DNA test to establish her father was the deceased, Sri Kuttikrishnan Nair – Trial court allows application for DNA test – Defendants challenge the order in Kerala High Court – High Court evaluates evidence to determine if strong prima facie case exists for ordering DNA test – Court finds plaintiff's evidence, mostly hearsay, insufficient to establish a strong prima facie case – High Court sets aside the trial court's order allowing the DNA test, emphasizing the necessity of substantial evidence to justify such an intrusive procedure [Paras 1-19].

Evidence Evaluation – High Court scrutinizes evidence presented by the plaintiff – Plaintiff's knowledge of paternity based on hearsay – Other witnesses also provide hearsay evidence – Court holds that a strong prima facie case must be established with concrete evidence to order a DNA test – DNA test should not be used as a fishing expedition for evidence [Paras 16-17].

Decision – Setting Aside Trial Court Order – Held – The trial court's order allowing the DNA test is set aside due to lack of a strong prima facie case by the plaintiff – The court emphasizes the potential adverse impact of a DNA test on defendants and the requirement for substantial evidence before permitting such tests – Matter remanded to trial court for proceeding in accordance with law without the observations from the High Court's judgment influencing the trial [Para 19].

Referred Cases:

- Goutam Kundu v. State of West Bengal (1993) 3 SCC 418
- Sharda v. Dharmpal (2003) 4 SCC 493
- Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women (2010) 8 SCC 633
- Dipanwita Roy v. Ronobroto Roy (2015) 1 SCC 365
- Jayachandran v. Valsala (2016) 2 KLT 81

Representing Advocates:

Santheep Ankarath and P. Anirudhan for petitioner
Vinod Bhat S and Anagha Lakshmy Raman for respondents

J U D G M E N T

Dated this the 20th day of May, 2024

The moot question involved in this Original Petition is whether a DNA test can be permitted – as sought for by the plaintiff in a suit for partition – in proof of her paternity, so as to enable her to lay a claim over the assets left by the person, whom the plaintiff propounds as her father? The plaintiff claims to be the daughter of Sri.Kuttikrishnan Nair and her mother Madhavi Amma. She preferred an application for conducting sibling DNA test, which was allowed, vide Ext.P12 order. The same is under challenge in this Original Petition. The petitioner herein is the 1st defendant in the suit and the respondents are the plaintiff and the 2nd defendant, respectively. The essential facts to be noted are as follows:

The plaintiff Sreedevi Amma preferred the suit O.S.No.225/2017 of the Munsiff's Court, Pattambi, on the premise that the plaint schedule property belonged to one Kuttikrishnan Nair, who married Madhavi Amma, and that plaintiff is the daughter born in that wedlock. During the subsistence of that marriage, Kuttikrishnan Nair married another women by name Lakshmi Appissi, in which relationship, the defendants are born. The plaintiff would aver that the matrimonial tie between the Kuttikrishnan Nair and Madhavi Amma continued until the death of the former in the year 1983. Accordingly, the plaintiff claims one fourth right each for Madhavi Amma and herself, and one fourth right each to the defendants.

2. The defendants filed written statement specifically denying that Kuttikrishan Nair never married Madhavi Amma, and that the plaintiff is not the daughter of Kuttikrishnan Nair. According to the defendants, Kuttikrishnan Nair married Lakshmi Appissi and defendants were born in that wedlock. The defendants would clarify that, Kuttikrishnan Nair passed away on 30.10.1987; and not in the year 1983.

3. Ext.P3 interlocutory application I.A.No.669/2022 – in which the impugned Ext.P12 order was passed – was preferred by the plaintiff seeking sibling DNA test to be conducted with the blood samples of the plaintiff, as also, the defendants. In the affidavit in support of the said application, the plaintiff would aver that, she is prepared to prove customary marriage between Kuttikrishnan Nair and Madhavi Amma,

and that a sibling DNA test would disprove the defense contention. It was specifically averred that, the marriage between Kuttikrishnan Nair and Madhavi Amma took place 81 years back; that nobody who witnessed that marriage are now alive; that there is no direct evidence to prove the same; that plaintiff got knowledge that her father is Kuttikrishnan Nair from her mother Madhavi Amma and she remembers living with Kuttikrishnan Nair upto the age of 5 years; and therefore, in the absence of any other evidence, a DNA test is quite essential, is the contention urged.

4. The trial court deferred the said interlocutory application for consideration after evidence. PWs 1 to 5 were examined, of which PW5 is none other than the brother of the plaintiff.

5. The defendants filed counter affidavit opposing I.A.No.669/2022 on various grounds.

6. By Ext.P10 order, the trial court allowed Ext.P3 interlocutory application, challenging which, the present petitioner preferred O.P.(C)No.191/2023. After referring to various decisions on the question of desirability of having a DNA test, a learned Single Judge of this Court allowed the said Original Petition, finding *inter alia* as follows:

"Thus, without expressing anything on the merits of the findings rendered in Ext P10 order, I relegate the parties back to the court below, for the purpose of deciding whether the first respondent has made out a case for the court below to hold that there was a marriage between Kuttikrishnan Nair and the mother of the first respondent, so as to enable the first respondent to be conferred with the right to have a DNA profiling test."

7. After re-consideration, Ext.P12 order was passed, again allowing Ext.P3 I.A. for conducting sibling DNA test.

8. Heard Sri.Santheep Ankarath, learned counsel for the petitioner/defendant and Sri.S.Vinod Bhat, learned counsel for the respondent/plaintiff. There is no representation for the 2nd respondent/ 2nd defendant, apparently for the reason that she supports the petitioner.

9. The desirability of having a DNA test conducted to prove the legitimacy of a child born in a marriage was considered by a two Judges Bench of the Hon'ble Supreme Court in *Goutam Kundu v. State of West Bengal and another* [1993 (3) SCC 418]. The relevant findings in paragraph no.26 are extracted here below, of which emphasis is made to finding nos. 3 and 4, for the purpose of the present Original Petition.

"26. From the above discussion it emerges-

(1) that courts in India cannot order bloodtest as a matter of course;

(2) wherever applications are made for suchprayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie casein that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as towhat 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.

(5) No one can be compelled to give sample ofblood for analysis."

10. Issue again fell for consideration by a three Judges Bench in *Sharda v. Dharmpal* [2003 (4) SCC 493]. The relevant findings as contained in paragraph no.81 are extracted here below, where again emphasis is given to finding no. 3, for the present purpose.

"81. To sum up, our conclusions are:

(1) A matrimonial court has the power to ordera person to undergo medical test.

(2) Passing of such an order by the courtwould not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

(3) However, the court should exercise such apower if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

11. In *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Others* [2010 (8) SCC 633], the Hon'ble Supreme Court propounded "the test of eminent need" in deciding the question whether an application for DNA test has to be allowed or not. The relevant findings in paragraph no.13 of the judgment are extracted herebelow:

"13. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is 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, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need'

whether it is not possible for the court to reach the truth without use of such test.”

(underlined by me, for emphasis)

12. In *Dipanwita Roy v. Ronobroto Roy* [2015 (1) SCC 365], all the above referred decisions were considered by a two Judges Bench of the Hon'ble Supreme Court, to conclude in paragraph no.16 that, it is quite permissible for a Court to direct the DNA examination to determine the veracity of one of the allegations constituting a ground, on which a party would either succeed or lose. However, the Hon'ble Supreme Court gives a caveat that, if the direction to hold such a test can be avoided, it should be so avoided.

13. From the judgments above referred, this Court notice that, there is absolutely no dearth of power for a Court, be it civil, matrimonial or otherwise to direct the DNA analysis, provided the outcome of the test would prove/disprove one of the grounds based upon which a party may either succeed or lose. However, the most clinching test is the one as expatiated in *Bhabani Prasad Jena*(supra), which is the test of “eminent need”. As held by the Hon'ble Supreme Court, in its quest to unearth the truth, the Court can certainly direct to conduct DNA test. However, the court has to exercise its discretion only after balancing the interests of the parties and upon due consideration whether the DNA test is eminently needed for a just decision in the matter. The same cannot be directed as a matter of course or in a routine manner. Instead, the Court has to consider diverse aspects; the pros and cons of such order and also as to whether it is possible for the Court to reach a logical conclusion without use of such test.

14. This Court is also impelled to observe that,the desirability of having a DNA test conducted would depend upon the facts and circumstances in which it is sought for and especially in the context of the relief prayed for. The consideration to be received at the hands of the court for an application to conduct DNA analysis differs from each other (i) in a case where the husband alleges adultery, where DNA analysis is sought for to prove such allegation/ground of adultery, (ii) in a case where the husband as a defense in matrimonial matter alleges

non access to disown the paternity of the child, (iii) in a case where an application for DNA test is opposed disputing the very existence of the marriage claimed. In *Dipawita Roy* (supra), the Hon'ble Supreme Court in paragraph no.13, specifically observed that, the judgments relied on by the counsel for the appellant were on the pointed subject of legitimacy of the child born during the subsistence of a valid marriage. The situation will undergo a seachange when a valid marriage, or for that matter, a marriage itself is denied and disputed. This Court may wind up the discussion by reiterating and underscoring the requirement as laid down in *Goutam Kundu* (supra) and also in *Sharda* (supra) that to exercise the power of directing the conduct of a DNA test, the applicant has to establish, not merely a *prima facie* case but a strong *prima facie* case, and there should be sufficient material before the Court, justifying a request for DNA analysis being allowed.

15. Coming to the instant facts, although it is not desirable at this stage of the suit to comment on the quality of the evidence adduced, this Court is constrained to look into the evidence adduced to some extent, to ascertain whether the applicant/plaintiff had made out a strong *prima facie* case, so as to allow Ext.P3 application for a sibling DNA test. One thing which has to be borne in mind is that, what is being enquired into is not whether the plaintiff is the daughter of Kuttikrishnan Nair. Instead, the true question to be posed is whether the marriage between Kuttikrishnan Nair and Madhavi Amma is established as claimed in the plaint and further, whether the plaintiff is a daughter born in that wedlock. One can probe into the latter question only upon establishing the former. The question is so posed since the plaintiff has no case under Section 16 of the Hindu Marriage Act, as per the pleadings in the plaint. Therefore, evidence as to the marriage between Kuttikrishnan Nair and Madhavi Amma is what is essentially required to be established in order to ascertain a *prima facie* case, or for that matter, a strong *prima facie* case.

16. Having gone through the evidence adduced by PWs 1 to 5, this Court is of the *prima facie* opinion that, the plaintiff could not establish a

strong *prima facie* case in proving a valid marriage between Kuttikrishnan Nair and Madhavi Amma. PW1 is none other than the plaintiff. Even in Ext.P3 application for conducting DNA test, her version is that, she came to know about the marriage between Kuttikrishnan Nair and Madhavi Amma, only as her mother's version. The said knowledge of the plaintiff is open to criticism as hearsay evidence. Another aspect spoken to by the plaintiff is regarding her memory that she was living with Kuttikrishnan Nair and Madhavi Amma upto the age of five. The veracity of that version has to be cross checked with the evidence adduced by other witnesses as well. It is relevant to note that all other witnesses would admit in cross examination that their knowledge about the marriage between Kuttikrishnan Nair and Madhavi Amma is nothing, but hearsay. Even the evidence adduced by PW5, the brother of the plaintiff, could not vouchsafe the plaintiff's claim that Kuttikrishnan Nair married Madhavi Amma and that the plaintiff is the daughter born in that wedlock. This Court is not elaborating much on the evidence adduced, as the same may have an adverse consequence on the fate of the suit itself. Suffice to say that, a *prima facie* case, much less a strong *prima facie* case, has not been borne out to order a DNA test as sought for in Ext.P3.

17. Another aspect which weighs with this Court to interfere with Ext.P12 order is the pleadings as contained in Ext.P3 application to the effect that the impugned marriage took place 81 years back, that no one who witnessed the marriage are alive and that there exists no way to prove the marriage, except through a DNA analysis. It appears that, the plaintiff is completely misconceived in seeking a DNA analysis for the afore-stated reasons. As already held by the Hon'ble Supreme Court, the existence of a strong *prima facie* case is a *sine qua non* to seek conduct of the DNA test. Here, in Ext.P3, the plaintiff/ applicant herself admits that there exists no evidence, except the aspect sought to be proved by DNA analysis to prove that the plaintiff is the daughter of Madhavi Amma through Kuttikrishnan Nair and consequentially, their marriage. That apart, it is questionable as to why the plaintiff did not choose to raise her claim during the life time of her mother Madhavi Amma, though Kuttikrishnan Nair passed away in the year 1987. The present suit was instituted when the plaintiff was aged 74 and therefore, none else can be blamed for dearth of evidence through those persons, who according to the plaintiff had witnessed the soclaimed marriage. At

any rate, the resultant situation cannot be propounded as a reason to seek a sibling DNA test.

18. It is of seminal important to note that, DNA analysis, even if allowed, will not establish the marriage between Kuttikrishnan Nair and Madhavi Amma. At best, it may prove that the plaintiff is the daughter of Kuttikrishnan Nair. The proof of the same, by itself, would not carry the plaintiff anywhere. The prayer is one for partition. The claim is that, Kuttikrishnan Nair married Madhavi Amma and plaintiff is their daughter. The further claim is that, during the subsistence of the marriage, Kuttikrishnan Nair maintained relationship with Lakshmi Appissi, in which relation the defendants are born. The above aspect is highlighted only to point out that, the plaintiff has no claim even under Section 16 of the Hindu Marriage Act, as per the pleadings. Now, assume for a moment, that such a plea is permitted to be taken as an alternative one. Still, the existence of a ceremonious/customary marriage is again a *sine qua non* to maintain a claim under Section 16 of the Hindu Marriage Act. See in this regard, a Division Bench Judgment of this court in *Jayachandran and Others v. Valsala and Others* [2016 (2) KLT 81].

19. In the light of the above discussion, this Court finds that Ext.P12 order cannot be sustained. This court finds that, one cannot seek DNA test to be done only in his/her attempt to fish out evidence in support of his case. Unless and until the applicant makes out a strong *prima facie* case, such an application is not liable to be allowed. In arriving at the above conclusion, this Court also considers the devastating effect [as pointed out in *Bhabani Prasad Jena*(supra)] on the children of Lakshmi Appissi (the defendants in the suit), more so, when all the witnesses – except the plaintiff – would admit that Lakshmi Appissi is believed to be the legally wedded wife of Kuttikrishnan Nair by the people in the locality. This Original Petition succeeds. Ext.P12 order is set aside. The trial court will now proceed with the matter, in accordance with law, untrammelled by any of the observations contained in this judgment.