AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Revision No. 601 of 2014

1. Smt. Rameshwari Bai, W/o. Ishwar Lal Sahu, Aged About 30 Years,
2. Prakash Kumar, S/o. Ishwar Lal Sahu, Aged About 11 Years.
3. Harendra Kumar, S/o. Ishwar Lal Sahu, Aged About 10 Years.

Petitioner No.2 & 3 are minor through natural guardian mother Smt. Rameshwari Bai, W/o. Ishwar Lal Sahu, Aged about 30 years.

All are R/o. Ward No.16, Dallirajhara, P.S. Rajhara, Civil & Revenue Distt. Durg (Now Civil & Revenue Distt. Balod), Chhattisgarh.

---- Petitioners

Versus

Ishwar Lal Sahu, S/o. Chintaram Sahu, Aged About 40 Years, R/o. Village Dubchera, Post Koba, Police Station- Snf, Tahsil Doundilohara, Civil & Revenue Distt. Durg (Now Civil & Revenue Distt. Balod) Chhattisgarh.

---- Respondent

For Petitioners : Mr. P.P. Sahu, Advocate.

For Respondent : Mr. Jitendra Gupta, Advocate.

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

05.07.2017

Heard

1. Challenge in this revision is to the order dated 06.08.2014 passed by the Principal Judge, Family Court, Balod in Misc. Criminal Case No.33/2010, wherein an application preferred on behalf of Prakash Kumar & Harendra Kumar, who are minors, in a proceeding for claim of maintenance along-with their mother for DNA test to confirm the paternity was dismissed.

2. The facts, which are involved in this case, are that, initially, an application under Section 125 of Cr.P.C. was filed by the petitioner No.1 Smt. Rameshwari Bai, claiming to be wife of Ishwar Lal

Sahu. The petitioner No.2 Prakash Kumar and petitioner No.3 Harendra Kumar had also joined in that petition and claimed maintenance against his father Ishwar Lal Sahu. The said application for 125 of Cr.P.C. claiming maintenance was rejected by an order dated 08.12.2010 in entirety. Against such order of rejection of the application under Section 125 of Cr.P.C., a Criminal Revision bearing No.21/2011 was preferred, which was decided by an order dated 31.03.2011 by the High Court. The High Court came to a finding that the wife Smt. Rameshwari Bai could not establish that she is legally wedded wife and upheld the finding to that extent but in respect of claim of the minor sons Prakash Kumar & Harendra Kumar, the application was remanded with a finding that the family Courts are under obligation to provide complete opportunity and sufficient assistance to the parties to prove their pleading and claim. Thereby, the revision was partly allowed and the finding of rejection for maintenance relating to Prakash Kumar & Harendra Kumar both the minor sons were set aside and direction was given to decide the case afresh.

3. The records as would show the proceeding again commenced before the family Court Balod on 06.09.2011. During such proceeding, an application was filed by minor sons who were represented by amicus curie for test of DNA of non-applicant father as the father had denied the paternity. The family Court rejected such application on the ground that the respondent has not acceded his consent for such DNA test, therefore, the Court cannot compel the non-applicant (father) to go for DNA test. Thereafter, the proceedings continued. Subsequently, another application for DNA test of non-applicant was filed wherein it was pleaded that the applicant sons can only prove their paternity

through the DNA test and no other means are left out. It was further pleaded that the earlier rejection of the application for DNA test was not informed by amicus curie who had represented the minors at the relevant time. Therefore, the DNA test is required to be carried out to prove the paternity of the child. Subsequently, the said application was decided by the order dated 06.08.2014 wherein the learned family Court rejected the application on the ground that on 07.02.2012 an application for DNA test was rejected, therefore, the said prayer cannot be repeated again and the application was dismissed.

4. Learned counsel appearing for the minor child would submit that unless and until DNA test is being carried out in the case, the paternity of the child cannot be established. It is further submitted that categorical submission was made in the second application, which is also supported by the affidavit that after earlier rejection of the application for DNA test was not informed, therefore, no inference of knowledge can be drawn. He further submits that in view of the law laid down in case of ***Sharda v. Dharmpal***[1] and in case of ***Aishwar Dhar Diwan & Others v. Rakesh Diwan***[2], the Court can order for DNA test and in such eventuality if despite such oder, the respondent do not wish to go for his DNA, the adverse inference can be drawn.

5. Per contra, learned counsel for the respondent submits that the similar application for test of DNA was rejected on 07.02.2012, therefore, the same cannot be repeated time and again.

6. Perused the record of the Court below. The record of the Court below would show that initially after the case was remanded from

1 (2003) 4 SCC 493
2 2006(3) C.G.L.J. 359

the High Court with a direction to reconsider the case by giving opportunity of hearing to the minor children, the proceeding started on 06.09.2011. Subsequently, the order dated 07.02.2012 would show that an application which was filed by the minor children through amicus curie was rejected on the ground that the non-applicant father do not wish to go for DNA test. As such there was no order on merits that whether a person who refuses the DNA test can be compelled or not ? The earlier order of rejection would show that wish of the non-applicant was given preference for rejection as he refused to go for such test and virtually no order on merits was passed which touches upon right of parties. Subsequently, while the proceeding was going on, again an application was filed on 04.09.2012 making a prayer by the minor for DNA test of non-applicant, the father. In the said application, pleadings were made that similar application was filed by amicus curie and after rejection of the application, the same was not informed and it was stated that only the paternity can be proved by the DNA test and therefore order for DNA of the father was prayed for.

7. From the facts it leads to give rise a question whether a father can be compelled to go for DNA test if he is not willing. If the answer is in positive and refusal of a person to go for DNA test is upheld in such case the second question comes for consideration what would the future of the kids, who claim their paternity through a particular person ? Can it be left unanswered for indefinite period or having raised the question by the children, whether the same can be avoided. Certainly in such eventuality the Court will lean in favour of a minor child to hold it's hand to help him to find out the answer.

8. The principles of compelling a person for DNA test came for consideration in few of the cases. One of it is the case of ***Sharda***[1] the Court has made a reference to ***B.R.B. v J.B.***[3] wherein the following observation was made :

> *"20. A judge of the High Court has power to order a blood test whenever it is in the best interest of the child. The Judges can be trusted to exercise this discretion wisely. No limit-condition or bound is set up to the way in which Judges exercise their discretion. The object of the court always is to find out the truth. When scientific advances give fresh means of ascertaining it, there should not be any hesitations to use those means whenever the occasion requires."*

9. Further, in the case of ***Goutam Kundu v. State of W.B.***[4] initially the Court has held that Courts in India cannot order blood test as a matter of course and whenever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained. It was further held that 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 bastard and the mother as an unchaste woman and therefore no person can be compelled to give sample of blood for analysis.

10. The said finding was further considered in case of ***Sharda***[1] and the Court held that if the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It was further held

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3 (1968) 2 ALL ER 1023 (CA)
4 AIR 1993 SC 2295

that no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase “personal liberty” this right has been read into Article 21, it cannot be treated as an absolute right. It was held that some limitations on this right have to be imposed and particularly where two competing interests clash. The Court further held if for arriving at the satisfaction of the court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. It was further held that the court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected. The limitation was further imposed that court cannot order for a roving inquiry and there must have sufficient materials before it to enable it to exercise its discretion.

11. Lately thereafter the Supreme Court in case of ***Narayan Dutt Tiwari v. Rohit Shekhar & Another***[5] has observed and at Para 40 has reproduced the observation from the Court of Appeal (Civil Division) of H. and A. (Children Paternity Tests) :

> “40. Though in the light of what we have held, it is not strictly relevant, but we are unable to restrain ourselves from recording what the Court of Appeal (Civil Division) observed in *H.* and *A. (Children) (Paternity : Blood Tests), In re- 2002 EWCA (Civ) 383* :
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> “Over thirty years ago in his speech in S. v. McC Lord Hodson said : (AC pp. 57 F-58 A)
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> '…...The only disadvantage to the child which is put forward as an argument against the use of a blood test, not for therapeutic purposes but to ascertain

5 (2012) 12 SCC 554

paternity, is that the child is exposed to the risk that he may lose the protection of the presumption of legitimacy.

Without seeking to depreciate the value of this presumption it is, I think, fair to say that whatever may have been the position in the past the general attitude towards illegitimacy has changed and the legal incidents of being born a bastard are now almost non-existent. I need not dilate upon this, for I recognise that it is impossible to say that there is no stigma of bastardy even though it be no more than the indirect stigma of the imputation of unchastity to the mother of the child so described. On the other hand, it is difficult to conceive of cases where, assuming illegitimacy in fact, it is to the advantage of the child that this legal status of legitimacy should be preserved only perhaps to be displaced by firm evidence of illegitimacy decided later in his or her life from a blood test.

The interests of justice in the abstract are best served by the ascertainment of the truth and their must be few cases where the interests of children can be shown to be best served by the suppression of truth. Scientific evidence of blood groups has been available since the early part of this century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity. Why should the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong ?'

Those principles have been consistently applied in subsequent cases, including *H. (A Minor) (Blood Tests : Parental Rights),* In re-1997 Fam 89 : (1996) 3 WLR 506 and *T. (A Child) (DNA Tests : Paternity),* In re- (2001) 3 FCR 577. The Jude sought to distinguish those two authorities in his concluding paragraph, which I have cited

above. It draws the distinction that in those two cases there were serious doubts as to the husband's procreative capacities. I do not consider that factual distinction begins to displace the points of principle to be drawn from the cases, *first that the interests of justice are best served by the ascertainment of the truth and second that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences.* It seems to me obvious that all the Lord Hodson expressed in the passage that I have cited applies with even greater force and logic in a later era. *First there have been huge scientific advances with the arrival of DNA testing. Scientists no longer require blood, thus removing what for some is the unbearable process of its extraction. Of even greater importance is the abandonment of the legal concept of legitimacy achieved by the Family Law Act, 1987."*

(emphasis supplied)

It was further observed that paternity of any child is to be established by science and not by legal presumption or inference or by a long and acrimonious trial.

12. Subsequently, the Supreme Court in case of ***Dipanwita Roy v. Ronobroto Roy***[6] has reiterated the principles laid down in case of *Bhabani Prasad Jena v. Orissa State Commission for Women reported in (2010) 8 SCC 633*, which is reproduced herein below :

> "14. A similar issue case to be adjudicated upon by this Court in *Bhabani Prasad Jena v. Orissa State Commission for Women*, wherein this Court held as under :
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> *21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means*

6 (2015) 1 SCC 365

whenever the occasion requires. The other view is that the court must be reluctant in the 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.

22. 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 test is eminently needed. DNA test 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.

23. There is no conflict in the two decisions of this Court, namely, *Goutam Kundu v. State of W.P. (1993) 3 SCC 418* and *Sharda v. Dharampal, 2003 (4) SCC 493*. In *Goutam Kundu [(1993) 3 SCC 418]*, 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."

Therefore, what is the principle emerges that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination to determine the veracity of the allegations, if it was eminently needed. However, the direction to hold such a test if can be avoided, if it is not required under the facts of the case.

13. In the context of the aforesaid principle, in the instant case, when the prayer made by the minor children are examined, it would show that an application was made initially but the same was not allowed as the non-applicant did not agree for same. In the second application, it was stated that earlier application for rejection of DNA test was not informed by the then amicus curie. The Court can not ignore the fact that the claimants herein are minors who claims their paternity to the non-applicant as father. If the wishes of the non-applicant are upheld then in such case the Court would be helpless to answer to the question of minors. The claim for maintenance is presently pending on behalf of minors. The non-applicant appears to avoid the claim has disowned the relations. In Indian social back ground, when a lady has claimed that she begotten the children out of the relations with that of non-applicant, the same cannot be shelved on a mere denial. In the facts of the case if the application for DNA test if is refused then it can be very well assumed that the paternity of the child cannot be established at any point of time in near future. It is also the right of the minor child to know about his parents specially when where specific averments made against a person that he is the father. Therefore, simply by making a submission that non-applicant do

not wish to get himself examined for DNA test cannot be appreciated. The Supreme Court in case of ***Sharda v. Dharmpal***[1] also held that the final wish of the father cannot be the end point as the proposition of case of ***Goutam Kundu v. State of W.B***[4] is not an authority. Under the circumstances, the Court can direct that blood test to be conducted. It is having regard to the future of the child, if it is in the interest of the child certain prayer can always be allowed. Further, as has been held in case of ***Narayan Dutt Tiwari***[5] & ***Dipanwita Roy***[6], the Supreme Court has observed that in case of eminent need, the Court can always direct for test for DNA.

14. Taking into such principles and after translating them into the present circumstances of this case, considering the future of the child, the question of paternity cannot be left in infinity and uncertainty can be allowed to loom large for all the time to come for the children. Considering the facts and circumstances of the case, the Court is of the opinion that the DNA test of the respondent cannot be refused when it is claimed by the minor children as under the facts it would be of eminent need.

15. In view of the above, the order dated 06.08.2014 is set aside and accordingly, the application to conduct DNA test of non-applicant is allowed. Consequently, the criminal revision stands allowed.

Certified copy, as per rules.

Sd/-

(Goutam Bhaduri)
Judge

Ashok