1 **THE HIGH COURT OF MADHYA PRADESH**
MP No.1239/2020
Ajay Singh Vs. Smt. Rama Bai and others

Gwalior, Dated :02/03/2020

Shri Aditya Sharma, Advocate for petitioner.

This petition under Article 227 of the Constitution of India has been filed against the order dated 2/12/2019 passed by Additional Collector, District Vidisha in case No.203/Revision/2019-20, by which the application filed by the petitioner for seeking DNA test of respondent no.2 to determine his paternity has been rejected.

The necessary facts for disposal of the present petition in short are that the respondents no.1 and 2 by projecting themselves to be the wife and son of Raghuvar filed an application for mutation of their names. The petitioner filed his objection and stated that the respondent no.2 is not the son of Late Raghuvar and has no right to get his name mutated and the petitioner being the nephew of Raghuvar has looked after the deceased and out of love and affection Late Raghuvar has bequeathed his property in favour of the petitioner by executing a Will. Accordingly, the petitioner filed an application for determination of the paternity of respondent no.2 by conducting a DNA test. By order dated 29/8/2016 the Tahsildadr, Basoda, District Vidisha rejected the application on the ground that the similar application has already been rejected by order dated 15/6/2016. The petitioner preferred a revision before the Board of Revenue, which was transferred to the Court of Additional Collector, Vidisha in view

of the amended provisions of MP Land Revenue Code and the Additional Collector by the impugned order dated 2/12/2019 has rejected the application.

Challenging the order passed by the authorities below, it is submitted by the counsel for the petitioner that since the petitioner has taken an objection with regard to the paternity of the respondent no.2, therefore, it can be adjudicated by conducting the DNA test.

Heard learned counsel for the petitioner.

The moot question for consideration is as to whether in the mutation proceedings the respondent no.2 can be compelled to undergo the DNA test or his personal liberty is to be respected?

The Supreme Court in the case of **Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission For Women and Another** reported in **(2010) 8 SCC 633** has held as under:-

> "**15.** In *Goutam Kundu* v. *State of W.B.* this Court was concerned with a matter arising out of maintenance for child claimed by the wife. The husband disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. This Court referred to Section 4 and Section 112 of the Evidence Act and also the decisions of the English and American courts and some authoritative texts including the following statement made in *Rayden's Law and Practice in Divorce and Family Matters* (1983), Vol. I, p. 1054 which reads thus:
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> > "Medical science is able to analyse the blood of individuals into definite groups; and by examining the blood of a given man

> and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves most valuable in determining paternity, that is, the exclusion aspect, for once it is determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher; between two given men who have had sexual intercourse with the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father."

16. This Court then finally concluded thus: (*Goutam Kundu case*, SCC p. 428, para 26)

> "(*1*) That courts in India cannot order blood test as a matter of course.
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> (*2*) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
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> (*3*) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.
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> (*4*) 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.

(*5*) No one can be compelled to give sample of blood for analysis."

17. In *Sharda* v. *Dharmpal*, a three-Judge Bench was concerned with the question whether a party to the divorce proceedings can be compelled to a medical examination. That case arose out of an application for divorce filed by the husband against the wife under Section 13(1)(*iii*) of the Hindu Marriage Act, 1955. In other words, the husband claimed divorce on the ground that wife has been incurably of unsound mind or has been suffering from mental disorder. The Court observed: (SCC p. 509, para 39)

"*39. Goutam Kundu* is, therefore, 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 regards mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child."

18. While dealing with the aspect as to whether subjecting a person to a medical test is violative of Article 21 of the Constitution of India, it was stated that the right to privacy in terms of Article 21 of the Constitution is not an absolute right. This Court summed up the conclusions thus: (*Sharda case*, SCC p. 524, para 81)

"*1*. A matrimonial court has the power to order a person to undergo medical test.

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

3. However, the court should exercise such a power 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."

19. In *Banarsi Dass* v. *Teeku Dutta* this Court was concerned with a case arising out of a succession certificate. The allegation was that Teeku Dutta was not the daughter of the deceased. An application was made to subject Teeku Dutta to DNA test. The High Court held that the trial court being a testamentary court, the parties should be left to prove their respective cases on the basis of the evidence produced during trial, rather than creating evidence by directing DNA test. When the matter reached this Court, few decisions of this Court, particularly, *Goutam Kundu* were noticed and it was held that even the result of a genuine DNA test may not be enough to escape from the conclusiveness of Section 112 of the Evidence Act like a case where a husband and wife were living together during the time of conception. This is what this Court said: (*Banarsi Dass case*, SCC pp. 454-55, para 13)

> "*13*. 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 Evidence 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 favour 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 answered in the light of what is meant by access or non-access as delineated above."

It was emphasised that DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given.

20. Recently, in *Ramkanya Bai* v. *Bharatram* decided by the Bench of which one of us, R.M. Lodha, J. was the member, the order of the High Court directing DNA test of the child at the instance of the husband was set aside and it was held that the High Court was not justified in allowing the application for grant of DNA test of the child on the ground that there will be possibility of reunion of the parties if such DNA test was conducted and if it was found from the outcome of the DNA test that the son was born from the wedlock of the parties.

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 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."

Accordingly, this Court is of the considered opinion that in a proceeding for mutation, the respondent no.2 cannot be directed to undergo the DNA test. Further, the petitioner is seeking mutation of his name on the basis of a Will and it is beyond the jurisdiction of the revenue authorities to determine the genuineness of a Will. If the petitioner is of the view that a Will was executed by Late Raghuvar in his favour, then he has to establish his title by filing a properly constituted civil suit.

Accordingly, the petition fails and is hereby **dismissed.**

(G.S. Ahluwalia)
Judge

Arun*