IN THE HIGH COURT OF KARNATAKA,

DHARWAD BENCH

DATED THIS THE 27TH DAY OF SEPTEMBER, 2024

R

BEFORE

THE HON'BLE MR. JUSTICE H.P.SANDESH

WRIT PETITION NO. 112825 OF 2019 (GM-CPC)

BETWEEN:

SRI. CHANDRU
S/O. HUCCHARAYAPPA HANUMANTHAPPA
HULLINAKATTI @ S. BANAKAR,
AGE: 39 YEARS, OCC: AGRICULTURE,
R/O: KADABAGERE, DEVADANA VILLAGE
KHANDYA HOBLI,
CHIKKAMAGALURU TALUK & DISTRICT-577127.

...PETITIONER

(BY SRI. PRASHANT V. MOGALI, ADVOCATE)

AND:

1. SRI.HUCCHARAYAPPA HANUMANTHAPPA HULLINAKATTI
   @ S.BANAKAR S/O. LATE HANUMANTHAPPA,
   AGE: 62 YEARS, OCC: AGRICULTURE,
   R/O: SHIRAGAMBI VILLAGE & POST,
   HIREKERUR TALUK, HAVERI DISTRICT-591111.

2. SRI. NAGARAJ S/O. SHEKHAPPA UJIANIPURA,
   AGE: 42 YEARS, OCC: VILLAGE
   R/O: INGALAGONDI VILLAGE,
   INGALAGONDI POST, HIREKERUR TALUK,
   HAVERI DISTRICT-591111.

3. SRI. SHIVARAJ S/O. VIJAYAMMA,
   AGE: 36 YEARS, OCC: AGRICULTURE,
   R/O: SHIRGAMBI VILLAGE & POST,
   HIREKERUR TALUK, HAVERI DISTRICT-591111.

...RESPONDENTS

(BY SRI. AVINASH BANAKAR, ADV. FOR R1-R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT IN THE NATURE OF CERTIORARI QUASHING THE IMPUGNED ORDER DATED 02.08.2019 ON I.A.NO.06 PASSED BY THE SENIOR CIVIL JUDGE AND JMFC HIREKERUR IN O.S.NO.05/2017 VIDE ANNEXURE-F.

THIS PETITION, COMING ON FOR PRELIMINARY HEARING IN 'B' GROUP, THIS DAY, THE COURT MADE THE FOLLOWING:

ORAL ORDER

(PER: THE HON'BLE MR. JUSTICE H.P.SANDESH)

Heard the petitioner's counsel and also the counsel appearing for the respondents.

2. The prayer sought in the writ petition is to quash the impugned order dated 02.08.2019 on I.A.No.6 passed by the Senior Civil Judge and J.M.F.C., Hirekerur rejecting the same in O.S.No.5/2017 vide Annexure-F to grant such other reliefs as deems fit in the circumstances of the case.

3. The petitioner is the plaintiff before the Trial Court and he filed the suit against defendant No.1 claiming that he is his father and also content that he is entitled for share in the suit schedule properties and also sought for mense profits. The suit is registered by the defendants and

defendant No.1 specifically denied that the plaintiff is not the son of him.

4. The Trial Court also considering the pleadings of the party, framed the issues and parties are also allowed to lead the evidence. The plaintiff also examined himself and also examined four witnesses and also defendant was examined i.e., defendant No.1 and he was also cross-examined. After recording the evidence, the application was filed invoking Order 26 Rule 10(a) R/W 151 of CPC and also Section 112 of the Indian Evidence Act, 1872. He claims that defendant No.1 got married his mother Smt.Somamma and he started living at Mudigere Taluk, Pulguni Village. In the said wedlock he was born. Defendant No.1 used to visit Shiragambi Village for taking care of the properties. It is also sworn in the affidavit that after marriage he started to reside at Kodapugere village. His mother was residing in Pulguni village and she passed away in 2015 and claims that he was the biological son of defendant No.1 and he is entitled for half share in the suit schedule property.

5. Defendant No.1 is denying that he is not the son. In order to determine the plaintiff is the son of defendant No.1 or not, DNA test is necessary. Apart from the witnesses who have been examined before the Court, the said application is registered by filing written statement by defendant No.1 contending that the plaintiff's mother married one Basappa Jadara and she was also claiming after the death of her husband widow pension and having five children through the Basappa Jadara and this plaintiff is one of the son of the said Basappa Jadara and he is not the son of defendant No.1 and there is no need of conducting any DNA test.

6. The Trial Court having considered the pleadings of the parties i.e., grounds urged in the application as well as the statement of objection comes to the conclusion that it is the burden on the plaintiff to prove that he is born to deceased Somamma in the wedlock with defendant No.1. Mere DNA would not suffice to hold that to the plaintiff is the son of defendant No.1 born to deceased Somamma. When the defendant specifically contended that the said

Somamma was the wife of Basappa Jadara and the plaintiff is born to the said Basappa Jadara, it is burden on the plaintiff to prove that the deceased Somamma was not a wife of Basappa Tirakappa Jadara and she is the wife of defendant No.1. The burden is on the plaintiff to prove that defendant No.1 married to deceased Somamma. Hence, the same cannot be permitted.

7. The counsel appearing for the petitioner would vehemently contend that the Trial Court committed an error in rejecting the application and after the examination of the witnesses, only an application is filed. It is also content that even though PW.2 supported the petitioner, the Trial Court without considering the same and documents, rejected the application.

8. It is contended that application is filed before the closing of evidence, but the Trial Court came to the conclusion that application is filed at belated stage and the Trial Court without considering the verdicts of the Hon'ble Apex Court produced by the petitioner which is very much necessary for the adjudication, rejected the application.

Counsel also in support of his argument he relied upon two judgments of this Court passed in ***W.P.No.13491/2018 dated 14.02.2014 Sri. M. V. Narayana Swamy and others vs. Sri Suresh***.

9. This Court also referred the judgment reported in ***2023 (2PJ LR 2007)*** decision of the coordinate Bench which has relied upon the judgment of the Hon'ble Apex court. The Hon'ble Apex Court discussed the other judgment in the case of ***Narayan Datta Tiwari vs. Rohit Shekhar and Another 2012*** reported in ***(12 SCC 554)*** therein also discussion was made that the High Court considering the application for DNA test filed by the applicant where the paternity was disputed by his father, who was the respondent, a distinction was drawn between legitimacy and paternity of the child.

10. It also observed that Section 112 of the Indian Evidence Act is intended to safeguard the interest of the child by securing his or her legitimacy and not the paternity. Right of the child to know the truth of his or her origin was highlighted by stating that child is having a

right to know his biological roots through reliable scientific tests. It is noticed that there is no bar for conducting such DNA test and it will not in violation of the right to life or privacy of a person. It will not come out to an invasion of right to life.

11. This Court also taken note of the judgment in the case of ***Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia*** reported in ***(Civil Appeal No.1308 of 2023 (Arising Out of SLP (C) No.9855/2022)*** decided on ***20.02.2023*** case which was referred where the paternity of the child was in question and also taken note of the presumption under Sections 112 and 114 of the Indian Evidence Act. The counsel referring this judgment also contends that the defendants themselves have filed similar application for DNA profiling which was later withdrawn. An observation is made that I do not find any reason to reject the claim of the plaintiff.

12. The counsel also relied upon judgment of this Court passed in W.P.No.201175/2018 dated 05.08.2024. The counsel also brought to notice of this Court the

discussion made by this Court in the case of ***Kamti Devi (Smt.) and another v. Poshi Ram, [(2001) 5 SCC 311]*** has held that "*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 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.*"

13. This Court also taken note of the judgment in the case of ***Aparna Ajinkya Firodia v. Ajinkya Arun***

Firodia [Civil Appeal No.1308 of 2023 (Arising Out of SLP (C) No.9855/2022) decided on 20.02.2023] and extracted paragraph No.24 of the judgment which reads as follows:

"24. Questions as to illegitimacy of a child, are only incidental to the claim of dissolution of marriage on the ground of adultery or infidelity. Allowing DNA tests to be conducted on a routine basis, in order to prove adultery, would amount to redefinition of the maxim, "Pater est quern nuptiae demonstrant" which means, the father is he whom the nuptials point out. While dealing with allegations of adultery and infidelity, a request for a DNA test of the child, not only competes with the - 11 - NC: 2024:KHC-K:5746 WP No. 201175 of 2018 presumption Under Section 112, but also jostles with the imperative of bodily autonomy."

Therefore, applying the law declared by the Hon'ble Apex Court in the above referred judgment, it was held that, it was incumbent upon the plaintiff No.1 to first prove that she was the wife of the defendant No.1 by adducing oral and documentary evidence. Even after such evidence is led if the question whether the plaintiff No.1 was the wife of defendant No.1 or not, cannot be sufficiently established or if there is a doubt as to whether defendant No.1 had any access to the plaintiff No.1 or not and if the DNA test was the only route to establish the

truth, then the Court may consider the application filed by the plaintiffs.

14. Per contra, the learned counsel appearing for the respondents would vehemently contend that when there is a dispute with regard to the marriage between the defendant No.1 and Smt.Somamma, since the plaintiff claimed that Somamma is the mother of plaintiff and unless the said marriage is proved, the question of sending the DNA test does not arise. The counsel also relied upon the judgment in the case of ***Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633*** and brought to notice of this Court paragraph Nos.14, 15 and 15, wherein, held that "(1) Courts in India cannot order blood test as a matter of course. (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained. (3) There must be 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. (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 women. (5) No one can be compelled to give sample of blood for analysis". The counsel referring this judgment also contends that unless the marriage is proved, question of sending DNA test does not arise.

15. The counsel also brought to notice of this Court the conclusion arrived in the judgment in paragraph No.24, wherein, an observation is made that the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the Court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court should an issue arise before the matrimonial Court concerning the paternity of the child, obviously that

Court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court.

16. Having considered the principles laid down in the judgment referred supra relied upon by the learned counsel for the petitioner and learned counsel for the respondents and also the grounds which have been urged in the petition while rejecting the application, this Court has to analyze the material available on record.

17. It is not in dispute that the plaintiff has filed the suit for the relief of partition and separate possession claiming 1/2 share in the suit schedule property. In the said suit, plaintiff claims that defendant No.1 is his father. But father appears and filed the written statement contending that the plaintiff is not his son and also specifically contends that he is the son of one Basappa Jadar and he is one of the son of Basappa Jadar and Smt.Somamma. It has to be noted that when the plaintiff

claims that he is the son of defendant No.1 and he examined himself and also examined four other witnesses. On the other hand, defendant No.1 also examined himself as DW.1. No doubt the learned counsel for the petitioner would contend that PW.2 has supported the case of the plaintiff stating that the plaintiff is the son of defendant No.1.

18. The Trial Court while considering the application comes to the conclusion that burden on the plaintiff to prove that he born to deceased Smt.Somamma in the wedlock with the defendant No.1. No doubt, the person who asserts, he has to prove the said fact and also comes to the conclusion that mere DNA would not suffice to hold that the plaintiff is the son of defendant No.1 born through deceased Smt.Somamma. The other reasoning given by the Trial Court is that the plaintiff has taken specific defense that he is the son of Basappa and Smt.Somamma. An observation is made that it is burden on the plaintiff to prove that deceased Somamma was not a wife of Basappa

S/o Tirakappa Jadar and she is the wife of defendant No.1. The reasoning given by the Trial Court that it is the burden on the plaintiff to prove that Somamma was not a wife of Basappa is erroneous and that is not the case of the plaintiff. The defense of the defendant No.1 that the plaintiff is the son of Basappa and Somamma and burden is on the defendant No.1 to prove the said fact and not the plaintiff and the plaintiff only to prove that he is the son of defendant No.1. The reasoning assigned by the Trial Court that it is burden on the plaintiff is an erroneous approach. But only the fact that the plaintiff has to prove that he is the son of defendant No.1 and the defense of the defendant to be proved by him.

19. It is important to note that the plaintiff filed the said application only after examination of himself and also examination of witnesses PW.2 to 4. It is also important to note that when the specific defense is taken by the defendant that he is the biological son of defendant No.1, the defendant has to prove the same. In order to prove

the contention of the plaintiff, the plaintiff also filed an application for DNA test. If the DNA test is conducted, it will not prejudice the right of the defendant No.1, since he categorically denies that he is not his son. The plaintiff has to prove his case in all angles and not only examining the witnesses and also to seek for DNA test.

20. In the case on hand, it has to be noted that the mother Somamma is not alive and hence, the judgment relied upon by the learned counsel for the respondents will not comes to the aid of the respondent, since the Hon'ble Apex Court made an observation with regard to the matrimonial dispute was pending before the Court in that case. When the mother of the plaintiff was not alive, the question of deciding matrimonial issue also does not arise. Now the case is pending for the consideration of suit for partition and separate possession and in order to prove that the plaintiff is entitle for 1/2 share as claimed in the plaint and he has to prove that he is the son of the defendant No.1, the Hon'ble Apex Court also in the

judgments which have been referred by this Court in W.P Nos.13491/2018 and 201175/2018, wherein, discussion was made with regard to the ***Aparna*** case referred supra and also the judgment ***Narayan Dutt Tiwari Vs. Rohit Shekhar and another*** reported in ***(2012) 12 SCC 554*** and also taken note of the fact that High Court considering the application for DNA test filed by the applicant where the paternity was disputed by its father who was the respondent, a distinction was drawn between legitimacy and paternity of the child. In the case on hand, father who was the respondent No.1 in this case, denying specifically that he is not the son. Even it is also observed that 112 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') is intended to safeguard the interest of the child by securing his or her legitimacy and not the paternity. Right of the child to know the truth of his or her origin was highlighted by stating that the child is having a right to know his biological roots through reliable scientific tests. It is noticed that there is no bar for conducting such

DNA test and it will not in violation of the right of life or privacy of a person.

21. The Court has to take note of the fact that the plaintiff himself is claiming for the DNA test and even if it goes against him, it will not claiming him as bastardised and he is ready to take the result of DNA test also. It will not amount to an invasion of right to life of any person. Even in the ***Aparna*** case also the Hon'ble Apex Court considered the presumption under Sections 112 and 114 of the Evidence Act. This Court would also like to extract Paragraph No.57 of the judgment, which reads as follows:

> *"57. With the advancement of science, DNA profiling technology which is a tool of forensic science can, in case of disputed paternity of a child by mere comparison of DNA obtained from the body fluid or body tissues of the child with his parents, offer infallible evidence of biological parentage. But, it is not always necessary to conduct a DNA test to ascertain whether a particular child was born to a particular person, however, the burden of proof is on the husband who alleges illegitimacy. He has to establish the fact that he has not fathered the child born to his wife which is a negative plea by positive proof in accordance with Section 112 of the Evidence Act."*

The Hon'ble Apex Court in this judgment in Paragraph No.57 held that in case of disputed paternity of the child by mere comparison of DNA obtained from the body fluid or body tissues of the child with his parents, offer infallible evidence of biological parentage. But, it is not always necessary to conduct a DNA test to ascertain whether a particular child was born to a particular person, however, the burden of proof is on the husband who alleges illegitimacy. He has to establish the fact that he has not fathered the child born to his wife which is a negative plea by positive proof in accordance with 112 of the Evidence Act.

22. It is also important to note that when the defendant No.1 specifically denies that he is not his son and also specific defense he has taken, he is the son of Basappa Jadar and he has to prove the same and mere taking of defense is not enough. In the case on hand, the plaintiff in order to prove his contention, he sought for

DNA test and DNA test is not only substantial piece of evidence and the said DNA test will comes to the aid of the petitioner in order to prove the claim, the fact that he alleged that the defendant No.1 is his father and he has to prove the same. If the same has not been proved, one of the factors goes against him in the suit of relief of partition and separate possession. When such being the case, the Trial Court ought to have taken note of the said fact into consideration and instead of committed an error in coming to the conclusion that burden is on the plaintiff to prove that he is not the son of Basappa Jadar and the Somamma is not the wife of Basappa Jadar and also the plaintiff has to prove that he is the son of defendant No.1 through his mother Somamma. When the plaintiff himself is ready to take the result of the DNA test, whether he would be called as bastardised in future or not, under such circumstances, the Trial Court ought to have allowed the application and committed an error in rejecting the application and hence, the order impugned requires to be quashed.

23. In view of the discussions made above, I pass the following:

ORDER

a) The Writ Petition is ***allowed***.

b) The impugned order passed by the Trial Court at Annexure-F is hereby quashed. Consequently, the application filed by the petitioner herein under Order XXVI Rule 10(a) R/w Section 151 of the CPC and Section 112 of the Indian Evidence Act, 1872 is allowed.

c) The Trial Court is directed to get the DNA test report by following the procedure.

Sd/-
(H.P.SANDESH)
JUDGE

SSP: Para 1 to 11
PMP: Para 12 to end
CT-MCK
List No.: 2 Sl No.: 4