

Neutral Citation No. - 2024:AHC:100046

Reserved on 21.05.2024

Delivered on 30.05.2024

Court No. - 91

Case :- APPLICATION U/S 482 No. - 28298 of 2021

Applicant :-

Opposite Party :- State Of U.P And Another

Counsel for Applicant :- Arvind Kumar

Counsel for Opposite Party :- G.A.,Priyanka Singh,Rajesh Kumar
Mishra,Rajesh Rai

Hon'ble Prashant Kumar,J.

1. Heard Shri Arvind Kumar, appearing for the applicant, Shri Shashidhar Pandey, learned A.G.A. for the State as well as Sri Rajesh Rai, learned counsel for the opposite party no.2 and perused the records.

2. The instant application under Section 482 of Cr.P.C. has been filed by the applicant praying for quashing of the order dated 03.11.2021 passed by Additional Civil Judge/Family Court, District Mathura, in case no. 901 of 2019 under Section 125 Cr.P.C., Police Station Vrindavan, District Mathura.

3. Learned counsel for the applicant submits that there is matrimonial dispute between the parties. It is alleged that earlier the opposite party no.2 was married to one After the disappearance of for many years, the opposite party no.2 re-married the present applicant and out of their wedlock two children were born. Thereafter there was some matrimonial discord and hence the opposite party no.2 had filed application under Section 125 Cr.P.C. for maintenance. In the pending proceedings under Section 125 Cr.P.C., applicant had filed an application stating therein that the children are not of his and hence there was no question of paying any maintenance. On the request of opposite party no.2, to ascertain the parentage sought for a DNA test, the trial Court vide order dated 03.11.2021 ordered for DNA test.

4. By means of the instant application, the applicant has challenged the impugned order dated 03.11.2021, by which, the court had ordered for the DNA Test of the applicant.

5. Sri Arvind Kumar, counsel for the applicant submits that the opposite party no.2 is not his legally wedded wife so there is no question of paying any maintenance under Section 125 Cr.P.C. He further submits that the opposite party no.2 had earlier initiated the proceedings under Section 498A IPC against the applicant no.1 which was dismissed as they are not the legally married. Thereafter the opposite party no.2 had filed a case under Sections 12, 18, 19, 20, 21 and 22 of the Protection of Women from Domestic Violence Act, 2005, which was also rejected on the same ground. He further submits that in various documents the opposite party no.2 has been stating the name of her husband as . He further submits that no court can force the applicant to undergo a DNA test, without his consent. To buttress his argument, he placed reliance upon the judgment of the Apex Court in the case of **Goutam Kundu Vs. State of West Bengal** reported in **1993 SCC (3) 418**, in which it has been held that the Court cannot order for blood test. He further placed reliance upon the judgment of Apex Court in the case of **Ashok Kumar Vs. Raj Gupta and others** reported in **2021 0 Supreme (SC) 534**. Hence the order issued to undergo a DNA test is completely contrary to the prevailing law.

6. Sri Rajesh Rai, learned counsel appearing for the opposite party no.2 submits that the marriage of opposite party no.2 and the applicant was solemnized in the month of May, 2007. Out of the wedlock two children were born, in the birth certificates of the children, the name of the applicant has been recorded as father of the children. In fact the entire expenses of the delivery of the children was borne by the applicant. Even in the school the name of the father of the children is recorded as

(present applicant). He further submits that thereafter the name of the father of the children was changed in connivance of the applicant and the headmistress of the school, for which, the opposite party no.2 has

lodged an FIR against the applicant and others. Against the said FIR,. the applicant had approached this Court for staying his arrest by filing criminal writ petition, which was dismissed. He further submits that the applicant is the biological father of the children of the opposite party no.2, and just to avoid paying any maintenance the applicant has taken a stand that he is not the father of the children of opposite party no.2. On his denial, to find out the truth the trial Court had ordered for a DNA test, which the applicant is opposing. The applicant cannot oppose to undergo the DNA test on the ground that no DNA test can be undertaken without his consent. To buttress his argument, he placed reliance upon the judgment of the Delhi High Court rendered in the case of **Rohit Shekhar Vs. Narayan Dutt Tiwari and another**, in **FAO (OS) No. 547 of 2011**.

7. Heard counsel for the parties and perused the record.

8. After considering the submissions and examining the relevant legal principles and precedents, this court in determining the appropriateness of ordering a DNA test in the present case, it is crucial to consider the provisions of the Act as well as the principles and precedents established by the Hon'ble Supreme Court.

9. **Section 53 of the Cr.P.C. lays down as follows:**

53. Examination of accused by medical practitioner at the request of police officer-(1)When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2). Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation- *In this section and in sections 53A and 54-*

*(a) 'examination' shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques **including DNA profiling** and such other tests which the registered medical practitioner thinks necessary in a particular case;*

(b) 'registered medical practitioner' means a medical practitioner who possesses any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act , 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

This explanation was added by way of amendment in 2005, which makes it clear that the profile examination includes blood, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clipping by the use of modern and scientific techniques including DNA profiling and such other test, which a doctor thinks necessary in a particular case.

10. The Explanation to Section 53 Cr.P.C. (amended in 2005) which has been reproduced above. It has been contended that the phrase “modern and scientific techniques including DNA profiling and such other tests” should be liberally construed to include the impugned techniques. It was argued that even though the narcoanalysis techniques, polygraph examination and the BEAP test have not been expressly enumerated, they could be read in by examining the legislative intent. Emphasis was placed on the phrase “and such other tests” to argue that Parliament had chosen an approach where the list of “modern and scientific techniques” contemplated was illustrative and not exhaustive. It was also argued that in any case, statutory provisions can be liberally construed in light of scientific advancements. With the development of newer technologies, their use can be governed by older statutes which had been framed to regulate the older technologies used for similar purposes.

11. A DNA test can serve as a decisive tool in resolving paternity disputes, which directly impacts the question of maintenance for the children involved. The primary aim of such testing is to arrive at the truth regarding paternity, which is essential for the just adjudication of maintenance claims, this Court finds that the paramount consideration in such cases is maintenance and the welfare of the children.

12. In **Sharda v. Dharampal, (2003) 4 SCC 493, para 80**, the hon'ble apex court held that the court must balance the interests of the parties and ensure that the children's welfare is not compromised. The DNA test, although invasive, is necessary to conclusively determine paternity, which directly impacts the children's right to maintenance.

13. I must also refer back to the substance of the decision in **Sharda V. Dharmpal (supra)**, which upheld the authority of a civil court to order a medical examination in exercise of the inherent powers vested in it by Section 151 of the Code of Civil Procedure, 1908. The same reasoning cannot be readily applied in the criminal context. Despite the absence of a statutory basis, it is tenable to hold that criminal courts should be allowed to direct the impugned tests with the subject's consent, keeping in mind that there is no statutory prohibition against them either.

14. Furthermore, the presumption of legitimacy under Section 112 of the Indian Evidence Act places the burden of disproving paternity on the person alleging illegitimacy. However, the use of DNA testing can provide a scientific basis for resolving such disputes definitively. In **Banarsi Dass v. Teeku Datta (2005) 4 SCC 449**, the Hon'ble Supreme Court acknowledged that while the presumption of legitimacy is strong, it can be rebutted by clear and convincing evidence. A DNA test, being a reliable and conclusive method, can either confirm or negate the

presumption, thereby ensuring that the maintenance obligations are accurately determined.

15. For the pursuit of justice, the court must employ all available means to uncover the truth and safeguard the rights of all individuals. The fundamental duty of the judiciary is to ensure that justice prevails by utilizing the most accurate and reliable methods, thus upholding the principles of fairness and equity for everyone involved. In the case of **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik & Anr (2014) 2 SCC 576**, the Hon'ble Supreme Court in para 17, highlighted the reliability and scientific accuracy of DNA tests. The Court emphasized that while Section 112 of the Evidence Act creates a presumption of conclusive proof under certain conditions, this presumption is rebuttable. The Supreme Court asserted that in the interest of justice, the truth must be ascertained using the best available science, stating :- "In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former."

16. In **Jamshed Vs. State of U.P. [1976 Cri L J 1680 (All)]**, wherein it was held that a blood sample can be compulsorily extracted during a "medical examination" conducted under Section 53 Cr.P.C. At that time, the collection of blood samples was not expressly contemplated in the said provision. Nevertheless, the Court had ruled that the phrase "examination of a person" should be read liberally so as to include an examination of what is externally visible on a body as well as the examination of an organ inside the body.

17. In light of the Hon'ble Supreme Court's decision in **Aparna Ajinkya Firodia v. Ajinkya Arun Firodia 2023 LiveLaw (SC) 122**, this court recognizes the significance and sensitivity surrounding the order for a DNA test. It is imperative to acknowledge that while a DNA test is a powerful tool in ascertaining biological relationships, its deployment must be carefully weighed against potential misuse, the resultant social stigma, and the psychological impact on the children. The court must be cautious to avoid directing such tests in a routine or casual manner, and instead should assess the necessity based on the specific facts and circumstances of each case.

18. The Supreme Court in the matter of **Selvi Vs. State of Karnataka, 2010 (7) SCC 263** has categorically held that the civil court can direct for conducting medical examination to ascertain mental state of a party of a divorce proceeding.

19. Furthermore, the applicant's refusal to undergo the DNA test, a procedure deemed essential for determining paternity and safeguarding the child's welfare, could warrant an adverse inference under Section 114, Illustration (h) of the Indian Evidence Act. This provision allows the court to infer that evidence which could be and is not produced would, if produced, be unfavorable to the person withholding it. In **Rohit Shekhar v. Narayan Dutt Tiwari 2011 SCC OnLine Delhi 4076**, the Delhi High Court affirmed this principle, stating that refusal to undergo a DNA test in a paternity dispute can lead to an adverse inference against the refusing party. Such an inference, while not conclusive, strengthens the court's ability to arrive at a just decision based on the available evidence and the best interests of the children.

20. The psychological and social implications of unresolved paternity disputes cannot be ignored. A definitive determination of paternity through a DNA test can provide closure and stability for all parties involved, particularly the children. Ensuring that the children receive rightful maintenance that not only fulfils their financial needs but also affirms their social and legal status.

21. In the present case, it is essential to consider the broader implications of directing a DNA test. The court is mindful of the potential trauma and stigma that might affect the children, should the paternity dispute be subjected to public scrutiny. The principle that the best interests of the children should be of the paramount consideration in all matters concerning them, as enshrined in Article 3 of the Convention on the Rights of the Children. The right to maintenance is not merely a legal provision but is deeply rooted in fundamental human rights. The Universal Declaration of Human Rights recognizes the right to an adequate standard of living, which includes food, clothing, housing, and medical care. In the context of children, maintenance is indispensable for their survival, growth, and development. Denying maintenance due to unresolved paternity issues would be a violation of their basic human rights.

22. In this case though the applicant is refusing the maintenance and the paternity of the children, however, when the court ordered for the DNA test, the applicant has assailed that order in this application. The applicant cannot be allowed to blow hot and cold at the same time. He cannot deny the paternity of the children and at the same time he refuses to undergo the DNA test. If he is doubting the paternity the only way to prove his

case is by the DNA testing. Moreover, the applicant cannot equate the DNA test with the other tests like Narco test which needs a prior consent. Explanation 53 of Cr.P.C. now makes it abundantly clear “examination” would include DNA parentage.

23. Accordingly, this Court hereby order the applicant to either fulfil his obligation of providing maintenance or undergo a DNA test, thereby dispelling any adverse inference drawn pursuant to Section 114, Illustration (h) of the Indian Evidence Act, 1872.

24. With the above observations/directions, the application under Section 482 Cr.P.C. is *disposed of*.

Order Date :- May 30th, 2024

Prajapati

[Prashant Kumar, J.]