



THIS WRIT PETITION IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA PRAYING TO SET ASIDE THE ORDER DATED 14.11.2019 PASSED BY THE COURT OF LEARNED II ADDL. SENIOR CIVIL JUDGE AND JMFC, SHIVAMOGGA ON I.A.NO.10 FILED BY THE R-1 U/O XXVI RULE 10A R/W SEC. 151 OF CPC, 1908 IN O.S.NO.209/2016 PRODUCED AS ANNEX-G TO THE W.P. AND CONSEQUENTLY REJECT THE I.A.NO.10 FILED BY THE R-1 U/O XXVI RULE 10A R/W SEC. 151 OF CPC, 1908 IN O.S.NO.209/2016 AND ETC.,

THIS WRIT PETITION, COMING ON FOR FINAL HEARING, THIS DAY, THE COURT MADE THE FOLLOWING:

**ORDER**

Defendant No.6 in O.S.No.209/2016 on the file of the learned II Additional Senior Civil Judge at Shimoga, (hereinafter referred to as 'the trial Court' for brevity), is impugning the order dated 14.11.2019 passed on I.A.No.10 filed by the plaintiff under Order 26 Rule 10A r/w Section 151 of CPC directing the plaintiff and the defendants to appear before the Forensic Laboratory, Bengaluru, to draw the samples to conduct DNA profiling test and to submit report before the Court.

2. Heard Sri S.V.Prakash, learned counsel for the petitioner/defendant No.6 and Sri Dilraj Jude Rohit Sequeira, learned counsel for respondent No.1. Perused the materials on record.



3. Learned counsel for the petitioner submits that the petitioner is defendant No.6 before the trial Court. The plaintiff filed the suit O.S.No.209/2016 seeking partition and separate possession. Relationship of the plaintiff with the defendants is denied by filing the written statement. The plaintiff instead of producing cogent materials in support of his contention for the purpose of proving his relationship with the defendants, filed I.A.No.10 seeking permission for collection of blood samples of the plaintiff and the defendants for conducting DNA profiling. The order in question passed by the trial Court allowing I.A.No.10 is without any basis.

4. Learned counsel submitted that even according to the plaintiff, his both parents have already dead. He is not having Birth Certificate, nor he is having any other documents to prove the paternity as contended by him. Admittedly, the plaintiff was brought up by S. Mohammed Ummar. He is the biological father of the plaintiff. But the plaintiff has taken up a stand that he belongs to the family of the defendants only for the purpose of claiming share in the suit property. Learned counsel has placed reliance on the decision of the Hon'ble Apex



Court in ***Banarsi Dass Vs. Teeku Dutta (Mrs) & Anr.***<sup>1</sup> to contend that the defendants cannot be compelled for DNA test.

5. Learned counsel also submitted that there is no clarity in the order passed by the trial Court as to who has to give the blood samples, who has to collect it, where it has to be collected, etc. Under such circumstances, the impugned order is liable to be set aside. Accordingly, he prays for allowing the petition, in the interest of justice.

6. Per contra, learned counsel for respondent No.1/plaintiff opposing the petition submitted that the plaintiff filed the suit for partition and separate possession of his share in the suit property specifically contending that he is one of the sharer belonging to the family of the defendants. He claimed to be the son of late L.P.Ghouse Baig. Defendant Nos.1 to 8 are also the sons of late L.P.Ghouse Baig and they are the brothers of the plaintiff. But the defendants deliberately denied the relationship of the plaintiff with them, in order to deny his share in the suit property. A specific contention was taken in the written statement that the plaintiff is the son of S.

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<sup>1</sup> ILR 2005 KAR 3270



Mohammed Ummar. On the other hand, it is the contention of the plaintiff that the said S. Mohammed Ummar fostered the plaintiff as he is also related to the plaintiff and the defendants. The plaintiff has already lead evidence as PW-1. The plaintiff has also examined the said S. Mohammed Ummar as PW-2, who specifically stated that the plaintiff is the son of late L.P.Ghouse Baig and his wife Umerabi. He also stated that Umerabi is his younger sister and therefore, he fostered the plaintiff. Learned counsel submitted that since the paternity of the plaintiff is denied by the defendants, he has filed the application for DNA profiling.

7. Learned counsel has placed reliance on the decision of the Hon'ble Apex Court in ***Narayan Dutt Tiwari Vs. Rohit Shekhar & Anr.***<sup>2</sup> to contend that to decide the paternity of the plaintiff, direction for collecting blood samples and conducting DNA test is permissible under law. Accordingly, he prays for dismissal of the petition.

8. The plaintiff is claiming share in the suit property claiming to be the brother of defendant Nos.1 to 8. It is stated

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<sup>2</sup> (2012) 12 SCC 554



that his father L.P.Ghouse Baig and mother Umerabi are no more. But his relationship with them and also with defendant Nos.1 to 8 is denied by the contesting defendant No.6. He has taken a specific contention that the plaintiff is the son of S. Mohammed Ummar and not of late L.P.Ghouse Baig. Admittedly, the plaintiff examined himself as PW-1 and subjected for cross-examination.

9. Learned counsel for respondent No.1 has produced deposition of S. Mohammed Ummar, referred to by the defendants in the written statement, as PW-2. The said witness has categorically stated that the plaintiff is the son of late L.P.Ghouse Baig and Umerabi as contended by the plaintiff and the said Umerabi is his younger sister. He also stated that since from the very young age of the plaintiff, he fostered him in his house.

10. Now it is stated that the matter is set down for defendants' evidence. At this stage, the plaintiff filed I.A.No.10 under Order 26 Rule 10A of CPC seeking a direction for collection of blood samples, to have DNA profiling and to have a report which will throw much light about his relationship with



the defendants. The said application was allowed by the trial Court. The order is challenged by defendant No.6.

11. It is pertinent to note that none of the other defendants have challenged the said order. The contention of learned counsel for the petitioner is that defendant No.6 cannot be compelled to give blood samples for the purpose of DNA profiling and therefore, he placed reliance on the decision of the Hon'ble Apex Court in *Banarsi* (supra).

12. In the case that was considered by the Hon'ble Apex Court in *Banarsi* (supra), a direction for DNA test was given for issuance of Succession Certificate under Indian Succession Act. The said order was set aside by the High Court and ultimately, it was challenged before the Hon'ble Apex Court. The Hon'ble Apex Court placed reliance on its earlier decisions including ***Goutam Kundu Vs. State of West Bengal***<sup>3</sup>, where it is 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. Under such

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<sup>3</sup> (1993) 3 SCC 418



circumstances, it is held that direction issued for DNA test by the trial Court is unsustainable and the High Court has rightly set aside the order of the trial Court.

13. In the present case, status of the plaintiff as a member of the family is denied by the defendants. The plaintiff is not only claiming his status as one of the member of the family, but he is also claiming his right over the suit property. He has lead evidence by stepping into the witness box and subjected himself for cross-examination. He also examined S. Mohammed Ummar who fostered him and according to defendant No.6 who is the biological father of the plaintiff. The said witness categorically stated that he is not the biological father of the plaintiff, but it was late L.P.Ghouse Baig and late Umerabi were the parents of the plaintiff.

14. It is stated that the plaintiff is not in a position to produce the Birth Certificate pertaining to him. Simply because the plaintiff could not produce the Birth Certificate or any such documents to prove his relationship with late L.P.Ghouse Baig and Umerabi, his right to claim the status as one of the family member of the defendants, to claim his right as the son of late



L.P.Ghouse Baig and Umerabi and to claim share in the suit property cannot be denied. The plaintiff himself has taken the risk of seeking DNA profiling to prove his contention that he is the son of late L.P.Ghouse Baig through late Umerabi. Under such circumstances, it cannot be said that the right of either the plaintiff or the defendants is violated in any manner.

15. The Hon'ble Apex Court in a subsequent decision in *Narayan Dutt Tiwari* (supra) considered a similar situation where the petitioner before the Apex Court denied the paternity of the respondent. Under such circumstances, the Hon'ble Apex Court called upon to furnish DNA lab report in a sealed cover to maintain confidentiality. The Hon'ble Apex Court considered the order passed by the High Court and upheld the same. 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 child. It also observed that Section 112 of 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 to life or privacy of a person. It will not amount to an invasion of right to life. The High Court has also noticed that the applicant was aged 29 years and he was capable of taking his decisions. Under such circumstances, question of his welfare being adversely affected did not arise. The Court also noticed that even though it is the contention of the respondent that there are other materials on record to arrive at a decision regarding paternity or otherwise, it is felt that there is strong *prima-facie* case suggesting eminent need to issue direction for DNA test. The Division Bench of High Court also upheld the finding of the learned Civil Judge by observing that the accuracy of DNA test was not even imagined at the time when the law was formulated. When a child seeks declaration regarding his true paternity, Section 112 of the evidence Act will not come in the way of passing necessary orders. It also observed that, if the prayer for DNA test is not accepted, the applicant will suffer irreparable injury.

16. If the facts of the said case are applied to the facts in the present case, the plaintiff who filed the application



seeking DNA profiling is a major, aged 43 years. He voluntarily came up with the application in his anxiety to know about his biological root and to claim share over the property. There is no fear of branding the petitioner as illegitimate. Admittedly, both the persons whom the plaintiff is claiming to be his parents are not alive. The person who according to the defendants is the father of the plaintiff is already examined before the Court as PW-2 who supported the claim of the plaintiff. Under such circumstances, I do not find any reason to reject the claim of the applicant, as DNA profiling is the procedure scientifically approved to find out the root through DNA. It cannot be said that the defendants will be prejudiced in any manner, if such a test is conducted. If an adverse report is received after such DNA profiling, the Court will take a call on it as the same will have an effect on the fate of the suit filed by the plaintiff. In that way, such a test will reduce the controversy on questions of fact and it will help the trial court to arrive at a just decision. Under such circumstances, I am of the opinion that the application is liable to be allowed.

17. I have gone through the impugned order passed by the trial Court which has taken into consideration the facts and



circumstances of the case and passed the impugned order. In view of the above, I do not find any substance in the contention taken by the petitioner/defendant No.6 who is the only aggrieved party who challenged the impugned order. If the request for DNA profiling is not accepted, the right of the plaintiff to seek the status of the family members of the defendants, to be the son of late L.P.Ghouse Baig and Umerabi and to claim share in the suit property will be denied. On the other hand, no prejudice would be caused to the petitioner or any other defendants, if DNA profiling is conducted. Therefore, I am of the opinion that there is no merit in the contention taken by the petitioner.

18. Regarding the contention that the order passed by the trial Court lacks details as to who has to give blood samples, when it is to be given, who has to collect the blood samples and how the report is to be submitted to the Court, I am of the opinion that the trial Court may be directed to specify all those details for the purpose of collecting the blood samples and for filing the report in accordance with law. Accordingly, I proceed to pass the following;



**ORDER**

- i. Writ petition is ***dismissed***.
- ii. The impugned order dated 14.11.2019 passed in O.S.No.209/2016 by the learned II Additional Senior Civil Judge at Shimoga, on I.A.No.10 filed by the plaintiff under Order 26 Rule 10A r/w Section 151 of CPC, is confirmed.
- iii. The trial Court is directed to make it clear about the persons who are required to give blood samples, the procedure to be followed in drawing the samples sending to the DNA lab, which is authorised to do DNA profiling and call for the report in a time bound manner.

**Sd/-  
JUDGE**

PN/BH  
List No.: 1 SI No.: 2