SHRI BANARSI DASS

v.

MRS. TEEKU DUTTA AND ANR.

APRIL 27, 2005

[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Indian Evidence Act, 1872—Section 112 :

Direction for DNA test given in a proceeding for issuance of Succession Certificate—Propriety of—Held: The purpose of issuing Succession Certificate is to facilitate collection of dues and to protect debtors dealing with the alleged representatives of the deceased persons and not to establish the title of the grantee—The scope of enquiry is very limited and the parties are required to prove their respective cases by such evidence produced during trial rather than creating evidence by DNA test—Direction for DNA test may be given only in deserving cases and not as a matter of routine—Indian Succession Act, 1925—Section 372.

Conclusive presumption under—The child born of a married woman is deemed to be legitimate and burden of proving illegitimacy is on the person alleging it—Law in general presuming against vice and immorality and that every person is legitimate.

DNA test—Conclusiveness of presumption under Section 112—Held: Cannot be rebutted by DNA test—Proof of non-access to each other is the only way to rebut that presumption.

Maxims—pater est quem nuptiae demonstrant—Meaning of.

Respondent no.1 filed a petition for grant of Succession Certificate in respect of properties of the deceased claiming herself to be his daughter. Appellant filed objection alleging that respondent no.1 was not the daughter of the deceased and moved an application for DNA test to establish the paternity of respondent no.1. Trial court allowed the application. Respondent no.1 preferred revision. High Court held that such a direction could not be given as the scope of the enquiry was very limited

A and the trial court being a testamentary court ought to have left the parties to prove their respective cases by such evidence produced during trial, rather than creating evidence by directing DNA test. Hence the present appeal.

Dismissing the appeal, the Court

B

HELD : 1. In matters of this kind Court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim *pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married women is deemed to be legitimate, it throws whole burden of C proving so on the person who is interested in making out the illegitimacy. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage of filiation (parentage) may be presumed, the law in general presuming against vice and immorality. It is rebuttable presumption of law that a child born during the lawful wedlock is D legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities. [928-A-C]

Dukhtar Jahan (Smt.) v. *Mohammed Farooq,* [1987] 1 SCC 624 and *Amarjit Kaur* v. *Harbhajan Singh and Anr.,* [2003] 10 SCC 228, referred to

E

2. 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 F of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception ut 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 G 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.

[928-H; 929-A-C]

H *Kamti Devi (Smt.) and Anr.* v. *Poshi Ram,* [2001] 5 SCC 311, relied on

3. A Succession Certificate is intended to protect the debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a Certificate under the Act, or is compelled by the decree of a Court to pay it to the person, he is lawfully discharged. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so choose, can also adduce evidence to oppose grant of succession certificate. The trial court erroneously held that the documents produced by the respondents were not sufficient or relevant for the purpose of adjudication and DNA test was conclusive. This is not a correct view. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given. [929-E-F-G]

Goutam Kundu **v.** *State of West Bengal and Anr.,* **[1993] 3 SCC 418, relied on**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2918 of 2005.

From the Judgment and Order dated 16.1.2004 of the Delhi High Court in C.R. No. 656 of 2000.

R.P. Sharma for the Appellant.

Mrs. Rani Chhabra, Y.P. Ahuja and Ms. Sudha Pal for the Respondents.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

The core question involved in this appeal is whether a direction for Deoxyribonucleic Acid Test (commonly known as DNA test) can be given in a proceeding for issuance of succession certificate under the Indian Succession Act, 1925 (in short the 'Act').

Challenge in this Appeal is to the order of a learned Single Judge of the Delhi High Court setting aside the order of learned Administrative Civil Judge, Delhi dated 20.12.1999 whereby he had allowed an application under Section 151 of the Code of Civil Procedure, 1908 (in short the 'CPC') filed by the appellant seeking DNA test of the respondent no.1Smt. Teeku Dutta and Sh. Ram Saran Dass Sharma, (who is not a party in this appeal). Respondent No.1 has filed case No.86 of 1944 for grant of succession certificate under Section 372 of the Act.

A Background facts in a nutshell are as follows :

The respondent No. 1 filed a petition for grant of Succession Certificate in respect of the properties of one Iqbal Nath Sharma (hereinafter referred to as the 'deceased') claiming that she was his daughter and the only surviving Class I legal heir under the Hindu Succession Act, 1956 (in short the B 'Succession Act'). It was indicated in the petition that the deceased had died intestate leaving behind five brothers- Sh. Banarsi Dass, Sh. Amar Nath Sharma, Sh. Ram Saran Dass Sharma, Sh. P.L. Sharma and Sh. K.C. Sharma. Originally Sh. Banarsi Dass was not impleaded and rest four were impleaded. Out of them Sh. P.L. Sharma and Sh. K.C. Sharma had expired and only C Amar Nath Sharma and Ram Saran Dass Sharma were alive and were impleaded as respondents to the petition. During the pendency of the petition Banarsi Dass, was also impleaded. He filed objection to the grant of Succession Certificate disputing Mrs. Teeku Dutta's claim. It was stated that she was not the daughter of the deceased. Evidence has been led and documentary evidence was also filed in support of the respective stands. At this stage the application D under Section 151 CPC was moved by the objector - Banarsi Dass alleging that the respondent Mrs. Teeku Dutta was not the daughter of the deceased, but in fact is the daughter of Ram Saran Dass Sharma and since the deceased and his wife both were dead it would not be possible to subject them to a DNA test and compare with the DNA test of Mrs. Teeku Dutta. Since Ram E Saran Dass Sharma is alive, DNA test of Sh. Ram Saran Dass Sharma and Mrs. Teeku Dutta would conclusively establish the paternity of Mrs. Teeku Dutta. The application was opposed on the ground that it was malafide and was made with a view to delay the proceedings. It was further stated that the DNA test would not serve any purpose as sufficient documentary evidence has already been brought on record. The trial court allowed the application F primarily on the ground that Mrs. Teeku Dutta had initially concealed the fact that the deceased had five brothers and had deliberately left out Banarsi Dass Sharma from the array of respondents, and this casts doubt on the *bonafides* of the applicant's claim of being the daughter of the deceased. The trial court considered the petition for grant of succession certificate and the G "no objections" filed by other respondents namely Ram Saran Dass and Amar Nath Sharma to be somewhat collusive. Another reason which appears to have weighted heavily with learned trial judge was that the documentary evidence brought on record was not cogent enough to show that she was the daughter of the deceased. Further the trial court held that since the applicant for the DNA test was willing to bear the cost of the said DNA test, there H would not be any difficulty in directing DNA test.

The High Court found that this is not a fit case where such a direction could be given. It was noticed that the scope of the enquiry was very limited and the trial court being a testamentary court should have left the parties to prove their respective cases by such evidence produced during trial, rather than creating evidence by directing DNA test. Accordingly, the Revision Petition filed under Section 115 of the CPC by Mrs. Teeku Dutta was allowed.

In support of the appeal learned counsel for the appellant submitted that the trial court had kept in view the correct perspectives of the case and instead of leaving the matter to be decided by oral and documentary evidence, the High Court should have held that the conclusive DNA test would have provided necessary material for an effective adjudication.

Learned counsel appearing for the respondents submitted that the order of the High Court is based on the correct legal position as regards the desirability of DNA test in such matters.

In *Goutam Kundu* v. *State of West Bangal and Anr.*, [1993] 3 SCC 418 this Court held, *inter alia*, as follows :

> "(1) That 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 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.
>
> (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.

It was noted that Section 112 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') requires the party disputing the parentage to prove non-access in order to dispel the presumption of the fact under Section 112 of the Evidence Act. There is a presumption and a very strong one, though rebuttable one. Conclusive proof means proof as laid down under Section 4 of the Evidence Act.

A In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim pater est quem nuptiae demonstrant (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married women is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both B that a marriage ceremony is valid, and that every person is legitimate. Marriage of filiation (parentage) may be presumed, the law in general presuming against vice and immorality.

It is rebuttable presumption of law that a child born during the lawful C wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

In *Dukhtar Jahan (Smt.)* v. *Mohammed Farooq,* [1987] 1 SCC 624 this Court held: (SCC p. 629, para 12) :

D

> "... Section 112 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of the man, unless it can be shown that the parties to E the marriage had no access to each other at any time when he could have been begotten. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been F begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman."

G The view has been reiterated by this Court in many later cases e.g. *Amarjit Kaur* v. *Harbhajan Singh and Anr.,* [2003] 10 SCC 228.

We may remember that Section 112 of the Evidence Act was enacted at a time when the modem scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in H 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 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. (See *Kamti Devi (Smt.) and Anr.* v. *Poshi Ram,* [2001] 5 SCC 311).

The main object of a Succession Certificate is to facilitate collection of debts on succession and afford protection to parties paying debts to representatives of deceased persons. All that the Succession Certificate purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of the deceased persons. Such a certificate does not give any general power of administration on the estate of the deceased. The grant of a certificate does not establish title of the grantee as the heir of the deceased. A Succession Certificate is intended as noted above to protect the debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a Certificate under the Act, or is compelled by the decree of a Court to pay it to the person, he is lawfully discharged. The grant of a certificate does not establish a title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts and allows the debtors to make payments to him without incurring any risk. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so chooses, can also adduce evidence to oppose grant of succession certificate. The trial court erroneously held that the documents produced by the respondents were not sufficient or relevant for the purpose of adjudication and DNA test was conclusive. This is not a correct view. It is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in *Goutam Kundu's* case (supra). Present case does not fall to that category. High Court's judgment does not suffer from any infirmity. We, therefore, uphold it. It is made clear that we have not expressed any opinion on the merits of the case

A relating to succession application.

Above being the position, the direction for DNA test as was given by the trial court is clearly unsustainable and the High Court has rightly set it aside.

B Appeal is dismissed with no orders as to costs.

D.G. Appeal dismissed.