IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 1435 of 2021
In the matter of:

Md. Abu Sufian.
...Petitioner.
-Vs-
Nasira Sultana Shammi.
....Opposite party.
Mr. Md. Khurshid Alam Khan, Adv. with
Mr. Titus Hillol Rema, Adv.
…For the petitioner.
Mr. Mir Mohammad Abul Kashem, Adv.
…For the opposite party.

Present
Mr. Justice Mamnoon Rahman

Heard on: ***07.01.2025 & 13.01.2025***
And
Judgment on: ***The 23rd January, 2025***

In an application under section 115(1) of the Code of Civil Procedure, 1908 rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 21.03.2021 passed by the learned Additional District Judge, Court No. 8, Dhaka and Family Appellate Court in Family Appeal No. 108 of 2019 allowing the appeal and thereby setting aside the judgment and order dated 04.07.2019 passed by the learned Additional Assistant Judge, Court No. 5, Dhaka and the Family Court in Family Suit No. 528 of 2006, now pending in the court of learned Additional Assistant Judge, Court No. 5 and the Family court, Dhaka, should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The short facts relevant for the disposal of the instant rule, is that, the present petitioner as plaintiff instituted Family Suit No. 251 of 2016 in the

court of Assistant Judge, 2nd Court, Dhaka impleading the opposite party as petitioner for the following reliefs;

অতএব বাদীপক্ষে বিনীত নিবেদন এই যে,

ক) বাদীকে ১৯৮৫ সনের পারিবারিক আদালত অধ্যাদেশের ৫(ঙ) ধারার বিধান মোতাবেক নাবালিকা কন্যা নুসরাহ রুকাইয়ার হেফাজতকারী ও তত্ত্বাবধায়ক নিযুক্তির ডিক্রী দিতে।

খ) মোকদ্দমার যাবতীয় খরচ বাদীর অনুকুলে এবং বিবাদীর প্রতিকুলে ডিক্রী দিতে।

গ) আাই ও ইকুইটি মোতাবেক বাদী আর যে সকল প্রতিকার পেতে হকদার তা বাদীর অনুকুলে এবং বিবাদীর প্রতিকুলে ডিক্রী দিতে মর্জি হয়।

The case as stated in the said plaint, are that, the plaintiff and defendant got married on 30.01.1993 and out of their wedlock a daughter was born on 28.12.1998 but she died on 29.12.1998. Subsequently, they adopted a girl as their daughter. Thereafter, the said couple facing difficulties in conceiving for which they got treatment in many places including Singapore and Calcutta. In the meantime, they admitted their adopted daughter in the school. The plaintiff in the said plaint further stated that since he needs to travel frequently taking advantage of the same the defendant developed an illegal relationship with Md. Masum. Subsequently, in the year 2010 the defendant revealed that she is pregnant though the plaintiff doubted about the parenthood of the child in question but he accepted the same because of social situation and ultimately on 6th September, 2010 the defendant gave birth of a daughter, namely Nusrah Ruquiya the subject matter of the suit in question. Subsequently, out of dispute and other things the plaintiff divorced the defendant on 30.12.2011 and the defendant got married with the said Md. Masum subsequently. In the

plaint the further case of the plaintiff, is that, since the defendant is staying with her second husband, Md. Masum which is threatening to his life and safety, and for betterment of the daughter, Nusrah Ruquiya taking her in his custody is a dire need at the moment and hence, the suit.

The defendant contested the suit by filing written statement denying all the material allegations made in the plaint. In the written statement the defendant raised counter allegation against the plaintiff regarding an illicit relationship with the sister of the defendant. In the written statement the defendant also claimed that the Nusrah Ruquiya is the daughter of the plaintiff. However, the suit is now pending for disposal by the trial court. During pendency of the suit the plaintiff-petitioner pressed an application for DNA Test of the said daughter to ascertain the parenthood of the said daughter. The said application was resisted by the defendant opposite party by way of filing written objection. The trial court proceeded with the application and after hearing the parties and considering the facts and circumstances, vide judgment and order dated 04.7.2019 allowed the same. The defendant being aggrieved by and dissatisfied with the aforesaid order passed by the trial court moved before the District Judge, Dhaka by way of Appeal being Family Appeal No. 108 of 2019 and eventually the same was heard and disposed of by the Additional District Judge, Court No. 8, Dhaka who vide judgment and order dated 21.03.2021 allowed the appeal and thereby set aside the judgment and order passed by the trial court. The petitioner being aggrieved by and dissatisfied with the said order moved before this court and obtained the present rule.

The defendant opposite party contested the rule by filing written objection. In course of hearing both the petitioner and opposite party filed several affidavits annexing different materials regarding the dispute in question.

Mr. Md. Khurshid Alam Khan, the learned Advocate on behalf of the petitioner submits that the lower appellate court below without applying its judicial mind and without considering the facts and circumstances most illegally and in an arbitrary manner passed the impugned judgment and order which requires interference by this court. He submits that the trial on thread back discussion of the facts and circumstances, materials on record as well as other aspects passed a well reason and defined order which requires to be sustained for ends of justice. The learned counsel frankly submits that the petitioner from the very beginning of the pregnancy relates to the daughter in question raises doubt about the parenthood because of the illicit relationship of the defendant with one Md. Masum who was her classmate of Jagannat University. He further submits that in the plaint the petitioner categorically stated the lifestyle of the defendant as much as severe dispute out of family issues claim and counter claim as well as the allegation of illicit relationship. He submits that in the plaint the petitioner plaintiff raises serious doubt about the pregnancy as because of his professional commitment he needs to travel a lot as much as they were receiving treatment for conceiving as they are facing problem after the death of the first daughter who died just one day after born. The learned counsel submits that admittedly the petitioner plaintiff is claiming custody and guardianship but this is a case of unique nature wherein for all purposes and to avoid

future complication the parenthood should be determined by DNA Test of the child in question. He further submits that due to the advancement of the science and technology this court as well as our apex court in numerous occasions came to a conclusion that serious disputed question of fact like parenthood, signature and verification these are to be done through expert procedure despite provisions laid down in the Evidence Act. The learned Counsel also referred the Act 10 of 2014 wherein it has been categorically stated that it is a very much easy things to determine any parenthood by simple DNA Test of the subject in question. In support of his contention he relied upon a decision reported in 67 DLR page 1. Regarding the question as raised by the opposite party so far it relates to section 112 of the Evidence Act the learned counsel referred the decision reported in PLD 1957 page 76 and submits that the question regarding access is to be construed depend upon the facts and circumstances of each cases and the present case in hand since there is a vigorous claim raised by the father for ends of justice the same should be determined taking the advantage of the modern technology as emphasized in the decisions reported in 67 DLR page 1. The learned counsel submits that on quarry it has been revealed that in the data base of the Birth Registration the name of the present petitioner was not shown as the father, rather the name of Mr. Masum is appearing as much as on further quarry the petitioner came to know from the school record that the name of Mr. Masum was used as father of the child.

Mr. Mir Mohammad Abul Kashem, the learned Advocate for the opposite party-defendant vehemently opposes the rule. He submits that the lower appellate court below on proper appreciation of the facts and

circumstances, materials on record, legal position as well as social context passed the impugned judgment and order which requires no interference by this court. He submits that the lower appellate court *vividly* considered the contention as raised by both the parties side by side and came to a conclusion on proper reasoning and grounds which requires to be sustained for ends of justice. He further submits that the trial court ought to have rejected the application or kept the same with the record since this is a case for custody and guardianship wherein the plaintiff-petitioner himself claiming custody and guardianship and as per the learned counsel whatever contention is being laid down in the application, but the ultimate prayer clearly shows the admission of parenthood by the petitioner. The learned Advocate referred the case reported in 27BLC page 1, 56 DLR page 358 as well as the decisions as reported in 75 DLR page 558 respectively. Both the parties also placed the supplementary affidavits and counter affidavits showing the disputed relationship and payments regarding family issues etc. The learned counsel further submits that since after marriage the petitioner is not taking care in any manner just for the sake of social context the mother defendant used the name of her second husband as father which does not disentitle the child from the original parenthood.

I have heard the learned Advocate for the petitioner as well as opposite party. I have perused the impugned judgment and order passed by the trial court as well as appellate court, perused the revisional application, ground taken thereon, supplementary-affidavits, counter-affidavits provisions of law decision as referred to as well as necessary papers and documents annexed herewith.

On perusal of the same, it transpires that admittedly a family suit is being pending in the court below for a decree of custody and guardianship filed by the plaintiff-petitioner who is the father of the daughter in question. It further transpires that the defendant-appellant-opposite party contested the said suit by filing written statement denying all the material allegations made in the plaint. However, I am of the view that the contention as raised by the petitioner regarding the custody and guardianship as much as the contentions so far it relates to that prayer as raised in the written statement are the subject matter of the trial court which can only be adjudicated by the trial court on framing issues and taking evidence.

It transpires that during pendency of the proceeding the present petitioner pressed an application for DNA Test of the child in question which was resisted by the opposite party defendant by way of filing written objection. It further transpires that the trial court, namely the Assistant Judge and Family Court heard both the parties, considered the application and written objection and thereafter allowed the application. However, on appeal the lower appellate court allowed the same and set aside the order passed by the trial court allowing the DNA Test of the child in question. Admittedly, the legislatures incorporated the Act 10 of 2014 for DNA Test. In the said Act the purpose of enacting the said law by the legislature is that to use the advance technology to determine certain factual aspects which cannot be determined in ordinary way or method. After the enactment of the Act 10 of 2014 the different authorities, namely Law Enforcing Agencies as well as the courts are using the same for many purposes for allowing in a clear

conclusion of any dispute in question. In the present case in hand it transpires that the DNA Test relates to a minor child in question.

On meticulous perusal of the plaint, it transpires that admittedly the father who filed the suit for custody and guardianship raises the question regarding the illicit relationship of the defendant with outsider and also raises a doubt about the real parenthood of the said daughter, namely Nusrah Ruquiya and also the said has been denied by the defendant in the written statement but it has been mentioned earlier that these are the subject matter of the trial court. The decisions as referred by the learned counsel for the petitioner reported in 67 DLR page 1 the High Court Division categorically stated that in directing a DNA Test courts must be cautious about the probable result of a DNA Test exposing a child to a socially deplorable condition as a bastard child. The court further held that the DNA Test for the purpose of identification of parentage and of individuals, is relatively a new technology in this country and not used frequently. But it has been accepted worldwide as a reliable scientific method for various purposes including determination of parentage. This court also in the case of Jashimuddin(Md) alias Md. Jashimuddin Vs. Dali Begum reported in 56DLR(2004) 358 elaborately discussed the facts and circumstances and vigorously depends upon the provisions of section 112 of the Evidence Act came to a conclusion that only if a person wants to prove that he had no access to his wife for a considerable time only in that case he raises the question about the parentage of the child in question. While passing the aforesaid judgment the court also discussed about this jurisdiction as well as other jurisdiction. Also in the case of Md. Islam Vs. Tasfiya reported in 75 DLR(2003)558 the High Court

Division relied upon section 112 of the Evidence Act came to a conclusion that the child was born of a valid marriage between its mother and the father. This is a conclusive proof of the infant's legitimacy. As per the High Court Division no other evidence, be it the DNA Test report or anything else, can be admitted into evidence to rebut the statutory 'conclusive proof'. While passing the decisions of our apex court in the case of Kanai Chandra Das Vs. Nipendra Chandra Mondal reported in 27 BLC(AD)(2022) 1 stated as follows;

> *"It is the duty of the Court to be more careful to examine the case of the defendants in view of the consequences of such defence. We are conscious that an innocent child may be the victim of our decision. In such circumstances, the Court has to consider diverse aspects including presumption under section 112 of the Evidence Act. The legal presumption as per provision of section 112 of the Evidence Act has the effect of throwing the burden of proving the illegitimacy of a child satisfying its requirements on the person interested in making it out. This provision has been treated by the Apex Courts of the sub continent as the general law determining the legitimacy is the questions involving rights of inheritance. The presumption being highly followed by law, the proof of non-access must be clear and satisfactory. In the case of Shamlal @Kuldip Vs Sanydev Kumer, (2009) 12 SCC 454, it was observed that the presumption cannot be displaced by mere balance of probabilities or any circumstances creating doubt. Even the*

evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. The defendants by adducing reliable evidence failed to prove that the plaintiff is not the son of Niroda and Krishna Das. In this regard, evidence of PW 2 is relevant here, who, aged about 81 years, stated that Niroda, after the death of her first husband Gupi Mandal, remarried Krishna Das and while she was living with Krishna Chandra Das, she gave birth of a son named Kanai, the plaintiff and 3/4 years thereafter, Krishna Chandra Das died. It appears that on 12-6-1972 (Exhibit 3), that is, about 14 years before filing the suit, Niroda executed and registered a deed of gift to plaintiff Kanai Chandra Das son of late Krishna Chandra Das. In that deed she, inter alia, stated-

আমার দুর্ভাগ্য বশতঃ বিবাহিত স্বামী উক্ত গুপি মন্ডল পরলোক গমন করার পর আমার পিতা শ্রী গৌর মন্ডল মান্দা থানার অন্তর্গত প্রসাদপুর গ্রাম নিবাসী মৃত শ্যাম গোসাই এর পুত্র কৃষ্ণচন্দ্র দাস এর সহিত বৈষ্ণব মতে দ্বিতীয় বার আমার পিতা আমাকে বিবাহ দিয়াছিলেন বর্তমানে আমি জাতীতে বৈষ্ণব ও আমার দ্বিতীয় স্বামীর ঔরষজাত ও আমার গর্ভজাত একমাত্র পুত্র উক্ত গ্রহীতা শ্রীমান কানাই চন্দ্র দাস তুমি আমার জীবন সর্ব্বস্ব তুমি ব্যতিত আর আমার কেহই নাই বর্তমানে আমার বয়স ৭৫ পঁচাত্তর বৎসর অতিক্রম হইত চলিল..... "

Such recital of an old document clearly goes to show that plaintiff Kanai is the son of Saroda and Krishna Das. The revisional Court failed to give any weight to the recital of Exhibit 3. It is not case of the defendants that the recitals contained in Exhibit 3 do not reflect the true facts. The presumption which exists with regard to the recitals in old documents should prevail. The defendant contended that Kanai was not the son of Niroda and Krishna Chandra Das. The defendants have failed to rebute the presumption proving that plaintiff No.1 was not the son Krishna Chandra Das and Niroda by adducing reliable evidence".

So, it transpires from the series of decisions that a jurisprudence has been developed regarding the proof of parentage in our country and in social context still section 112 of the Evidence Act placed a vital role and apart from that this court as well as our apex court set a strict test on the part of the claimant to prove regarding the question of accessibility even it is proved that the wife has been involved in illicit relationship despite accessibility in any circumstances.

In the present case in hand the main question is mooted whether the application should be allowed for DNA Test. It is evident that admittedly the present petitioner filed a separate suit being Title Suit No. 420 f 2015 seeking certain reliefs including the legitimacy of the child in question. However, the suit was dismissed on question of maintainability based on Order 7 Rule 11 of the Code of Civil Procedure, 1908 and the appeal also failed on the same count. It has been mentioned earlier that this is a case for

custody and guardianship and wherein it is the admitted position when a person is seeking custody and guardianship at the same time he is raising the question of legitimacy of the child in question which ultimately affecting the very root of the prayer of the suit in question.

In view of the above decision and other aspects I am of the view that the suit is not a perfect one to decide the question of legitimacy of the child by conducting DNA Test and apart from that I am not inclined to pass any concrete opinion or view about the legitimacy of the child in question as because the suit is still pending before the trial court and any such observation may affect the disposal of the suit by the trial court. On these counts I find no reason to interfere.

Accordingly, the instant rule is discharged and the impugned judgment and order passed by the court below is hereby affirmed. The interim order passed at the time of issuance of rule is hereby vacated. The trial court is strictly directed to hear and dispose of the suit being Family Suit No. 251 of 2016 expeditiously, as possible not later than 31st July, 2025 without fail.

However, there shall be no order as to cost.

Communicate the judgment and order to the concerned court below at once.

(Mamnoon Rahman,J:)

Emdad.B.O.