

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Md. Akhtaruzzaman

Civil Revision No. 609 of 2022

Hamida Akter Mina and others

..... petitioners

-Versus-

Md. Mamun Sajjad (Rubel) and others

..... opposite parties

Mst. Jannati Khatun, Advocate

..... for the petitioners

Mr. Debashis Bhattacharya, Advocate

..... for opposite party 1

Judgment on 08.02.2024

Bhishmadev Chakrabortty, J:

In this rule, issued at the instance of the plaintiffs, the opposite parties were called upon show cause as to why order dated 19.10.2021 passed by the Joint District Judge, Court No. 5, Dhaka in Title Suit No. 614 of 2015 rejecting the petitioners' application for holding DNA test of petitioners 2 and 3 with opposite parties 1-3, 5 and 6 to ascertain their paternity should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

At the time of issuing the rule, all further proceedings of the aforesaid suit was stayed for a limited period which was subsequently extended till disposal of the rule.

Facts relevant for disposal of the rule, in brief, are that the plaintiffs instituted the suit against the defendants praying for partition

of the suit property claiming their *saham* to the extent of .145954 acres out of 20 katha and 3.5 chhataks of land as detailed to the schedule of the plaint. They claimed that plaintiff 1 Hamida Akter Mina was the second wife of Md. Al Amin alias Mohammad Amin Sajjad, plaintiff 2 is his daughter and plaintiff 3 is the son. Defendant 1 is the son and defendants 2 and 3 are daughters of late Amin Sajjad also and defendant 4 is his first wife. Defendants 1-4 have been enjoying the schedule suit property depriving the plaintiffs and as such they instituted the suit and prayed for *saham* of the property of late Sajjad. Defendants 1-5 appeared in the suit and filed written statement denying the averments made in the plaint. They mainly contended there that Amin Sajjad was the original owner of the suit property. He died leaving behind the above defendants as heirs; that plaintiff 1 was not his wife and plaintiffs 2 and 3 are not his issues. The suit has been filed on false averments and as such it would be dismissed.

During pending of the aforesaid suit, the plaintiffs filed an application on 23.03.2021 for holding DNA test to ascertain the paternity of plaintiffs 2 and 3 and that the DNA test is to be done with defendants 1-3 the sons and daughter of late Sajjad, defendant 5 his brother and 6 sister. The defendants opposed the said application without filing any written objection. However, the learned Judge

heard both the parties and by its judgment and order under challenge rejected the same.

Mst. Jannati Khatun, learned Advocate for the petitioners appearing for Advocate Mr. Bakir Uddin Bhuiyan takes us through the materials on record and submits that this is a suit for partition claiming plaintiffs' *saham* in the suit property. Plaintiff 1 claimed that she was the second wife of late Amin Sajjad and plaintiffs 2 and 3 are his daughter and son respectively. Since the defendants did not agree that late Amin Sajjad was the father of plaintiffs 2 and 3, a DNA test is required to be held to ascertain their paternity for proper disposal of the suit. She then refers to the provision of section 12 of Deoxiribonucleic Acid (DNA) Act, 2014 and submits that to resolve a dispute between the parties the Court can pass an order to hold DNA test. He refers to the case of Beautiful Bibi Vs. Md. Sydur Rahman, 67 DLR 1 and submits that the DNA test has been accepted worldwide as a reliable scientific method for various purposes including determination of parentage. In disposing the application, the learned Joint District Judge mainly relied on the judgment and decree passed in Family Suit No. 752 of 2005 filed by present plaintiff 1 which was dismissed but the above decision is still under challenge in this Court in Civil Revision No. 818 of 2010. If the Court allows in holding DNA test as prayed for it would cause no harm to the defendants. It is required to resolve the controversy between the

parties. In rejecting the application the Joint District Judge apparently committed error of law resulting in an error in such order occasioning failure of justice. The impugned order, therefore, should be interfered with by this Court.

Mr. Debashis Bhattacharya, learned Advocate for opposite party 1, on the other hand opposes the rule and submits that admittedly the plaintiffs are not in possession of any part of the suit property and as such the suit for partition simpliciter is not maintainable. Therefore, in such a suit the petitioners cannot get an order of holding DNA test. In the previously instituted family suit, petitioner 1 failed to prove that late Amin Sajjad was her husband. The matter has been settled in the family suit against which a revision in this division is still pending. Unless and until it is decided in the aforesaid revision, the instant application is not maintainable. The Joint District Judge correctly appreciated the fact and law and rejected the application. In a suit for partition there is no scope to allow an application for holding DNA test to ascertain the paternity of petitioners 2 and 3. The rule, therefore, having no merit would be discharged.

We have considered the submissions of both the sides, gone through the documents appended with the application, the order under challenge and the law as referred to.

It transpires that the plaintiffs filed the instant suit claiming share of the property left by late Amin Sajjad as described in the schedule to the plaint. The plaintiffs claimed that plaintiff 1 was the second wife of late Amin Sajjad and plaintiffs 2 and 3 are his daughter and son respectively. In the written statement the defendants denied the fact that late Sajjad had second wife and as such plaintiffs 2 and 3 cannot be his issues. It is admitted that plaintiff 1 instituted Family Suit No. 752 of 2005 in the Court of third Additional Assistant Judge and Family Court, Dhaka under the provisions of Guardians and Wards Act to appoint her as guardian of plaintiffs 2 and 3's person and property. The suit was dismissed against which she preferred Family Appeal No. 198 of 2014 before the District Judge, Dhaka. The appeal was dismissed summarily being barred by limitation. Petitioner 1 then filed civil revision before this Court and rule in Civil Revision No. 818 of 2015 has been issued which is still pending for disposal. The Joint District Judge in passing the impugned judgment held that plaintiff 1 has no valid documents to show that she was the second wife of late Amin Sajjad and that the claim that she was not the second wife of late Sajjad has already been decided in Family Suit No. 752 of 2005 and as such he rejected the application for holding DNA test. The grievance of the present plaintiff 1 raised in the family suit claiming herself as guardian of plaintiff 2 and 3 is still pending because the matter is *in seisin* of this Court in the aforesaid civil

revision. Before disposal of the aforesaid revision, it cannot be finally said that plaintiff 1 is not the legally married wife of late Amin Sajjad or that plaintiff 2 and 3 are not his issues.

It is common character of married men of this country that if they maintain extramarital relation with another lady or enter into second marriage, they usually keep the fact secret to avoid bitterness with the first wife. It may have happen in case of plaintiff 1 also. The decision passed in the family suit that plaintiff 1 failed to prove that she was the wife of late Amin Sajjad cannot be a ground to reject the application for holding DNA test to ascertain the paternity of plaintiff 2 and 3 in this suit. The way the family Court disposed of the suit cannot be taken as a weapon to use it in this suit to reject the application for holding DNA test. Plaintiff 1 still can file an application in the aforesaid civil revision for the same purpose, if desires. The merit of a civil suit depends upon the evidence adduced by the parties in its trial. At this moment it cannot be said that the original suit for partition simpliciter is not maintainable and that the plaintiffs are not entitled get an order in it for holding DNA test. Therefore, the submission of Mr. Bhattacharya to that effect bears to substance. The result of this suit will not depend solely on the result of DNA test. But in the present suit, we find it necessary to hold the test as prayed for to ascertain the paternity of plaintiffs 2 and 3. Section 12 of the DNA Act, 2014 reads as follows:

“ধারা ১২। ডিএনএ নমুনা ও ডিএনএ প্রোফাইলের ব্যবহার -নিম্নবর্ণিত উদ্দেশ্য ব্যতীত অন্য কোন উদ্দেশ্যে ডিএনএ নমুনা ও ডিএনএ প্রোফাইল ব্যবহার করা যাইবে না;যথা:

- (ক) কোন ব্যক্তি শনাক্তকরণ;
- (খ) কোন অপরাধের সহিত সংশ্লিষ্ট কোন ব্যক্তি;
- (গ) নিখোঁজ বা অজ্ঞাত ব্যক্তি শনাক্তকরণ;
- (ঘ) দুই বা ততোধিক ব্যক্তির মধ্যে পারস্পরিক সম্পর্ক নিরূপণ;
- (ঙ) প্রাকৃতিক দুর্যোগ বা দুর্ঘটনাজনিত কারণে মৃত ব্যক্তি শনাক্তকরণ;
- (চ) বিরোধ নিষ্পত্তি এবং
- (ছ) বিধি দ্বারা নির্ধারিত অন্য কোন বিষয়।” *(emphasis supplied)*

Sub-section “gha” and “cha” of section 12 provides for filing application for holding DNA test to ascertain relation between two or more persons and to resolve any dispute.

In the plaint, we find that name of plaintiff 2 is Sagorika Sajjid and 3 Imon Sajjid, that is, the title of family name of late Amin Sajjad. In the record, the name of the father of late Mohammad Amin Sajjad appears as Hazi Mohammad Islam alias Kalachad Hazi which tallies with the father’s name of defendants 5 and 6 who are brother and sister respectively of late Amin Sajjad. On perusal of the plaint as well as the contention made in the application for holding DNA test, we find that the plaintiffs have been able to prove a *prima facie* case for holding DNA test. The opposite parties have nothing to be aggrieved with it, because if result of the test goes in favour of the plaintiffs, it will not be the only reason for passing decree in the suit. The paternity

of plaintiffs 2 and 3 is required to be ascertained for their identity in the world. In rejecting the application for holding DNA test, the learned Judge travelled beyond his jurisdiction and put reliance on the decision of the family suit and thereby committed error of law resulting in an error in such order occasioning failure of Justice. Therefore, the impugned order is required to be interfered with by us.

In view of the discussion made hereinabove and the *ratio* laid in the cited case, we find substance in the submission of Ms. Khatun. Consequently, the rule is made absolute. However, there will be no order as to costs. The impugned judgment and order is hereby set aside and the application for holding DNA test is allowed. The concerned Court is directed to take steps in accordance with law for holding DNA test as prayed for.

Communicate this judgment and order to the concerned Court.

Md. Akhtaruzzaman, J.

I agree.