Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 4694 of 2022

Sabina Yasmin Sweety and another

…… Petitioners.

-Versus-

Kajol Rekha being dead her heirs Shawkat Akbar and others.

…….Opposite parties.

Mr. Md. Harun-Or-Rashid, Adv. with
Mr. Md. Yadnan Rafique, Advocate

……For the petitioners.

Mr. Md. Ekramul Islam, Advocate with
Mr. Sayed Quamrul Hossain, Adv.

.....For the Opposite parties

Heard and judgment on 9th June, 2024.

A.K.M.Asaduzzaman,J.

Opposite party as plaintiff filed Title Suit No. 61 of 2021 for partition and for further declaration that defendant No.2 is not a successor of late Abdul Mannan. In that suit plaintiff filed an application for DNA test of the child with the sample collection

from the hair, bone, teeth upon collecting from the dead body of Abdul Mannan, which was allowed by the court below. The said order has been challenged in the instant revisional application under section 115(4) of the Code of Civil Procedure, but instead of granting leave, rule was issued on 14.11.2022 to see the legality of the said order. Matter has come before this court today for hearing.

Mr. Harun-or-Rashid, the learned advocate appearing for the petitioner drawing my attention to the judgment of the court below submits that both the court below allowed the application for DNA test upon considering the provision as laid down under Rule 6(2) of the Deoxyribonucleic Acid (DNA) Bidhimala, 2018, which was been formulated through DNA Ain, 2014. But as per section 4 of the said Ain, this rule practically was corroborated for DNA test only to ascertain the criminal on a crime committed by him, which is not applicable in the civil jurisdiction and the court below totally failed to consider this aspect of this case. The learned advocate further submits that both the court below failed to consider that the paternity of the child as well as legitimacy of the child, whether was born on the wedlock of the plaintiff and

defendant No.1 is a matter, can be decided upon circumstantial evidences, for which no DNA test is required to be done. In support of this contention he has cited a decision in the case of Kamal Hossain -Vs. State and others reported in 29 BLC 177 relying upon the provision of section 112 of the Evidence Act and in the case of Kanai Chandra Das –Vs. Nipendra Chandra Mondal reported in 27 BLC(AD)1. The learned advocate further submits that since the minor child was born during a subsistence of the marriage he was a legitimate child, which has to be presumed, no further evidence is required for the same as per section 112 of the Evidence Act. In support of this contention he has cited the decision in the case of Nasrin Jahan (Parul) and others –Vs. Khabir Ahmed and others reported in 61 DLR 697. He further drawing my attention to the provision as laid down under section 3 of the Evidence Act, 2014 submits that this provision of this Ain is not applicable for determining the paternity of child, which can only been determined by the provision as laid down under section 112 of the Evidence Act and as such the impugned order of allowing the DNA test is apparently illegal, which is not sustainable in law, it is liable to be set aside.

Mr. Md. Ekramul Islam, the learned advocate appearing for the opposite party, on the other hand drawing my attention to the judgment passed by the court below submits that the appellate court while deciding the revision has rightly held that:

> "বিজ্ঞ নিম্ন আদালতের নথি, তর্কিত আদেশ ও প্রার্থীকের দরখাস্ত পর্যালোচনায় দেখা যায় অত্র রিভিশন দরখাস্তের প্রতিপক্ষ বিজ্ঞ নিম্ন আদালতে মূল মোকদ্দমার ২নং বিবাদীর ডি.এন.এ টেষ্ট এর জন্য আদালতের আদেশ প্রার্থনায় দরখাস্ত আনয়ন করলে বিজ্ঞ নিম্ন আদালত বিগত ০৬/০১/২২ ইং তারিখে তা মঞ্জুর ক্রমে আদেশ প্রচার করেন। বর্নিত আদেশের বিরুদ্ধে অত্র প্রার্থীক মাননীয় জেলা জজ আদালত, লক্ষ্মীপুর-এ সিভি রিভিশন নং-১/২০২২ দায়ের করলে উভয় পক্ষের শুনানী অন্তে মাননীয় জেলা জজ আদালত বিগত ১০/০৩/২২ইং তারিখে আদেশ প্রচারকালে পর্যবেক্ষণ প্রদান করেন যে, "সন্তানের পিতৃত্ব ও মাতৃত্ব নির্ধারনের ক্ষেত্রে সংশ্লিষ্ট সন্তান এবং পিতা মাতার রক্তের নমুনা সংগ্রহক্রমে ডি.এন.এ টেষ্ট করার বিধান আছে। পিতা মারা গেলে পিতৃত্ব নির্ধারনের ক্ষেত্রে উক্ত আইনের ৬(২) নং উপনথিতে উল্লেখ আছে।" রক্তের নমুনা সংগ্রহন করার সম্ভব না হলে এই বিধিমালার বর্ণিত পদ্ধতি অনুসারে মৃত ব্যক্তির দাঁত, চুল, কোষকলা বা হাড় সংগ্রহ করতে হবে। বিজ্ঞ জেলা জজ

আদালত তৎ দরখাস্তটি বিবেচনায় নেয়া উচিত ছিল এবং তৎ আলোকে আদেশ দেওয়া উচিত ছিল।

মাননীয় জেলা জজ আদালতের বর্ণিত আদেশ বিজ্ঞ নিম্ন আদালত তর্কিত আদেশটি প্রচার করেন। মাননীয় জেলা জল আদালতের পর্যবেক্ষণ আমলে না নিয়ে অন্যথা আদেশ প্রচারের আইনগত সুযোগ বিজ্ঞ নিম্ন আদালতের যেমন ছিলনা তেমনি অত্র রিভিশন আদালতেও তৎ বিষয়ে ভিন্নরূপ আদেশ প্রচার করার আইনগত এখতিয়ার নাই।"

Since the application for DNA test was been allowed as being necessary in order to have a proper adjudication of the suit as been determined by the court below consecutively and thereby plaintiff has got nothing to lose rather it was essential for determining the real question in controversy, court below committed no illegality in allowing the same. The learned advocate further submits that the judgment cited in the instant case by the petitioner has got no manner of its application in the instant leave petition. All these are matter to be looked into as well as considered by the court below during trial. As the provision which has been laid down through DNA Rules, 2018 pursuant to the DNA Ain, 2014 is the only provision to determine the legitimacy

of a child by way of DNA test and there is no other provision distinguishing the civil and criminal matters to determine the issue, the submission as been made by the petitioner has got no legs to stand. Drawing my attention to the provision as been referred to here by the learned advocate for the petitioner under section 3 read with section 112 of the Evidence Act, the learned advocate further submits that the provision as laid down under section 112 of the Evidence Act for determining the legitimacy of the child is totally been vested upon the court below, while deciding on merit after taking evidence. But taking the assistance from a DNA report, which is secondary evidence court below committed no illegality to allow the application at this stage. Court can form his independent opinion relying upon the evidence as would be adduced together with the DNA test report keeping in mind the provision as laid down under section 112 of the Evidence Act during trial and as such since the impugned order committed no illegality, he finally prays for dismissing the leave petition.

Heard the learned advocate and perused the lower court record and the impugned judgment.

In the suit plaintiffs sought for partition, wherein defendant No.2 was shown to be a child of Abdul Mannan and it has been urged in the suit by the plaintiff that defendant No.2 is not the child, who was not been born on the wedlock of marriage between the plaintiff and defendant No.1.

In the premises the legitimacy of the child, defendant No.2 is the question to be decided first and in order to determine the said issue it was very essential to determine the legitimacy by way of having a DNA test done properly. In the premises recently law was enacted on 22.09.2014 vide Act No.10, 2014 of enacting the Deoxyribonucleic Acid (DNA Ain, 2014). Pursuant to the provision as laid down under section 13 of the said Ain, a rule was framed being named DNA Rules 2018, on 2nd October, 2018, wherein Rule 6 has been provided, how the maternity or paternity would be determine by way of DNA test. Having regard to the said provision, court below allowed the DNA prayer of the plaintiff, which was allowed by the court below concurrently.

Going through the impugned judgment and the provision of law as laid down under rule 6 of the DNA Rule, 2018, I find substances in the submission of the learned advocate for the

opposite parties. Since the court below committed no illegality in allowing the DNA prayer of the plaintiffs. I find no merits in the application.

In the result, the leave petition is dismissed and the judgment passed by the court below is hereby affirmed.

Trial Court is hereby directed to proceed the case expeditiously as early as possible.

The order of stay granted earlier is hereby recalled and vacated.

Send down the Lower Court Records and communicate the judgment at once.