HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Writ Petition No. 5426/2022

Smt. Bhauri Devi D/o Badri Wife Of Late Bhaurilal, Aged About 70 Years, R/o Village Shri Kishanpura, Tehsil Sanganer, District Jaipur, Presently R/o Village Ramnagariya, Tehsil Sanganer, District Jaipur.

----Petitioner

Versus

1. Mahendra Kumar Son Of Sarvan, R/o Village Shri Kishanpura, Tehsil Sanganer, District Jaipur.
2. Smt. Bila Devi Wife Of Late Badri, Aged About 93 Years, R/o Village Shri Kishanpura, Tehsil Sanganer, District Jaipur.
3. Ramswaroop Son Of Late Badrinarayan, R/o Balaion Ka Mohalla, Village Shri Kishanpura, Tehsil Sanganer, District Jaipur.

----Respondents

For Petitioner(s) : Mr. Anil Mehta, Sr. Adv. assisted by
Mr. Raj Kamal Gaur and
Mr. Yashodhar Pandey

For Respondent(s) : Mr. Prahlad Sharma with
Mr. Ramprasad Sharma
Mr. Khem Singh Rajawat
Mr. Lakhan Sharma
Mr. Akshay Sharma

HON'BLE MR. JUSTICE BIPIN GUPTA

Judgment / Order

Reportable

Date of hearing and conclusion of arguments	29.01.2026
Date on which the judgment was reserved	29.01.2026
Whether the full judgment or only the operative part is pronounced	Full Judgment
Date of pronouncement	07.02.2026

1. The present writ petition has been filed assailing the order dated 24.02.2022 passed by the learned Additional Civil Judge & Judicial Magistrate No.17, Jaipur Metropolitan-I, Sanganer in Civil Suit No.77/2017, whereby the application filed by the petitioner-plaintiff under Order 26 Rule 10-A CPC has been rejected.

2. The brief facts of the case are that a suit was filed by the plaintiff-petitioner, for declaration of the will dated 10.04.2014, to be null and void and for permanent injunction, contending therein that the plaintiff-petitioner is daughter of Shri. Badri and Defendant No.2-Smt. Bila Devi is the wife of Shri. Badri and mother of plaintiff-petitioner. Badri has expired on 14.01.2017.

2.1 Late Shri. Badri was having agriculture land, which was an ancestral land recorded in the name of Shri Badri; father of the plaintiff-petitioner who had half share in the property. Out of this land, some was acquired for the Central Spine Scheme by RIICO and father of the plaintiff-petitioner got eight plots through different allotment letters in lieu of his share in the land.

2.2 A Will dated 10.04.2014, which was registered was executed by her father, whereas he had no right to execute the Will as the property was an ancestral one. In the property, plaintiff-petitioner and her mother i.e. defendant No.2-Smt. Bila Devi had a right. On 17.02.2017, the knowledge of the Will came to the plaintiff and thereafter, the suit was filed for declaration of the Will as null and void and further, declaration was sought that the plaintiff-petitioner may be declared as owner of the half share of her father.

3. The said suit was opposed by the defendants-respondents,

denying the fact of plaintiff-Smt. Bhauri Devi being daughter of Shri Badri. Further, defendant No.2-Smt. Bila Devi, who is wife of Shri Badri also denied the factum of plaintiff-petitioner being her daughter. It was also alleged in the reply by the defendants-respondents that Shri Badri and Smt. Bila Devi had a son named as Shri. Ramswaroop and therefore, prayed that the suit may be rejected.

4. The dispute thus, arose that whether the plaintiff-petitioner is the daughter of Shri Badri and defendant No.2-Smt. Bila Devi or not and to crystallize the issue, an application was moved by the plaintiff-petitioner under Order 26 Rule 10A CPC, contending that the paternity of the plaintiff-petitioner, could be proved beyond doubt through scientific investigation, i.e., by conducting a DNA test of the mother Smt. Bila Devi, the plaintiff Smt. Bhauri Devi and of defendant No.3 Ramswaroop.

5. The plaintiff-petitioner in the application also drew attention of the learned trial Court to Issue No.5, which was to the effect that whether the plaintiff-petitioner is the daughter of Late Shri Badri or not. Further, in the application it was claimed that it was even necessary to find out that whether defendant No.3-Ramswaroop is the son of Smt. Bila Devi or not and for that purpose also scientific investigation i.e. DNA test is required to be carried out. Moreover, it was contended that defendant No.2-Smt. Bila Devi aged about 90 years is under undue pressure of defendants No.1 & 3. Therefore, also it was necessary to carry out the DNA test, where the Court can through scientific investigation arrive at a conclusive conclusion.

6. In reply to the said application, the defendants denied the

averments made in the application and stated in the reply that since, defendant No.2-Smt. Bila Devi had denied the claim of the plaintiff-petitioner being the daughter of Shri Badri and Smt. Bila Devi. Therefore, there is no necessity of any scientific investigation to be conducted. It was also contended in the reply that if any such order is passed, then the same will affect the privacy of the defendants. It was further contended by the respondents that the burden is on the plaintiff-petitioner to prove the fact that she is the daughter of Late Shri. Badri and Smt. Bila Devi. Further, even in the criminal proceedings, a similar application was filed, which was rejected on 13.09.2021 and therefore, learned counsel prayed that the application may also be rejected.

7. The learned trial Court thereafter, vide its order dated 24.02.2022, rejected the application on two counts; *firstly*, that it will affect the privacy of the defendants and *secondly*, the defendants have refused to undergo DNA test.

8. Aggrieved by the said order, the present writ petition has been filed.

9. Learned counsel for the petitioner argued that to prove the fact that plaintiff-Smt. Bhauri Devi is the daughter of Smt. Bila Devi, a scientific investigation in the form of DNA test has to be conducted in order to have a conclusive proof of the fact. He submitted that defendant No.2-Smt. Bila Devi denied the fact that the petitioner-plaintiff was her daughter and she was having no documentary proof to prove the same. Further, the plaintiff-petitioner being an illiterate person cannot prove the said factum by any other document and since a valuable property is involved

in the present suit, the mother Smt. Bila devi under undue pressure of Defendant no. 1 is denying the plaintiff to be her daughter.

10. Learned counsel for the petitioner thus submitted that the only method and conclusive proof about paternity is the DNA test which in modern times is the conclusive proof and a scientific method to find out the correct paternity of an individual. He further submitted that defendant No.3 is claiming to be the son of Late Shri. Badri and defendant No.2-Smt. Bila Devi whereas, in no record, defendant No.3-Ramswaroop is recorded as their son and merely, on the factum of admission by defendant No.2-Smt. Bila Devi, a person, who is not at all related by blood cannot be considered as the son of Smt. Bila Devi and Late Shri. Badri. He thus submitted that to conclusively find out that whether defendant No.2 -Ramswaroop is the son of Smt. Bila Devi or Late Shri. Badri, DNA test ought to have been permitted.

10.1. It was further contended by the learned counsel for the petitioner that there is nothing on record wherein, the defendant No.2-Smt. Bila Devi had not consented for the DNA test. He submitted that there was no refusal by defendant no. 2 to go under DNA test and therefore, no adverse inference can be drawn. He therefore, prayed that in such facts and circumstances of the case, a direction may be issued to the defendant Nos.2 & 3 to undergo the DNA test and plaintiff-Smt. Bhauri Devi's DNA test may be matched with that of defendant No.2-Smt. Bila Devi.

11. Learned counsel for the petitioner relied upon the following judgments:

(i) ***Narayan Dutt Tiwari vs Rohit Shekhar & Anr.****; (2012) 12 SCC 554.*

(ii) ***Dipanwita Roy vs Ronobroto Roy****; (2015) 1 SCC 365.*

(iii) ***Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik & Anr.****; (2014) 2 SCC 576.*

(iv) ***Neelam Rani & Ors. vs Smt. Mainka @ Maina Devi & Anr.****; 2014 (3) Civil Court Cases 317 (P&H).*

(v) ***Dalip Singh & Ors. vs Ramesh & Ors.****; (2017) 2 RLW 1043.*

(vi) ***Namdeo Babasaheb Korde & Anr. vs Babasaheb @Babarao Ramkrishna Korde & Ors.****; 2013 SCC OnLine Bom 1756.*

12. Per contra, learned counsel for the respondents-defendants submits that if a DNA test is ordered to be conducted, then it will infringe the privacy rights of the defendants. Therefore, such permission cannot be granted. It was also contended by the learned counsel for the respondents that Shri Ramswaroop is the natural son of Late Shri. Badri. Thus, there is no requirement for conducting the DNA test of defendant No. 3.

12.1 Learned counsel for the respondents further submitted that the claim in the suit pertains to challenging the factum of the Will dated 10.04.2014, which has been executed in favour of defendant No.1. He further submitted that the claim of the

plaintiff-petitioner is that the will could not have been executed by Late Shri. Badri as the property in dispute was an ancestral property and therefore, the plaintiff-petitioner was firstly required to prove the factum that the property in dispute is an ancestral one and Late Shri. Badri had no right to execute the will.

12.2 Thus, until and unless the same is proved no other issues would be relevant for the purpose of adjudication of the suit and therefore, he prayed that the application has been rightly rejected by the learned trial Court while considering the same as argued.

12.3 Learned counsel for respondents relied upon the following judgments to buttress his arguments:

(i) ***R. Rajendran vs Kamar Nisha & Ors.***; *2025 INSC 1304.*

(ii) ***Ashok Kumar vs Raj Gupta & Ors.***; *(2022) 1 SCC 20.*

13. Heard learned counsel for the parties and perused the material available on record.

14. On perusal of the material available on record, it is clear that the dispute between the parties is not only with regard to the Will dated 10.04.2014, which has been executed by one Late Shri. Badri in favour of defendant No.1-Mahendar Kumar, but also pertains to fact that the plaintiff-petitioner has claimed that she may be declared as the owner of the half share of property belonging to her father.

15. The issue to that effect has also been framed by the

learned trial Court i.e. "Whether the plaintiff is daughter of the Smt. Badri or not".

16. This Court on bare reading finds that the present is a case where mother-defendant no. 2 Smt. Bila devi is herself denying the fact of being the mother of the plaintiff-petitioner. Further, she has also stated that the plaintiff-petitioner is not the daughter of Late Shri. Badri. The Defendant no. 2 however does not deny the factum of Late Shri. Badri, being her husband. Thus, when a female counterpart is not disputing her marriage with a male, but she is denying the fact that a child is not her own, then it is not a case of testing the paternity, but rather a case to decide the maternity of the child.

17. This Court is also of the opinion that most of the judgments relied upon by the learned counsel for the parties are based on the issue of paternity i.e. where a male counterpart is denying the fact of the child being his own. However, in the present case it is the female who is denying a child to be hers. Thus, the fact of paternity is not under challenge in the *lis* but it is the maternity of the child that is disputed.

18. This Court is astonished by the fact that a mother denying a child to be hers is a rarest of rare cases, as in society it is usually the male who denies the paternity of a child on many grounds, including alleged infidelity of the wife. The reason why this Court states that it is a rarest of rare case is that a bare perusal of Section 112 of the Indian Evidence Act, 1872 (hereinafter referred to as the "Act of 1872") and the corresponding provision under Section 116 of the Bharatiya Sakshya Adhiniyam, 2023

(hereinafter referred to as the "BSA, 2023"), shows that the presumption is that if a child is born during the subsistence of a marriage or within 280 days of its dissolution, such child is presumed to be the child of the man.

Section 112 of the Act of 1872 reads as under:

> "***112. Birth during marriage, conclusive proof of legitimacy.***
>
> *The fact that any 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, the mother remaining unmarried, shall be conclusive proof that he is the legitimate <u>son</u> of that **man**, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."*

Section 116 of the BSA, 2023 reads as under:

> "***116. Birth during marriage, conclusive proof of legitmacy.***
>
> *The fact that any 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, the mother remaining unmarried, shall be conclusive proof that he is the legitimate <u>child</u> of that **man**, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."*

19. Though the legislature, under Section 116 of the BSA, 2023, has merely replaced the word "son" with "child", it did not contemplate a scenario where a female may also deny the fact that the child is hers. The aforesaid provision, thus, beyond any doubt, demonstrates that the legislative intent never envisaged

a situation where a female would deny that a child was not born from her womb.

20. Thus, the question that arises before this Court is that, when there is no statutory presumption in respect of a woman under the said provisions, how a person born to a female is to prove that the woman whom he or she claims to be his or her mother is, in fact, the natural mother.

21. In the modern world, where everything has become materialistic, it is easy to admit or deny the parenthood of a child. However, it is extremely difficult for a child to prove that a particular person is his or her parent. With significant advancements in science, not only paternity but also maternity can now be conclusively determined through DNA testing.

22. Now, with regard to the privacy of an individual being infringed in case a DNA test is conducted, this Court finds that a person cannot be forced to undergo a paternity or maternity test, but a direction can be issued to a person to undergo a DNA test. If anyone does not appears for the DNA test or denies to undergo the test then, the issue would be determined by the Court by drawing a presumption of the nature contemplated in Section 114 of the Act of 1872 corresponding to provision under Section 119 of BSA 2023 shall apply. To arrive at the said conclusion, this Court has relied upon the judgment passed by the Hon'ble Apex Court in the case of ***Dipanwita Roy*** (supra) wherein the Court observed and held as under:

> *"14. A similar issue came to be adjudicated upon by this Court in Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and*

Anr.; (2010) 8 SCC 633, wherein this Court held as under:

> *21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.*
>
> *22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption Under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test.*
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> *23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu v. State of West Bengal; (1993) 3 SCC 418 and Sharda v. Dharmpal; (2003) 4 SCC 493. In Goutam Kundu, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda, while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prime facie case and there is sufficient material before*

the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court.
(Emphasis supplied)

It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties.

15. Recently, the issue was again considered by this Court in Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Anr.; (2014) 2 SCC 576, wherein this Court held as under:

> *15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had not any access to his wife at the time when the child could have been begotten.*

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the Appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the Appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the Appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances.

Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the Appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice. (Emphasis supplied)

This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption Under Section 112 of the Indian Evidence Act.

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18. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the Appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the Respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

114. Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (h) - That if a man refuses to answer a

question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him. This course has been adopted to preserve the right of individual privacy to the extent possible. of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated Under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

23. So far as the argument raised by the learned counsel for the petitioner to direct the conducting of DNA test of defendant no. 3 is concerned, there is no necessity of conducting DNA test of Defendant no. 3 Shri Ramswaroop as it is for defendant No.3 to prove to be the natural son of Late Shri. Badri.

24. For the reasons as discussed above, the present writ is allowed. The order dated 24.02.2022 is quashed and set aside. The application of the plaintiff-petitioner filed under Order 26 Rule 10A is partly allowed and a direction is issued to the learned trial Court that it shall order defendant no. 2 to undergo a DNA test and match the same with the DNA of the plaintiff-petitioner for ascertaining the maternity and if defendant no. 2 refuses to undergo the DNA test then, as held in the case of ***Dipanwita Roy*** (supra), consequences will follow as per Section 119 of BSA 2023; Illustration (h), to the aid of the plaintiff-petitioner.

25. All pending applications also stand disposed of.

(BIPIN GUPTA),J

Sudha/1