

**Stereo. No.H C J D 38.**

**Judgment Sheet**

**IN THE LAHORE HIGH COURT AT LAHORE.**

**JUDICIAL DEPARTMENT**

**Case No. W.P. No.12443 of 2015**

**Mst. Rubina Kausar.**

**Vs.**

**ASJ etc.**

**J U D G M E N T**

<b>Date of Hearing</b>	<b>18.01.2017</b>
<b>Petitioner By:</b>	<b>Mr. Waqar Ahmad Bhatti, Advocate.</b>
<b>Respondents By:</b>	<b>Mr. Iftikhar Ahmad Bhatti, Advocate for respondents No.2 and 3.</b>

**Muhammad Ali, J.-** Through this constitutional petition, the petitioner has challenged the legality of order dated 05-01-2015 passed by respondent No.1-Additional District & Sessions Judge, Pindi Bhattian, District Hafizabad, whereby application of respondent No. 2 for conducting DNA test of the petitioner was accepted and order of learned Civil Judge dated 10.04.2012 was set aside.

2. The petitioner-plaintiff filed a suit for declaration, permanent injunction and cancellation of mutations executed in favour of respondent No.2. The petitioner asserts that she is the only daughter of her father Muhammad Naseer (deceased), who was follower of Shia faith, hence, she is entitled to inherit the estate of her father. The petitioner sought cancellation of Mutation No.1086 dated 19-09-2005 and Mutation No. 4585 dated 03.10.2005 attested in favour of

respondent No.2 (brother of Muhammad Naseer deceased) wrongly sanctioned on account of connivance of respondent No. 2 with the revenue staff.

3. On the other hand, it is the case of respondent No.2-original defendant No. 1 that Muhammad Naseer died issueless, the petitioner Mst. Rubina Kausar is falsely claiming to be daughter of Muhammad Naseer. The petitioner was only brought up by Muhammad Naseer, in fact she is a daughter of Jaffar son of Fateh Din. In the absence of any issue of Muhammad Naseer, the property left by him under the law is to be inherited by respondent No. 2 being real brother of the deceased.

4. The case was fixed for final arguments when an application was moved by Muhammad Bashir respondent No. 2 seeking permission to get paternity of the petitioner-plaintiff tested through DNA Test. It was prayed that paternity of the petitioner be determined by conducting DNA test of petitioner and Khursheed Bibi defendant No. 2 (widow of Muhammad Naseer). The petition was opposed and no consent to such offer was given by the petitioner. The learned trial Judge after considering respective arguments of the parties dismissed the application on 10.04.2012. The decision was challenged by respondent No. 2 in revision. The revision was allowed by the Additional District Judge, Pindi Bhattian vide order dated 05-01-2015, setting aside the order of trial Court.

5. Learned counsel for the petitioner submits that DNA Test is not a reliable test, when there is independent evidence available on the record to adjudicate the case, there is no need for such test. The petitioner has not given her consent for DNA test, to compel a person to undergo or to submit to medical examination of his or her blood without consent tantamount to interference with her fundamental right of life and liberty, particularly when there is no provision in the Code of Civil Procedure, 1908 or Qanun-e-Shahdat Order, 1984 or any other law which may be said to authorise the Court to compel a person

to undergo such a medical test against her wish. In order to substantiate his arguments, learned counsel has placed reliance on the case of Salman Akram Raja and another v. Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others (2013 SCMR 203).

6. Learned counsel appearing for respondent No. 2 by supporting the impugned decision submits that truth and falsehood of the matter could easily be ascertained, if DNA test is conducted. Contends that there is no illegality in the order passed in revision, calling for interference in the constitutional jurisdiction of this court.

7. I have anxiously considered respective arguments of the learned counsels for the parties, examined the record and case law on the subject.

8. The question involved in this case is as to whether paternity of a person in a civil case pertaining to inheritance could be determined by conducting a DNA test. Admittedly, father of the petitioner Muhammad Naseer who is claimed by respondent No. 2 not to be real father of the petitioner is not alive. The DNA test is sought to be conducted by matching blood samples of the petitioner with her mother Khursheed Bibi.

9. It is an admitted fact that during the lifetime of deceased, the paternity of the petitioner was never disputed. It is only questioned when the petitioner claimed share in the property of her deceased father. The respondent No.2 being real brother of the deceased and uncle of the petitioner is asking for DNA test to be conducted in a routine manner, without *prima facie* establishing that such test is inevitable. The resort to DNA Test is made in rare and exceptional circumstances. Entertaining applications for DNA Test as a routine in inheritance cases would open flood gates and co-sharers in the property would move such applications every now-and-then.

10. The law relating to obtaining blood samples and conducting DNA Test came up for consideration in various cases. The august Supreme Court of Pakistan in the case of Salman Akram Raja and another v. Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others (2013 SCMR 203) held that nobody could be forced to have her blood test samples obtained for conducting of DNA Test. The Court has to consider the facts and circumstances of each case. If a person does not give consent for such test, he/she cannot be compelled for the test. It amounts to interference with personal liberty of a person. It was finally concluded that the Court has power to order for DNA Test or any blood test in order to ascertain the truthfulness of allegations but such order must be passed with the consent of a party, the order cannot be made in routine. Compelling a person to undergo a DNA Test can have serious consequences. It is the duty of a court to safeguard and protect personal liberty of every citizen.

11. Similar view has been expressed in the case of Mst. Shamim Akhtar v. Additional District Judge, Gujranwala and another (PLD 2015 Lahore 500), it was held that the DNA Profile Test is always conducted with the consent of the person concerned and is normally applied in criminal cases. The Indian Supreme Court in the case of Goutam Kundu v. The State of W.B (AIR 1993 SC 2295) held that before the blood test of a person is ordered, his consent is required, as, that test is concerned with his personal liberty and cannot be carried out without his consent. The Court went to an extent to order that even if there is legislation which can compel the blood test, then also, unless and until there is consent of the concerned person, he cannot be compelled to go to the hospital for giving blood test.

12. There is yet another aspect of the case which has to be kept in mind i.e. authenticity and accuracy of the test in this part of the World. Considering this, it was held in the case of Khizar Hayat v.

Additional District Judge, Kabirwala and two others (PLD 2010 Lahore 422) as under

*“Although the Medical Science has developed a lot in this modern era, but unfortunately at the same time it has not attained the level of accuracy, competence of persons associated with these test and fairness of society and prevailing system as it has been applied in the developed societies like USA and Europe, either due to lack of skilled persons, tools to perform this test and human error in judgment in conducting of this test cannot be ruled out in our system.”*

It was also held in the judgment

*“Furthermore, the DNA test as per information available in text books, medical science and various authoritative writings on the point available on internet, possibility of error cannot be excluded.”*

13. In Pakistan there is lack of proper legislation on DNA testing like other countries of the World. A short reference to DNA legislation and its testing requirements in different countries is highlighted here:

#### **United Kingdom**

*In the United Kingdom, there were no restrictions on paternity tests until the Human Tissue Act 2004 came into force in September 2006. Section 45 states that it is an offence to possess without appropriate consent any human bodily material with the intent of analyzing its DNA.*

#### **Germany**

*Under the Gene Diagnostics Act of 2009, secret paternity testing is illegal. Any paternity testing must be conducted by a licensed physician or by an expert with a university degree in science and special education in parentage testing, and the laboratory carrying out genetic testing must be accredited according to ISO/IEC 17025. Full informed consent of both parents is required, and parental paternity testing is prohibited, with the exception of sexual abuse and rape cases. Any genetic testing done without the other parent's consent is punishable with fine.*

### **Canada**

*The standards Council of Canada regulates paternity testing in Canada whereby laboratories are ISO 17025-approved. In Canada, only a handful of labs have this approval, and it is recommended that testing is performed in these labs.*

### **Philippines**

*DNA Paternity Testing for official purposes, such as child support and inheritance disputes, must follow the Rule on DNA Evidence A.M. No.06-11-5-SC, which was promulgated by the Philippine Supreme Court on October 15, 2007.*

### **France**

*Without a Court order the express consent of the person must be obtained in writing before carrying out of the DNA examination, after the person has been duly informed of its nature and its purpose.*

### **United States of America**

*In the United States, paternity testing is fully legal, and fathers may test their children without the consent or knowledge of the mother. Paternity testing take-home kits are readily available for purchase, though their results are not admissible in court, and are for personal knowledge only. Only a court-ordered paternity test may be used as evidence in court proceedings.*

14. Even in these advance countries questions are raised about authenticity of DNA testing. The august Supreme Court of Pakistan in the case of *Azeem Khan v. Mujahid Khan* (2016 SCMR 274) adverting to this aspect observed with reference to accuracy of DNA testing as under:

*“27. In the recent past many scandals in USA, UK and other countries have surfaced where desired DNA test reports were procured by the investigative by contaminating the samples. Such contamination has also been reported in some cases while the samples remained in the laboratories. Many inquiries were held on this issue and stringent law has been made by many States to prevent the contamination of samples outside and inside the laboratories. Proper procedure has been laid down for securing and carefully putting into parcel the suspected materials to correlate with the samples of the parents to establish paternity or maternity. Similarly, stringent check and procedure has been provided to avoid and prevent cross contamination of the two samples because if both come in contact with each others then, it will give false positive appearance and the expert is thus misled. It has also been discovered that credentials of many experts, claiming possessed of higher qualification in this particular field,*

*were found fake and they were thus, removed from service. The DNA Wikipedia on web is on unrebutted testimony to these facts.”*

Thus, for what has been discussed above, it is not safe to resort to DNA testing in Civil matters of inheritance as a matter of routine, the paternity issue could be proved by oral and documentary evidence already recorded by the trial Court.

15. For the reasons stated above, the impugned judgment passed by respondent No.1 dated 05-01-2015 is declared to have been rendered illegally and without lawful authority, same is set aside. Resultantly, application of respondent No. 2 seeking DNA test is dismissed. The writ petition is **allowed** with no order as to costs.

**(MUHAMMAD ALI)  
JUDGE**

**APPROVED FOR REPORTING.**

**JUDGE**

*\*M. Afzal*