
(2010) 04 AP CK 0053
In the Andhra Pradesh High Court
Case No : C.R.P. No. 2755 of 2009

Buridi Vanajakshmi

APPELLANT

Vs

Buridi Venkata Satya Varaha Prasad Gangadhar Rao and
Another

RESPONDENT

Date of Decision : 01-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 151
Constitution of India, 1950 — Article 21, 227
Evidence Act, 1872 — Section 112, 114, 4, 45
Hindu Marriage Act, 1955 — Section 12(1)

Citation : AIR 2010 AP 172 : (2010) 4 CivCC 130

Hon'ble Judges : Ghulam Mohammed, J

Bench : Single Bench

Advocate : S. Sridhar, for the Appellant; K. Subrahmanyam, for the Respondent

Final Decision : Dismissed

Judgement

Ghulam Mohammed, J.—This civil revision petition is filed against the order dated 5-3-2009 passed in IA No. 35 of 2009 in OP No. 13 of 2007 by the Senior Civil Judge, Chodavaram, Vishakapatnam District, allowing the application filed u/s 45 of the Evidence Act, 1872, read with Section 151, CPC by the 1st respondent to subject the petitioner and her son including himself to undergo DNA test to determine the paternity of the son of the petitioner.

2. The petitioner is wife and the 1st respondent is her husband the above OP is filed by the husband 1st respondent herein for divorce on the alleged ground of petitioner leading an adulterous life with the 2nd respondent herein. The dispute between the parties relates to the identity of the child. The petitioner states that the child is the son of the 1st respondent, but the 1st respondent denies and disputes the same and states that the child is born out of adulterous life of the petitioner.

3. The parties, petitioner and 1st respondent were married on 7-12-2002 at

Lankavanipalem village, K. Kotapadu mandal and lived amicably for a period of 3 1/2 years and thereafter disputes arouse between the parties, as it is stated that the petitioner developed illicit intimacy and maintained extra marital relationship with the 2nd respondent. It is stated that for the reason, the petitioner was left at her parents house and she is staying at her parents house. It is stated that the 1st respondent came to know that the petitioner gave birth to a male child, but he denies paternity of the child on the ground that he has no access to the petitioner at the relevant time and the child born to the petitioner is not his son. The petitioner denied the allegations made by the 1st respondent and stated that she conceived when she was in the company of her husband 1st respondent.

4. Sri S. Sridhar, learned Counsel for the petitioner contended that the Court below having held that a party cannot be compelled to undergo DNA test erred in observing that if she does not undergo the test, adverse interference would be drawn for not doing so. It is also contended that though the petitioner in her cross-examination stated no objection for subjecting herself to the test, that itself is not a ground to straightaway allow the application filed by the respondent-husband unless he prima facie proves his case. On the other hand, Sri K. Subrahmanyam, learned Counsel for the 1st respondent contended that the question about the paternity of a child can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities, and as such the Court below rightly allowed the application.

5. In view of the controversy involved, this Court sought the assistance of Sri VLNKG Murthy, learned Counsel to be amicus curie in the matter. Learned Counsel (amicus curie) submitted that in matrimonial disputes, the Court has a conciliatory role to play and for the said purpose it may require expert advice. It is also stated that there is no provision either in the CPC or the Evidence Act or any other law which may be said to authorize the Court to compel a person to undergo such a medical test, but in appropriate cases, to secure ends of justice, the Court can exercise discretion if the applicant has a strong prima facie case and there is sufficient material before the Court. In support of his submissions cited decisions of this Court as well as the decisions of Supreme Court.

6. Whether a party to a divorce proceeding can be compelled to a medical test to determine the paternity of the child is the controversy in this case.

7. It is the contention of learned Counsel for the petitioner that merely the petitioner-wife has stated that she has no objection to undergo the DNA test that does not itself be a ground to allow the application, unless the 1st respondent-husband establishes his case that there was no access to his wife and then alone a strong preponderance of evidence can be sought for. Reliance is placed on the decision of the Supreme Court in Shri Banarsi Dass Vs. Mrs. Teeku Dutta and Another, and contended that the impugned order would amount to permitting the husband to lead evidence to rebut the conclusive proof as to the legitimacy of the child enjoined u/s 112 of the Evidence Act, which is not permissible under law. Reliance is also placed on the decision of the Supreme Court in Ramkanya

Bai v. Bharatram 2010 (1) SCJ 1 (SC) : AIR 2009 SC (Supp) 2951.

8. Birth during marriage and its legitimacy, proof or otherwise is stated u/s 112 of the Indian Evidence Act, 1872 (for short, "the Evidence Act") which reads thus:

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 son 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.

9. It is also necessary in this context to note what is "conclusive proof with reference to the conclusive proof of legitimacy of the child, as stated in Section 112 of the Evidence Act. Section 4 of the Evidence Act deals with conclusive proof, which reads thus:

4. "Conclusive proof "- When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

10. A reading of Section 112 of the Evidence Act, read with the definition of "conclusive proof u/s 4 of the Evidence Act, makes it amply clear that the child born during a valid marriage should be deemed to be legitimate child except where it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten or within 280 days after the dissolution of the marriage and the mother remains unmarried, that fact is the conclusive proof that the child is the legitimate son of the man. This is rebuttal presumption, but this presumption can only be displaced by adducing acceptable evidence by the person questioning the legitimacy.

11. In Goutam Kundu Vs. State of West Bengal and another, the Supreme Court while dealing with the question about the paternity of a child noticed the provisions of Section 112 of the Evidence Act and held that the presumption arising thereunder can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. At para 26 it was held thus:

26. From the above discussion it emerges:

- (1) That Courts in India cannot order blood test as a matter of course;
- (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising u/s 112 of the Evidence Act.
- (4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a

bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.

12. In *Sharda Vs. Dharmpal*, the Supreme Court considered the decision of *Goutam Kundu* (supra) and having held that the ratio laid down therein not an authority for the proposition that under no circumstances the Court can direct blood tests to be conducted, at paras 75 to 81 held thus:

75. The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion it may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitation on his right have to be imposed and particularly where two competing interest clash. In matters of aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus, the Court has to reconcile these competing interests by balancing the interests involved.

76. It for arriving at the satisfaction of the Court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the Court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. The Court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.

77. It is, however, axiomatic that a Court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terras of Section 115 of the CPC and/or Article 227 of the Constitution of India, Abuse of the discretionary power at the hands of a Court is not expected. The Court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order.

78. It despite an order passed by the Court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Indian Evidence Act also enable a Court

to draw an adverse inference if the party does not produce the relevant evidences in his power and possession.

79. So viewed the implicit power of a Court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy.

80. To sum up, our conclusions are:

1. A matrimonial Court has the power to order a person to undergo medical test.
2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court will be entitled to draw an adverse inference against him.

13. The issue whether a person disputing paternity of the child can seek for DNA test has been once again considered by the Supreme Court in Teeku Dutta's case (supra). In paras 9 and 10 it was held thus:

9. In matters of this kind the Court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim *pater is est quern nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage of filiation (parentage) may be presumed, the law in general presuming against vice and immorality;

10. It is rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

14. In Smt. Kanti Devi and Another Vs. Poshi Ram, the Supreme Court while considering the scope of Section 112 of the Evidence Act held as follows:

Section 112 which raises a conclusive presumption about the paternity of the child during the subsistence of a valid marriage, itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. The result of a genuine DNA test is said to be scientifically

accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception, but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain un rebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception.

15. This Court in *B. Vandana Kumari Vs. P. Praveen Kumar and Another*, at paras 30 and 31 held thus:

30. In the instant case, as noted above, the contentious issue between the parties and the decision thereupon has a direct bearing on the legitimacy of the child born during the continuance of the marriage. Having regard to the nature of the proceedings in the main OP, undoubtedly the issue of paternity of the child is also a necessary issue for effective adjudication of the controversy in between the parties.

31. May be that the DNA Test, even if reveals that the child was not born to the husband, would not decide the core question in the main OP whether the wife was pregnant by some other person at the time of marriage itself. It is also true that the DNA test by itself would not discharge the burden of proof placed on the husband u/s 12(1)(d) of the Hindu Marriage Act. However, undoubtedly, it is a piece of evidence to establish the case of the husband. Hence, in my considered opinion, it is a deserving case where the DNA test could be directed to be conducted. It is not contrary to the conclusive proof enjoined u/s 112 of the Evidence Act and does not suffer from any error of law or fact.

16. In *Shaik Fakruddin Vs. Shaik Mohammed Hasan and Another*, this Court considered the expression "conclusive proof as given in Section 4 of the Evidence Act with reference to Section 112 of the Evidence Act. Paras 10 & 13 read thus:

10. It is also appropriate at this stage to consider the definition of the expression "conclusive proof as given in Section 4 of the Act, which reads as under "conclusive proof " - When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. The expression "conclusive proof shall have to be read along with Section 112 of the Act. A combined reading of both the provisions would make it clear that if a person is born during the continuance of a valid marriage or within 280 days after the dissolution of the marriage and the mother remains unmarried, that fact is the conclusive proof that he is the legitimate son of the man, unless it can be shown that the parties to the marriage had no access to each other at any time, when that person could have been begotten. Legitimacy is the conclusive proof when it is shown that the son was born during the continuance of the marriage or within 280 days after the dissolution of the marriage when the

mother remains unmarried. Once it is the conclusive proof, it admits of no evidence to disprove the same. The only manner in which the conclusive presumption can be avoided is by proving the non-access in between the husband and wife when the son could have been begotten, it may be mentioned here that it is not a case of rebutting the presumption for the reason that conclusive proof is irrebuttable. The other presumptions mentioned in Section 4 of the Act, namely, may presume and "shall presume" are rebuttable presumptions. Conclusive proof is irrebuttable. Therefore no evidence can be permitted to be let into disprove the conclusive presumption. It becomes a misconception to say that the person who is disputing the paternity of the child can disprove the same or rebut the presumption by adducing any evidence of non access in between the couple at the relevant time. On the other hand, it appears to be the correct view that the operation of the conclusive presumption can be avoided by proving non-access at the relevant time. But, certainly it is not a case of rebutting the presumption. All this is germane having regard to the discussion made hereinabove that on the admitted facts as can be seen from the counter filed by the second defendant, the controversy in between the parties can be effectively adjudicated upon. Moreover, having regard to the contentious issue involved in between the parties inter se, the issue of paternity of the first defendant becomes ancillary.

13. A conspectus of the above referred judgments shows that the Court has the power to order a person to undergo medical test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution. However, the Court should exercise such a power only when it is expedient in the interest of justice and when the fact situation in a given case warrants such an exercise. The DNA test cannot rebut the conclusive presumption envisaged u/s 112 of the Act. The parties can avoid the rigor of such conclusive presumption only by proving non-access which is a negative proof. It is always open to the Court to draw an adverse inference when the spouse refuses to undergo the test despite the direction given by the Court.

17. The Supreme Court in Ramkanya Bai's case (supra) observed that application by the husband in appeal before the High Court to perform DNA test of the child, in the absence of any allegation made that the child was born to his wife as a consequence of her illicit relationship, liable to be rejected. At paras 8 and 9 held thus:

8. We are unable to accept the impugned order of the High Court. The High Court was not justified in allowing the application for grant of DNA test of the child only on the ground that there will be a possibility of reunion of the parties if such DNA test was made and if it was found from the outcome of the DNA test that the son was born out of the wedlock of the parties. In the absence of any reason except on the ground that the husband/respondent had made a prestige issue about the paternity of the child, nothing could be found from the impugned order of the High Court which could invite the Court to allow such application.

9. On a perusal of the application for grant of an order for DNA test of the child, it would also be evident that there was no allegation made by the husband/respondent that as a consequence of illicit relationship with some third person, the child was born to the wife/appellant. Apart from that, it is an admitted position that during the pendency of the divorce proceedings in trial Court, neither such prayer for performing DNA test to find out the paternity of the child was ever made by the husband/respondent nor any allegation in the plaint was made by him in his pleading. Therefore, it was not open to the High Court at the appellate stage to direct the DNA test to be performed on the child of the wife/appellant. It is also well settled that the presumption of legitimacy is a presumption of law. When a child is born out of a wedlock, there is a presumption in favour of his legitimacy and presumption of legitimacy largely depends on the presumed fact that the parties to a marriage have necessary access to each other when a divorce petition is filed and specially, when the husband/respondent did not assert that the son of the wife/appellant was a consequence of illicit relationship with some third person. The High Court, in the impugned order, has also observed that the son of the wife/appellant has begotten from the husband/respondent, which cannot be disputed at this stage on the basis of mere desire of the husband/respondent to deny such paternity of the child.

18. The primary duty of a Court is to see that truth is arrived at. The Hindu Marriage Act or any other law governing the field does not contain any express provisions empowering the Court to issue a direction upon a party to a matrimonial proceedings to compel him to submit himself/herself to a medical examination. However, that does not preclude a Court from invoking its inherent jurisdiction to pass such order so as to secure the ends of justice. Medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties and perhaps may bring the parties to terms. It is laid down by the Supreme Court in Sharda's case (4 supra) that right to privacy in terms of Article 21 of the Constitution is not an absolute right. If there were a conflict between the fundamental rights of two parties, that right which advances public morality would prevail.

19. In the instant case, the respondent-husband specifically averred that the petitioner maintained extra marital relations with the 2nd respondent and the child born was not through him but due to the adulterous life of the petitioner. Further, the petitioner in her cross-examination expressed no objection for subjecting herself to the DNA test. In the circumstances, I do not find any illegality or irregularity in the impugned order passed by the Court below allowing the application of the 1st respondent. The civil revision petition is, therefore, dismissed.

20. Before parting with the case, I sincerely place on record the assistance rendered by Sri VLNGK Murthy, learned Counsel (amicus curie) in this case. No

costs.