

**(1983) 12 BOM CK 0034**

**In the Bombay High Court**

**Case No :** Civil Revision Application No. 795 of 1983

Hoovayya Kanthappa Shetty

APPELLANT

Vs

Renuks S. Shetty

RESPONDENT

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**Date of Decision :** 21-12-1983

**Acts Referred:**

Evidence Act, 1872 — Section 101, 104, 114

**Citation :** AIR 1984 Bom 229 : (1984) 2 BomCR 356 : (1984) MhLj 345

**Hon'ble Judges :** H. H. Kantharia, J

**Bench :** Single Bench

**Advocate :** M.B. Badkar Ib and Desai and Co, for the Appellant; B.S. Setty and S.M. Shetty, for the Respondent

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**Judgement**

1. The short question that arises in this civil revision applicaiton filed u/s 115 of the Civil Procedure Code. Is as to on whom the burden of proof lies of the statements| averments made by him || her pleadings.

2. The respondent (Original Plaintiff) filed s.SC Suit No. 1228 of 1978 in the City Civil Court, Bombay. Against the petitioner (original defendant) for possession of certain restaurant business along with certain moveable properties and also the premises in which the sad business is carried on and payment of certain sum of money together with damages or mesne profits at certain rate and for accounts. In the said suit her pleading in para 1 of the plaint is as under : -

"the plaintiffs is the daughter of one Ramayya SEtty who died intestate at Bombay on 4th August 1977, leaving behind him surviving the plaintiffs as his only her and legal representative".

3. To this pleading petitioner replied by his written statement vide para 2 thus :-

"The Defendant further submits that the plaintiff has no cause of action inasmuch as the plaintiff is not an hier and legal representative of the Ramayya ..Shetty, the plaintiff being an .. Dassu Shetty. The plaintiff is daughter is one smt. Gulabi who was not married to the said deceased Ramayya Dassu Setty".

4. On these pleading of the parties initially while framing several other issues on other pleadings, the learned trial Judge framed Issue No.1 as under :

"Whether the plaintiff proves that she is the hier of the deceased RAmayya d. Shetty?"

5. The suit was then set down for hearing and final disposal and when if same uip and final on August 16, 1983 for recording the evidence the respondent applied for re-settling Issue No.1 submitting that the said issue be recast and the burden of proof br shifted form the plaintiff to the defendeant. Thereafter, on hearing the parties the trial Court recast original Issue No.1 by its order dated September 26, 1983 as under:-

"Whether the defendant proves that the plaintiff is illegitimate child of deceased Ramayya?

6. It is the said order recasting Issue No. 1 as above that has been challenged by the petitioner in this revision application.

7. Mr. Badkar, learned counsel application on behalf of the petitioner, urged burden of proof as to whether is the legal heir and of deceased Ramayya Dassu Shetty is on her as plaintiff and the burden is should not have been shifted to the petitioner to prove wehther she was the illegitimate child of deceased Ramayya assu Shetty. Mr. Badkar brought to my notice several decision as regards the burden of proof in the like matters in cases of Mt. Bassati v Poj\\hlu AIR 1952 Bila 13 , K.S. Nanji and Company Vs. Jatashankar Dossa and Others, , B. Mahadeva Rao Vs. Yesoda Bai, Sunkavilli Suranna and Others Vs. Goli Sathiraju and Others, and Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, to show as to how to the burden of proof shifts and on whom the ultimately it lies to be discharged. As rightly submitted by Mr. Shetty, in reply all these ruling have no relevance because they pertain to appreciation of the evidence regard being had to the nature of the facts and circumstances obtaining in those individual case. The only authority having some relevance to which Mr. Badkar has invited my attention is the cse of AIR 1944 162 (Oudh) in which it was held :

"Where a plaintiff claims to recover property as the son to of the any person by his lawfully married wife and the defendant denies that the wife ever gave birth to the child and sets up that the plaintiff was the son of a woman other than the lawfully married wife the onus of proof is upon the person who claims to show that the lawfully wedded wife gave birth to him before invoking the presumption in favour of legitimacy without laying the foundation for it under S. 112 namely that a valid marriage took place between the parents".

8. Prima facie this authority appears to be helpful to Mr. Badkar but is careful reading to shows that in fact it is not, for the presumption sought to be relied upon in the said case was u|s 112 of t the Indian Evidence Act. 1872 whereas in the instant case we are concerned with the general presumption available with the regard u|s 114 of the Indian Evidence Act.

9. The submission of Mr. Shetty, learned counsel appearing on behalf of the respondent, in this regard is that the petitioner in our case has admitted the paternity of the respondent and, therefore, there is general presumption in favour of the legitimate birth of the respondent u/s. 114 of the Indian Evidence Act. To bring home his point Mr. Shetty, relied upon commentary on the law of Evidence, by Woodroffe & Amirali, 14th Edition Page 2295, para 119 that :

"There is a presumption in favour of legitimacy and marriage, and therefore, on any person, who is interested in making the out the illegitimacy of another, is thrown the whole burden of proving it. The burden of proving, that the connection between the mother and her father of the illegitimate child involved the criminal offence and grave misconduct of adultery, is on the person who sets up of that contention".

10. I am in full agreement with what MR. Shetty, has submitted for the simple reason that the petitioner has in para 2 of his written statement admitted that the respondent was a child of one Ramayya Dassu Shetty. But he asserts that she was the illegitimate child of the said deceased Ramayya Dassu Shetty being the daughter of one Gulabi who was not married to deceased Ramayya Dassu Shetty. In other words, it is the petitioner who asserts that the respondent was illegitimate child of deceased Ramayya Dassu Shetty and Gulabi. When he makes such an assertion the burden of proving it conclusively is on him that there was no valid marriage between deceased Ramayya Dassu Shetty and Smt. Gulabi and as such the child born to them viz the present respondent was an illegitimate child. In support of his contentions Mr. Shetty invited my attention to a couple of rulings to which we may usefully refer here. Thus in *Dularey Singh* AIR 1918 Oudh 103 it was held :

11. Where a party admits the paternity of other party but pleads that he is of illegitimate descent, the legal presumption being in favour of legitimacy onus lies on the party alleging illegitimacy to prove it".

12. *Shivajirao Lagad Vs. Bapurao Lagad and Others*,

13. Law Presumes in favour of marriage and against concubinage and on him who challenges the legitimacy must be thrown the burden of proving it".

14. In view of this position in-law and the facts and circumstances obtaining in the instant case I find no infirmity in the impugned order passed by the learned trial Judge recasting issue No. 1 and defaming the one as stated hereinabove. There is thus no substance in this revision accordingly discharged with costs.

15. Rule discharged.