
(2002) 08 MP CK 0093

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 62 of 1996

Madhulika Verma and another

APPELLANT

Vs

Prabhawati Verma

RESPONDENT

Date of Decision : 20-08-2002

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103, 104, 112
Succession Act, 1925 — Section 383, 384

Citation : (2002) 2 MPJR 465 : (2003) 1 MPLJ 65

Hon'ble Judges : S.M. Samvatsar, J

Bench : Single Bench

Advocate : N.K. Mody, for the Appellant; A.M. Naik, for the Respondent

Final Decision : Allowed

Judgement

S. Samvatsar, J.

This appeal is filed u/s 384 of the Indian Succession Act, against the order dated 22-1-1996, passed by Fifth Additional District Judge, Gwalior in Case No. 44/87 Succession, whereby the Court below has rejected the application filed by the present appellants for revocation of succession certificate issued in favour of respondent in Case No. 246/85 Succession, which was amended by order passed in Case No. 13/87.

The present appellants are heirs of one Sanjay Verma. Sanjay Verma is alleged to be son of Harikishore Verma and Gayitri Devi Verma. Harikishore was in employment of State Bank of India, who retired from the Bank on 30-9-1981 and died on 17-3-1989. Gayitri Devi Verma was an employee of Education Department, who died on 30-7-1984. Respondent Prabhawati is the daughter of Harikishore and Gayitri Devi. After death of Gayitri Devi Verma, Harikishore and respondent Prabhawati moved an application for issuance of Succession Certificate in respect of the property of Smt. Gayitri Devi Verma on 12-2-1985. The name of Sanjay Verma was mentioned in the cause-title of the said

application as respondent. In the said proceedings on 3-3-1986 Prabhawati moved an application that she has no objection if the succession certificate is issued in favour of her father, i.e., Harikishore. On 9-3-1986 the Court issued Succession Certificate in favour of Harikishore. After issuance of Succession Certificate, Prabhawati moved an amendment application praying for amending the said certificate by adding her name as successor. This application was registered as MJC 13/87. Notices of this application were published in the newspaper and on getting knowledge of the said application the present appellant No. 1 filed an objection to the effect that her husband Sanjay Verma, who had committed suicide by that time, was also son of Gayitri Devi Verma and, therefore, she is also entitled to succeed the estate of Gayitri Devi Verma. The objection filed by appellant Madhulika Verma was not considered by the Court below and Succession Certificate was amended by adding the name of Prabhawati on 9-10-1987. Thereafter, Madhulika Verma filed the present application for cancellation of the Succession Certificate. This application was registered as MJC 44/87. This application is rejected by the impugned order. Hence, this appeal.

Some more relevant facts of the case are that the appellant No. 2 had filed a suit against Harikishore Verma, which was registered as Civil Suit No. 183A/86 in the Court of Third Civil Judge Class-2, Gwalior. In that suit the appellant No. 2 had alleged that Harikishore Verma is trying to alienate the ancestral property situated in Dana Oli, Lashkar-Gwalior. This suit was compromised on 11-3-1987. A copy of the order is on record as Ex. P/I. As per the said decree, Harikishore Verma agreed to give the amount of Family Benefit Fund and General Provident Fund of Gayitri Devi Verma to the appellant No. 2. Harikishore Verma further agreed to give sale proceedings of the house situated at Dana Oli, Lashkar-Gwalior to Akash Verma and also agreed to transfer plot No. 19 situated at Johari Colony, Gwalior, owned by Gayitri Devi Verma in the name of appellant No. 2 - Akash Verma. As per the said compromise, it was agreed that Akash Verma will get the ornaments lying in Locker No. 997 in State Bank of India except a golden necklace which will be kept by Harikishore Verma. Respondent Prabhawati Devi opposed his compromise application but her application was rejected. On 12-10-1987 the present appellant came to know about the Succession Certificate and, therefore, moved an application u/s 383 of the Indian Succession Act for revocation of the same.

The respondent resisted the application alleging that Sanjay Verma was not the son of Harikishore and Gayitri Devi Verma. According to her, Harikishore found Sanjay Verma lying in a temple when he was newly born baby (20-25 days old). According to her, at that time the respondent had already married and was living with her husband. She has further alleged that after giving birth to her, Gayitri Devi Verma was declared incompetent for giving birth to any other child by the doctor. When Harikishore and Gayitri Devi Verma found Sanjay in the temple, Prabhawati was 22 years of age.

The trial Court after recording the evidence believed in the story putforth by respondent. As already stated, Harikishore died in the year 1989, i.e., during pendency of the litigation but before the evidence was recorded and, therefore, his evidence is not on record. The trial Court in para 16 of its judgment has placed the burden on the appellant to prove the fact that Sanjay Verma was son of Gayitri Devi and Harikishore.

Learned counsel for the appellants urged before me that the trial Court has erred in placing the burden of proof on appellant Madhulika Verma. According to para 16 of the judgment, as Madhulika has filed the application for revocation, the burden of proving the fact alleged in the application, lies on her and it was for her to prove that Sanjay Verma was the son of Harikishore and Gayitri Devi Verma. Learned counsel for the appellants submitted that this approach of the lower Court was erroneous and contrary to law. According to him, the burden lay on the defendant. For this purpose he relied on the presumption laid down by section 112 of the Evidence Act. Learned counsel for the appellant cited large number of authorities to show that there is always a presumption in favour of legitimacy of a child. All these judgments cited by the learned counsel are based on section 112 of the Evidence Act. The said section reads as under:-

Section 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 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.

After perusing the said section and the judgments cited by the learned counsel, I am of the view that when a question about the legitimacy of a child arises then u/s 112 of the Evidence Act presumption arises in favour of the child that he is born out of the wedlock but the said presumption applies only when the maternity of the child is not disputed. In all the cases cited by Shri N.K. Mody, learned counsel for the appellants, the maternity of the child is not in dispute and, therefore, the cases are not applicable in the present case. In the present case, the maternity as well as paternity of the child both are in dispute and, therefore, presumption u/s 112 of the Evidence Act will not be applicable in its strict sense. The said section in fact does not apply to the facts and circumstances of the present case.

The provisions about the burden of proof are sections 101 to 104 of the Evidence Act. which are as under:-

101. Burden of proof. - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

On whom burden of proof lies. - The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Burden of proof as to particular fact. - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Burden of proving fact to be proved to make evidence admissible. - The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Section 101 of the Evidence Act lays down that the burden of proof lies on a person, who desires any Court to give a judgment as to any legal right or liability in his favour. Section 102 of the Act lays down that the burden of proof lies on the person who would fail if no evidence is led by any of the parties. Section 103 provides that the burden of proof as to any particular fact lies on a person, who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Learned counsel for the respondent, therefore, urged that in the present case if no evidence was led by any of the parties then the present appellants were bound to fail and, therefore, the burden of proof was on the appellants. He, further asserted that when appellant Madhulika had asserted the fact that her husband Sanjay Verma was the son of Harikishore and Gayitri Devi Verma, then the burden certainly lay on her to prove the fact.

It is no doubt true that primarily burden of proving the fact that Sanjay was the son of Harikishore and Gayitri Devi Verma certainly is on Madhulika, i.e., the present appellant.

Now the important question is whether Madhulika has discharged the said burden. For this purpose appreciation of the evidence is necessary.

Appellant Madhulika has filed copy of the order passed in Civil Suit, dated 11-3-1987, as Ex. P/1. The said application is accompanied with is not exhibited. Ex.P/2 is a nomination form filled up by Gayitri Devi Verma, which is in favour of Harikishore. The said nomination form further mentions that in case Harikishore dies then the second nominee will be Sanjay. Ex. D/1 is the order dated 23-3-1987 in Case No 33A/85 filed by Madhulika against State Bank of India. Ex. D/2 is an order in Civil Suit No. 18A/84 filed by Sanjay against Prabhawati. Ex. N.A. 3 is the reply filed by Harikishore to the application under Order XXXK Rr. 1 and 2, Civil Procedure Code, filed in a case by appellant No. 2 Akash Verma, i.e., in C.O.S. No. 183A/86. Ex. N.A. 4 is an affidavit in support of the said reply. The other documents in the case are the school certificates of Sanjay Verma. These certificates are filed in the present appeal. In the said certificates, the date of birth of Sanjay Verma is shown to be 2-10-1961. Ex. P/1 is the Higher Secondary Certificate. Ex. P/2 is the marksheets of Sanjay Verma in which the name of

Harikishore is mentioned as father. Ex. P/3 is the certificate from Safia College, Bhopal. This certificate also shows the name of Harikishore as the father of Sanjay Verma. Ex. P/4 is marksheet of Sanjay Verma issued by Bhopal University. Similarly, Ex. P/5, is a marksheet of Jiwaji University issued in the name of Sanjay Verma. The name of Harikishore Verma is mentioned as father of Sanjay Verma. All these documents are not filed along with any application and were simply filed with the appeal memo.

Learned counsel for the respondent submitted that these documents cannot be read in evidence as they were not filed before the trial Court.

In reply to this argument, learned counsel for the appellants submitted that these are the public documents and, therefore, can be relied on for the proof of the fact that Harikishore was the father of Sanjay Verma. Moreover, the respondent in para 10 of her cross-examination has admitted the fact that Sanjay was always treated by Harikishore and Gayitri Devi as their son. In the school record the name of Harikishore is entered as father of Sanjay.

In my opinion, the most important fact in the matter is that the respondent and Harikishore, who have filed an application for succession certificate, themselves have joined Sanjay Verma as the respondent. This shows that they were aware of the fact that Sanjay Verma is one of the claimants of the property left behind by Gayitri Devi Verma. After perusing the proceedings of the said application, I find that no notices were ever issued to Sanjay Verma though there is an order from the Court on 19-2-1985 to that effect. Respondent and Harikishore have paid process fees for service of notice on Sanjay Verma but the address on the said process form is not complete, even the surname of Sanjay is not mentioned in the process-form. From perusal of the file, it is clear that original process-form does not show that notices were even issued by the Court. There is no document on record to show that the notices have returned either served or unserved. When Harikishore and Prabhawati had filed the application joining Sanjay Verma as respondent then it was necessary for them to see that his notices are properly served before proceeding in the case.

The second important fact is the nomination paper of Gayitri Devi, which shows the name of Sanjay Verma as second nominee. So, even if I ignore the Higher Secondary certificate and other documents filed in the appeal, even then also it appears from the record that Sanjay Verma was claiming some rights, title and interest in the property of the deceased. The fact that Harikishore Verma has entered into compromise with Akash Verma and agreed to part some of the property in his favour also shows that Harikishore was admitting the claim of Sanjay Verma to some extent. It is true that in the compromise application Harikishore has not admitted or denied any relationship with Sanjay Verma or Akash Verma. The copy of the statement of Harikishore attached with the compromise application cannot be looked into, as the same is not exhibited and not tendered in evidence.

Appellant Madhulika in her statement has stated that she married to Sanjay Verma, as he was son of Harikishore and Gayitri Devi Verma. It is true that she had no personal knowledge about the birth of Sanjay Verma. According to her, he was always treated as son by Harikishore and Gayitri Devi. DW. 1/respondent in her statement has admitted that Sanjay was brought up by her parents as a son. In para 10 of her statement, she has admitted the fact that Sanjay was living with her father till the death of his father. She also admits that in school record father's name of Sanjay is written as Harikishore Verma. The invitation card issued at the time of marriage of Sanjay also mentions the name of Harikishore as father of Sanjay. Thus, it is an admitted position that Sanjay was always treated as a son of Harikishore. This evidence has primarily discharged the burden of proving the initial facts and thereafter the onus shifted on the respondent to prove the fact that Sanjay Verma was found lying in the temple and Harikishore brought him to the house and treated him as his son. For proving this fact, respondent Prabhawati could have examined any of the neighbourers in whose presence the child was brought to the house. The neighbourers could have deposed that Gayitri Devi was not pregnant during the period in which Sanjay was brought by Harikishore to his house. Moreover, Gayitri Devi was in service during that period and there was no difficulty in procuring her service record to show that Gayitri Devi never obtained any maternity leave during the relevant time. This evidence could have definitely proved the fact that Gayitri Devi was not pregnant after giving birth to Prabhawati and never obtained any maternity leave for the pregnancy but this evidence is not at all produced by the respondent.

It is very unnatural to expect Madhulika to examine the doctor, who was present at the time of birth of her husband, as she is not expected to be aware of the name of the doctor or the hospital in which birth took place. The trial Court has drawn inference against the present appellant from the fact that Madhulika has not produced any birth register from the hospital or examined any doctor. As already stated, Madhulika is not expected to have knowledge of this fact and, therefore, the Court erred in placing the burden of proof on her. On the other hand, Prabhawati could have brought positive evidence by examining the neighbourers of her father and by summoning the service record of her mother. However, she has failed to produce this evidence and, therefore, inference has to be drawn particularly from the following circumstances, namely, the name of Sanjay appears in the nomination-form (Ex. P/2) and the fact that Sanjay is joined as respondent in the case and the case is decided without issuing notice to him. Moreover, he was always treated as a son by Harikishore and Gayitri Devi. The defendant has failed to discharge the burden placed on her. From these facts inference can be drawn that Sanjay was the son of Harikishore and Gayitri Devi.

In such circumstances, the impugned order cannot be sustained in law and deserves to be set aside. The application for revocation deserves to be allowed.

In the result, this appeal is allowed. The impugned order is set aside and the

application for revocation of succession certificate is allowed.

The succession certificate is modified and the trial Court is directed to issue a fresh certificate showing that the appellants and respondents are entitled to half share in the property.

The appeal is thus allowed with no order as to costs.