

(2011) 12 KL CK 0061
In the High Court Of Kerala
Case No : O.P. (C) No. 3733 of 2011

Pathukala Sakkariya

APPELLANT

Vs

Salman Faris

RESPONDENT

Date of Decision : 16-12-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(1)
Evidence Act, 1872 — Section 112

Citation : (2012) 4 KLT 658 : (2013) 1 RCR(Criminal) 815

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : C.P. Peethambaran, for the Appellant;

Final Decision : Allowed

Judgement

Thomas P. Joseph

1. Respondent is served but there is no response. This Original Petition is in challenge of Ext. P9, order passed by the learned Munsiff, Kottuparamba on I.A. No. 580 of 2010 in O.S. No. 170 of 2008.

2. That is a suit filed by the respondent, represented by his mother as next friend for a declaration that petitioner is his biological father and for consequential reliefs. Case of respondent is that petitioner subjected his mother to forcible sexual intercourse on 7.3.2001 and in that incident he was begotten. There was a criminal case against petitioner in connection with the said incident which ended in acquittal of petitioner as evidenced by Ext. P3, judgment under S. 235(1) of the Code of Criminal Procedure. That proceeding, I am told, has become final. While so, respondent filed M.C. No. 380 of 2003 in the Family Court, Kannur claiming maintenance from petitioner. There, I am told that a DNA test of petitioner and respondent was conducted but it went against the respondent. Exhibit P4 is the report where it is stated that the DNA test performed on the exhibits provided was sufficient to conclude that the source of

Exhibit C (petitioner) is not the biological father of the source of Exhibit B (respondent). The order in M.C. No. 380 of 2003 was challenged in this Court in a Civil Revision. It is submitted that this Court left the issue regarding paternity of respondent open to be decided in a suit. It is accordingly that the issue again came up for consideration in the suit. Respondent filed I.A. No. 580 of 2010 for conducting a DNA test. That application was resisted by petitioner on various grounds including what is stated above. Learned Munsiff by Ext. P9, order allowed the application holding that DNA test is necessary to decide the question of paternity. Learned Munsiff was of the view that if the earlier DNA test was properly conducted and if the test is again conducted, no prejudice will be caused to the petitioner. Learned Munsiff also took the view that so far as the suit is concerned, request for DNA test came for the first time (though in the M.C. proceedings a DNA test was conducted and adverse report was obtained). Learned Munsiff referred to the decisions in Sunil v. Leelavathi (2006 (3) KLT SN 13 (C.No. 21) and Ramakrishnan v. Ramadas (2010 (1) KLT SN 38 (C.No. 48) and concluded that since the case of mother of respondent is that she had no sexual intercourse with anybody other than petitioner, it is necessary to conduct a DNA test. So holding the application was allowed.

3. It is contended by learned counsel that on the facts and circumstances, request for DNA ought not to have been allowed. According to the learned counsel there is already a report on DNA test available in M.C. No. 380 of 2003 and unless it is shown that the said report is not correct, there is no scope for calling for a second report. It is contended that without at least prima facie evidence of truth of allegations made by the respondent, petitioner ought not to have been ordered to undergo another DNA test.

4. Exhibit P4 shows that a report is already obtained in M.C. No. 380 of 2003 and that report does not suit the case pleaded by the respondent so far as his paternity is concerned. That in the criminal case petitioner was acquitted of course, stands on a different footing. True that courts have the power to direct a party to undergo DNA test and if he does not co-operate with the order, the court can draw adverse inference against him. Question is whether on the facts and circumstances of the case at this stage where parties have not adduced any evidence in the suit petitioner should be directed to undergo the DNA test.

5. Though referring to S. 112 of the Evidence Act (for short, "the Act") it was held in Goutam Kundu Vs. State of West Bengal and another, that courts in India cannot order blood test as a matter of course, whatever applications are made for such prayer in order to have a roving inquiry, the prayer for blood test cannot be entertained and that there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under S. 112 of the Act Further guidelines issued by the Supreme Court are that court may 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 and further that no one can be compelled

to give sample of blood for analysis. In *Sunil v. Leelavati* (supra) again referring to S. 112 of the Act the Bombay High Court held that merely because either of the parties have disputed the factum of paternity does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference or adverse inference on the basis of such evidence or the controversy in issue cannot be resolved without a DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases where such a test becomes indispensable to resolve the controversy the Court can direct such test. In any case it cannot be ordered as a matter of routine. Court should record reasons as to how and why such test in the case is necessary to resolve the controversy and is indispensable. Later decision of this Court is *Ramakrishnan v. Ramdas* (supra) where it is held that the Civil Court has implicit power to direct the parties to undergo DNA test if it finds that will lead to the truth of the matter to be unraveled in the suit.

6. In the present case it is not a case of S. 112 of the Act being made applicable in so far as admittedly there is no marital relationship between petitioner and the mother of respondent But, I must bear in mind that summoning a person to the court on the allegation of paternity of the child of an unwed woman and directing him to undergo DNA test is something which casts a social stigma on him. It is not appreciable for a person to say that he has been summoned to undergo the DNA test to prove paternity of the child born out of his wedlock. In such a situation the court must be extra careful in directing a DNA test notwithstanding that it is not a case coming within the purview of S. 112 of the Act. In that situation I am inclined to hold that in the absence of prima facie proof regarding truth of allegations made by the respondent, petitioner should not have been directed to undergo DNA test and suffer the ignominy of being called upon to be subjected to a DNA test to prove or disprove that he is the biological father of a person born outside his wedlock.

7. In this case it is submitted that no evidence whatsoever was let in by the parties in the suit and prima facie there is a report which goes against the respondent (obtained in M.C. No. 380 of 2003). In that situation I am inclined to think that learned Munsiff should not have straight away directed petitioner to be subjected to another DNA test.

8. But it is not as if, if circumstances warranted such a course in the course of the suit cannot be followed by the learned Munsiff. That depends upon the evidence which parties may let in and the acceptability of report if any already obtained in M.C. No. 380 of 2003. Having heard learned counsel and gone through the relevant records as also the decisions on the point I hold that at this stage a DNA test is not required and the order to that effect cannot stand.

Resultantly, Original Petition is allowed. Exhibit P9, order is set aside and I.A. No. 580 of 2010 in O.S. No. 171 of 2008 is remitted to the learned Munsiff,

Koothuparamba for fresh decision after recording evidence of parties. Learned Munsiff may after considering the evidence let in by the parties decide whether notwithstanding that a report has already been obtained in M.C. No. 380 of 2003 it is necessary to direct petitioner to undergo a DNA test again and if learned Munsiff is of the view that such a course is required it is open to the learned Munsiff to pass appropriate orders on I.A. No. 580 of 2010. I make it clear that I have not expressed any opinion as to whether I.A. No. 580 of 2010 could be allowed or not after recording evidence or, as to the acceptability or otherwise of the report of DNA test already available in M.C. No. 380 of 2003.