
(1967) 12 BOM CK 0014

In the Bombay High Court

Case No : Civil Revision Application No. 1130 of 1966

Ramchandra Shankar Kad

APPELLANT

Vs

Shankar Genu Kad

RESPONDENT

Date of Decision : 11-12-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Evidence Act, 1872 — Section 1, 101, 104, 114

Citation : AIR 1968 Bom 388 : (1968) 70 BOMLR 222 : (1968) MhLj 492

Hon'ble Judges : Nain, J

Bench : Single Bench

Advocate : A.C. Agarwal, for the Appellant; C.G. Parulekar, for R.G. Samant, for the Respondent

Judgement

(1) This is a revision application under the provisions of Section 115 of the CPC against the order dated 15th September 1966 of the learned Civil Judge, Junior Division Saswad, Poona, ordering the petitioner to permit a sample of his blood to be taken by the Civil Surgeon, Poona, for blood grouping test and his opinion as to whether the petitioner is or is not the son of the respondent.

(2) The facts leading to this case are that the petitioner filed a suit in the Court of the learned Civil Judge, Junior Division, Saswad, Poona for partition and possession of a one-third share in the alleged ancestral property of joint Hindu family consisting of the petitioner the respondent and the original defendant No. 2 who is his mother and the wife of the respondent. The case of the petitioner was that the respondent is his father and the defendant No. 2 who is not a party to this revision application, is his mother and that he was entitled to a one-third share in the property belonging to the Joint Hindu family consisting of the parties to the suit. In the written statement the respondent denied the plaintiff's claim. He stated that the petitioner was not his son and as such he had no right, title or interest in the property and was not entitled to ask for partition and separate possession of his share. He admitted his marriage with the defendant No. 2, but

stated that he had no sexual relations with her and alleged that the defendant No. 2 had committed adultery. Although originally in the written statement the respondent had not stated that he was impotent, during the course of the trial he alleged that he was impotent. He had himself examined by the Civil Surgeon of Poona. But, according to the report dated 14th February 1966 of the Civil Surgeon, there was no signs of impotency. The respondent thereafter made an application on 21st April 1966 praying that the petitioner be directed to appear before the Civil Surgeon for a blood grouping test. The learned Judge made a very short order which reads as under:

"The plaintiff and the defendant No. 1 should appear before the Civil Surgeon, Poona, for their blood examination. The Civil Surgeon is requested to give his opinion whether the plaintiff is or is not the son of the defendant No. 1, after taking the sample of blood from their persons. The defendant No. 1 to deposit Rs. 50 into the Court in the first instance towards this examination."

(3) The petitioner objects to a sample of his blood being taken and has come in revision against the said order. The question for determination, therefore, is whether in law the petitioner can be compelled to give a sample of his blood for analysis or blood grouping test.

(4) I am not aware of any provision of law and none has been cited before me, whether in the Code of Civil Procedure, Indian Evidence Act, or elsewhere under which such application can be made or granted or which compels a person to give a sample of his blood for analysis or blood grouping test or even warrants an adverse inference to be drawn against him if he refuses to give such sample.

(5) Similar question arose in a similar contest in Madras in the case of Polavarapu Venkataswarlu Vs. Polavarapu Subbayya, , on an application under S. 115 C.P.C. which has been described as the last resort of the procedurally destitute, and Mr. Justice Raghava Rao held that Section 115 has been introduced in the Code to give effect to the inherent powers of Court. Such powers can only be exercised ex debito justice and not on the mere volition of Courts and that where the defendant applied for direction from Court to the plaintiff a minor child and his mother to appear in person before the Court in order to enable a medical expert to take sample of their blood and the plaintiff and his mother are unwilling to offer their blood for the test to recognise the paternity of the child, there is no procedure either in the CPC or the Indian Evidence Act, which empowers the Court to force them to do so.

(6) The same question again arose in the case of Subayya Gounder Vs. Bhoopala Subramanian, and Mr. Justice Ramaswami, after discussing the scope and value of such blood tests, the law on the subject of compelling parties to submit to blood tests in several countries of the world in civil and criminal cases, observed as follows at page 399:

"In India there is no special statute and there is no provision either in the Criminal Procedure Code or in the Indian Evidence Act empowering Courts to

direct such a test to be made. Similarly, as pointed out by Raghava Rao, J. in *Polavarapu Venkataswarlu Vs. Polavarapu Subbayya*, there is no procedure either in the CPC or the Evidence Act which provides for a blood test being made of a minor and his mother when the father is disputing the legitimacy of the minor and held that if the parties are unwilling to submit to such a test the Court has no power to direct them to submit themselves to such a test."

(7) I hold that there is no law in India empowering the Courts to direct parties to submit to a blood grouping test or to compel an unwilling party to allow a sample of his blood to be taken for analysis or blood grouping.

(8) Coming to the question of scope and value of blood grouping tests, Modi in his book on Medical Jurisprudence 1965 Edition at page 108 states as under:

"In such cases it cannot be said by the determination of the blood groups of the parties concerned that a particular man is the father of a given child, but it may be possible to affirm by a process of exclusion that he cannot be father of the child. The importance of this means of establishing non-paternity is obvious and has its application in suits of maintenance of illegitimate children and in suits of nullity, alleged adultery and blackmailing. The blood grouping tests have been accepted as evidence in the courts of India, England and other European countries. As the determination of various Rh Sub-groups may now be carried out accurately with the help of antisera which have lately become more readily available, the tests are likely to be less fallacious and more acceptable in our courts in India.

(9) Taylor in his book "Principles and Practice of Medical Jurisprudence" 12th Edition states at page 46 as under.

"The Blood Group Test in Disputed Paternity. The determination of the blood group of the child (the antigens are present at birth) and the alleged parents may provide evidence about the possibility of a certain person being the father of a child, or of deciding, "when two persons are involved, which of the two, if either, could be the father. For some years now, evidence of non-access (which cannot be given by either of the spouses) has been provided indirectly by blood tests.

The English Courts have no power to order blood tests upon an unwilling spouse, and much injustice must still exist so long as this reputable scientific test is excluded.

In *W. v. W* 1963 3 WLR 540 in 1963, the Court of Appeal upheld a decision of Mr. Justice Cairns that he had now power to accede to a husband's request for such tests to be performed in an effort to resolve his dispute with his wife over the paternity of his wife's child. In the Danish and many American Courts compulsory tests have been operating for some years with success, but, even the fact that their effectiveness is exclusory has not yet persuaded English lawyers to accept the principle of intrusion upon personal liberty"

(9A) The technique of blood grouping tests has been developing over the years and what new vistas in the field of determining issues of paternity in law Courts the progress in medical science will open up no one can say. By reference to current books on medical jurisprudence, one comes to the conclusion that as of today blood grouping tests have their limitations. They may exclude a certain individual as the possible father of a child, but they cannot possibly establish paternity. Another man with the same blood grouping as the alleged father could be the father of the child whose paternity is in dispute.

(10) This being the state of development in this science, the petitioner cannot be blamed for refusing to submit to a blood test. Such a test can possibly exclude the respondent being his father, but it cannot possibly establish the fact of the respondent being his father. He can never win the game but he can possibly lose it. He, therefore refuses to play. In a civil suit there is no burden cast on any part similar to the one in criminal prosecutions which requires the prosecution in all fairness to produce even evidence against its case.

(11) This incidentally raises the question whether such refusal will in law warrant an adverse inference against the petitioner under S. 114 of the Indian Evidence Act. I am not called upon to decide this question at this stage in this matter. It will be for the learned trial Judge to determine whether such inference is warranted and the nature and scope of such inference.

(12) The order of the learned Judge dated 15th September 1966, is, therefore, set aside. The revision application is allowed with costs. Rule made absolute.

(12) Revision allowed.