

(2014) 07 KL CK 0004
In the High Court Of Kerala
Case No : R.P. (FC) No. 342 of 2010

Riyas

APPELLANT

Vs

Haseena

RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125

Citation : (2014) ALLMR(Cri) 362 : (2014) CriLJ 4588 : (2015) 1 DMC 563 : (2014) 3 KHC 419 : (2014) 3 KLJ 724 : (2014) 4 KLT 119 : (2015) 1 RCR(Civil) 55 : (2015) 1 RCR(Criminal) 86

Hon'ble Judges : P. Ubaid, J

Bench : Single Bench

Advocate : K. Girija, Advocate for the Appellant; Jacob Sebastian, Advocate for the Respondent

Judgement

P. Ubaid, J.—The claim for maintenance made by an illegitimate son under Section 125 Cr.P.C. was allowed by the Family Court, Palakkad as per the order dated 18/09/2009 in MC No. 170 of 2008. The person liable to pay maintenance is the revision petitioner herein, and so he is aggrieved by the said order. The claim was made by the illegitimate minor child through his mother, Haseena. Her case is that she had been in intense love with the revision petitioner herein, and this continued for some time. While so, he once visited her at her residence on 10/08/2001 when she was alone there, and subjected her to sexual intercourse. In the said solitary incident of intercourse against her will, she conceived, and she delivered of the claimant child on 20/05/2002. The revision petitioner was duly informed and was also requested to marry her. When he declined and washed his hands off the responsibility, Haseena made a complaint before the police alleging rape. On the said complaint, the police registered FIR, and after investigation submitted final report in Court. The revision petitioner faced prosecution before the Court of Sessions, Palakkad in SC No. 301 of 2004. On trial, the Court found him not guilty, and accordingly he obtained an order of acquittal. In fact, Haseena waited with hope that the revision petitioner will

marry her and accept the child as his, as promised by him, but in vain. In such a situation, she brought MC No. 170 of 2008 against the revision petitioner herein, claiming maintenance for the said illegitimate son.

2. The revision petitioner entered appearance and resisted the claim with all vigour possible, and contended that he is not the father of the child. Of course, he would admit that he had acquaintance with the lady for a few years, but that apart, he had no connection or affair.

3. During the proceedings in the Trial Court, Haseena filed application as CMP No. 1362 of 2009 for a DNA test. The revision petitioner opposed the said application vigorously and maintained a definite stand that he would not consent for such a test, for reasons known to him alone. In such a situation, DNA test could not be ordered by the Court below. However, the case proceeded for trial. Haseena examined herself as P.W. 1, and the revision petitioner examined himself as RW 1. On an appreciation of the evidence and contra evidence on the point, the trial found that the revision petitioner is in fact the father of the child. Accordingly, he was directed to pay maintenance to the child at the rate of Rs. 1,000/- per month. The said order is under challenge in this revision.

4. Pending this proceedings, I found the necessity of some reliable scientific method like DNA test for a just decision. Finding that result of such a test would resolve the dispute for ever, I directed the revision petitioner to file a statement as to whether he is ready to undergo any scientific test at the expense of the 1st respondent. Before this Court also he maintained a negative stand and did not consent for such a course.

5. In the above factual situation, the question for decision is whether the paternity of the claimant child stands properly and legally proved. Of course, it is a dispute on facts, and the Trial Court has found in favour of the child on the basis of evidence adduced on both sides. Being a revision, this Court cannot go into the meticulous details of the evidence adduced by the parties on facts. Still let me examine whether the impugned order is tainted with any illegality or irregularity.

6. This is a case where the 1st respondent could not have adduced any other evidence, except her own versions regarding the alleged incident, or the alleged incident of sexual intercourse with or without consent. The mother of the child examined as P.W. 1 has given definite and consistent evidence proving her case, and proving the specific incident of intercourse on 10/08/2001 alleged in the petition.

7. Of course, the revision petitioner has made denial in the counter-statement, but the definite and specific instance of intercourse with or without consent, made on 10/08/2001, is not seen specifically and effectively denied in the counter-statement. This will, in fact, help the innocent child. In cases like this, of course, Courts will insist on proper and legal evidence. But at the same time it must be the concern of the Court that no child is bastardized , when there is

some evidence or material to prove who his father is.

8. A similar case of claim made by an illegitimate child came up before the Honourable Supreme Court in 1999. In *Dwarika Prasad Satpathy Vs. Bidyut Praya Dixit and Another*, , the Honourable Supreme Court considered the effect of the conduct of the man, not consenting for DNA or other scientific method for proving paternity. The Honourable Supreme Court directed the respondent to report whether he is willing for DNA test. Much time was given to him by the Honourable Supreme Court to think over it and to take appropriate decision. But the respondent maintained his adamant stand and reported before the Honourable Supreme Court that he is not ready for such a test. In such a situation, DNA test could not be ordered by the Honourable Supreme Court, but the Honourable Supreme Court recorded during the proceedings that he is disentitled to dispute the paternity of the child. Of course, the Trial Court relied on a decision of this Court in *K. Selvaraj @ Surendran Vs. P. Jayakumary*, . But that is a case where marriage was proved, and the Court dealt with the claim of the child in such a factual situation. However, the Court made an adverse inference in view of the defiant stand of the husband in refusing to undergo DNA test. *Pathukala Sakkariya Vs. Salman Faris*, was decided by this Court in a civil proceeding-in different factual situation. Any way here is a case where the revision petitioner maintained an adamant stand though out, that he is not willing for DNA test. Of course, he cannot be compelled, and against his will, the Court cannot direct him to undergo such a test. But it stands well settled that in such a situation where the respondent does not consent for such test for no reason, or for reasons known to him alone, the Court can very well draw an adverse inference in the matter of paternity. Of course, such an inference will not amount to legal proof. Inference is always inference, and that will have to be considered along with other positive evidence.

9. As stated above, PW 1, the mother of the illegitimate child is definite that the revision petitioner had subjected her to sexual intercourse on 10/08/2001. She is also definite that the claimant child is the product of that solitary intercourse. Of course, it is true that the revision petitioner could obtain an order of acquittal in the rape case. That will not absolve him from the liability to pay maintenance to his son, if it is otherwise proved that the claimant is in fact his son. Acquittal in the rape case will not help him. There is reason to believe that he did not consent for DNA test, with the confidence that he will get favourable orders in view of acquittal in the rape case. The advice he got was not a proper advice. Even when the incident of intercourse is proved in a prosecution for rape, the accused can get acquittal on the ground of consent. Such an acquittal will not stand in the way of claim for maintenance.

10. As stated above, the revision petitioner did not make effective denial of the specific instance of intercourse, in his counter-statement. Of course, he has made a total denial, evasively or casually, without making specifically, a definite denial of the specific instance of intercourse in which the lady conceived

according to her. When such a specific denial is not there, and when the revision petitioner would not in any circumstance consent for a scientific test, the Court will have to accept the evidence of the lady on facts. Of course, it is true that there is only evidence and contra evidence. In such a situation, the Court will have to analyse and examine the evidence on both sides to see which is more acceptable. The revision petitioner has admitted that he had acquaintance with the lady for some time. He does not explain how or why he had such an acquaintance. He has also no reason or explanation why the lady should bring a false case against him. He has no case of any previous enmity, or dishonest motive, or any other reason behind such a claim. It was submitted by the learned counsel that the lady has not adduced other evidence possible. In a case like this, other evidence may not be possible. This is an affair in secrecy which led to the birth of an illegitimate child. However, the learned counsel for the respondent submitted that the birth of the child is duly registered in the Grama Panchayat, and that the revision petitioner herein is shown as the father of the child. This is not denied. Of course, it can well be argued that such an entry was made on a self serving statement. Even hospital documents could be questioned on such a contention. In short, in cases like this what is possible is only the evidence of the victim. Just because such evidence was not accepted in the criminal proceeding, the claim of the lady cannot be rejected in a proceeding for maintenance under Section 125 of the Cr.P.C.. The nature and standard of evidence required in the two proceedings are different. If the revision petitioner is really confident, or if he believes that he is not the father of the child, he would definitely have consented for DNA test. Having obtained an acquittal in the rape case, he hoped and believed that he could escape from the liability to pay maintenance to the child who is said to be the product of that rape. I find no reason why the lady should bring a false claim against the revision petitioner. I find no reason why the revision petitioner should not consent for DNA or other scientific test. I find no reason to discard or reject the evidence given by the lady, proving the instance of sexual intercourse in which she conceived. Thus, I find that the claim of paternity stands well proved in this case, and that the revision petitioner is liable to pay maintenance to the claimant. I find no scope for interference in the order of the Trial Court granting maintenance to the child. What is granted is only Rs. 1,000/- per month. The child was aged 6 years in 2008, and now we are 2014. Whether Rs. 1,000/- per month would meet his requirements is not a matter for consideration in this proceeding. The amount does not require any interference in this revision brought by the father.

In the result, this revision petition is dismissed. Parties will bear their respective costs.