

(2016) 01 KAR CK 0123

In the Karnataka High Court

Case No : Writ Petition No. 114645 of 2015 (GM.-FC)

Shri Riyazahmed Abdulsattar Nagarchi

APPELLANT

Vs

Kumari Shipa and Another

RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

Citation : (2016) 4 AirKarR 158 : (2016) 3 ICC 292 : (2016) ILRKarnataka 2457 : (2016) 1 KCCR 801

Hon'ble Judges : B. Veerappa, J.

Bench : Single Bench

Advocate : Sri G.B. Naik and Smt. P.G. Naik, Advocates, for the Appellant;

Final Decision : Dismissed

Judgement

B. Veerappa, J.—The petitioner who is the plaintiff in the Trial Court had filed the above writ petition for the writ of certiorari to quash the order dated 21.11.2015 passed by the Family Court, Belgaum rejecting his application under Order 26, Rule 10 (A) read with Section 151 of the Code of Civil Procedure and Section 45 of the Indian Evidence Act for DNA test of the plaintiff and defendant No.2 to find out the paternity of the 1st defendant.

2. The petitioner filed suit for declaration declaring that the 1st defendant Shipa is not the daughter of the plaintiff since she is not born to Shehnaz/2nd defendant out of the wedlock with the plaintiff contending that the plaintiff and 2nd defendant are husband and wife and their marriage took place on 20.05.2007 at Gokak falls, as per customary rites and rituals of the Muslim community. Soon after the marriage, the 2nd defendant/wife joined him and lived together happily for less than two weeks and the wife left her matrimonial home without any rhyme or reason and that too without informing the plaintiff. She did not returned back and there was no communication from the defendant No.2/wife on account of which the plaintiff along with the elders and his father and members of the Jamaat tried their level best, but the same was unfruitful. The plaintiff and his wife lived separately and have no access to each other from

last week of June 2007 up to the date of filing of the petition. The wife filed Criminal Misc. No.330/2010 before the Family Court stating that the child Shipa was born to her on 09.10.2009 and it is also contended that the plaintiff was never told or communicated by the said Shehanaz or the family members regarding the alleged birth of the female child and he learnt the same for the first time on receipt of the notice for maintenance petition. The plaintiff further contended that the plaintiff and his wife had no access to each other from June 2007, the question of the child being born out of the wedlock of the plaintiff and the defendant No.2/wife does not arise. Therefore, the 1st defendant is not at all the daughter of the plaintiff. In fact the plaintiff denied the relationship of himself and the defendant No.2 and the same was not accepted by the Family Court while granting maintenance of Rs.750/- per month from 02.08.2010 till the date of her remarriage and the revision petition filed by him before this Court also came to be dismissed confirming the order passed by the Family Court.

3. The petitioner further contended that he came to know that his wife Shehnaz is having illicit relationship with another man and 1st respondent is born out of illicit relationship. The wife has filed petition for maintenance for herself and the child etc. Therefore, he sought for declaration as prayed for.

4. The respondent/defendant No.2 filed written statement. Denied the plaintiff's averments. Accepting the relationship and the marriage, defendant No.2 specifically contended that the 1st defendant was born out of the wedlock with the plaintiff and also specifically contended that the plaintiff filed the suit against the defendants with an intention to avoid maintenance being paid by virtue of the order passed by the Family Court in Crl. Misc. No. 330/2010 and the plaintiff has not come to the Court with clean hands and suppressed all the material facts of the case.

5. It is the specific case of the defendants that the plaintiff and 2nd defendant Shehnaz @ Tabassum were married on 20.05.2007 at Gokak and out of their wedlock the 1st defendant Kumari Shipa was born on 09.10.2009 after two years. It is also contended that after lapse of one year of the marriage, the mother and plaintiff started inflicting ill-treatment to the daughter-in-law/2nd defendant without any cause or reason. The plaintiff therefore arranged separate accommodation for himself and for his wife at Bukhari building, Veerbhadr Nagar, Belgaum and started residing with his wife. The plaintiff was working as Manager in Gokak Falls Mill, he used to travel from Belgaum to Gokak. Thereafter, the plaintiff started neglecting the work as Manager in Gokak Falls and started demanding Rs. 50,000/- from the parents of his wife. The 2nd defendant could not fulfil the illegal demand made by the plaintiff due to the poverty of her parents. Therefore, the plaintiff became angry and started ill treating his wife without any cause or reason.

6. It is further case of the defendants that the 2nd defendant's parents, elderly persons of Gokak Jamaat, requested the plaintiff to lead a happy married life and perform his matrimonial obligations as a good husband. Further, the plaintiff did

not show any inclination. Therefore, the 2nd defendant had no option except to approach the Court by filing a Criminal Petition No.330/2010 under Section 125 of the Code of Criminal Procedure before the Family Court, Belgaum.

7. The defendants have produced various documents, which discloses that the 1st defendant was born out of the wedlock between the plaintiff and his wife-2nd defendant. After considering the entire material on record, the Family Court has awarded maintenance amount of Rs.750/- per month to both, the wife and daughter. Aggrieved by the said order of the Family Court, the husband filed revision petition before this Court in RPFC 308/2012 and this Court after hearing both the parties has dismissed the RPFC and affirmed the order passed by the Family Court in granting maintenance to the defendants. Therefore, he filed a suit for declaration. During the pendency of the suit, he filed an application under Order 26, Rule 10 (A) read with Section 151 of Code of Civil Procedure and Section 45 of the Evidence Act for DNA test of the plaintiff and second defendant. The said application was resisted by the defendants by filing objections reiterated the averments made in the written statement and contended that the present application filed by the plaintiff is tainted with mala fide as the same has been filed with an intention to harass the defendants and the application filed by the plaintiff deserves to be rejected and also contended that the plaintiff has raised the very contention stating that the 1st defendant is not his daughter in Criminal Miscellaneous No.330/2010 itself, and after considering the oral and documentary evidence on record the said contention was negated by the Family Court and granted maintenance. The same was affirmed by the High Court in Revision Petition No.308/2012. It is also her contention that the plaintiff has not at all made out any legal or logical grounds to appoint a Court Commissioner for conducting DNA test. Since, he has filed a suit for declaration he has to prove his case by placing positive evidence and it was not permissible in law to seek appointment of Court Commissioner so as to collect evidence. The public document produced by the defendants clearly indicates that the 1st defendant is daughter of the plaintiff and defendant No.2 etc. Therefore, she sought for dismissal of the application filed before the Trial Court.

8. After considering the application and objections, the trial Court by its impugned order dated 21.11.2015 rejected the said application holding that under the provisions of Section 112 of Indian Evidence Act, the party disputing the paternity to prove non-access in order to dispel the presumption. Against the said order, this present writ petition is filed.

9. I have heard the learned Counsel for the petitioner.

10. Smt. Premalatha G. Naik, learned Counsel for the petitioner vehemently contended that the impugned order passed by the trial Court rejecting the application to appoint a Court Commissioner to conduct DNA test is without any basis. The Family Court failed to appreciate the fact that since there was no access between the petitioner and 2nd respondent from 2007 till 2009, the question of child born out of their wedlock does not arise and she has specifically

contended that the 1st respondent is not at all the daughter of the petitioner and it could be proved by DNA test conducted by a Forensic Expert by appointing as Court Commissioner which requires interference by this Court. She further contended that the very suit filed by the plaintiff is seeking declaration of paternity of child. Therefore, the trial Court ought to have allowed the application filed for conducting DNA test to know the truth of the case. Therefore, she sought to set aside the impugned order passed by the Family Court.

11. In support of her arguments, the learned Counsel has relied upon the decision of Hon?ble Supreme Court in the case of Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another reported in 2014 AIR SCW 506.

12. I have given my thoughtful consideration to the arguments advanced by the learned Counsel for the petitioner and perused the entire material on record.

13. It is an undisputed fact that the marriage between the plaintiff and 2nd defendant held on 20.05.2007 and it is also not in dispute that the 1st defendant was born on 09.10.2009. It is also not in dispute that the defendants filed Criminal Miscellaneous No.330/2010 before the Family Court under Section 125 of the Code of Criminal Procedure stating that they are wife and daughter of the plaintiff and sought for maintenance. After contest, the Family Court granted maintenance of Rs.750/- on 05.06.2012. The same was affirmed by this Court in RPFC No.308/2012, prima facie holding that the defendants are wife and daughter of the plaintiff. The said order passed by the Family Court, affirmed by this Court has reached finality. It is also not in dispute that after disposal of the RPFC No.308/2012, the petitioner filed a suit on 20.07.2012 for declaration that 1st defendant is not his daughter. After completion of the evidence on both the sides, the matter was posted for arguments. At that stage the present application was filed under Order-XXVI, Rule 10(A) of the Code of Civil Procedure on 06.10.2015 to appoint Court Commissioner to conduct DNA test of the plaintiff and 2nd defendant to find out the paternity of the 1st defendant. The prayer in the main suit and the prayer in the interim application are one and the same.

14. In the plaint, the plaintiff made assertions at Para No.9 that the 2nd defendant had an illicit relationship with another man and the 1st defendant is born out of that illegal relationship and to just legitimate the child, the wife filed a maintenance petition for herself and her child. But the said allegations have been specifically denied by the defendant in Para 12 of the written statement and contended that the child was born out of the wedlock between 2nd defendant and the plaintiff. In Para No.9 of the plaint the plaintiff has alleged that he had no access with his wife from June-2007 till the date of filing of the suit, therefore, the question of child being born out of the wedlock of the plaintiff and wife does not arise. The said allegation is specifically denied by the defendants in the written statement and specifically contended that the 1st defendant was born out of the wedlock of the plaintiff and the 2nd defendant. There is no dispute that the child was born during the subsistence of the valid marriage between the

plaintiff and the 2nd defendant etc.

15. In view of the admitted facts stated above, the only question that arise for consideration is:

"Whether the trial Court is justified in rejecting the application filed under Order 26, Rule 10 (A) read with 151 of the Code of Civil Procedure seeking for appointment of Court Commissioner to conduct DNA test of the plaintiff and 2nd defendant?"

16. It is the fact that the plaintiff filed the very suit for declaration declaring that the 1st defendant is not his daughter and admittedly the suit filed on 26.07.2012, both the parties have lead their evidence and produced respective documents to defend their respective case and the matter was posted for arguments. At that stage, the present application is filed. When the parties have produced material documents and adduced evidence so as to defend their respective assertions made in the plaint and as well as in the written statement the dispute between the parties to the lis has to be adjudicated by the Trial Court after considering both oral and documentary evidence on record.

17. In the present case the petitioner though made the assertions that the 1st defendant is not his daughter, but, there is no specific allegations against the wife. Except bald allegation that the 2nd defendant had illicit relationship with another man no material is produced before the Court to prove his contention and no evidence is forthcoming. Admittedly the plaintiff failed to establish that he had no access to his wife in order to dispel the presumption arising under the provisions of Section 112 of the Indian Evidence Act, which reads as under:

"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 son 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."

18. By plain reading of the said provision, makes it clear that any person was born during the continuance of a valid marriage between his/her mother and any man or within 280 days after dissolution, the mother remaining unmarried, shall be conclusive proof that he/she is the legitimate child 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.

19. The deoxyribonucleic acid (DNA) test cannot rebut the conclusive presumption envisaged under the provisions of Section 112 of the Indian Evidence Act. The parties can avoid rigor of such conclusive presumption only by proving non-access, which is a negative proof. Section 112 read with Section 4 of the Indian Evidence Act really have the effect of completely closing and debarring the party from leading any evidence with respect to the fact which the

law says that to be the conclusive proof of legitimacy and paternity of child covered by the provisions of Section 112 of the Evidence Act. When the parties to the marriage had access to each other, to order the blood group test, violates the right under Article 21 of Constitution of India.

20. Admittedly, the marriage between the plaintiff and 2nd defendant, was held on 20.05.2007 and 1st defendant was born on 09.10.2009, when the valid marriage was subsisting. It is a fact that the Family Court granted maintenance to the defendants on 05.06.2012 and it was confirmed by this Court in RPFC No.308/2012 holding that the defendants are wife and daughter of the plaintiff which is final and conclusive. In the present case, the petitioner has not produced any oral and documentary evidence to prove that he had no access with his wife i.e., 2nd defendant and the 1st defendant born not out of wedlock between him and the 2nd defendant-wife.

21. The trial Court on the basis of the admitted facts has held that the valid marriage between the parties was subsisted on the date of birth of the child, and relied upon the conclusive presumption as contemplated under Section 112 of the Indian Evidence Act and the trial Court held that the husband failed to prove that he has no access to his wife during the subsistence of valid marriage at that relevant period.

22. The Privy Council while considering the provisions under Section 112 of the Indian Evidence Act in the case of *Karapaya Servai v. Mayandi* reported in AIR 1934 PC 49 held that the word "access" connotes only existence of opportunity for marital intercourse. The same has been reiterated in the case of *Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana* reported in AIR 1954 SC 176 held that when the legislature chose to employ the expression that a certain fact "shall be conclusive proof of another fact, normally the parties are disabled from disrupting such proof. This can be discerned from the definition of the expression "conclusive presumption" in Section 4 of the Act. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, nor merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The *raison d'être* is the legislative concern again illegitimizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

23. The Apex Court while considering the provisions of Section 112 of the Indian Evidence Act in the case of *Goutam Kundu v. State of W.B.* reported in AIR 1993 SC 2295 held at paras 24 and 26 as under:

"24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. Access and non-access mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation.

26. From the above discussion it emerges:-(1) That Courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) the Court must carefully examine as to what would be the consequences 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.

(5) no one can be compelled to give sample of blood for analysis."

24. This Court is in agreement with the principles of the law laid down by the Hon^{ble} Supreme Court in the case of Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another reported in 2014 AIR SCW 506 relied upon by the learned Counsel for the petitioner. But the facts of that case has no application to the facts and circumstances of the present case. In the Badwai case stated supra, admittedly the husband and wife lived separately even prior to the wife was pregnant and 1st petition filed by wife for maintenance was dismissed on 10.12.1993. Again the wife was restored to a fresh maintenance proceedings under Section 125 of the Code of Criminal Procedure alleging that she started living with her husband from 20.06.1996 and stayed with him about two years and during that period got pregnant. It was a case of re-union and re-cohabitation. In that case an order already was passed for DNA test by the co-ordinate Bench. In the present case, the claim for maintenance alleging that defendants are wife and daughter was granted by the Family Court, affirmed by this Court in RPFC No.308/2012 reached finality. Therefore, the said decision has no application to the facts and circumstances of the present case.

25. The trial Court while considering the application for appointment of Court Commissioner to conduct DNA test has recorded a finding that in Criminal Miscellaneous No.330/2010 the present petitioner has admitted in cross-examination that he is ready to take back the defendants (wife and daughter) to lead married life and the contention regarding dispute that the 1st defendant is not his daughter has been negated by the Family Court by deciding the application filed under Section 151 of the Code of Civil Procedure. The same was affirmed by this Court in RPFC No.308/2012 which is final and conclusive. The trial Court also recorded the finding that the evidence of both the parties concluded and posted the matter for argument, at this stage the plaintiff filed the

present application under Order 26, Rule 10A of the Code of Civil Procedure, which requires the party disputing of paternity to prove non access in order to dispel the presumption under the provisions of Section 112 of the Indian Evidence Act. The said presumption is rebuttal presumption. Therefore, the plaintiff has not made out any ground to allow the application and to direct the party to undergo medical examination of DNA test to find out the biological father and accordingly rejected the application. In view of the aforesaid reasons, the question raised in the Writ Petition has to be answered in affirmative holding that the trial Court is justified in rejecting the application filed by the plaintiff.

26. The trial Court considering the material on record recorded a specific finding that the plaintiff has not made out any case to grant the prayer sought therein. Admittedly, in the facts and circumstances of the present case, the plaintiff has failed to establish that he had no access to his wife at any time when she could have begotten 1st defendant in order to dispel the presumption arising under the provisions of Section 112 of the Indian Evidence Act. The Hon^{ble} Supreme Court time and again held that the Courts in India cannot order blood test as a matter of course and whenever the applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained. In the present case in view of the subsistence of the valid marriage between the plaintiff and 2nd defendant, 1st defendant was born, the petitioner has not made out any extraordinary circumstances to allow the application. Therefore, the impugned order passed by the trial Court is just and proper, no interference is called for under Articles of 226 and 227 of the Constitution of India. Accordingly, the writ petition is dismissed.

27. However, it is made clear that any observation made by the trial Court and this Court while deciding the interim application would not be in any manner influence the trial Court while deciding the matter on merits in accordance with law.

28. Ordered accordingly.