

Ningappa and Others Vs. Shankar and Others

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Court : Karnataka Dharwad

Decided On : Mar-04-2014

Judge : A.V. Chandrashekara

Appeal No. : Regular Second Appeal No. 866 of 2002 (PAR)

Appellant : Ningappa and Others

Respondent : Shankar and Others

Judgement :

(Prayer: This Appeal Is Filed Under Section 100 Of Cpc Against The Judgment And Decree Dtd. 12.7.02 Passed In Ra No. 102/89 On The File Of The Prl. District Judge, Dharwad, Dismissing The Appeal And Confirming The Judgment And Decree Dated. 31.3.80 Passed In O.S.No.46/76 On The File Of The Prl. Civil Judge and Jmfc, Dharwad.)

1. This is an appeal by the defendants of an original suit bearing O.S.No.46 / 1976, which was pending on the file of the Court of Civil Judge (Jr.Dn.), Dharwad.
2. Appellants were the defendants in the said suit. Deceased respondent-Shankar was the only plaintiff in the said case. Parties will be referred to as plaintiff and defendants as per their ranking given in the trial Court.
3. Claiming himself to be the son of the deceased 1st defendant - Kallappa through his second wife Venkavva, plaintiff had filed a suit for the relief of partition

and separate possession claiming 1 /5th share in all the schedule properties. According to the plaintiff, 1st defendant Kallappa married his mother Venkavva and as a result of the said cohabitation, he was born in the year 1942. Since the marriage of Venkavva with the 1st defendant was prior to the coming into force of the Bombay Prohibition of Bigamy Act, 1943, he is stated to be the son entitled to 1 / 5th share. According to him, his mother Venkavva and 1st defendant lived as husband and wife under the same roof for quite a long time and residents of Navalur village had recognized them as husband and wife.

4. The defendants had emphatically denied all the material averments found in the plaint. The plaintiff had been called upon to prove the contents of the plaint strictly. The averment that, 1st defendant Kallappa had married Venkavva and as a result of the said marriage plaintiff is born, has been specifically denied. According to him, 1st defendant Balawwa is his only wife and defendants 2 to 4 are born out of his marriage with Balawwa. Two years after the filing of the written statement, it was got amended to include some material averments. According to the 1st defendant, the said Venkavva was a lady of loose character and that she had lived with one Desai and as a result of the same, one son by name Parashuram was born to her and therefore, he had prayed for dismissal of the suit.

5. on the basis of the pleadings, following issues came to be framed:

"i. a) Whether plaintiff proves that his late mother Venkavva was the legal wedded wife of defendant No. 1 ?

b) If so, whether the plaintiff proves that he is the legitimate son of defendant No. 1 ?

ii. Whether the suit properties are the joint family properties?

iii. Whether the defendant No. 1 is not the manager of the joint family?

iv. Whether the suit mortgage transaction is for legal necessity?

v. a) Whether defendant No. 1 has relinquished, his rights in the suit property and other family properties if any in favour of defendants 2 and 3?

b) If so, whether such transaction or relinquishment is genuine?

vi. Whether the Court fee paid is correct?

vii. Whether defendants are entitled for compensatory costs?

viii. To what relief the parties are entitled?"

6. Plaintiff himself has been examined as PW.I and two witnesses have been examined on his behalf. According to him, Balappa and Chanabasappa examined as PWs. 2 and 3 had attended the marriage of his mother Venkavva with the 1st defendant. Kallappa himself has been examined as DW1 and four more witnesses have been examined on his behalf. In all twelve exhibits have been got marked on behalf of the plaintiff and five exhibits have been got marked on behalf of the defendant.

7. After hearing the arguments from the learned Counsel appearing for the parties and after analysing the evidence placed on record, the learned Civil Judge IJr.Dn.) has answered issues 1(a) 1(b), 2, 3 and 6 in the affirmative and remaining issues in the negative. Ultimately suit is decreed as prayed for.

8. Against the said judgment and decree dated 31.03.1980, an appeal was filed under Section 96 of CPC in RFA 195/1980 before this Court. In view of amendment to Section 19 of the Karnataka Civil Courts Act and in view of enhancement of pecuniary jurisdiction of the District Court, appeal stood transferred from this Court to the District Court, Dharwad and numbered as R.A.No. 102/1989. After hearing elaborate arguments from the learned Counsel appearing for the parties and after going through the records, the learned First Appellate Judge has affirmed the judgment of the trial Court by dismissing the appeal vide a considered judgment dated 12.07.2002. It is these concurrent findings which are called in question before this Court on various grounds as set out in the appeal memo.

9. My learned predecessor has framed the following substantial questions of law for consideration in the present case:

"i. Whether both the Courts below were justified in holding that the mother of plaintiff-Shankar was legally wedded wife of 1st defendant-Kallappa in the absence of proof of marriage?

ii. Whether both the Courts below were right in holding that the 1st defendant Kallappa was biological father of plain tiff- Shankar?"

REASONS

10. Learned Counsel for the appellants has vehemently argued that, both the trial Court and the First Appellate Court have adopted a wrong approach to the real state of affairs, in spite of giving a specific finding that plaintiff has failed to prove the actual marriage of Venkavva with the 1st defendant.

11. It is further argued that, when the plaintiff has failed to prove the legal marriage between two, more particularly, when Venkavva belonged to Maratha community and Kallappa belonged to Hindu-Lingayat community, the trial Court should have non-suited the plaintiff. It is further contended that, when the trial Court has disbelieved the versions of PWs. 2 to 3 in respect of their attendance in the marriage and proof of actual marriage, the trial Court could not have decreed the suit. It is further contended that the trial Court has failed to take into consideration, that the initial burden cast upon the plaintiff has not been effectively discharged, and therefore weaknesses, if any, in case of adversary cannot be a trump card for the plaintiff to succeed. It is further contended that the evidence adduced by the parties has not been tested on the basis of preponderance of probabilities and thereby, it has resulted in great injustice to the appellants. The judgments and decree of both the Courts, according to the learned Counsel for the appellants, are opposed to the law, facts and probabilities.

12. Per contra, learned Counsel for the respondents has vehemently argued that, the trial Court has analyzed the entire evidence threadbare and has taken into consideration the conduct of the defendants in causing aspersions on the character of Venkavva, without there being any basis in the earlier written statement filed on their behalf. It is further contended that the evidence adduced by Kallappa is contrary to the averments found in the written statement and that

many of them are actually improvements.

13. According to the learned Counsel for the respondents, the trial Court and the First Appellate Court have taken into consideration the totality of the case, in order to come to the conclusion that the plaintiff is the son of Venkavva and that he was born out of the legal wedlock between Venkavva and 1st defendant Kallappa. According to him, both the Courts have drawn presumption available under Section 114 of the Evidence Act in regard to Kallappa and Venkavva living as husband and wife. Hence prayed for dismissal of the appeal.

14. Plaintiff himself has been examined as PW1 and one Balappa and Chanabasappa who are residents of Navalur village have been examined as PWs. 2 and 3. Of course PW1 cannot speak anything about the marriage that allegedly took place between his mother Venkavva and 1st defendant. At the best his evidence can only be taken to a limited extent of his living in the house of 1st defendant and 1st defendant having admitted him to school, subject of course to the acceptable evidence, if any, placed on record. Balappa was aged about 56 years when his evidence was recorded and Chanabasappa was aged about 80 years, when his evidence was recorded. Both of them are residents of Navalur village. The fact that 1st defendant is also a resident of Navalur village and has immovable properties in Navalur village, inclusive of a residential house, is not in dispute. Of course, the evidence of both Balappa and Chanabasappa examined as PWs. 2 and 3 has not been believed by the trial Court and the First Appellate Court, on the ground that their evidence in regard to their participation in the marriage is doubtful.

15. The trial Court has relied upon the presumption available under Section 114 of the Evidence Act. In order to draw presumption under Section] 14 of the Evidence Act, the evidence of persons who are conversant with the parties will be relevant. As per Section 50 of the Evidence Act, opinion of the persons who had seen the deceased Venkavva and 1st defendant living as husband and wife would be relevant. The evidence of PWs. 2 and 3 has been mainly disbelieved because of the caste to which Venkavva belonged.

16. Admittedly, Venkavva belonged to Maratha caste and 1st defendant was a Hindu- Lingayat. According to them, Uduke marriage was not invoked between the person belonging to backward caste and Lingayat. What is observed by the trial Court is that, both these persons were sudras and therefore, there is no legal prohibition for any marriage between them.

17. Admittedly, Bombay Prevention of Bigamy Act, 1948 came into effect from 18.04.1948. The alleged marriage between Venkavva and 1st defendant was long prior to the coming into force of this Act. The suit was filed in the year 1976 and plaintiff was aged about 34 years. If 34 years is deducted from 1976, his year of birth would be somewhere in 1942. Ex.PI is the School Leaving Certificate of plaintiff issued by Bassel Mission Higher Secondary School, Dharwad on 10.03,1976. Name of plaintiff is mentioned as Jergewade Shankar Kallappa and father's name is mentioned as Kallappa. His caste is mentioned as Hindu- Lingayat. His native place is mentioned as Navalur and his date of birth is mentioned as 04.07.1942. The date of admission is mentioned as 17.06.1958 and he left the school on 31.05.1961. What is argued before this Court, by the learned Counsel for the respondent is that, the said document is only admissible in evidence and is not a conclusive proof of the paternity, as sought to be impressed upon the Court by the plaintiff. Admittedly, the surname of the family of defendant No.1 is Jeigewade.

18. Anyhow, this document can be definitely looked into about the date of birth. His date of birth is mentioned as 04.07.1942. Looking to the age of the plaintiff mentioned in the plaint and the date of birth found in Ex.PI, it may be said that, he was born in the year 1942 and that is probabalized. The trial Court has not taken this as one of the main circumstances about his paternity. Admittedly, Bassel Mission Higher Secondary School is in Dharwad. There is no dispute about this. If really the authenticity of the said document was in question, nothing would have come in the way of defendants to prove that the said document is not a genuine document.

19. In page two in paragraph 2 of his evidence, he has relied upon Ex.PI, the School Leaving Certificate. It is his case that, his mother had married a person by

name Basappa and out of the said marriage, one son was born. He has admitted that, name of male child born to his mother through Basappa was Parashuram. He has admitted that, said Parashuram is his elder brother and difference between him and Parashuram was about 8-10 years. He has denied the suggestion put to him that difference of age between himself and Parashuram was 2-3 years. Several questions have been put to him as found in paragraph 9 of his cross-examination at Ex.PI. Nothing is suggested to him that the said document marked as Ex.PJ is a concocted document. Suggestion put to him that he was not admitted to the said school by the 1st defendant has been specifically denied. What is suggested to him is that, he has not produced the progress card. Non-production of the progress card cannot take away the effect of Ex.PI, the document issued at an undisputed point of time. Entries found in the school register and admission form regarding date of birth constitute good proof of age. There is no legal requirement that official record should be kept only by a public officer. All that is required under Section 35 of the Evidence Act is that, it should be regularly kept in discharge of official duty. To this effect, the decision reported in AIR 2005 SC 1368 in the case of State of Punjab Vs. Mohinder Singh, is relevant and applicable to the facts of the case.

20. It is further held in the case of Lakhwinder Singh Vs. Miss Paramjit Kaur reported in AIR 2004 PH 6 that the record pertaining to the School Leaving Certificate and the admission register maintained by the school is admissible in evidence, though it is not a conclusive proof of the date of birth or age of a person.

21. What is argued before this Court is that, in order to vouchsafe Ex.PI, somebody should have been examined from the school, which has issued the said certificate. As already discussed earlier and the reasons given by the trial Court, this document is not taken as be all and end all to prove the paternity.

22. Though the evidence of PWs. 2 and 3 has been disbelieved in regard to their participation in the alleged marriage of Venkavva with Kallappa, their evidence in regard to both of them living together under the same roof for a long time is not disbelieved. Similarly, DWs. 2 to 5 are treated as interested witnesses, as they have suppressed material facts about Venkavva living in Navalur village for quite a

long time and in view of their inconsistencies in regard to material particulars.

23. One more circumstance that has been taken into consideration by the trial Court to disbelieve the stand of first defendant is. about the amendment effected to the written statement two years after it was filed. Nothing had been mentioned about the unchastity of Venkavva in the written statement filed earlier. Later on, some amendments were proposed and they have been incorporated to prove that she was a lady of loose character and that she had once lived with one person by name Desai and had given birth to one Parashuram and later on she lived with another person by name Basappa, who was a clerk under Advocate Sri.Jog. Even during his evidence, defendant No.1 examined as DW1 had sought to lead evidence without there being any basis in his written statement.

24. In the examination in chief, DW1 has deposed that, one person by name Basappa was clerk under an Advocate by name Jog and that he had kept this Venkavva with him in Navalur and Parashuram was already born to Venkavva by the time she was brought and kept with him by Basappa. He has made an attempt to impress upon the Court that this plaintiff was born only after Basappa brought Venkavva to Navalur. According to him, Venkavva lived with Basappa till her death and that, she had kept with her both the plaintiff and Parashuram in a rented house belonging to one Kamate and later on this was purchased by Parashuram. He has been cross-examined at length by the learned Counsel for the plaintiff. Thus an attempt is made to doubt her chastity.

25. The trial Court has taken into consideration one important circumstance. It is in regard to the plaintiff getting legal notice issued to the defendants, prior to the filing of the suit calling upon them to give share. A copy of the legal notice is marked as Ex.P2 and it had been acknowledged by the defendants. Ex.P3 is the postal acknowledgement. In spite of receipt of legal notice, 1st defendant did not choose to reply the same. Of course, there is no statutory requirement that such a notice should be replied. Anyhow, non- replying of such notice, which contained assertion of the plaintiff that he is the son born to Venkavva through him and claiming 1 / 5th share is very relevant. In regard to question put to him that suit was came to be filed five months after service of notice, he has feigned ignorance.

26. If really Venkavva was living with one Basappa as kept mistress in a rented house along with her two children, nothing would have come in the way of 1st defendant to have incorporated the same, when the written statement was filed earlier. According to him, Basappa, Venkavva and Parashuram lived there for about 7-8 years and he came to know about that only through somebody. What is the name of the said Basappa is not known to him. According to him, he came to know of Venkavva living with Basappa through Chanabasappa, since Chanabasappa was often coming to his bouse for regular work. This is nothing but an attempt to create a story.

27. According to him, there are several witnesses who can speak about Venkavva being kept as a kept-mistress by Basappa. All the witnesses examined on his behalf in this regard have not been examined. Ultimately it has turned out from the record that they are interested witnesses and hence much credibility is -not attached to their evidence.

28. The evidence recorded by the trial Court has been properly re-assessed by the First Appellate Court also. In typed page 38 of the First Appellate Court's judgment, it is specifically held that defendant No.1 has suppressed true facts before the Court and was pretending as though he was not knowing Venkavva earlier at all.

29. DW1 has stated in his evidence that he did net have any relationship with Venkavva in any manner and that plaintiff was not born to her through him. But he has not whispered anything in his evidence that she was leading a life of concubine or kept mistress of one Desai. According to him, Venkavva lived with one Desai of Amminabhavi and later on she was brought to Navalur by Basappa and she was his kept mistress.

30. If DW2 is also a resident of Navalur and if he knew very well that Venkavva lived with Desai of Amminabhavi and later on she was brought to Navalur and kept by Basappa in his Jiouse, he would have definitely spoken to that effect. As rightly pointed out b}^ the trial Court and the First Appellate Court, if deceased Venkavva was not a lady of good virtues, and if she was staying with various persons as sought to be projected by defendants, certainly these witnesses would not have

forgotten to mention about these material aspects in their evidence, more particularly, when they are also residents of Navalur village.

31. DW.4 has made an attempt to impress upon the Court that one Basappa, who was working as a clerk under an Advocate Jog was residing in the house of Kamate on a rent of Rs.5/- p.m. and it was adjacent to his house. According to him, Basappa was living with this Venkavva in the said rented house. If that was so, DWs. 1 to 3 who are also of Navalur village would have definitely spoken to that effect.

32. The trial Court has made a detailed analysis of the entire oral evidence and has tested the same on the touchstone of intrinsic probabilities. Legal burden of proof will remain static. It is not as thought, the burden of proof cannot be discharged at all. What is expected of a person like plaintiff is to state on oath, that he is the son of such and such person and to provide some reliable evidence in support of the same.

33. There is an essential distinction between burden of proof and onus of proof. Burden of proof lies upon a person who has to prove the fact, which never shifts. Onus of proof shifts and such a shift of onus is a continuous process in the evaluation of evidence, as held in the case of Raghavamma Vs. Chenchamma reported in AIR 1964 SC 136.

34. The entire judgment of the trial Court is based upon Section 114(d) of the Evidence Act. Section 114(d) of the Evidence act reads as follows:

"Sec. 114 - The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume"

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it"

35. It is true that Venkavva had married earlier and had given birth to a son whose name is Parashuram. PW1 has fairly admitted the same. Whether the existence of previous husband to Venkavva would come in the way of raising a presumption under Section 114 is relevant. The Division Bench of the Hon'ble High Court of Madras as reported in 1971 Madras Page 330 in the case of Raghuvir Kumar (minor) by next friend and Mother Smt. D. P. Kamalakumari and another Vs. Smt. Shanmughavadivu and Others, has held that existence of previous wife is not sufficient to rebut presumption, when second marriage is not prohibited by law.

36. As already discussed, there was no prohibition of marriage between a lady belonging to Maratha caste and a man belonging to Lingayat community. According to shastras, both of them were sudras and there was no legal prohibition, more particularly, when the Bombay Prohibition of Bigamy Act came into force only in the year 1948. As per the evidence placed on record, PW1 was born in the year 1942 itself.

37. In the case of Tulsa and Ors. Vs. Durghatia and Ors. reported in AIR 2008 SC 1193, Hon'ble Supreme Court has reiterated the principles enunciated by the Privy Counsel in Mohabhat Ali Vs. Md. Ibrahim Khan's case as reported in 1929 PC 135. In the said decision it is held that law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years.

38. Under these circumstances, drawing a presumption under Section 114(d) of the Evidence Act would be proper and legal. Even in the case of Badri Prasad Vs. Dy. Director of Consolidation (AIR 1978 SCC 1557), it is clearly reiterated that law always leans in favour of legitimacy and frowns upon bastardy.

39. Admittedly, marriage of Venkavva with the 1st defendant had taken place several decades ago. That could be proved only by the oral evidence of persons who had seen the marriage or seen the couple living as husband and wife and children born out of their marriage. In the light of such an old marriage, it is not practical to expect the witnesses to testify to the details of the marriage. Taking into consideration the inconsistent stand of the 1st defendant and the manner in which he has chosen to get his written statement amended two years after the filing of the original written statement and the inconsistencies and suppression of material aspects from the purview of the Court by DWs. 1 to 3 and the connected documentary evidence placed on record, the trial Court has rightly drawn presumption of valid marriage by invoking Section 114(d) of the Evidence Act.

40. The trial Court as well as the First Appellate Court have properly assessed the evidence in right perspective. The evidence so adduced has been tested on the touchstone of intrinsic probabilities. No illegality or perversity is found about the approach adopted by the Courts below. Absence of proof of marriage between the two cannot invalidate the marriage of Venkavva with the first defendant, when both of them had lived as husband and wife and were being recognized as husband and wife by the people in the locality. Inability of the 1st defendant to prove the loose character of Venkavva, the trial Court and the First Appellate Court have rightly held that 1st defendant Kallappa was the biological father of plaintiff Shankar.

41. Hence substantial questions of law 1 and 2 will have to be answered in the negative.

42. There are no grounds to interfere with the concurrent findings in regard to the proof of marriage of Venkavva with 1st defendant on the basis of long cohabitation and consequently birth of the plaintiff. The trial Court as well as the First Appellate Court have properly weighed the evidence on the basis of broad preponderance of probabilities.

43. Hence there are no merits in the appeal and accordingly it is liable to be dismissed by affirming the judgment and decree of the First Appellate Court.

The appeal is dismissed. Judgments and decrees of the First Appellate Court passed in R.A.No. 102/1989 and trial Court are affirmed.

There is no order as to costs.

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