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Court : Kerala

Decided On : Dec-01-2015

Judge : K. Ramakrishnan

Appeal No. : OP (Crl.) No. 169 of 2015 (Q)

Appellant : Saji Mathew

Respondent : Bindu and Another

Judgement :

1. This is an application filed by the petitioner challenging the impugned order passed by the Family Court, Muvattupuzha, in C.M.P.No.33/2015 in M.C.No.94/2014 under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioner and first respondent are husband and wife and their marriage was solemnized on 16.05.2005 and a son was born to them in that wedlock. Later their marital relationship has been irrecoverably broken down and they were living separately and she was leading an adulterous life with one Kamaruddeen. 2nd respondent is the child born on 22.01.2013 to the first respondent in the said Kamaruddeen. Petitioner filed application for divorce on the ground of adultery and also another petition for declaring the paternity of the 2nd respondent and another petition for getting the custody of the son, who is admittedly born to him in that wedlock. It is thereafter that the first respondent filed a petition for getting maintenance for her and her two children as Ext.P1. The

petitioner filed Ext.P2 objection denying his liability to pay maintenance to the 2nd respondent alone. During the pendency of this petition, he filed Ext.P3 petition as C.M.P.No.33/2015 in M.C.No.94/2014 for conducting DNA (Deoxyribo Nucleic Acid) test to find out the paternity of the 2nd respondent. First respondent filed Ext.P4 objection. After considering the contentions raised by both sides, learned family court judge by Ext.P5 impugned order dismissed the application. Aggrieved by the same, the present petition has been filed.

3. Heard Sri.Alias M.Churian, counsel appearing for the petitioner and Smt.Shylaja, counsel appearing for the respondents.

4. The counsel for the petitioner submitted that, merely because they are living under the same roof does not mean that he had cohabitation with the first respondent. The presumption under Section 112 of the Evidence Act can be rebutted only by adducing scientific evidence for which DNA test is a must. The court below according to him had wrongly interpreted the decision of the Hon'ble Supreme Court to deny the prayer.

5. On the other hand, learned counsel for the respondent submitted that, the child was born in the year 2013 and till 03.09.2014 when she left the matrimonial home, they were living under the same roof. He had not raised any objection regarding the paternity of the child. So the court below was perfectly justified in dismissing the application.

6. It is an admitted fact that the petitioner married the first respondent in the year 2005 and admittedly a male child was born to them in that wedlock. It is also in away admitted that during the subsistence of marriage, the first respondent became pregnant again and delivered a female child on 22.01.2013, but the petitioner is not admitting the paternity of that child. According to him, the first respondent was having illicit connection with one Kamaruddeen and as a result of that illicit relationship she became pregnant and delivered the female child and when this was known to him, their relationship strained. According to the petitioner, the first respondent went for delivery and delivered the child from her parental house from a hospital and his name was shown in the birth certificate of the 2nd child as given by the first respondent and her family members and he was

not aware of the same as well. It is also in away admitted that from 03.09.2014 onwards they were living separately. But according to the petitioner after she went for delivery, she did not come back. These are all matter for evidence.

7. It is also an admitted fact that the petitioner filed O.P.No.453/2014 for divorce before the Family Court, Muvattupuzha, on the ground of adultery and he had also filed O.P.No.452/2014 for declaring the paternity of the second respondent that he is not the father of the 2nd respondent and that is also pending before that court. He had also filed O.P.No.451/2014 before the Family Court, Muvattupusha for getting custody of the male child and all these petitions were pending. According to the petitioner only after he filed those three petitions, first respondent filed Ext.P1 petition for maintenance as M.C.No.94/2014 and he entered appearance and filed Ext.P2 objection in which he had admitted the marriage and paternity of the first child, but denied the paternity of the second child and his liability to pay maintenance to the second child and also to the wife. In this circumstances, he filed C.M.P.No.33/2015 as Ext.P4 to conduct DNA test to ascertain the paternity of the 2nd respondent and the first respondent filed Ext.P5 objection. The main contention raised in the objection was that, no objection was raised by the petitioner about the paternity of the child till 2014, though the child was born in the year 2013 and they were living together till 03.09.2014 when she left the house. The court below relied on the presumption under Section 112 of the Evidence Act and came to the conclusion that, the presumption available under Section 112 of the Evidence Act cannot be overridden by allowing the application for DNA test.

8. The question as to whether the presumption under Section 112 or the scientific test will prevail has been considered by the apex court in the decision reported in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Another* (2014 KHC 4005) and held that, if there is conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the whole community to be correct, the later must prevail during the trial and in that case it was held that the result of DNA test would prevail.

9. Further in the decision reported in *Dipanwita Roy v. Ronobroto Roy* (2014 KHC 4675), the Honb'le Supreme Court has gone into the question as to whether a

person can be compelled to go for DNA test and whether that will intrude into the right of individual privacy and the Supreme Court has held that in appropriate cases directing DNA test to be conducted, if it is required for proper adjudication of the case, it cannot be said to be intruded into the individual privacy. Further in the same decision it has been observed that whether a person refusing to undergo the test of DNA can be treated as a ground for taking adverse inference against such person also left open to be considered by the trial court on the basis of other evidence available. So the dictum laid down in both these cases will go to show that when a scientific evidence is required or helpful for the purpose of deciding the point in dispute, then if such evidence is available that will prevail over the presumption under Section 112 Evidence Act regarding the presumption regarding legitimacy of the child. In this case, admittedly the petitioner is denying paternity of the 2nd child who is the 2nd respondent herein.

10. It is also settled law that court must always be slow in bastardizing a child, but at the same time when that itself is in issue, then an opportunity must be given to the party, who is denying the paternity to prove the same by adducing scientific evidence for enabling the court to consider as to whether he is liable to pay maintenance to that child or not. The question as to whether there is a possibility of access and really they have access which resulted in the 2nd pregnancy etc., are matter for evidence. Before that, an opportunity of getting such a scientific evidence regarding the paternity of the 2nd child whose liability to pay maintenance is in dispute which can be resolved only by getting a scientific evidence which is now available and accepted by the world community at large, should not be shut out at this stage relying on the presumption under Section 112 of the Evidence Act alone as observed by the apex court in the decisions mentioned above. So under the circumstances, the reasons stated by the court below for dismissing the application misquoting the observation of the apex court on this aspect is unsustainable in law and the same is liable to be set aside. In the result, the order of the court below in C.M.P.No.33/2015 in M.C.No.94/2015 dismissing the application seeking conduct of DNA test to ascertain the paternity of the 2nd respondent is set aside and the same is allowed. The first respondent is directed to co-operate with the DNA test to be conducted to ascertain the paternity of the 2nd child, who is the 2nd respondent herein. The petitioner is directed to

take steps to deposit the required amount for meeting the expenses for conducting the DNA test within a period of two weeks from today. On making such deposit, the court below is directed to take all steps required for conducting the DNA test as required by the laboratory for this purpose.

With the above direction and observation the petition is allowed and disposed of.

Office is directed to communicate this order to the concerned court, immediately by fax.

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