

Rajanaika Vs. Umesh

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Court : Karnataka

Decided On : Dec-03-2015

Judge : Aravind Kumar

Appeal No. : WP 3950/2015

Appellant : Rajanaika

Respondent : Umesh

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE03D DAY OF DECEMBER, 2015 BEFORE THE HONBLE MR.JUSTICE ARAVIND KUMAR W.P.NO.3950/2015 (GM-CPC) BETWEEN: RAJANAIIKA S/O LATE KADANAIIKA AGED ABOUT49YEARS R/AT SULEKOTE VILLAGE HARNAHALLI HOBII, PERIYAPATNA TALUK-571 107 MYSORE DISTRICT. (BY SRI.LOURDU MARIYAPPA A, ADVOCATE) ... PETITIONER UMESH S/O RAJANAIIKA AGED ABOUT22YEARS R/AT SULEKOTE VILLAGE HARNAHALLI HOBII, PERIYAPATNA TALUK-571 107 MYSORE DISTRICT. SMT. MARIYAMMA S/O RAJANAIIKA AGED ABOUT42YEARS R/AT SULEKOTE VILLAGE HARNAHALLI HOBII, PERIYAPATNA TALUK-571 107 MYSORE DISTRICT. (BY SRI.S. VICTOR MANOHARAN, ADVOCATE) ... RESPONDENTS AND:

1.

2. 2 THIS WRIT PETITION IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED

ORDER

DATED 31.12.2014 PASSED ON I.A.NO.7, FILED BY THE PLAINTIFF/RESPONDENT NO.1 UNDER SECTION 45 R/W 56 OF EVIDENCE ACT R/W SECTION 151 OF CPC IN O.S.NO.170/2010, ON THE FILE OF HONBLE CIVIL JUDGE (JR.DN) AND JMFC, PERIYAPATNA, MYSORE DISTRICT AT ANNEXURE-E. THIS PETITION COMING ON FOR

ORDER

S THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

First defendant in O.S.No.170/2010 being aggrieved by order dated 03.12.2014 passed on I.A.No.7 by Civil Judge and JMFC, Periyapatna - Annexure-E allowing the application filed under Section 45 read with Section 56 of Indian Evidence Act, 1872 and Section 151 CPC and directing plaintiff and defendants 1 and 2 to tender their blood samples for forwarding it for a DNA test is before this Court.

2. I have heard the arguments of Sri Lourdu Mariyappa, learned Advocate appearing for petitioner and Sri Victor Manoharan, learned Advocate appearing for respondent - 1. Perused the records. 3. Plaintiff has filed a suit for partition and separate possession of suit schedule properties contending inter alia that he was born out of the wedlock between defendants-1 and 2 and suit schedule properties being ancestral properties, he is entitled for partition and separate possession of 1/3rd share. First defendant appeared and filed his written statement not only denying averments made in the plaint, but also has denied very relationship between him and plaintiff contending inter alia that plaintiff is not his son and he is not married to second defendant but on the other hand, he is married to one Smt. Jayanti and out of said wedlock, he has two sons and they are entitled for share in the suit properties and not the plaintiff. Second defendant has not appeared before trial Court and as such she has been placed ex parte.

4. On the basis of the pleadings of parties, trial Court has framed issues and parties have gone to trial to substantiate their respective claims and to prove the issues whereunder burden has been cast on the 4 respective parties. On conclusion of trial, when the matter is set down for final arguments, an application under Section 45 read with Section 56 of Evidence Act, 1872 and Section 151 CPC came to be filed by plaintiff as per Annexure-C with a prayer to direct first defendant to give blood samples in the presence of Medical Officer in open Court for being sent to DNA test since he had denied paternity of the plaintiff. Trial Court after considering rival contentions and also taking note of Section 112 of Evidence Act, 1872 into consideration, has allowed the application by impugned order dated 03.12.2014 - Annexure-E which is impugned in the petition.

5. It is the contention of Sri Lourdu Mariyappa, learned Advocate appearing for petitioner that trial Court could not have directed first defendant i.e., writ petitioner to subject himself to DNA test without considering the fact that plaintiff had not even proved *prima facie* case about solemnization of marriage between first and second defendant and as such, 5 reasons assigned by trial Court is contrary to facts and liable to be set aside. On account of initial burden having not been discharged by plaintiff, writ petitioner- first defendant cannot be heard to furnish his blood samples for conducting DNA test to ascertain paternity of the plaintiff or in other words as to whether he is the son of first defendant. In support of his submissions, he has relied upon following judgments:

(1) AIR 1993 SC2295 GOUTAM KUNDU vs STATE OF W.B. AND ANOTHER

(2) AIR 2000 KAR PAGE 80 SMT. NINGAMMA AND ANOTHER vs CHIKKAIAH AND ANOTHER (2005) 4 SCC 449 BANARSI DASS vs TEEKU DUTTA (MRS) AND ANOTHER

(3)

6. Per contra, Sri Victor Manoharan, learned Advocate appearing for respondent-1 would support the impugned order and contends that when first defendant has specifically denied that plaintiff is not born out of wedlock between defendants-1 and 2, plaintiff was forced to file this application and as such, trial Court 6

having considered the fact that first defendant had denied paternity of plaintiff has allowed the application and there is no error of jurisdiction committed by the trial Court in passing the impugned order. Hence, he prays for dismissal of writ petition. In support of his submission, he has relied upon following judgments:

(1) AIR 2003 SC34501) SHARDA vs DHARMPAL

(2) AIR 2008 ANDHRA PRADESH1951) MARADA VENKATESWARA RAO vs OLETI VARA LAKSHMI AND ANOTHER⁷ Having heard the learned Advocates appearing for parties and on perusal of records, it would indicate that plaintiff has filed suit for partition contending inter alia that first defendant is his father and he was born out of wedlock between first and second defendant. On the contrary, first defendant having entered appearance, in his written statement has denied his relationship with second defendant and plaintiff having born out of such alleged wedlock. He has specifically contended that he is married to one Smt. Jayanti and out of said wedlock, he has two sons. ⁷

8. Section 112 of the Evidence Act clearly indicates that any person born during the continuance of valid marriage between his mother and any man or within 280 days after its dissolution and mother remaining unmarried during this period shall be a conclusive proof that he is the legitimate son unless it can be shown that parties to the marriage had no access to each other at any time when the child could have been born.

9. Honble Apex Court in GOUTAM KUNDU¹ case referred to supra has held that Section 112 of Evidence Act lays down that if a person was born during the continuance of the valid marriage between his mother and any man, it shall be taken conclusive proof that he is the legitimate son born out of such marriage. In other words, presumption would arise with regard to legitimacy of the child. All presumptions are rebuttable presumptions, as such, Section 112 of the Evidence Act requires that the party disputing the paternity to prove ¹ AIR 1993 SC22958 that he had no access to his wife or lady as the case may be in order to dispel the presumption or in other words, such presumption arising under Section 112 of Evidence Act, can be rebutted by tendering evidence to show non access to such woman. Access and non access as held by Apex Court would mean the existence

or non existence of opportunities for sexual intercourse. As such, a presumption arises as indicated under Section 112 of Evidence Act that a child born through lawful marriage is legitimate and parties had access to each other. This presumption can be replaced or displaced by strong preponderance of evidence and not by mere balance of probabilities. In this background, it has been held by the Apex Court that Courts in India cannot order for conducting blood test as a matter of course and wherever applications are made for such prayer, in order to have a roving enquiry, prayer for blood test cannot be entertained and there must be strong prima facie case i.e., husband must establish non access in order to dispel presumption arising under Section 112 of the Evidence Act. As a word of caution, 9 it has been observed by Apex Court in GOUTHAM KUNDUS case that Courts must carefully examine as to what would be the consequence of ordering blood test as to whether it will have the effect of branding the child as bastard or mother as an unchaste woman. In conclusion, it has been held as under: 22. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

26. From the above discussion it emerges:- (1) that courts in India cannot order blood test as a matter of course; applications (2) wherever 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 consequence of ordering the blood test; whether it will have the effect of 10 branding a child as a bastard and the mother as an unchaste woman. (5) give sample of blood for analysis. No one can be compelled to 10. BANARASI DASSs 1 case referred to supra relied upon by learned Advocate appearing for petitioner, GOUTAM KUNDUS 2 case has also been referred to and followed and as such, question of discussing said judgment would only be an addition and as such, I desist from doing so.

11. Judgment of Apex Court relied upon by learned Advocate appearing for respondent-1 in SHARDA vs DHARMPAL reported in AIR 2003 SC34501) it has been held that Courts must arrive at a finding that applicant has established a strong prima facie case before passing such an order vide paragraph 82 and by arriving at such conclusion and allowing such medical examination would not be violative of ones right of privacy. Thus, it would depend 1 (2005) 4 SCC449 2 1993 SC229511 on facts of each case as to whether applicant seeking such prayer has produced or made available, strong facie case or not, for granting such prayer.

12. Keeping in mind principles indicated in above reference judgments of Apex Court, when facts on hand are perused, plaintiff except asserting that he is born out of the wedlock between defendants-1 and 2, placed no other material which would prima facie establish plaintiffs claim. At this stage, learned Advocate appearing for the respondent has made available Exs.P-8 and P-9 - Transfer Certificate issued by School/authorities where plaintiff had studied and statements made by villagers said to have been drawn at the village level at the time of alleged solemnization of marriage between defendants-1 and 2. Ex.P-8 which has been made available has been perused by this Court and as rightly pointed by learned Advocate appearing for petitioner, it has been indicated in the column relating to fathers name of applicant as Raju Naika. Said entry prima facie indicates having been 12 made after striking down the original name. Since it is a photocopy it cannot be conclusively held that there has been change, alteration or tampering. This Court is not expressing any opinion with regard to said document either having been tampered or altered and it is for the trial Court to adjudicate same inasmuch as, any opinion expressed by this Court is likely to prejudice rights of either of parties. It is also made clear that opinion expressed by this Court herein above is for the limited purpose as to ascertain whether plaintiff has made out a prima facie case to indicate that first defendant was always recognized as father of plaintiff at any undisputed point of time. By reading of this document one and only conclusion which can be drawn at this stage for the limited purpose of examining the impugned order is to arrive at a conclusion, that it does not. That apart, Ex.P-9 - statement said to have been made by villagers and recorded to evidence the fact of solemnization of marriage between defendants 1 and 2 would also recede for the same reason as assigned to Ex.P-8 by this Court herein above. 13 13. In that

view of the matter, this Court is of the view that trial Court was not justified in allowing the application and directing first defendant to furnish blood samples and tender himself for DNA test.

14. For the reasons aforestated, I proceed to pass the following:

ORDER

(1) Writ petition is hereby allowed. (2) Impugned order dated 03.12.2014 passed on I.A.No.7 by Civil Judge and JMFC, Periyapatna in O.S.No.170/2010 - Annexure-E is hereby quashed. (3) I.A.No.7 filed under Section 45 read with Section 56 of Evidence Act, 1872 read with Section 151 CPC - Annexure- C stands dismissed. (4) No order as to costs. Ordered accordingly. SD/- JUDGE *sp

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