Master Leonard Mark Hillario Son of Seby Hillario, Through His Mother Smt. Maria Fernandes Wife of Shri Seby Hillario Vs. Shri Seby Hillario

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Court : Mumbai

Decided On : Mar-07-2007

Reported in : 2007CriLJ3627

Judge : N.A. Britto, J.

Acts : Evidence Act - Sections 50

Appeal No. : Criminal Revision Application No. 65 of 2006

Appellant : Master Leonard Mark Hillario Son of Seby Hillario, Through His Mother Smt. Maria Fernandes Wife of S

Respondent : Shri Seby Hillario

Advocate for Def. : S.S. Kakodkar, Adv.

Advocate for Pet/Ap. : Vivek Rodrigues, Adv.

Disposition : Application allowed

Judgement :

N.A. Britto, J.

1. Heard learned Counsel on behalf of both the parties.

2. Admit. By consent heard forthwith.

3. This revision petition is directed against order dated 11.10.2006 of the learned Sessions Judge, Margao, by which, the learned Sessions Judge allowed the revision filed by the respondent herein and dismissed the application for maintenance filed on behalf of the applicant.

4. Some facts are required to be stated to dispose of this revision petition filed against the said Order of the learned Sessions Judge.

5. The applicant was born to his mother Maria Fernandes/Pw1, on 25.04.2002 and was delivered by Dr. Surendra P. Verenkar.

6. The applicant claiming to be the illegitimate son of the respondent, filed an application dated 01.07.2002, through his mother, said Smt. Maria Fernandes, claiming a sum of Rs. 1,000/-per month as maintenance. The claim of the applicant was that he was named as Mark Hillario and that the respondent who is the neighbour of his mother, had good relations with her for last so many years and as time passed, his mother got closer and closer and she started visiting the house of the respondent as per his request and the respondent took

her to hotels on many occasions and had sexual intercourse with her and the respondent had taken her to the hotels in the months of June, July, August and September, 2001, and after the respondent had constant sexual relations with his mother, his mother became pregnant and the respondent told his mother that he would marry her and having trust on the respondent, his mother kept the things in darkness and when the mother asked the respondent to finalize the date of civil marriage, the respondent got wild and told her that he would not marry her at any cost, and at that time, the applicant's mother was displeased and was in a bad position after the respondent told her that she should abort the child, which she flatly refused. The applicant stated that his mother has no source of income to maintain her and the applicant, who is a child of the respondent. The applicant stated that his mother had filed an application before the Conciliation Committee, Margao, to see whether any conciliation was possible. The applicant stated that his mother has to incur an expenditure of Rs. 1,000/-per month towards the milk and other food items and also for clothing which were being provided by her relatives, parents and neighbours.

7. The respondent contested the claim of the applicant and stated that he did not know that the applicant was named as Mark Hillario and that he had no relationship with the applicant or his mother. The respondent denied that the mother of the applicant had visited his house. Likewise, the respondent denied that he took the applicant's mother to hotels on many occasions and had sexual intercourse with her. As per the respondent, the applicant's mother was a girl of loose character and easy virtue and she was having connection and association with other persons in and around the locality, which fact was known to the villagers, where the applicant's mother resides. The respondent stated that he had never moved with the mother of the applicant nor was friendly with her nor the mother of the applicant informed the respondent of her pregnancy. In other words, the case of the respondents was one of denial.

8. To support his case, the applicant examined his own mother namely Maria Fernandes/Pw1, the latter's mother, namely Pedrina Dias/Pw2 and his mother's sister in law Milagrina Fernandes/Pw3. On behalf of the applicant, his grandfather Rosario Fernandes/Pw4 was also examined and it appears that he was unable to answer any questions during his cross examination before the Court. It is stated that he was suffering from depression and subsequently committed suicide. On behalf of the applicant, it has been submitted by learned Counsel that his evidence could be kept aside.

9. On the other hand, the respondent examined himself/Dw1, his cousin Kalic Hillario/Dw2 and his mother Rita Hillario/Dw3.

10. The learned J.M.F.C., after considering the oral and documentary evidence produced on behalf of the applicant, allowed the claim of the applicant and ordered the respondent to pay to the applicant a sum of Rs. 1,000/-by way of monthly allowance. Dissatisfied with the said Order dated 25.01.2006, the respondent preferred a revision to the Court of Sessions, which came to be allowed by the impugned Order dated 11.10.2006.

11. On behalf of the applicant, firstly, it is submitted that the learned Sessions Judge exceeded his jurisdiction by appreciating the evidence in revision which exercise was not available to him. In support of the said submission, reliance has been placed on Smt. Anandibai Dattajirao Patil v. Dattajirao Dhondiram Patel and Anr. : 2000(5)BomCR210 , wherein this Court observed that the revisional Court's jurisdiction to interfere is called for only where the original authority's findings become perverse or where the relevant materials have not been taken into account or any irrelevant materials have been taken into account by the authority who passes the order under revision. Reliance is also placed on Pathumma and Anr. v. Muhammad : 1986CriLJ1070 , wherein the Apex Court stated that in revisional jurisdiction, the Court is not justified in substituting its own view for that of Magistrate on the question of fact. Same view is followed in Bakulabai and Anr. v. Gangaram : [1988]2SCR787 , when the Apex Court stated that revisional Courts are not justified in making reassessment of the evidence and substitute their own views for those of the Magistrate. In Prabhati Rani Sahu and Anr. : (2002)10SCC510 , the Apex Court has observed that the High Courts should be slow to interfere with a positive finding in favour of marriage and paternity of a child. Hence, in such instances, said the Supreme Court, High

Courts shall not interfere with such fact findings but that principle could not be imported in that case because the child happened to be bastardized as a consequence of the Order passed by the Magistrate and the claimant was in effect found to be a woman of un-virtuous morality and in such a situation, the High Court should have entertained revision and re-evaluated the evidence and come to a conclusion whether the findings or conclusions reached by the Magistrate were legally sustainable or not. This Court again in Shri Zulfikar Ali v. State of Goa 2006 ALL MR (Cri) 2492, has stated that in a revision petition, the scope for interference is limited. In other words, it is not permissible for this Court sitting in revision to reassess the evidence led by the prosecution or do in depth examination of the same. This Court would be justified to interfere only in the event the conclusion of facts recorded by both the Courts below are based on any serious legal infirmity or there is failure of justice.

12. On the other hand, it is contended on behalf of the respondent, that the Sessions Court has appreciated the evidence which the Sessions Court was entitled to and this being a revision against the Order of the Court of Sessions, this Court should be slow in interfering with the order of the learned Sessions Judge. In support of this submission, learned Counsel has placed reliance on Deb Narayan Halder v. Smt. Anushree Halder : 2003CriLJ4470 and Sau. Ranjana Shivaji Rakhpasare v. Shivaji Bapu Rakhpasare .

13. In Deb Narayan Halder v. Smt. Anushree Halder (supra), the Apex Court observed that it is well settled that the Appellate or Revisional Court while setting aside the findings recorded by the Court below must notice those findings, and if the Appellate or Revisional Court comes to the conclusion that the findings recorded by the Trial Court are untenable, record its reasons for coming to the said conclusion. Where the findings are findings of fact it must discuss the evidence on record which justify the reversal of the findings recorded by the Court below. This is particularly so when findings recorded by the Trial Court are sought to be set aside by an Appellate or Revisional Court. One cannot take exception to a judgment merely on the ground of its brevity, but if the Judgment appears to be cryptic and conclusions are reached without even referring to the evidence on record or noticing the findings of the Trial Court, the party aggrieved is entitled to ask for setting aside of such a Judgment. This Court in Sau. Ranjana Shivaji Rakhpasare v. Shivaji Bapu Rakhpasare (supra), stated that the power can be exercised by the Sessions Court when it comes to the notice that there is any gross error of the facts, appreciation of evidence, perverseness or illegality.

14. In my view, the correct scope of a revision petition has been indicated by this Court in Smt. Anandibai Dattajirao Patil (supra) and Shri Zulfikar Ali v. State of Goa (supra) and that view is in conformity with the decision of three learned Judges of the Supreme Court in Pathumma and Anr. v. Muhammad (supra), wherein it is stated that revisional jurisdiction cannot be exercised to substitute its own view with that of the Magistrate on a question of fact. Unless the finding of the Court below is shown to be perverse or untenable in law or is based on irrelevant evidence or ignoring relevant evidence, it is impermissible to interfere with the Order of the Court below in revisional jurisdiction. Sessions Judge cannot interfere unless there is capriciousness on the part of Magistrate in the assessment of evidence. It cannot interfere with the order if on the same set of evidence another view different from that taken by the Magistrate is possible. That certainly was not the case of the learned Sessions Judge, when he interfered with the order of the J.M.F.C. dated 25.01.2006. It is upon assessment of the very same material that the learned Sessions Judge came to a different conclusion which was impermissible in revisional jurisdiction and, on this count alone, the Order of the learned Sessions Judge, deserves to be set aside. The learned Magistrate had taken much pains in analysing the evidence and arriving at the conclusion that applicant's paternity was proved. In such a situation, the interference by the learned Sessions Judge was improper, illegal and unjustified.

15. There can be no doubt that the onus to prove that the child who claims maintenance from the alleged father, is upon the child. In other words, when a child is born out of wedlock, the onus lies squarely on the mother, to establish the paternity of such child and it is for her to prove that the person from whom she claims maintenance for the child is the father of the child. There can also be no dispute that disputed paternity cannot be determined on the evidence of the mother alone and the rule of prudence requires that her evidence should be corroborated. Corroborative evidence is required in such cases in order to protect

men against unfounded charges which might be easily made if the evidence of the mother is to be accepted without corroboration. However, it must be stated that there can be no hard and fast rule that a particular type of corroboration would be necessary in all such cases. What would be the corroborative evidence which will be acceptable will depend on the facts and circumstances of each case. Nevertheless, the nature of proceedings being of civil nature, the onus will have got to be discharged on the balance of probabilities. In Kh. Ningol Ibetombi Devi and Anr. v. Dr. Pukharambam Ibomcha 1993 (1) Cri 182, it is stated that the paternity of a child must be established with convincing evidence and it is unsafe to award maintenance on the uncorroborated evidence of a woman. The said observation was made after referring to several decisions.

16. Be that as it may, it appears that at one stage, the applicant's mother filed an application showing her willingness to undergo DNA test, to which the respondent did not object but the application was not pursued on account of the costs involved, as submitted on behalf of the applicant, by learned Counsel. It appears that at revision stage before the Sessions Court, neither of the parties made any serious effort to pursue this matter although it is stated that a ground in revision was taken on behalf of the respondent, and when the matter came up before this Court, it is the respondent who had been unwilling to undergo DNA test since according to the learned Counsel, it is rather too late in the day that he should undergo such a test. Although a DNA test would have conclusively proved the paternity of the applicant, it is not that paternity cannot be proved in the absence of DNA testing.

17. Undisputedly, the applicant's mother and the respondent are close neighbours, being from the same ward of Courtroom Village and their houses are within a distance of about 30 metres. The applicant in her evidence has stated that the respondent was her husband though they were not legally married and their marriage was not registered. She had categorically stated that the applicant, the son born to her, was named as Leonard Mark Hillario and he was hers and that of the respondent. As per applicant's mother, they had good relations for many years and they became stronger and stronger with the passage of time and she used to go to the house of the respondent as the respondent used to call her. She stated that the respondent used to call her to have sexual intercourse and then they used to have sexual intercourse and that the respondent used to take her to the hotels on many occasions for sexual relations and even in hotels they had sexual intercourse many times. She had stated that the respondent had taken her to the hotel in the month of June, July, August and September 2001, and thereafter, she became pregnant and when she asked the respondent to marry her, the respondent assured that he would marry her and she kept in darkness and did not inform anyone that she was pregnant but later on, the respondent refused and told her to go in for abortion, which she refused. The applicant's mother produced the birth certificate and the baptism certificate wherein the respondent's name has been recorded as the father of the applicant. The birth was registered on 02.07.2002, after permission was obtained from BDO on 24.06.2002 after an affidavit was filed on 13.06.2002. The applicant filed the application for maintenance on 05.07.2002. However, the fact remains that the Baptism Certificate was issued later because the applicant was baptized on 07.07.2002. They could not have been brushed aside as sought to be done by the learned Sessions Judge for they remain as they are even today without any challenge from the respondent inspite of the fact that respondent's mother having stated that she would file a case for cancellation of entry in the birth certificate. One was a public document and the other was an authentic document and the former was made by a public servant in discharge of official duty and carries with it the presumption of its correctness.

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18. The learned Sessions Judge has brushed aside the evidence of applicant's mother Maria Fernandes/Pw1 because in her cross examination, she had admitted that she was informing her parents while going out with the respondent for sexual intercourse because according to the learned Sessions Judge, that conduct did not appear to be normal. The said statement of the applicant's mother Maria Fernandes/Pw1, in the cross examination, was either a mistake in recording her evidence or at the most could be considered as an exaggeration on her part to the effect that she was going to the respondent for sexual intercourse. It is quite probable that what she wanted to convey was that she would inform her parents whenever she went out with

the respondent and, on that statement alone, her entire evidence could not have been rejected. The evidence given by the applicant's mother was supported by her mother namely Pedrina Dias/Pw2 as well as her sister in law namely Milagrina Fernandes/Pw3. No doubt, they were related to the applicant's mother and their evidence ought to have been closely analysed but the fact remains that their evidence clearly established that Maria Fernandes/Pw1 and the respondent were going about together, were residing at each other's houses and also going to hotels and staying there. It is contended on behalf of the respondent that the applicant's mother had admitted in her cross examination that for the first time, she had sexual intercourse with the respondent about two years back and considering that the deposition of the witness was recorded on 14.01.2004, she must have started having sexual intercourse in the year 2002. Learned Counsel contends that if she had sexual intercourse two years prior to 14.01.2004, the child could not have been conceived to be delivered on 25.04.2002. The submission appears to be misconceived for it is not necessary that everyone conceives at the very first intercourse or soon thereafter. Things always don't click immediately.

19. The defence of the respondent was that the applicant's mother was a woman of easy virtue and it was suggested to her that she used to go for dramas along with one Sebastian but the fact remains that neither the respondent nor his cousin nor his mother were able to give the name of any persons with whom, the applicant's mother went about and the said suggestion was not translated into evidence. It is very easy to put suggestions. Suggestions don't amount to proof. The version given by applicant's mother Maria Fernandes/Pw1, is sufficiently corroborated by her mother and sister in law and the said versions show that they were going about together and that was because the respondent had promised to marry her and they were even spending nights at each other's houses. When things went wrong, the applicant's mother Pedrina Dias/Pw2, sought the assistance of the Parish Priest, and, as stated by her, the respondent took sometime to give an answer but thereafter did not turn up. It is very difficult to believe that either the applicant's mother Maria Fernandes/Pw1 or latter's mother Pedrina Dias/Pw2, would have had courage to approach the Priest in case the respondent was not responsible for her pregnancy or broken the promise to marry her. This is very often the first step persons belonging to the Community of the applicant's mother and the respondent take when love affairs turn sour. Later, the applicant approached a social worker namely Auda Viegasand at her behest, approached the Conciliation Centre and also the Police Station. Although it appears from the evidence of applicant's mother that the respondent and some boys had alleged at the Police Station that she was charging Rs. 500/-to Rs. 700/-for sexual intercourse, the respondent himself did not adhere to such specific allegation in his evidence nor did bring about any of the said boys as his witnesses to support the same and, in fact, the respondent as well as his cousin Kalic Hillario/Dw2 and his mother Rita Hillario/Dw3, has not been able to name a single boy as the person with whom the applicant's mother was going about. In fact, the respondent himself has admitted that he cannot tell the name of any single person with whom the applicant's mother was roaming and although the respondent's mother had made a wild allegation that she saw the applicant's mother roaming with some boys, she could not name any of them. The case of the applicant's mother that the child was fathered by the respondent was to a great extent supported by the applicant's witnesses namely her mother Pedrina Dias/Pw2 and her sister in law Milagrina/Pw3, and which showed that they were enjoying a close relationship and that was because of the promise made by the respondent that he would marry her. The learned Sessions Judge has disbelieved Pedrina Dias/Pw2 because she stated that the applicant's mother and the respondent were sleeping together and being a mother she did not object to her daughter sleeping with another person who is not her husband but, in my view, the mother might have tolerated the said conduct of her daughter considering that both of them were about to be married and, on that count alone, her evidence could not be discarded. With all said and done, everybody does not live today with the standard of morality of the 16th Century. The evidence of the applicant's mother was consistent and was substantially corroborated by that of her mother Pedrina Dias/Pw2 and her sister in law Milagrina Dias/Pw3 and their evidence was certainly relevant in terms of Section 50 of the Evidence Act. The applicant's evidence was also substantially corroborated by the circumstances which compelled her first to approach the Parish Priest, then a Social Worker, then the Conciliation Centre and then the Police Station. The documents produced, particularly the Baptism Certificate and the Birth Certificate, are relevant and lend support to her story. The only plea taken by the respondent that she was a girl of easy virtue was not at all established.

Respondent's evidence is inconsistent. On balance of probabilities and after assessing the evidence of the respondent, both oral, circumstantial and documentary, the learned Trial Court had come to the conclusion that the respondent had failed to prove that the applicant's mother was a girl of easy virtue (loose character) and the claim of the applicant's mother that the respondent had fathered her child, was proved and the learned Sessions Judge ought not to have interfered with the said conclusion arrived at by the learned Trial Court, unless he was able to demonstrate that it was perverse. In fact, an allegation like the one made by the respondent could be very easily made, but the respondent was unable to substantiate the same by any evidence whatsoever. Admittedly, the applicant and the respondent were from the same ward and were very close neighbours and considering the other evidence on record, it is difficult to accept that the applicant has put the blame for her pregnancy on someone else with whom she had no connection. Respondent has also not attributed any motive to the Applicant's mother as to why she should have implicated him. The learned trial Court was, therefore, right in coming to the conclusion that the case of the applicant was probable. That conclusion was arrived at by the learned Trial Court after assessing the evidence -oral, circumstantial and documentary and it was nobody's case that the appreciation of evidence was perverse. The learned Sessions Judge, therefore, ought not to have interfered with the findings of the Trial Court by appreciating the evidence and substituting his own view with that of the learned Trial Court.

20. Consequently, this revision is bound to succeed and the Order of the learned Sessions Judge is liable to be disturbed and that of the learned Trial Court is to be upheld.

21. As far as the quantum of maintenance is concerned, it has been admitted by the respondent's mother that the respondent runs their family bar and although there is no evidence as to the earnings of the respondent from the said bar, the learned trial Court had ordered the payment of Rs. 1,000/-per month to the applicant after being satisfied that the sum would be required to provide food, clothing, medicines, education to him, which in the opinion of the trial Court, is not very high for maintenance of a minor child. I am not inclined to interfere with the said finding. The respondent is always at liberty to apply for modification of the Order of the learned Trial Court, if permissible in law.

22. In view of the above discussion, the revision succeeds. The Order of the learned Sessions Judge is set aside and that of the learned J.M.F.C., is maintained. Considering the facts, there will be no order as to costs.