

Joseph Vs. State of Kerala

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Court : Kerala

Decided On : Mar-14-2006

Reported in : AIR2006Ker191; I(2007)DMC421; 2006(2)KLT67

Judge : V.K. Bali, C.J. and; J.B. Koshy, J.

Acts : Kerala Women's Commission Act, 1990 - Sections 2, 16, 17 and 17(3); Evidence Act - Sections 4 and 112; Succession Act; Code of Criminal Procedure (CrPC) - Sections 125

Appeal No. : W.A. Nos. 1761 and 2314 of 2000

Appellant : Joseph

Respondent : State of Kerala

Advocate for Def. : Noorji Noushad, Sr. Government Pleader,; Parvathy Menon and;

Advocate for Pet/Ap. : Abraham Mathew,; V.V. Surendran and; P.A. Harish, Ad

Disposition : Appeal dismissed

Judgement :

V.K. Bali, C.J.

1. Janaki K.M., it appears is striving to be called a legitimate and legally wedded wife of Gopalan Nair. She was also clamouring for her daughter to have a name of her father so that the child, a female, is not called illegitimate. This effort she is making for a long time, it appears, primarily to do away the social stigma which is haunting her and her daughter. In her pursuit to achieve the desired result she, prior in point of time, filed a petition under Section 125 of the Code of Criminal Procedure, which was however dismissed for default in 1992. She then filed a petition Ext.P3 dated 24.4.2000 before the Kerala Women's Commission claiming that her husband had deserted her and her daughter. She claimed a declaration being the wife of Gopalan Nair and in consequence thereof a further declaration that her female child was the legitimate daughter of her husband. Gopalan Nair appeared before the Commission and filed a counter statement. He was then served with notice Ext.P5 directing him to appear for DNA test on 3.3.2003. He challenged the order aforesaid by filing O.P.No. No. 6577 of 2003 which has been dismissed. The order of the learned Single Judge has been questioned by Gopalan Nair, hereinafter referred to as 'the petitioner', by filing WA No. 2314 of 2004.

2. Smt. Reena @ Sindhu likewise is endeavouring to be called a legitimate daughter of Joseph, primarily in pursuit of the same cause as guided Janaki K.M. to be called as legitimate wife of Gopalan Nair. In pursuit of her goal she approached the Kerala Women's Commission by filing Ext.P3 petition stating that she was living for ten years with her mother, who was an adivasi and that out of the wedlock between Joseph and her mother an adivasi woman, she was born. Joseph, hereinafter referred to as 'the petitioner' was disowning her paternity and it is in that context that she prayed to the Commission to hold a DNA test of the petitioner to establish the blood relationship between him and her. The Women's Commission held enquiry after issuing notice to the petitioner. When the Commission, however, ordered DNA test, he filed original petition bearing No. 34349 of 2002 which has been dismissed by the learned Single Judge vide orders dated 24th June, 2004. It is against this order of the learned Single Judge that the petitioner has filed W.A.No. 1761 of 2004.

3. Both these appeals were clubbed together. Common arguments have been raised. Thus, this common judgment.
4. As before the learned Single Judge so also before us, the order passed by the Women's Commission for holding DNA test is challenged on twin grounds, namely that the Women's Commission under the provisions contained in the Kerala Women's Commission Act, 1990, hereinafter referred to as 'the Act of 1990' would have no jurisdiction to order DNA test and that in no circumstances the petitioners can be compelled to undergo DNA test.
5. We have heard learned Counsel for the parties and examined the records of the case. Before we might proceed any further, we would like to mention that petitioner in O.P.No. 6577 of 2003 had agreed to the suggestion made by the Women's Commission for DNA test and the Commission recorded its willingness for the same. It is a different matter that he later backed out from his recorded willingness and rather chose to file a petition challenging the order of the Commission for holding DNA test.
6. The learned Counsel appearing for the appellants while making a reference to the definition of 'unfair practice' contained in Section 2(i) of the Act of 1990 which is reproduced below, contends that denial of the relationship, as alleged by the appellants, would not be an unfair practice:
- (i) 'unfair practice' means any distinction, exclusion or restriction made on the basis of sex for the purpose of or which has the effect of impairing or nullifying the recognition, enjoyment or exercise by women of fundamental constitutional rights, or of human rights, or of fundamental freedom in the political, economic, social, cultural, civil or any other field or the infringement of any right or benefit conferred on women by or under the provisions of any law for the time being in force or the mental or physical torture or sexual excess on women.
7. This contention has to be summarily rejected as unfair practice also means enjoyment or exercise by women of fundamental constitutional rights, or of human rights. Enjoyment would have in it included non-enjoyment as well. A woman deprived of her legitimate right of being a wife of her husband and all the rights

that might accrue to her because of a legal union between them can well be said not to be in enjoyment of human rights.

8. Learned Counsel while referring to the provisions contained in Section 16 of the Act of 1990 also contends that the functions of the Commission as mentioned therein do not take in its sweep determination of relationship between a man and woman. This contention has once again to be rejected and once again summarily. While performing its functions the Commission shall have every power and jurisdiction to inquire into any unfair practice. The mere fact that the Commission would not have power by itself to take decision after entering into a finding of unfair practice does not mean that it does not have power to inquire into unfair practices. That apart, it would be well made from a reading of the provisions contained in Section 17 of the Act of 1990, that while making an inquiry into an unfair practice, the Commission on receipt of the complaint from any woman alleging that she has been subjected to any unfair practice, can proceed to inquire into the matter and take a decision thereon and if the Commission may find that there is unfair practice, it shall recommend to the Government the action to be taken thereon. Sub-section (3) of Section 17 empowering the Commission to proceed to inquire into the matter in the complaint and take a decision thereon reads as follows:

(3) Where the person against whom the complaint has been made, appears and show cause or falls to appear on the day appointed for that purpose the Commission may proceed to inquire into the matter in the complaint and take a decision thereon and if the Commission find that there is unfair practice, it shall recommend to the Government the action to be taken thereon or initiate prosecution.

9. The second contention of the learned Counsel as noted above is exclusively based upon judicial precedents. In that context learned Counsel has primarily relied upon judgment of the Honourable Supreme Court in Goutam Kundu v. State of West Bengal and Anr. : 1993 CriLJ3233 , decision of this Court in Mathew v. Annamma Mathew 1993 (2) KLT 1016, judgment of the Karnataka High Court in Nigamma v. Chikkayya : AIR2000 Kant50 , judgment of the Honourable Supreme

Court in Banarsi Dass v. Teeku Dutta 2005 (2) KLT 729 (SC) and a decision by a Single Judge of the Gujarat High Court in Haribhai Chanabhai Vora and Ors. v. Keshubhai Haribhai Vora : AIR2005 Guj157 .

10. The facts in Goutam Kundu v. State of West Bengal and Anr. (supra) reveal that Goutam Kundu the appellant therein was married to the respondent according to the Hindu rites and customs. In the month of April, 1990 the respondent conceived and on coming to know that she was pregnant Goutam Kund, the appellant, approached the respondent and her family members and wanted the child to be aborted. The respondent refused. A female child was born on January 3, 1991. Thereafter the respondent filed a petition under Section 125 of the Code of Criminal Procedure for maintenance for herself and her child and by order dated 14.8.1991 a sum of Rs. 300/- per mensem to her and Rs. 200/- to the child was granted. Against that order the appellant moved a revision in the High Court. When the revision aforesaid was pending, he filed a Criminal Miscellaneous Case for blood group test of the respondent and the child. He disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. According to him if that could be established he would not be liable to pay maintenance. The application was dismissed on two grounds, (i) that there were other methods in the Evidence Act to disprove the paternity; and (ii) it was settled law that medical test cannot be conclusive of paternity. Aggrieved, he filed a revision before the High Court. The High Court while dismissing the revision held that Section 112 of the Evidence Act says that where during the continuance of valid marriage if a child is born that is a conclusive proof about the legitimacy. It is because of the provisions contained in Section 112 of the Evidence Act that he could not ask for proving the paternity by blood group test. It is on these facts that the Honourable Supreme Court held that the court must have regard to Section 112 of the Evidence Act where the words 'conclusive proof must be understood by their definition in Section 4. That section is based upon the well known maxim *pater est quern nuptiae demonstrant* (he is the father whom the marriage indicates). It was further held that the presumption was 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. The law

presumes both that a marriage ceremony is valid, and that every person is legitimate. It was further observed that ordering blood test could have the consequence of branding the child as a bastard and the mother as an unchaste woman. It is no doubt true that the Supreme Court held that no person can be compelled to give sample of blood for analysis against his/her will and no adverse inference can be drawn against him/her for this refusal and further that the courts in India cannot order blood test as a matter of course. The observations to the effect aforesaid however, primarily came to be made in view of the observation made by the Supreme Court on the basis of Section 112 of the Evidence Act and that the effect of blood group test could result in a child being branded as bastard and the mother as an unchaste woman. The observations made by the Supreme Court that the courts in India cannot order blood test as a matter of course are significant. If there was a complete embargo on holding the blood test, the observations as mentioned above could not have been made. In some exceptional cases blood group test or DNA test is permissible and as we have mentioned here in the present case the outcry of Janaki K.M. and Reena @ Sindhu is for a declaration that they are not illegitimate wife and children or bastards. DNA test may rather absolve them of the slur suffered by them constantly and continuously. In *Banarsi Dass v. Teeku Outta* (supra) pertaining to Succession Act the Honourable Supreme Court observed that the main object of a succession certificate was to facilitate collection of debts on succession and afford protection to parties paying debts to representatives of deceased persons. All that the succession certificate purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of the deceased persons. Such a certificate does not give any general power of administration on the estate of the deceased. It was further held that the grant of certificate does not establish title of the grantee as the heir of the deceased. A succession certificate is intended to protect the debtors. The grant of a certificate does not establish a title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. DNA test in such matters was not conclusive. Surely, the observations made with regard to DNA test came in the

context of there being no need to hold such a test as succession certificate could be granted on cogent and credible evidence for which title was not required to be proved.

11. In *Ningamma v. Chikkayya* (supra) the respondent father moved for blood test of the second petitioner who was his daughter to disprove his paternity. This judgment would not be applicable for the same reason as the decision made by the Supreme Court in *Mathew v. Annamma Mathew* (supra). The present case, as mentioned above, is one where a motion for DNA test has been made on behalf of the persons who wanted to prove their legitimate relationship of wife and husband and their paternity. In *Haribhai Chanabhai Vora v. Keshubhai Haribhai Vora* (supra) the plaintiff had filed a suit for declaration to the effect that the property in question was the ancestral property and he had right and title over the land in question. The defendant appeared and filed a written statement denying that the plaintiff was his son. Considering the said stand in the written statement by the defendant, the application was filed by the plaintiff for having DNA test of the plaintiff as well as of the defendant. It was in that context that the trial court passed the order allowing the said application and directing the plaintiff and the defendant to appear before the Government Hospital for their DNA test. The defendant challenged the order aforesaid. The order impugned was quashed and the revision was allowed. While doing so reliance was placed upon the judgment of the Honourable Supreme Court in *Goutam Kundu v. State of West Bengal* (supra). It was again a case where DNA test if conducted could result in the plaintiff being called a bastard.

12. We are quite convinced that whereas DNA test if positive, would redeem Janaki, K.M. and Reena @ Sindhu of their trauma that they are undergoing for several years and also advance the purpose for which the Women's Commission Act, 1990 came to be enacted, the appellants, on the other hand, even if they be right in the stand taken by them would have nothing to fear in undergoing DNA test, as if their stand is correct and based upon truth, they too would be absolved of the false allegation made against them.

In view of the discussions as made above, we dismiss both these appeals, but in the circumstances of the case we make the costs easy.

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