

Alpana Vs. Mohanlal

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Court : Himachal Pradesh

Decided On : Oct-27-1993

Reported in : 1993CriLJ1008

Judge : Kamlesh Sharma, J.

Acts : [Evidence Act, 1872](#) - Sections 17, 21 and 112; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 125 and 482; ;[Constitution of India](#) - Article 227

Appeal No. : Cr. M.P. (M) No. 203 of 1992

Appellant : Alpana

Respondent : Mohanlal

Advocate for Def. : Ajay Sharma, Vice Counsel

Advocate for Pet/Ap. : Devyani Kuthiala, Vice Counsel

Disposition : Petition allowed

Judgement :

ORDER

Kamlesh Sharma, J.

1. Miss Alpana is a minor. She has filed this petition under Section 482, Cr. P.C. read with Article 227 of the [Constitution of India](#) through her mother and natural

guardian, Smt. Sarla Devi wife of respondent Mohan Lal. Miss Alpana is aggrieved by the judgment dated 27th November, 1991 passed by the Sessions Judge (Forests), Shimla, whereby the judgment dated 24th December, 1988 of Sub-Divisional Judicial Magistrate, Rampur Bushahar, was affirmed. The Sub-Divisional Judicial Magistrate had dismissed the petition under Section 125, Cr. P.C. filed by Miss Alpana for granting her maintenance, holding that she is not the daughter of respondent Mohan Lal.

2. There is no dispute that Smt. Sarla Devi, the mother of Miss Alpana, is the wife of respondent Mohan Lal and their such relationship is subsisting. They were married in the year 1983. On 22nd March, 1986, Smt. Sarla Devi filed a petition under Section 125, Cr. P.C. for maintenance for herself and for her first daughter, Miss Kalpana. The petition was resisted by respondent Mohan Lal but it was ultimately allowed by the Sub-Divisional Judicial Magistrate, Rampur Bushahar, vide his judgment dated 16th November, 1987. An amount of Rs. 150/- per month was awarded as maintenance to Smt. Sarla Devi. No maintenance was allowed to her daughter Miss Kalpana as during the pendency of the petition, her custody was taken over by the respondent Mohan Lal. This judgment became final between the parties as no appeal was filed against it.

3. In the meantime, another daughter, the present petitioner, Miss Alpana, was born to Smt. Sarla Devi and another petition under Section 125, Cr. P.C. was filed on 16th February, 1988 for granting her maintenance. In reply to this petition, respondent Mohan Lal took the stand that Miss Alpana is not his daughter and he was not bound to, maintain her. After trial, this petition was dismissed by the, Sub-Divisional Judicial Magistrate, Rampur Bushahar, accepting the contention of respondent Mohan Lal that Miss Alpana was not begotten from him. It was further held that the presumption arising under Section 112 of the Indian Evidence Act that every child born during the subsistence of valid marriage is legitimate stood rebutted on the basis of record, mainly, the statement of Smt. Sarla Devi herself. These findings were affirmed by the Sessions Judge (Forests), Shimla. Hence the present petition.

4. This Court has heard the learned; counsel for the parties and gone through the record of this case as well as of the earlier application under Section 125, Cr. P.C. (No. 33-IV of 1986 titled Sarla Devi v. Mohan Lal) which had ended in the judgment dated 16th November, 1987. The copies of the judgment dated 16th November, 1987 and the statement, dated 22nd July, 1987 of respondent Mohan Lal made in the earlier proceedings have been brought on record of the present petition to show that the stand taken by respondent Mohan Lal that Miss Alpana is not his daughter is contradictory to his admission made in the earlier proceedings and also the findings in the judgment made therein. No reply has been filed to the present petition denying or explaining the earlier judgment and/ or alleging that findings in the judgment dated 16th November, 1987 may not be taken into account while deciding the present petition, for any reason. This Court called the parties and made efforts for their reconciliation but Without any results. Ultimately, the case was heard.

5. Sh. Ajay Sharma, appearing on behalf of the learned counsel for the respondent, has made submissions that this Court cannot look into the statement of respondent Mohan Lal made in the earlier petition for deciding the present petition as it was not put to him while he appeared in the witness-box to enable him to explain the same. Another submission made by Mr. Sharma is that the findings of fact arrived at by both the Courts below that Miss Alpana is not the daughter of respondent Mohan Lal cannot be interfered with in the present petition in exercise of the inherent powers under Section 482, Cr. P.C. and powers of superintendence under Article 227 of the [Constitution of India](#).

6. So far the first submission is concerned, respondent Mohan Lal has not denied his earlier statement and his only objection is that it cannot be read in the later proceedings as it was not put to him when he appeared a witness to enable him to explain it. Once a party accepts his earlier statement, it becomes a substantive piece of evidence of the fact(s) admitted therein in view of Section 17 and Section 21 of the Indian Evidence Act. It is a different matter what weightage is to be attached to such a statement. Before using such statement, it is not required to be put to its, maker to provide him an opportunity to explain it when he appears as a witness or by calling him as a witness. The purpose of confronting a witness with

his earlier statement is altogether different, that is, to test the Veracity of his later statement, if it differs from the earlier statement. (See *Bharat Singh v. Mst. Bhagirathi*, AIR 1966 SC 405 and *Union of India v. Moksh Builders and Financiers Ltd., etc.*, AIR 1977 Sc 409).

7. In view of this legal position, this Court finds no substance in the submission made on behalf of respondent Mohan Lal and holds that his earlier, statement containing, inter alia, the admission that the second daughter born to Smt. Sarla Devi is his daughter, can be used in the proceedings under Section 125, Cr. P.C. filed on behalf of Miss Alpana and also the present petition. What weightage is to be attached to this statement will be examined while dealing with the other submission. So far the judgment dated 16th November, 1987 is concerned, there is no dispute that it could be read as part of evidence in the later proceedings as well as for deciding the present petition.

8. So far the second submission is concerned, this Court is of the opinion that it is a fit case to exercise the inherent powers under Section 482, Cr. P.C. as well as the powers of superintendence under Article 227 of the [Constitution of India](#) as the findings of fact arrived at by both the Courts below are not sustainable on the pleadings and evidence on record and if the judgments of the Courts below are not set aside, the ends of justice will be defeated.

9. It is correct that in his reply to the petition of Miss Alpana, respondent Mohan Lal has denied that she is his daughter but from the tenor of his reply it appears that his real objection was that he was not the father of any girl by the name of Miss Alpana Sharma as he is not Sharma and Brahman by caste. His reply to para 2 of the petition is relevant. It is :-

'2) Para II of the application is partly denied as the respondent does not belong to Sharma of Brahmin caste of Hindu Religion and the respondent is not bound to maintain any Alpana Sharma. The rest of the para is correct.'

Even from the cross-examination of witnesses who appeared on behalf of Miss Alpana, it is clear that it was not the case of the respondent Mohan Lal that second daughter of Smt. Sarla Devi was not his but his objection was that he had no

daughter by the name of Alpana Sharma. Smt. Sarla Devi (P. W. 1) appeared as a witness and stated that Miss Alpana is the daughter of respondent Mohan Lal who was not maintaining her from the very beginning. It has not been asked from her in the cross-examination that Miss Alpana was not begotten from respondent Mohan Lal. It was also not put to Sh. Plast Ram, the father of Smt. Sarla Devi, who appeared as P.W. 2, that Miss Kalpana, the second daughter of Smt. Sarla Devi, was not of respondent Mohan Lal. He had categorically stated that Miss Alpana was about 2 years old and Smt. Sarla Devi was residing in his house for the last 2 1/2 years. His statement and statement of Smt. Sarla Devi were recorded on 15th July, 1988. According to Smt. Sarla Devi at the time she gave the statement, third year had started since when she was residing with her parents and her daughter Miss Alpana was about two years old. If both these statements are read together, the only conclusion possible is that when Smt. Sarla came to the house of her parents, she was pregnant as admittedly Miss Alpana was born on 15th July, 1986.

10. Both the Courts below have not referred to the statement of Plast Ram, father of Smt. Sarla Devi, which is very much relevant for deciding the controversy. They have arrived at their findings by wrongly interpreting the statement of Smt. Sarla Devi and believing the statement of respondent Mohan Lal that Smt. Sarla Devi had left his house on 6th October, 1984 and thereafter he had visited her only once on 6th December, 1984 but did not stay in her house. Both the Courts below have not tested the veracity of his statement in the context of other evidence on record. Though respondent Mohan Lal has stated in his examination-in-chief that Miss Alpana was not his daughter and in cross-examination that Smt. Sarla Devi gave birth to a girl after about 1 1/2 years of their separation, yet, he could not state who was the father of Miss Alpana. Admittedly, the distance between his house and the house of the parents of Smt. Sarla Devi is of ten minutes walk and Smt. Sarla Devi did not have illicit relations with any one. He has also admitted that in the Panchayat record his name has been recorded as father of second daughter of Smt. Sarla Devi named Guddi. But according to him, he had not got it recorded. He has further stated in his cross-examination that twice he had gone to the house of parents of Smt. Sarla Devi to call her back. Both the Courts below have dealt with the statement of Smt. Sarla Devi and respondent Mohan Lal in a

very cursory manner. They have also not considered the statement of Mela Ram (P.W. 3), Secretary Gram Panchayat Nirmand who had produced the record of the birth of Miss. Guddi, the second daughter of Smt. Sarla Devi. According to him, the name of the father of both the daughters of Smt. Sarla Devi is Mohan Lal as per the record of the Panchayat. In cross-examination, he has stated that it was the father of the girl, whose name is recorded as Mohan Lal, who had come to inform about the birth of second daughter of Smt. Sarla Devi named Guddi.

11. From such type of evidence, both the Courts below were not justified in holding that Miss Alpana was not the daughter of respondent Mohan Lal as he had no access to her mother Smt. Sarla Devi. Besides the evidence adduced in the petition under Section 125, Cr. PC. filed on behalf of Miss Alpana, there is the statement dated 22nd July, 1987 of respondent Mohan Lal given in the earlier petition in which he has categorically admitted that the second daughter of Smt. Sarla Devi, Miss Alpana, who was born after the filing of that petition, was his daughter. He has also admitted that he had visited the house of the parents of Smt. Sarla Devi many a times before the birth of his second daughter but he did not stay there. According to him, he had lastly met his wife Smt. Sarla on 6th December, 1985. In para 2 of that petition, Smt. Sarla had stated that at the time of filing the petition she was pregnant and expected to deliver a baby within two months thereafter. In his reply, respondent Mohan Lal had admitted para 2 as correct. The petition was filed on 22nd March, 1986 and Miss Alpana was born on 15th July, 1986. In the said petition when Smt. Sarla Devi had appeared as her witness on 20th November, 1986, she had stated that two daughters were born to her out of her wedlock with respondent Mohan Lal and this statement was accepted as no question was asked in cross-examination, that her second daughter was not of respondent Mohan Lal. While giving his judgment dated 16th November, 1987, the Judicial Magistrate, on the assessment of evidence adduced before him, held as under:-

'...In the present case, neglect of the respondent in maintaining the petitioner No. 1 before filing of this application is apparent from the fact that he has never visited the petitioner No. 1 at her father's house. He did not also visit her when she gave birth to the second child parentage of which was not disputed when the

respondent appeared in the witness-box. He even has not seen the face of his second daughter before she was brought to the Court what to talk of providing any money or necessities to her or to her mother....'

Had the judgment dated 16th November, 1987 and the earlier statement of respondent Mohan Lal been taken into account by the Courts below, they would not have held that Miss Alpana is not the daughter of respondent Mohan Lal. From the earlier statement of respondent Mohan Lal and the findings in the judgment dated 16th November, 1987, it is proved on record that respondent Mohan Lal knowingly, intentionally and in order to harass Miss Alpana and her mother Smt. Sarla Devi denied that Miss Alpana was not begotten from him. His later statement denying that he had any access to Smt. Sarla Devi and Miss Alpana was begotten from him deserves to be rejected outrightly. In the face of this material, if the judgments of both the Courts below are not set aside there will be grave miscarriage of justice and not only the petitioner Miss Alpana will be denied maintenance but also be dubbed as illegitimate child which findings may stare at her throughout her life besides causing aspersions on the character of her mother Smt. Sarla Devi.

12. The result of the above discussion is that the findings of both the Courts below are set aside. This Court holds that Miss Alpana is the daughter of respondent Mohan Lal and he is bound to maintain her. Since he has denied that Miss Alpana is his daughter, his neglect and refusal to maintain her stands proved. Admittedly, he is working as casual constable in Home Guards and is physically fit, to work. Therefore, this Court can safely presume that even if he works as a daily wage labourer, his monthly income will be about Rs. 660/- at the rate of Rs. 22/- per day. Admittedly, he is the only son of his father who possesses sufficient land and other property. Therefore, besides maintaining his first daughter Miss Kalpana and paying Rs. 150/- to Smt. Sarla Devi as, maintenance allowance, he has no other liability. In view of these circumstances, an amount of Rs. 100/- per month is fixed as maintenance for Miss Alpana from the date of the application, that is, 6th February, 1988. The petition is allowed accordingly.