

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA 410/2004**

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9th May, 2012

SHRI RAJENDER SINGH & ORS

Through:

..... Appellants

Mr. Vishal Singh, Adv.

VERSUS

SHRI RAVINDER YADAV

Through:

..... Respondent

Mr. Santosh Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC), is to the impugned judgment of the trial Court dated 14.5.2004. By the impugned judgment the suit of the respondent/plaintiff for partition, permanent injunction etc. was decreed with respect to the suit property being H.No. 80(part) Samaipur Main Market, Delhi.

2. The only issue which is urged before this Court is as to whether respondent /plaintiff was or was not the legitimate child of Sh. Rajender Singh

and Smt. Murti Devi. Putting it differently, the issue is whether the date of birth of the respondent /plaintiff is 1.3.1975 and whether Smt. Murti Devi married Sh. Rajender Singh earlier on 20.4.1974 as per the case of the respondent/plaintiff or later on 15.12.1975(i.e. after 1.3.1975) as per the case of the appellants/defendants.

3. The facts of the case are that Smt. Murti Devi, mother of the respondent/plaintiff was married to the elder brother of the defendant no.1. The elder brother namely Sh. Suraj Singh died in the year 1969 and the respondent/plaintiff was born on 1.3.1975 inasmuch as Smt. Murti Devi lived with and got married to Sh. Rajender Singh/defendant No.1 who is the younger brother of Sh. Suraj Singh, the deceased husband of Smt. Murti Devi.

4. The issue as to what was the date of marriage of Smt. Murti Devi, mother of the respondent/plaintiff with Sh. Rajender Singh, the second husband has been dealt with by the trial Court in the following paragraphs.

“5. Issue No.2 to 4

Main dispute between the parties is as to whether plaintiff is son of defendant no.1 or not. It is admitted case that Murtidevi who is mother of the plaintiff was married to elder brother of defendant no.1 who died in the year 1969. This is also not in dispute that plaintiff was born on 1-3-75.

Therefore, only disputed question is whether Murti Devi married defendant no.1 on 15-12-75 as claimed by defendant no.1 or on 20-4-74 as claimed by the plaintiff.

6. In her affidavit pw2 Murtidevi has stated that after death of her first husband Suraj Singh in the year 1969, she started staying with defendant no.1 as his wife and their marriage as per customary rites was performed on 20-4-74. She has produced certificate of marriage Ex.PW2/A. PW3 Rampat Yadav is a resident of Village Samaipur. In his affidavit he has stated that Murti Devi started living with defendant no.1 after death of her husband Suraj Singh in the year 1969 and their marriage as per customary rites took place on 20-4-74. PW4 Mohanlal Yadav is another resident of Village Samaipur. He has corroborated the deposition of PW2 and PW3. PW5 Balbir singh Yadav is Pradhan of village Samaipur. In his affidavit he has stated that he has attended marriage of Murti Devi with defendant no.1 on 20-4-74 and certificate Ex.PW2/A was issued by him as Pradhan of the village. He has also claimed that Murti Devi was residing with defendant no.1 since the death of her husband Suraj Singh in the year 1969.

7. In rebuttal defendant no.1 Rajender Singh has stated that after the death of his elder brother Murti Devi was residing separately with her children and he married her only on 15-12-75 when the plaintiff was of the age of about 9 months. According to him plaintiff is not his son and his (defendant's) name has been wrongly mentioned in the school record by Murti Devi. He has also stated that he is realizing rent of ₹950/- pm from the two shops let out in the suit property.

8. DW2 Kanwar Singh is also resident of village Samaipur. In his affidavit he has stated that Murti Devi was married to defendant no.1 on 15-12-75 and the plaintiff was 9 months old at that time.

9. Ex.DW1/1 is the birth certificate of the plaintiff. This document has been filed by the defendant no.1 himself. In his cross examination defendant no.1 has admitted that he had obtained the birth certificate of plaintiff Ex.DW1/1. A perusal of the birth certificate shows that the birth was registered on 29.3.75. The name of the father of the child has been shown as Shri Rajinder Singh Yadav and name of the mother of the child has been shown as Smt. Murti Devi in this certificate. Admitted date of birth of the plaintiff is 1.3.75. It is not unlikely that Smt. Murti Devi would have gone to the office of MCD to get the birth of the plaintiff registered four weeks' after the birth of her child as normally ladies are not allowed to go out of the house for at least 40 days from the birth of the child. Moreover, during cross examination of Smt. Murti Devi, no suggestion was given to her that the birth of the plaintiff was got registered by her or that she had wrongly given the name of the father of the plaintiff as Shri Rajinder Singh Yadav, to MCD official. Even otherwise, there could have been no reason for Smt. Murti Devi to give wrong name of father of the plaintiff to MCD official in the year 1975 because at that time there was absolutely no dispute between the parties.

10. Defendant no.1 has admitted that the plaintiff had a joint ration card with him and the name of his father was shown as Shri Rajinder Singh Yadav. The true copy of the ration card is Ex.DW1/4. Had the defendant no.1 not been the father of the plaintiff he would not have lent his name to him while obtaining the ration card. It would be pertinent to mention here that ration card was obtained by defendant no.1 as head of the family. Therefore, this document contains an admission on the part of the defendant no.1 that the plaintiff Shri Ravinder Yadav was his son.

11. Admittedly, first husband of Smt. Murti Devi expired many years before the birth of the plaintiff. Therefore, he cannot be the son of Smt. Murti Devi from her first husband. Had the plaintiff not been the son of defendant no.1, it is

most unlikely that he would have married Smt. Murti Devi. It has to be kept in mind that Smt. Murti Devi to was sister in law of defendant no.1 before she married him. In our tradition bound society, no one would like to marry a woman who has given birth to an illegitimate child. This is more so when the name of the father of the child is not known and the women happens to be noneother than sister in law of the man concerned. The ld counsel for the defendants has pointed out that in her deposition in the Court, in the divorce petition smt. Murti Devi claimed that she was married to Shri Rajinder singh on 15.12.75 and and has contended that having being born on 1.3.75 the plaintiff cannot be son of the defendant no.1. As provided in Section 157 of the Evidence Act, a previous statement can be used only for corroborating or contradicting a witness. Therefore, the previous statement of Smt. Murti Devi cannot be used against her unless she was not confronted and contradicted with it during her cross examination. However, she was confronted with her statement in divorce petition and her deposition on affidavit regarding date of birth marriage was contradicted with her previous statement. Therefore defendantno.1 does not get any benefit from the date of marriage given in the previous statement. The case of the plaintiff, as suggested to defendant no.1is that he had engaged a counsel for drafting and filing the divorce petition and that's why he did not appear in the Court to contest the petition. It is also an admitted case that Murti is an illeterate women therefore, it is unlikely that she would have given a instruction to the counsel, who drafted the petition, regarding date of her marriage.” (underlining added)

5. A reference to the aforesaid paragraphs shows that whereas no documentary evidence was led by the appellants/defendants to show the date of marriage of Smt. Murti Devi with Sh. Rajender Singh as 15.12.1975, Smt.

Murti Devi as PW-2 produced certificate of marriage, Ex.PW2/A as also PW-5, Sh. Balbir Singh Yadav, Pradhan of the village, who has confirmed the fact that he had issued the certificate of marriage as the Pradhan of the village. Further, the ration card of Sh.Rajender Singh with Smt. Murti Devi as Ex.DW1/4 proved that the respondent/plaintiff was the son of Sh. Rajender Singh Yadav and in this ration card Rajender Singh/defendant No.1 is the head of the family. The trial Court has rightly observed that since the date of birth of the respondent/plaintiff was 1.3.1975, the birth certificate in fact would not be at the instance of Smt. Murti Devi as normally, ladies are not allowed to go out of the house for at least 40 days of the birth of her child. The trial Court also observed that no suggestion was given to Smt. Murti Devi that the birth of the respondent/plaintiff was got registered by her and that she had wrongly given the name of the father of the plaintiff as Sh. Rajender Singh Yadav. In fact, the trial Court also correctly notes that there was no reason to give the wrong name of the father of the plaintiff in 1975 because at that stage, there were no disputes between the parties. The trial Court has also rightly observed that if Murti Devi had an illegitimate child before marriage (the first husband expired way back in 1969) the defendant No.1 would not have married her. To the above reasoning of the trial Court, I may add that a

Court is entitled under Section 114 of the Evidence Act, 1872 to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct. In this case, the relation of Smt. Murti Devi and Sh. Rajender Singh Yadav who were living together as husband and wife, after the death of Suraj Singh, is not disputed. Once Smt. Murti Devi and Sh. Rajender Singh Yadav were living together as husband and wife, I would seek to draw presumption that they were living together as husband and wife i.e. only after their having been married and it is an aspect, in fact, is confirmed by the certificate Ex.PW2/A issued by Sh. Balbir Singh, Pradhan of the village. Therefore the Courts will loath to take a view which will make a child illegitimate.

6. Accordingly, in my opinion, the trial Court has rightly held the date of marriage of Smt. Murti Devi with Sh. Rajender Singh as 20.4.1974 and not 15.12.1975 as was claimed by the appellants/defendants.

7. Learned counsel for the appellant argued that Smt. Murti Devi in an earlier proceeding had stated her date of marriage as 15.12.1975 and which admission proves the case of the appellants/defendants. I cannot agree inasmuch as the trial Court has rightly held that under Section 145 of the

Evidence Act, 1872 (wrongly noted by the trial Court as Section 157 Indian Evidence Act, 1872) the earlier statement cannot be used to contradict Smt. Murti Devi unless she was confronted with her earlier statement, and admittedly this was not done.

8. A civil case is decided on balance of probabilities. The balance of probabilities in this case, and which is clear from the marriage certificate Ex.PW2/A, ration card Ex.DW 1/4 and also the presumption which can be drawn under Section 114 of the Evidence Act, leads to the irresistible conclusion that the trial Court has rightly decreed the suit for partition and injunction.

9. In view of the above, there is no merit in the appeal which is accordingly dismissed leaving the parties to bear their own costs.

May 09, 2012
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VALMIKI J. MEHTA, J.