

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No. 321 of 2010

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Sadhana Sinha, W/O Arvind Kumar Sinha (D/O Late Nagendra Pd. Sinha), Resident
of Village- Alawalpur, P.S. Poonpooon, District- Patna.

...Defendant no. 1 in the Court below. Appellant/s

Versus

Arvind Kumar Sinha, Son of Sri Bishwanath Prasad of Village- Alawalpur, P.S.
Poonpooon, District- Patna at present residing at Ashray Mahesh Apartment Plot No.
31, Pandui Kothi, Boring Road, Patna.

. Plaintiff in the Court below Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Rajeev Kumar Verma, Sr. Advocate Mr. Rajneesh, Advocate.
For the Respondent/s	:	Mr. Devendra Kumar Sinha, A.A.G. 2 Mr. Arvind Kumar Singh & Mr. Shailesh Kumar, Advocates.

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CORAM: HONOURABLE MR. JUSTICE V.N. SINHA

and

HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE V.N. SINHA)

Date: 24-03-2015

Wife is the appellant. She has filed this appeal assailing the judgment and decree dated 16.03.2010 passed by the Principal Judge, Family Court, Patna in Title Suit No. 18 of 1998 whereunder the learned Principal Judge has held that marriage between the plaintiff and defendant no. 1 was never solemnized and defendant no. 2 was not born to the plaintiff out

of the wedlock. Before recording the operative portion, the learned Family Judge has also held that defendant no. 1 Sadhana Sinha was married to one Ravi Kumar Sinha @ Tuntun Prasad Sinha who was not even impleaded as party defendant in the suit.

2. Learned counsel for the appellant has assailed the impugned judgment and decree on various grounds that the suit itself was not only barred by limitation but also not maintainable in view of the finding recorded in Maintenance Case No. 35 (M) of 1987 disposed off by the Principal Judge, Family Court, Patna under order dated 08.01.1999. According to learned counsel for the appellant the Principal Judge under order dated 08.01.1999 having specifically held that applicant of the maintenance case was married to Arvind Kumar Sinha and defendant no. 2 was born out of the said wedlock and defendant granted maintenance for both mother and son. The issue of matrimony between the parties and the son born to them having already been resolved under order dated 08.01.1999, the subsequent suit was barred by principles of *res judicata*. In this connection he has also referred to the order of the High Court dated 27.11.1999 passed in Civil Revision No.386 of 1999 whereunder the challenge made to the order dated 08.01.1999 was dismissed.

3. Learned counsel for the appellant further submitted that instant suit i.e. Title Suit No. 18 of 1998 was filed on 30.06.1998, 9 years after the cause of action arose. According



to the respondent himself the cause of action arose on 28.11.1987. In any case the present suit was filed after 7 years of the filing of the earlier Title Suit No. 23 of 1994, which point was specifically taken by the wife in her written statement. Learned Principal Judge while considering the maintenance matter has held under order dated 12.03.1996 that the ex-parte decree passed in the earlier Title Suit No. 23 of 1994 on 31.03.1995 will have no bearing in the matter as the said ex-parte decree was passed by the Munsif who has no jurisdiction in the matter after establishment of the family Court. The aforesaid order dated 12.03.1996 was challenged by the husband in the High Court by filing Civil Revision No. 615 of 1996 which was dismissed under order dated 31.07.1997. After dismissal of the aforesaid Civil Revision respondent-husband filed present Title Suit No. 18 of 1998 on 30.06.1998 that is 9 years after the cause of action on 28.11.1987.

4. Besides the aforesaid point of limitation, regarding res-judicata, the finding recorded by the Court below in the impugned judgment that the parties are Sapinda, come from the common stock and are within the prohibited decree of relationship in which marriage cannot be performed it is submitted that under order dated 08.01.1999 Annexure-1, Principal Judge, Family Court, Patna has categorically held in paragraph 11 at internal page-7 of the said order that from the certified copy of the Khatiyani Exhibit- A/2 filed by respondent-



husband before the learned Principal Judge it does not appear that parties were within prohibited relationship in which marriage could not have been performed. Ignoring the aforesaid categorical finding recorded by the Principal Judge under the aforesaid order dated 08.01.1999 in the impugned order Principal Judge with reference to certified copy of the same Khatiyani which is Exhibits- 17 and 26 held in paragraph 39 that appellant is the aunt of respondent and they could not have solemnized marriage between them being *Sapindas*.

5. In this connection, learned counsel for the appellant categorically submitted with reference to genealogical table referred to in paragraph 20 of the impugned judgment that Buniyad Singh had only one son Ghanshyam Lal and the appellant-wife is the offspring of Buniyad Singh and his son Ghanshyam Lal. The claim of the husband that Buniyad Singh had two sons Ghanshyam Lal and Bhawani Sahay does not appear from Khatiyani Exhibits- 17, 26 of plot nos. 10 and 40 and with reference to the said Khatiyani, it is submitted that the learned Principal Judge erred in fact and law both in concluding that appellant-respondent are the heirs of Buniyad Singh through Ghanshyam Lal and Bhawani Sahay. Khatiyani exhibits- 17, 26 is not indicative of the fact that Buniyad Singh had two sons, as such the finding recorded by the Court below that appellant is the aunt of respondent as both have common ancestor, Buniyad Singh who had two sons appears to be misreading of Khatiyani,

there being no other evidence on records to suggest that Buniyad Singh had two sons, the finding recorded by the Court below cannot be sustained.

6. In this connection, we notice the submission made by learned counsel for the respondent that the statement of the grandfather of the appellant which was marked as Exhibit-34/A in the Maintenance Case No. 35(M) of 1987 that their houses are separated by a common boundary wall is not proof of the fact that the residents of the two houses are *Sapindas*.

7. This Court under order dated 08.09.2011 directed the parties along with the boy born out of the wedlock to subject themselves for D.N.A. test, respondent did not appear for the D.N.A. examination and challenged the order dated 08.09.2011 before the Hon'ble Supreme Court but till date Supreme Court has not considered the merit of the challenge.

8. In the circumstances, there being opposition on the part of the respondent to subject himself for D.N.A. examination to establish that the son born to Sadhana Sinha has not been fathered by him is persuading us to presume against him as respondent wants to avoid a scientific test to disprove the claim of the appellant she was married to the respondent and Ravi Kumar Sinha was born out of the wedlock.

9. In this connection, we refer to the Judgment of the Hon'ble Supreme Court in the Case of **Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit & Anr. (1999) 7 SCC 675 and**

Dipanwita Roy Vs. Ronobroto Roy (2015) 1 SCC 365 wherein Supreme Court having considered the submissions held that paternity cannot be denied, if D.N.A. test is refused by the father.

10. For the reasons aforesaid, we have no option but to set aside the impugned judgment and order dated 16.03.2010 passed by Principal Judge, Family Court, Patna in Title Suit No. 18 of 1998 and we hold that Arvind Kumar Sinha married Sadhana Sinha and out of the matrimony a son Ravi Kumar Sinha was born to them. For the present appellant is being paid maintenance amount of Rs. 500/- which is too meager amount to maintain both the appellant and her son Ravi Kumar Sinha. Accordingly, placing reliance on the judgment of the Supreme Court in the case of **Jaiminiben Hirenghai Vyas & Anr. Vs. Hirenghai Rameshchandra Vyas & Anr. 2015 CRI. L. J. 608**, we direct the respondent husband to pay the appellant maintenance 1/3rd of his take home salary from the date of the impugned judgment. Arrears in terms of this order be paid to the appellant within four months from the date of receipt/production of this order before the Branch Manager under whom respondent is serving. The current maintenance amount be paid to the appellant from the month of April, 2015 on or before 07th day of the succeeding month in her Bank account which the appellant shall furnish to the Branch Manager along with the representation annexing copy of this judgment. After retirement of the respondent from service

the appellant shall also be entitled to 1/3rd of his retiral dues.

11. The Appeal is accordingly, allowed.

(V.N. Sinha, J.)

(Ahsanuddin Amanullah, J.)

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