

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO.56 OF 2007

Santosh Dnyandeo Badade
R/at Shastrinagar, Mairechawl,
Kothrud, Near Sangam Chowk
Pune 411 029

.. Appellant.

Vs.

Jayashree Santosh Badade
R/at Erandwane, Gavthan,
Rajput Vitbhatti,
Pune 411 004

.. Respondent.

Ms.Sangeeta Salvi i/b Smt.Seema Sarnaik for the Appellant.
None for the Respondent.

CORAM : A.S. OKA & A.K. MENON, JJ.

DATED : 14TH JANUARY, 2015

ORAL JUDGMENT (PER A.K. MENON, J.)

1. The present appeal is filed by the appellant challenges the judgment and order dated 20.22007 passed in a Petition filed under section 13(1) (ia) and 25 of the Hindu Marriage Act, 1955. The appeal was admitted on 23/07/2007. The Respondent has not appeared ever since though served.

2. By the impugned judgment the petition was partly allowed. The Family Court held that the Respondent was not the legally wedded wife of the Appellant. Consequently, it was held that

the Respondent/Original Petitioner was not entitled for decree of divorce. As far as the issue of maintenance for the Respondent and the minor children is concerned, the Family Court directed payment of sum of Rs.500/- to each of the children from 20th February, 2007. The Respondent has not challenged the impugned judgement and order of 20th February, 2007.

3. The Respondent claimed that the marriage between the parties was solemnised on 2.6.1997 at Alandi in accordance with Hindu vedic rites. According to the Respondent, after the marriage they lived together at Kothrud for one year. Thereafter with her parents and then at Shahstrinagar. It is alleged that the Appellant also beat the Respondent and the children as a result of which she lodged police complaints. The Respondent alleged that the Appellant destroyed the photographs and papers pertaining to their marriage. That on 14.11.2005 the Appellant and his sister had beaten the Respondent as a result the Respondent apprehending danger to her life left the matrimonial home along with her children and went to her parents house. She also lodged a complaint against the Appellant. Subsequently, on 23.11.2005 with the help of a representative of an N.G.O, the Petitioner collected her belongings.

4. The Appellant has in his written statement denied these contentions. He contended that the Petitioner was working as domestic help and has taken advantage of her acquaintance with the

family and has filed a false petition with intention to defame him. He contended that even today the Respondent is working in various houses as domestic helper. The question of marriage or divorce did not arise. The Appellant has denied paternity of the children. Therefore, the question of maintenance does not arise. We may observe that the denials are absolute and bare denials bereft of any particulars. There is specific averment in the petition that the parties co-habitated initially in Kothrud, thereafter at Respondent's parent's house and finally at Shastrinagar in house of the Respondent. As against this there is only a bare denial by the Appellant.

5. Both parties led oral evidence. The evidence of Respondent having co-habited with the Appellant has not been shaken. There is also evidence to the effect that the Respondent had with the help of Officer of N.G.O. collected her clothes from the Appellant's house in 2005. The documentary evidence reveals that the birth certificate of the daughter Shruti records her date of birth on 27th July, 2001 and clearly shows the name of father as Santosh Dnyandeo Badade and the name of mother as Jayshri Santosh Badade i.e. the Appellant's name is shown as father and the Respondent's name is shown as mother. The permanent address of the parents is also shown at Vitbhatti, Plot No.14, Erandwane, Pune 411 004. The Family Court came to the conclusion that there is evidence of co-habitation and that paternity of children could not be disputed by the Appellant.

6. In the light of the rival contentions the controversy is restricted to whether the children are of the Appellant. As far as the order rejecting plea for divorce is concerned, there is no challenge to the finding and hence we need not enter upon that controversy.

7. Apropos the controversy relating to paternity of the children, it is seen from the record that the Appellant was put to notice of the Respondent's contention that he was the father of the children, at the outset, viz. on the filing of the petition itself. We have therefore perused the record and we find that after filing of the written statement the Respondent has filed her affidavit of evidence in which she has made a positive assertion as to the birth of children. Her affidavit of evidence is dated 17.6.2006. In her affidavit she has clearly stated that the Appellant is father of the children. The Appellant filed his claim affidavit dated 13.11.2006 in which he has merely denied the marriage rituals. In her affidavit she has clearly mentioned that the Appellant is father of the children and that birth certificate clearly shows the name of Appellant as daughter. The Appellant has, however, not questioned the particulars entered in the birth certificate. He took no steps to have the record corrected, if indeed, it was falsely represented that he was father of the children. In his cross examination, he has not denied the fact of co-habitation at Kothrud and Shastrinagar. He has admitted the photographs at Exhibit-58 which includes a photograph of him with the daughter.

However, he claims that he is not aware the identity of the girl whose hand he held in the photograph. He also deposed that he was not aware if the girl is Shruti. However, the Appellant admits that the photographs were clicked 4 to 5 years ago. He has admitted that no other woman claims to be his wife except the Respondent. Therefore, after filing of the Petition, the Appellant had become aware of the Respondent's case that he is shown to be father. But for a bare denial, there is nothing on record which supports his denial of paternity.

8. Besides, it is seen from Exhibit-30, which is an application filed by the Appellant in the Tahsildar Court, Haveli for getting birth certificate of the children that it is signed by the Appellant and the Respondent on Page 2. The child's name is shown as Chi. Swapnil Santosh Badade. For getting birth certificate the Appellant has also annexed No objection certificate from the Municipal Corporation, copy of ration card, copy of admission card of child Swapnil at Sanjivani hospital.

9. The Respondent has also examined Smt.Nirmala Mukund Sohani who has deposed that she works for a N.G.O and the Respondent used to work for the said witness as a house help. The witness has deposed that she started working in the house when her elder son was two to three years old. In her cross examination it is stated that she was present when the Respondent delivered her

second child. It is pertinent to mention that in the cross examination she deposed that on one occasion when the Respondent was admitted to the police hospital for "MTP", the Appellant signed as her husband. Furthermore, she has deposed that on 16.12.2005, the Appellant had visited the house of said witness at 1.30 pm when the Respondent was working there and at that time on being queried as to his identity he told the witness that he was the Respondent's husband. We have no reason to doubt the veracity of the evidence.

10. Exhibit-52 is the claim affidavit filed by the Appellant in which he denies relationship of marriage between the Respondent and him. He admits that on 23.11.2005 the Respondent along with a representative from Swadhar Centre came to his house to take away the Respondent's belongings. Cohabitation was not denied. In his cross examination he admits that some photographs shown to him with the children were taken at the time of Yatra near Khatarkhad.

11. In the circumstances we are of the view of the fact that the Appellant was aware of the birth of children and the fact that his name was shown as father of daughter Shruti and in the application for the birth certificate of the son Swapnil. The fact that the Appellant has signed the application for issuance of birth certificate Exhibit-30 is material. Ordinarily, in view of the fact that the petition for divorce was rejected since no valid marriage could be established it would not be appropriate to grant maintenance under section 25 of

the Hindu Marriage Act. The Supreme Court in the matter of Chand Dhawan Vs. Jawaharlal Dhawan (1993) 3 SCC 406 has observed that in cases where the petition for divorce is dismissed it would not be appropriate to grant maintenance under the provisions of Section 25 of the Hindu Marriage Act. The Court observed that since the marital status of the parties have effect of disruption as matrimonial Court under the Hindu Marriage Act, the claim for permanent alimony has not to be valid as ancillary and incidental without fact or disruption and that wife claims for maintenance necessarily as in such a situation to be agitated under the Hindu Adoption and Maintenance Act, 1956. On these facts of the case, the Court served that Hindu wife can seek maintenance under section 18(1) of the Hindu Maintenance Act. Applying the ratio to the present case, we find that the maintenance can be provided for under the provisions of section 20 of the Hindu Adoption and Maintenance Act. It would be useful, to refer to the provisions of section 20 :

“20. Maintenance of children and aged parents-

(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property

As can be seen by the above section, Hindu wife is liable to maintain his or her legitimate or illegitimate children. The liability of the Appellant to maintain children cannot be avoided simply by denying the fact of marriage. The provisions of section 20 of the Hindu Marriage Act inter alia empowers the Court to make such provisions in the decree as it may deem it just and proper with respect to maintenance of minor children. Such provisions could be made in any matrimonial proceedings and thus it was lawful for the Family Court to provide for maintenance of the children. In our view the findings in Issue Nos.4 and 5 would be well founded except to the extent of the impugned judgment proceeding on the basis of an application for maintenance being made under the provisions of section 25 of the Hindu Marriage Act. This anomaly can be set right by this Court by exercising powers under Order 41 Rule 36. Accordingly, we direct that the orders directing the payment of maintenance shall be treated as an order pursuant to the provisions of section 20 of the Hindu Adoption and Maintenance Act, 1956.

12. The Supreme Court in the case of *Padmja M. Sharma Vs.*

Ratan Lal Sharma 2000 (4) SCC 266 held that although the maintenance is not defined under the Act and nor it has been specified that as between parents, whose duty is to maintain the children, maintenance can be awarded under section 26 of the Hindu Marriage Act read with section 20 of the Hindu Adoption and Maintenance Act, 1956. The Supreme Court in the case of *Jasbir Kaur Sehgal Vs. District Judge, Dehradun 1987 (7) SCC 7* observed that there can be no such formula for fixing the amount of maintenance, the very nature of things it depends on the facts and circumstances of each case, provided the amount fixed is not excessive or extortionate. In the present case we find that given the income of the Appellant no fault can be found with the quantum of maintenance awarded. It has to be commensurate with the factual circumstances. In the case of *Manjula Vs. K. R. Mahesh 2006 (5) SCC 461* the Supreme Court observed that when the parents fight out their marital disputes, the children have nothing to do with it are the ultimate victims. In the circumstances we find that grant of maintenance cannot be faulted even though the marriage has not been proved.

13. We are of the view that there is little or no doubt the Appellant is father of two children. It is also pertinent to mention that the law leans in favour of legitimacy rather than illegitimacy. On the issue of paternity of children we are inclined to hold against the Appellant and the impugned judgment cannot be faulted.

14. For the aforesaid reasons the appeal is rejected and stands dismissed. The Appellant is directed to pay the Respondent, the arrears of past maintenance including arrears of maintenance and continue to pay the sum awarded.

(A.K. MENON, J.)

(A.S. OKA, J.)