

HON'BLE SRI JUSTICE GUDI SEVA SHYAM PRASAD

CIVIL REVISION PETITION No. 1314 of 2017

ORDER:

This Civil Revision Petition is arising out of the order dated 03.01.2017 passed in I.A.No.1616 of 2016 in O.S.No.409 of 2007 by the learned Principal Junior Civil Judge, Vizianagaram (for short, trial Court). The revision petitioner herein is the defendant in O.S.No.409 of 2007 filed by the plaintiff seeking partition of plaintiff schedule property.

2. The plaintiff filed O.S.No.409 of 2007 against the defendant seeking partition of plaintiff schedule property. In the suit, the defendant filed I.A.No.1616 of 2016, under Section 45 of the Indian Evidence Act, 1872 (for short, the Act), stating that the plaintiff is not his biological son, and he is the son of his wife's sister, and as the plaintiff lost his father long ago, he used to take care of the plaintiff and the plaintiff nursed an evil intention to grab his property in the guise of real son, he filed the suit for partition. To prove the paternity of plaintiff the defendant sought for DNA Test.

3. It is the case of the plaintiff that the defendant admitted in his evidence as DW1 that the plaintiff schedule property is a joint family property of the plaintiff, and that the defendant has sold some landed property on 16.04.1987 in favour of one Anitha Kumari Sethapathi under a registered sale deed, (Ex.A9) on behalf of both the plaintiff and defendant, and the defendant has clearly mentioned

in Ex.A9 that the plaintiff is his son and as the plaintiff was minor boy by the time of sale deed, the defendant has signed on behalf of the plaintiff. It is the further case of the plaintiff that his educational records, voter identity card, voter list and revenue records clearly reveal that he is the son of the defendant. It is his further case that the defendant filed the present I.A. seeking DNA Test, after a long lapse of ten years from the date of filing of the suit, only to protract the trial and siphon off the legitimate share of the plaintiff in the plaint schedule property. That the defendant has not given any reasons as to why he had kept quiet all these years, without taking legal action against the plaintiff, and sought for dismissal of the petition filed for DNA Test.

4. The trial Court, on consideration of arguments of both counsel, has dismissed the petition on the ground that defendant filed the petition at a belated stage, i.e., ten years after filing of the suit, at the fag end of the trial, and it has no merits to allow the petition. Aggrieved by the same, the defendant approached this Court with this Civil Revision Petition.

5. Heard Sri Gudapati Venkateswara Rao, learned counsel for the revision petitioner-defendant and Sri J.C. Francis, learned counsel for the respondent-plaintiff.

6. Learned counsel for the revision petitioner-defendant argued that the delay in filing the I.A., is not fatal to the case of the defendant, as the defendant has specifically denied the paternity of

the plaintiff, in his pleadings. It is further argued that the presumption under Section 112 of the Indian Evidence Act does not arise in this case, as it is not a case of illegitimacy but it is a case of paternity dispute. Therefore DNA Test is required in this case to decide paternity. To buttress his arguments, he placed reliance on the judgment in L. Yashwanth Rao v. L. Anil Kumar¹, and argued that, even at the fag end of trial, a petition can be entertained for establishing the substantial rights of parties.

7. In fact, the above citation L. Yashwant Rao (1 supra) is not applicable to the facts of the present case. The defendant has to prove that the plaintiff is not his son by his evidence. When the plaintiff himself has filed many documents to prove his paternity, the defendant also may file his documents to disprove it. The DNA Test can only be ordered in the interest of child, but not in a case filed by the father seeking proof of paternity. In fact, the DNA Test is sought for 44 year old adult who is the plaintiff in the suit, and who had already filed several documents to prove that he is the son of defendant.

8. In the instant case, there is delay of 10 years in filing the petition seeking DNA Test. That too, it is filed at the fag end of the trial. The defendant cannot file petition under Section 45 of the Indian Evidence Act for collection or creation of evidence. This is a suit for partition filed by the plaintiff. The burden is on the plaintiff

¹ 2017(1) ALD 65

to prove his case under Section 103 of the Indian Evidence Act. The plaintiff has adduced evidence on his behalf, and the defendant got examined himself as DW1 and, at that stage of trial, the defendant filed the present petition seeking for DNA Test. It is only to delay the proceedings further.

9. Learned counsel for the defendant also relied on Dipanwita Roy v. Ronobroto Roy² and submitted that D.N.A. test will decide conclusively the rights of the parties and therefore, sought for ordering D.N.A. Test to prove that the plaintiff is not the son of defendant.

10. Relying on Dipanwita Roy (2 supra), learned counsel for the defendant submits that D.N.A. test can be ordered for deciding rights of the parties. He further submits that the defendant has no other go except to seek for D.N.A. test to prove that the plaintiff is not his son. He also placed reliance on K. Sugandha Kumar v. K. Vijaya Laxmi³, wherein it was held in para 22 that,

“In this view of the matter, I am of the opinion that the order passed by the Court below cannot be sustained. It is accordingly set aside and I.A.No.1115 of 2010 is allowed. The respondent is directed to submit blood samples of herself as well as that of her child for a D.N.A. Test at C.C.M.B., Hyderabad for conducting scientific investigation to decide about the paternity of the child at the cost of petitioner. This exercise shall be completed within a period of eight (8) weeks from the date of receipt of a copy of this order.”

² 2015(1) SCC 365

³ 2016(2) ALD 101

11. Learned counsel for the respondent-plaintiff submits that the plaintiff has sufficient evidence and also produced certain documents to prove that he is the son of the defendant. Learned counsel further submits that the evidence of the parties is completed and now the suit is coming up for further evidence of DW1 and, at that stage, the present interlocutory application is filed only to protract the trial and to deny the legitimate share of the plaintiff in the plaint schedule property.

12. Learned counsel for the plaintiff referred to the cross-examination of D.W.1 wherein defendant stated as follows:

"it is true, in general the joint family properties stand in the name of elder of the family. It is true the plaint schedule properties are joint family properties of myself and plaintiff. I am not willing to accept for D.N.A. test to prove the plaintiff is not my son"

13. Referring to the cross examination of DW1, the learned counsel submits that the defendant himself stated that the plaint schedule properties are joint family properties of himself and the plaintiff, and that he is not willing for D.N.A. test to prove that the plaintiff is not his son.

14. It is appropriate to refer to the following decisions to appreciate the legal position in this case.

15. In *Banarsi Dass v. Teeku Dutta (Mrs)*⁴, it was held in para 14 that,

“The main object of a succession certificate is 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. The grant of a certificate does not establish title of the grantee as the heir of the deceased. A Succession Certificate is intended as noted above to protect the debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a Certificate under the Act, or is compelled by the decree of a Court to pay it to the person, he is lawfully discharged. 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 and allows the debtors to make payments to him without incurring any risk. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so chooses, can also adduce evidence to oppose grant of succession certificate. The trial court erroneously held that the documents produced by the respondents were not sufficient or relevant for the purpose of adjudication and DNA test was

⁴ (2005)4 SCC 449

conclusive. This is not a correct view. It is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in Goutam Kundu's case (supra). Present case does not fall to that category. High Court's judgment does not suffer from any infirmity. We, therefore, uphold it. It is made clear that we have not expressed any opinion on the merits of the case relating to succession application."

16. In Sham Lal Alias Kuldip v. Sanjeev Kumar⁵, it was held in para 35, as under:

"It is well settled principle of law that odiosa et inkonesta non sunt in lege prae sumenda (nothing odious or dishonourable will be presumed by the law). The law presumes against vice and immorality. In a civilized society it is imperative to presume legitimacy of a child born during continuation of a valid marriage and whose parents had "access" to each other. It is undesirable to enquire into paternity of a child whose parents "have access" to each other. Section 112 of the Evidence Act is based on presumption of public morality and public policy."

17. In Goutam Kundu v. State of West Bengal⁶, the Hon'ble Supreme Court held as under:

(1) that courts in India cannot order blood test as matter of course;

⁵ (2009) 12 SCC 454

⁶ (1993) 3 SCC 418

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under [section 112](#) of the Evidence Act. (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.

18. In the light of the above decisions rendered by the High Court and the Hon'ble Apex Court, generally the Courts are not inclined to order D.N.A. test, as a matter of course, and depending upon facts and circumstances of each case, the DNA Test was permitted in extraordinary circumstances.

19. In the case referred by the counsel for defendant in Dipanwita Roy (2 supra), the facts of the case are that the husband filed a petition under Section 13 of Hindu Marriage Act, for dissolution of marriage alleging infidelity of the respondent wife. The husband also named the person of the male child born to the respondent wife. The Hon'ble Supreme Court held that the husband has no other way to prove his plea of paternity except by way of DNA Test and also observed that the DNA Test also gives an opportunity to prove the wife's innocence, if really she was innocent. In that background of the matter, the DNA Test upheld by the High

Court was approved by the Apex Court. The facts of the present case are different. This is a case where the defendant is disputing the paternity of the plaintiff contending that he is not his son. In fact, the plaintiff has filed several documents to prove that he is the son of the defendant. The defendant also can prove his case by disproving those documents. It is not a case where the defendant has no other way to dispute the paternity of the plaintiff, except DNA Test.

20. In the instant case, the dispute arose with regard to partition of plaint schedule properties. The plaintiff filed a suit for partition against the defendant. The plaintiff produced several documents before the trial Court in support of his contention that he is the son of the defendant, apart from producing Ex.A9-registered sale deed which is, admittedly, signed by the defendant on behalf of the plaintiff, in a sale transaction, as the plaintiff was minor by the date of sale deed, and the status of the plaintiff in the said document Ex.A9 was shown as "son". There is no cogent explanation forthcoming from the defendant as to why he executed a registered sale deed as father of plaintiff who was minor then, on behalf of the plaintiff, and why the plaintiff is shown as his son, and as to why he has not filed the petition seeking DNA Test for 10 years from the date of filing of suit and why he kept quiet all these years. Since there is no plausible explanation from the defendant and in the facts of this case, it is not a fit case to order for DNA test.

21. In fact, this Court is not inclined to go into the merits of the case, as this being a revision against the order passed in an interlocutory application. However, I do not see any illegality in the order of the trial Court. Since the revision petition is devoid of merit, it is liable to be dismissed.

22. In the result, the Civil Revision Petition is dismissed. The trial Court shall dispose of the suit, uninfluenced by any of the observations made in this order, after affording due opportunity to both the parties. No costs. Miscellaneous Petitions, if any pending, shall stand closed.

03rd April, 2017

Note: Issue C.C. in 3 days.

B/o

ssp / ksm

GUDI SEVA SHYAM PRASAD, J



HON'BLE SRI JUSTICE GUDI SEVA SHYAM PRASAD



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03.04.2017

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