

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

**SECOND APPEAL st. NO.1755 OF 2009
with
CIVIL APPLICATION NO.377 OF 2014**

Shri Nandu Madhukar Chiplunkar & Anr. ... Appellants
Vs.
Madhukar Kashinath Chiplunkar & Ors. ... Respondents

Mr.Tushar Sonawane for the Appellants
Mr.Gaanesh V. Gokhale, for Respondents

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: APRIL 12, 2018**

P.C. :

1. Admit. By consent of the parties, Appeal called out and heard finally.
2. This Second Appeal is directed against the judgment and decree dated 28.8.2007 passed by the learned District Judge, Nasik in Regular Civil Appeal No.182 of 2005, dismissing the Appeal and thereby confirming the judgment and decree dated 12.7.2005 passed by the learned 2nd Joint Civil Judge, Junior Division, Nasik in Regular Civil Suit No.47 of 1999. The appellants are the plaintiffs, who have filed Regular Civil Suit No.47 of 1999 in the Court of 2nd Joint Civil Judge, Junior Division, Nasik, for

partition of the suit properties, claiming one half share in the suit property. They claim to be the sons of defendant No.1 deceased Madhukar Kashinath Chiplunkar. Defendant No.2 is the son of Madhukar and defendant No.3 is Madhukar's father; Defendant No.2(1D) Ajit is the son of Madhukar. Defendant No.2(1E) is the wife of Madhukar; Defendant No.2(1EE) Archana and Achala are the daughters of Madhukar; Defendant No.3 Shevantabai is the biological mother of the plaintiffs. Defendant No.2(1E) is the step mother. Thus, defendant No.2(1D) and plaintiffs are the steps brothers and defendant Nos.2(1EE) and 2(1EF) are the step sisters of the plaintiffs.

3. The plaintiffs claim that their mother Shevantabai was the second wife of Defendant No.1 Madhukar and defendant No.1 is having ancestral property which includes agricultural land so also the house property wherein they claim 50% of the share in the land property. As per the facts of the case, Madhukar earlier got married to Malti, out of which marriage, three children were born, who are original defendant Nos.2(1D), 2(1EE) and 2(1F). Madhukar performed second marriage with Shevantabai 25 years prior to filing of the suit and out of this wedlock, the plaintiffs were

born. However, Madhukar and and their children and their step brothers and sisters denied the right of the plaintiffs in the ancestral property of Madhukar. Therefore, they filed the suit. It is the case of the defendants that the plaintiffs' claim that Madhukar is their father, is false and bogus and there was no relationship between Shevantabai and Madhukar at any time. The parties led documentary as well as oral evidence before the trial Court and the trial Court dismissed the suit on 12.7.2005. The trial Court held that the plaintiffs have failed to prove that they are the sons of the deceased defendant No.1 Madhukar and step brothers of defendant No.2(1D), 2(1EE) and 2(1EF). Therefore, they have no share in the suit property.

4. The learned Counsel for the appellants submitted that the trial Court as well as the appellate Court failed to appreciate the evidence and the proceedings to decide the paternity of the plaintiffs. He formulated a substantial question of law as follows:

“Whether the trial Court as well as the first Appellate Court have overlooked the issue of paternity of the plaintiffs in the absence of referring the matter for DNA?”

5. Learned Counsel has submitted that the appellants/plaintiffs had tried to send the blood sample of Madhukar for DNA test. He made an application at exhibit 48 during the trial. The learned trial Judge passed an order that the said application will be decided finally at the appropriate stage and did not decide the said application. He has submitted that during the cross examination of Madhukar, on seeking admission that he was ready for DNA test, the appellants moved another application marked at exhibit 162A requesting the learned Judge to order taking of blood sample of Madhukar and send it for DNA test. However, the trial Court rejected the said application on 16.8.2002. The learned Counsel submitted that it was the duty of the trial Court to send the blood sample of Madhukar and the plaintiffs to the Forensic Science Laboratory to find out whether Madhukar is the father of the plaintiffs. It was illegal on the part of the trial Judge to deny the opportunity to the plaintiffs to bring the evidence on record. He further submitted that the first Appellate Court has also wrongly decided the point of determination that the plaintiffs could not prove that they are the sons born to Shevantabai from Madhukar. The learned Counsel has further submitted that even assuming that the plaintiffs are illegitimate children, yet, their right in the

ancestral property cannot be denied. In view of his submissions, he relied on the judgment of the Supreme Court in the case of **Revanasiddappa & another vs. Mallikarjun & others**¹.

6. In the case of **Revanasiddappa & another vs. Mallikarjun & others** (supra), the Supreme Court has dealt with section 16(3) of the Hindu Marriage Act and referred to the case of **Bharata Matha vs. R. Vijaya**² wherein the Supreme Court held that a child born in a void or voidable marriage, was not entitled to claim inheritance in ancestral co-parcenary property but was entitled to claim share only in self acquired property.

7. The same view was taken in the case of **Jinia Keotin vs. Kumar Sitaram Manjhi**³. However, in the case of **Revanasiddappa (supra)**, the Supreme Court has expressed a disagreement with the view taken in the earlier cases while interpreting section 16(3) of the Hindu Marriage Act and observed that even illegitimate children have right not only in the self acquired property but also in the ancestral property and therefore, at the end the Supreme Court has stated thus:

1 (2011) 11 SCC 1

2 (2010) 11 SCC 483

3 (2003) 1 SCC 730

“In the instant case, section 16(3) as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self acquired or ancestral. For the reasons discussed above, we are constrained to take a different view from the one taken by this Court in **Jinia Keotin (supra)**, **Neelamma v. Sarojamma**⁴ **(supra)** and **Bharatha Matha (supra)** on Section 16(3) of the Act.”

Considering the facts of this case and the evidence before the Court, this ruling is not useful to the present appellants as they have failed to prove basic fact that they are the sons of Madhukar.

8. Learned Counsel for the respondent while opposing this Second Appeal, has pointed out that Shevantabai was married to one Tukaram Bhoir and the marriage was in existence and thereafter these children i.e., the plaintiffs were born. He has submitted that no evidence is brought by the appellants to prove that they are illegitimate children of Madhukar. The learned Counsel further argued that they are claiming share in the ancestral property u/s 16(3) of the Hindu Marriage Act. The children have no right in the ancestral property of the father but have right only in the self acquired property and the appeal should fail.

4 (2006) 9 SCC 612

9. Heard submissions; perused the plaint and the orders of both the Courts below so also the evidence of all the witnesses. In this case, a short point is involved as to whether the plaintiffs have tendered evidence to prove that they are the children of Madhukar ? Whether they are legitimate or illegitimate, is immaterial at this stage. First, they have to prove the basic fact that Madhukar was their father. When such claim is made that some person is a father, then, on the basis of the evidence of the mother or other witnesses and the circumstantial evidence, that fact can be proved. In the present case, the plaintiffs produced their school leaving certificates where their father's name is shown as Madhukar Chiplunkar. They examined their mother Shevantabai who has stated that she got married to Madhukar and she was staying in Chiplunkar Mala as wife of Madhukar and the plaintiffs are their children. One witness, namely, Waman Bikhaji Pangare, was examined by the plaintiff on the point of performance of marriage between Madhukar and Shevantabai. All this evidence could have been considered in favour of the plaintiffs, however, while appreciating these facts, the trial Court and the first Appellate Court have rightly given importance to the fact that Shevantabai was admittedly married to one Tukaram Bhoir and her first

marriage was in existence, though she had stated in the cross-examination that her first marriage with Tukaram Bhoir was not in existence due to customary divorce taken by both and thereafter, she got married with Madhukar. It is to be noted that no evidence is brought on record of customary divorce. Under such circumstances, her marriage with Tukaram Bhoir, as she has admitted, was the first marriage, which was in existence. Assuming that Madhukar and Shevantabai were having illegitimate relationship and the plaintiffs were born during such relationship, yet, the fact cannot be proved conclusively that the plaintiffs are the children of Madhukar unless concrete evidence establishing biological relationship is produced. Section 112 of the Indian Evidence Act lays down presumption of paternity thus:

“112. Birth during marriage, conclusive proof of legitimacy.— The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

10. Thus, unless it is brought on record that her marriage with Tukaram Bhoir had come to an end and was not in existence when

the children were born to her, it is presumed that the children born to her were begotten from Tukaram Bhoir, her husband. The presumption under section 112 is to give protection to a child by fixing the paternity of the child so the child can be considered as legitimate. There may be a case where the paternity is denied by a man and it is difficult for a woman to prove that the child is begotten from that man. However, this presumption and protection given in respect to a child, which is born during the continuance of a valid marriage or within 280 days after its dissolution and the mother remaining unmarried. It is noted that this presumption is rebuttable if the other fact of denial of access to husband during that period is brought on record. The facts of this case demand a proof of a very peculiar circumstance and of standard as there is no evidence of divorce between Shevantabai and Tukaram and the children are born when the marriage was in existence, then they are presumed to be born and legitimate children of Tukaram. However, this fact is rebuttable if the evidence is brought that the parties to the marriage had no access to each other at the time when the children were begotten. Even if it is accepted that Madhukar and Shevantabai might have been leading a life of a husband and a wife, still, for rebuttal of presumption of paternity of

Tukaram, the evidence of customary divorce or denial of access to him ought to have been brought on record.

11. In the absence of non-availability of such evidence, the other mode was to establish the fact of Madhukar's paternity was very much available i.e., by producing the evidence of the Chemical Analyser by conducting DNA test of Madhukar and the plaintiffs. It is true that the plaintiffs have filed application in the Court that Madhukar's blood sample was to be taken and to be sent to Forensic Laboratory for DNA. However, the Court has passed an order that it will be decided at a proper stage i.e., at the time of final hearing. Such order ought to have been challenged in appeal by the plaintiffs. Under such circumstances, the plaintiffs should have approached higher Court and ought to have got the order of blood sample of Madhukar or the respondents (step-brothers) and sent for DNA test. It appears that no steps were taken by the plaintiffs.

12. During cross-examination of Madhukar, which was part heard on 21.4.2002, an application was moved when he gave admission that he is ready for DNA test to prove that the

defendants were not his children. The second application for DNA test of Madhukar's blood sample was moved, however, the said application was rejected by giving a detailed order by the trial Court on 16.8.2002. The plaintiffs did not challenge that order before the higher authority and did not get the blood sample of Madhukar for DNA test and also did not ask for blood samples of his alleged step-brothers. After three months, i.e., on 17.11.2002, Madhukar expired. Thus, when the plaintiffs, as per the Evidence Act, the burden is strictly on the plaintiffs to prove that Madhukar was their biological father and this could have been proved only through DNA test. Thus, if the plaintiffs would have been successful to produce a positive DNA report, showing that Madhukar is their biological father, then, the presumption under section 112 of the Evidence Act, could have been rebutted successfully by the plaintiffs. Thus, in the absence of this very material evidence and in view of the peculiar facts and the marital background of Shevantabai the trial Court and the appellate Court both have rightly discussed and considered the evidence and held that the plaintiffs failed to prove that they are children of Madhukar.

13. Under such circumstances, the question of law framed as above, is answered in the negative. Appeal is dismissed.

14. Civil Application No.377 of 2014 also stands dismissed.

(MRIDULA BHATKAR, J.)