

Tikam

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

APPEAL FROM ORDER (ST) No. 28844 OF 2018
WITH
CIVIL APPLICATION (ST) No. 28846 OF 2018
IN
APPEAL FROM ORDER (ST) No.28844 OF 2018

Mr. P.V. Raghavan	...Appellant
Vs.	
Mr. P.V. Mahesh Kumar	...Respondent

Mr.S.B. Shetye i/b. Manish Bohra for Appellant
Mr. Sushil Upadhyay i/b. A.M. Saraogi for Respondent

CORAM : SHRI K.K. TATED, J.

DATE : MAY 02, 2019

P.C.:

1. Heard learned counsel for the parties.
2. By this Appeal from Order, the Appellant – Original Defendant is challenging the Judgment and Order dated 28th August, 2018 passed by the Bombay City Civil Court At Bombay in Notice of Motion No. 146 of 2017 in S.C. Suit No. 60 of 2017, directing the Plaintiff and Defendant to undergo the test which is available for determining the paternity within two months of passing of the order. The operative order reads thus:

“Order

- i) The Notice of Motion No. 146 of 2017 is allowed.
- ii) The plaintiff and defendant are directed to undergo the test which are available for determining the paternity within two months of passing of this Order.
- iii) Parties to maintain confidentiality, till further orders.

iv) Accordingly, the notice of motion is disposed of.”

3. Learned counsel Mr. S.B. Shetye appearing on behalf of the Appellant- Original Defendant submits that the Trial Court erred in coming to the conclusion that the suit filed by the Respondent/Original Plaintiff is maintainable. He submits that the birth date of the respondent/original plaintiff is 10th May, 1973, whereas, the present suit filed by him in the month of December, 2016. The same is barred by limitation.

4. Learned counsel for Appellant further submits that the court below failed to consider the fact that without leading any evidence by the parties, the notice of motion for DNA test is not maintainable in law. He submits that the trial court ought to have held that first the Plaintiff to prove his case by leading cogent evidence. Hence, the impugned order is required to be set aside.

5. On the other hand, the learned counsel Mr. Sushil Upadhyay appearing on behalf of Respondent/Original Plaintiff vehemently opposed the present Appeal from Order. He submits that in the present proceeding, the Plaintiff filed the suit under Section 34 and 38 of the Specific Relief Act under Order XXXIX of C.P.C. for declaration that the plaintiff is the biological son of the defendant. He submits that the plaintiff has made following prayers in plaint.

“a) that it be declared that the Plaintiff is the bi-logical son of the Defendant having born out of the relations between the Defendant and the mother of the Plaintiff i.e. Mrs. P.V. Parakuntty, born on 10.05.1973.

b) that this Hon'ble Court be pleased to issue a mandatory order and directions directing the Plaintiff as well as the Defendant to undergo necessary tests as may be required for the purpose of examining the bi-logical relations between the Plaintiff and the Defendant on such terms as this Hon'ble Court may deem fit and proper.”

6. I heard both the counsels at length.

7. In the present proceeding, incident which was occurred in the year 1972 between the Defendant and deceased is narrated in paragraph 7 of the plaint which reads thus:

“7. The plaintiff states that on one occasion, during the defendant's visit to Kerala in the aforesaid period, all the family members save and except the defendant and Mrs. P.V. Parakutty had gone out for a certain family function. The plaintiff further states that during this time, the defendant outraged the modesty of Mrs. P.V. Parakutty forced him upon her and raped her. The plaintiff states that after the said act, the defendant blackmailed her saying that if she reports this incident to anyone, he will kill her. The plaintiff further states that the defendant justified his act to Mrs. P.V. Parakutty stating that such type of a sexual relation with the brother-in-law is legitimate in 'Ezhava' community.

8. It is to be noted that bare reading of the plaint i.e. paragraphs 7 and 9, the best mode of determining the relationship between plaintiff and the defendant is only the DNA test.

9. Considering this fact, and the observations recorded by the trial court in the impugned order, I do not find any substance in the Appeal from Order.

10. Hence, following order :

ORDER

- (a) Appeal from Order and Civil Application stand rejected.
- (b) At this stage, learned counsel Mr. S.B. Shetye appearing on behalf of the Appellant, seeks stay of this order. Considering the submissions made by the learned counsel for the Appellant and the issue involved in the present proceeding, the interim protection granted by this Court, to continue till 7th June, 2019.

[K.K. TATED, J.]