

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 857 OF 2016

1. Shri. Yogesh Baburao Shinde
2. Sau. Durga Baburao Shinde Petitioners

Vs.

1. Shri. Baburao Mahadu Shinde
2. Shri. Bharat Baburao Shinde
3. Shri. Sharad Baburao Shinde
4. Shri. Rameshwar Baburao Shinde
5. Sau. Jijabai Baburao Shinde Respondents

Mr. Girish R. Agrawal for Petitioners
Mr. Suresh M. Sabrad for Respondent No. 1.

Coram : NITIN W. SAMBRE, J.
Date : 31ST AUGUST, 2021

P.C.:

1. This Petition is by the original Plaintiffs to the Regular Civil Suit No. 105 of 2012, which is for partition.
2. Petitioner No. 1 claims to be son of Petitioner No. 2 born out of marriage with Defendant No. 1 i.e. Respondent No. 1 herein.

3. In a Suit, an issue in regard to the paternity was framed as the Defendant No. 1/Respondent No. 1 denied paternity and also marriage.

4. The Petitioners moved an application, Exhibit 54 for issuance of directions to the Respondent- Defendant No. 1 to present himself for D.N.A. test, which prayer is rejected by the impugned order dated 28th November, 2015 passed by 2nd Joint Civil Judge, Junior Division, Niphad. As such, this petition.

5. Mr. Agrawal, learned counsel appearing for the Petitioners while inviting attention of this Court to the provisions of Sections 16, 11 and 5(1) of the Hindu Marriage Act, 1955 would claim that even a child born out of voidable marriage can claim right to property. Even illegitimately born out of live-in relationship cannot claim inheritance of coparcenary property, however, has every right to claim share in the self-acquired property, as is settled down in the judgment of the Apex

Court in the matter of Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others, reported in (2010) 11 Supreme Court Cases, page 483. He would then claim that though the presumption under Section 112 of the Indian Evidence Act about legitimacy of the child born during continuation of marriage is formed basis for rejection of a prayer of the Petitioners in the order impugned, however, such presumption, in the case in hand is difficult to be discharged considering the advance age and the absence of witnesses.

6. Drawing support from the judgment of this Court in the matter of Namdeo Babasaheb Korde and Another Vs. Babasaheb @ Babarao Ramkrishna Korde and Others, reported in (2015) 1 Maharashtra Law Journal page 888, he would urge that so as to establish the truth, it is necessary to direct Defendant No. 1/Respondent No. 1 to undergo D.N.A. test.

7. While countering aforesaid submissions, learned counsel appearing for the Respondents would oppose the claim as according to

him, the initial burden is on the Petitioners to establish about existence of marriage or birth of Plaintiff No. 1/Petitioner out of subsistence of marriage. Unless such burden is discharged, the Petitioner cannot take recourse to the remedy available under Section 45 of the Indian Evidence Act in the form of medical evidence/Expert evidence.

8. I have considered rival submissions.

9. From the pleadings, it is apparent that the claim put-forth by the Petitioner about the marriage and birth of Plaintiff No.1 was denied by the Respondent- Defendant No. 1 resulting into framing of an issue to that effect.

10. In such an eventuality, burden is on the Petitioners- Plaintiffs to prove that there was a marriage and if not, the son- Plaintiff No.1 was born out of relationship between Plaintiff No.2 and Defendant No. 1.

11. In case if the issue of marriage is established by Plaintiff No. 2, the presumption under Section 112 of the Indian Evidence Act can be

drawn and such presumption can be rebutted by Defendant No. 1.

12. In the case in hand, the trial Court rejected the prayer of the Petitioner-Plaintiffs on three counts :

- (a) There is denial of marriage and relationship;
- (b) The burden is on the Plaintiff to prove the performance of marriage and
- (c) presumption under Section 112 of the Indian Evidence Act, to be initially discharged by the Petitioners.

13. The fact remains that this Court while considering such an issue in the matter of Namdeo Korde and Another Vs. Babasaheb @ Babarao (cited supra) has made following observations :

“8. It is a misconception that only a valid and legal marriage leads to parenthood. A biological child would equally be an offspring as like a child born out of a legal wedlock. A child born out of relationship between a male and a female will

render both to parenthood. Therefore, in the present case, whether there was any legal marriage performed between Petitioner No.2 and Respondent No. 1 would not be significant when it came to a DNA Test to be performed for establishing paternity of Respondent No.1 qua Petitioner No.1 and Respondent No. 7.

17. I am, therefore, of the firm view that when the Petitioner No.1 (claiming to be the son) and Respondent No.7 (claiming to be the daughter) desire that their father needs to be identified, the Law will rush in aid to the duo. For ascertaining the truth and to avoid evading, of the clutches of Law, Respondent No.1 Babasaheb @ Babarao Ramkrishna Korde, needs to undergo the DNA test. Ultimately, in the eyes of law, truth which is divine, must surface. No loss or harm of any nature would be caused to him. When medical science can act in aid of law, Courts must allow truth to prevail.”

14. The Respondent-Defendant No.1 has denied the relationship so also the paternity, which has resulted into preferring an application under Section 45 of the Indian Evidence Act.

15. The Petitioners have claimed that the marriage was solemnized on 4th October, 1978. In the plaint, it is specifically pleaded that the relation between Defendant No. 1 and Plaintiff No. 2 is that of husband and wife and Plaintiff No. 1 is born out of said relationship. It is further claimed that the property of which partition is sought was in possession of Defendant No.1 and the Plaintiffs. However, since the Defendant No. 1 has started taking steps adverse to the interest of the Plaintiffs, the suit in question is brought into action.

16. The disclosure of the date of marriage, specific pleadings that the Plaintiff No. 1 was born out of marriage of Plaintiff No. 2 with Defendant No. 1, legitimate claim appears to have been raised by the Plaintiffs. Such claim, for adducing medical evidence by ordering Defendant No. 1 to undergo DNA test appears to be in the interest of

son of Plaintiff No. 2, claimed to have born out of marriage with Defendant No. 1. It cannot be inferred that if directed to undergo DNA test, any right of privacy of Defendant No. 1 is going to be jeopardised. As such, in my opinion, a case for showing indulgence in extra ordinary jurisdiction is made out. As such order impugned dated 28th November, 2015 passed by 2nd Joint Civil Judge, Junior Division, Niphad below Exhibit 54 is hereby quashed and set aside.

17. Application, Exhibit 54 is allowed.

18. Defendant No. 1/Respondent No.1 is directed to undergo D.N.A. Test, the schedule about which shall be decided by the Civil Judge, who is dealing with the Suit including that of costs and conditions to be complied.

19. In case if the Defendant No.1 fails to give sample of blood for analysis, inspite of this order and failed to submit himself to the medical examination, the trial Court will be at liberty to take such refusal on record and draw appropriate adverse inference.

20. Let aforesaid exercise be completed within the stipulated period to be fixed by the trial Court.

21. The Writ Petition stands allowed in above terms.

(NITIN W. SAMBRE, J.)