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SA 512.95.odt

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 512 OF 1995

1. Tukaram s/o. Narayan Karhale
Aged 58 years, Occ. Nil
R/o. Bhategaon, Tq. Purna, Dist. Parbhani.
2. Maroti s/o. Wamanrao Bhonsale,
Aged 40 years, Occ. Agriculture
r/o. Bhategaon, Tq. Purna,
Dist. Parbhani.

Appellants
(original defendants)

VERSUS

1. Laxmibai w/o. Tukaram Karhale,
Aged 49 years, Occ. Household,
R/o. Pangra, Tq. Purna, Dist. Parbhani.
2. Bapurao s/o. Tukaram Karhanale
Age 27 years, Occ. Agriculture,
r/o. As above.
3. Ramesh s/o. Tukaram Karhale
Age 20 years, Occ and r/o. As above.

Respondents
(original plaintiffs)

Mr. B.A. Darak, Advocate for appellants.
Ms. Rekha M. Mohale-Chaudhari h/f. Mr. S.S. Choudhari, Advocate for respondents.

CORAM : S.G. CHAPALGAONKAR, J.

DATE : 20TH FEBRUARY, 2025.

JUDGMENT :-

1. The appellant/original defendant takes exception to the judgment and decree dated 14.9.1995 passed by learned District Judge Parbhani in Regular Civil Appeal No. 76 of 1988, thereby upholding the judgment and decree dated 29.2.1988 passed by civil Judge (Junior Division), Parbhani in RCS No. 488 of 1986, by which the suit of the respondent/plaintiffs seeking decree of partition and separate possession has been decreed.

2. The respondents/plaintiffs instituted R.C.S. No. 488 of 1086 contending that she is legally wedded wife of defendant No.1 Tukaram. Out of said wedlock, plaintiff Nos. 2 and 3 are born. The suit property is ancestral joint family property of plaintiffs and defendant. Defendant No.1 Tukaram is addicted to vices, therefore, there was conflict between plaintiff No.1 Laxmibai and defendant No.1 Tukaram. There was oral partition prior to about 9 years, in that Tukaram allotted lands Gat No. 2 and 39 and Hissa No.1 from Gat No., 24 to the plaintiffs, so also, portion of residential house. However, mutation could not be effected in pursuance to said oral partition. Defendants obstructed their peaceful possession. Therefore, cause of action arose to file the suit. In the alternative, plaintiffs claimed for effecting partition by metes and bounds and grant a decree of partition and separate possession of suit property.

3. Appellants/defendants filed written statement. They admitted that plaintiff No.1 Laxmibai is legally wedded wife of defendant – Tukaram, however, denied paternity of plaintiff No.2 Bapurao and Plaintiff no.3 Ramesh.

4. Trial court framed issues, recorded evidence of parties and decreed suit of plaintiffs accepting their case that defendant no.1 is father of plaintiff nos. 2 and 3 born, from plaintiff No.1. As such, granted 3/4th share to defendant No.1 in suit property. Defendants assailed decree in appeal, appellate court pleased to uphold the decree.

5. Present second appeal has been admitted on 6.3.1997 treating ground Nos. 1 to 5 as stated in appeal memo as substantial questions of law. Learned advocate for appellants submits that he would restrict his submissions on those substantial questions of law as mentioned in the form of grounds of appeal in para. 1 to 5, which read thus :-

“ 1. That, the burden of proof to prove that plaintiffs 2 and 3 are the sons of defendant No.1 Tukaram born from plaintiff No.1 Laxmibai was on the plaintiff. The plaintiffs would succeed or fail on the basis of the evidence led by them. Whether said burden could be shifted on the shoulders of the defendants to prove the plaintiffs 2 and 3 were not the sons of defendant No.1, is a substantial question of law in this second appeal.

2. Whether in the matter of appreciation of oral evidence, the Courts below could apply different standards for appreciating or believing the evidence of plaintiffs and the defendants, is also a substantial question of law in this second appeal.

3. When there is oath against oath and witnesses are deposing on the question of relationship of defendant no.1 with plaintiffs 2 and 3 on the point of paternity, the Courts below required to give solid and credible reason for believing one set of evidence and discarding the other set of

evidence. The failure to do so, has given rise to substantial question of law in this second appeal.

4. *That, the failure to lead or produce any documentary evidence showing the plaintiffs 2 and 3 as the sons of defendant no.1 either from the birth and death register or from the school or from any source or conduct till before the filing of the suit, is sufficient to cast a serious shadow of doubt on the credibility of the oral evidence. Failure to consider this aspect has given rise to a substantial question of law in this second appeal.*

5. *That plaintiff no.1 could not have been believed in her deposition that there was no birth and death register at village Panghra, where the plaintiffs no.2 and 3 were born admittedly, and further that they did not take any school education right from their birth. The total absence of any conduct or assertion about the legitimacy of plaintiffs 2 and 3 as well as of plaintiff no.1 to claim or assert that they were the sons of defendant no.1 is also a very material point sufficient to discard the oral testimony of plaintiff no.1 and her brother PW 3 Balaji. The finding so recorded in the above background about the paternity of plaintiffs 2 and 3, is vitiated and has no sanctity in the present second appeal.”*

6. Heard Mr. Darak, learned advocate for appellant on aforesaid substantial questions of law. The sum and substance of aforesaid questions of law is that, burden to prove paternity of plaintiff Nos. 2 and 3 was on the plaintiffs and it could have never been shifted to defendants and courts below were not justified in accepting case of plaintiffs that plaintiff Nos. 2 and 3 were born to plaintiff No.1 from her matrimonial relationship with defendant No.1 Tukaram.

7. Apparently, defendants filed a joint written statement and admitted that plaintiff No.1 – Laxmibai, is wife of defendant No.1 Tukaram. In the wake of admitted matrimonial relationship, it would be necessary to refer to Section 112 of the Indian Evidence Act which reads 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.

It is pertinent to note that apart from clear admission as to validity of marriage and substance of such matrimonial relationship, defendants have not pleaded that plaintiff No.1 was living adulterous life. Therefore, it is undesirable to inquire into paternity of children unless it has been brought on record that defendant No.1 had no access to plaintiff No.1. It is trite that presumption under section 112 of the Evidence Act, is based on public morality and public policy, particularly, the principle of law that *odiosa et inhonesta non sunt in lege praesumenda* (nothing odious or dishonourable will be presumed by the law).

8. In light of aforesaid legal position, if the findings recorded by courts below, on appreciation of evidence are perused, it can be seen that defendant No.1 could not bring any evidence to show that defendant Tukaram had no access to plaintiff No.1 Laxmibai. Apparently, the burden to rebut presumption in favour of paternity was upon defendant No.1 Tukaram. He relied upon evidence of three witnesses including

himself. Tukaram states in his evidence that Laxmibai resided with him for about 10 ½ years after marriage, although in pleadings, he states that Laximibai resided with him at village Bhategaon for 4 to 5 years after the marriage.

9. The appellate court, on appreciation of evidence, observed that evidence of defendant Tukaram is absolutely inconsistent and unreliable. Evidence of DW-2 Shivaji and DW-3 Vitthal, who are relatives of defendant No.1, is of no assistance to rebut the presumption. As rightly observed by appellate court, in written statement at Exh. 27, there is no pleading that plaintiff No.1 and defendant No.1 Tukaram had no access at all. On the other hand, plaintiff No.1 has entered into witness box and given consistent evidence that plaintiff Nos. 2 and 3 are begotten out of her wedlock with defendant No.1 Tukaram. There are concurrent findings of fact recorded by courts below on the vital issue that defendant No.1 failed to discharge his burden and dislodge the presumption under Section 112 of the Evidence Act.

10. The Supreme Court of India in the case of ***Smt. Kamti Devi & Anr vs Poshhi Ram (2001)5 SCC 311***, observed in para.9 as under :-

“Section 112 which raises conclusive presumption about the paternity of the child born during subsistence of a valid marriage, itself provides the outlet to the party who wants to escape from the rigor of that conclusiveness. Said outlet is, if it can be shown that parties had no access to each other at the time when child could have been begotten, the presumption can be rebutted.”

Therefore, the only way available for defendant No.1 to rebut

presumption was to bring home an impeccable evidence that there was no access between himself and Laxmibai when plaintiff Nos. 2 and 3 were born. However, defendants miserably failed to bring on record evidence to establish non-access. While interpreting the term non-access, it is consistently held that non-access means impossibility, not merely inability of spouses to have marital relations with each other. For a person to rebut the presumption of legitimacy, it is necessary for him to first assert non-access, which in turn, must be substantiated by evidence. In present case, as observed by the appellate court, written statement sans such assertion. In that view of the matter, substantial questions of law as framed do not arise in this appeal. Second appeal sans merit, hence dismissed. Civil application, if any, stands disposed of.

[S.G. CHAPALGAONKAR, J]

grt/-