Sajeera Vs P.K. Salim

Court: High Court Of Kerala

Date of Decision: Oct. 28, 1999

Acts Referred: Constitution of India, 1950 â€" Article 14, 20(3), 23
Evidence Act, 1872 â€" Section 112, 27, 73
Family Law Reform Act, 1969 â€" Section 26

Citation: (2000) 1 ILR (Ker) 863

Hon'ble Judges: K.A. Mohamed Shafi, J

Bench: Single Bench

Advocate: T.M. Abdul Latheef, for the Appellant; Sunny Mathew, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.A. Mohamed Shafi, J.
This M.C. is filed fay the petitioner in C.M.P. 1410/98 in M.C. No. 168/98 on the file of the Family Court,

Kozhikode to quash the order dated 4-1-99 in C.M.P. 1410/98 passed by the Court.

2. The M.C. is filed by a minor child Sajeera aged about 2 1/2 years, represented by her mother claiming maintenance from the respondent

alleging to be her father. It is alleged that the mother of the minor child was married to one Majeed, the brother of the respondent and thereafter

she was residing in her husband''s house. During the relevant period her husband Majeed was away in Gulf country and the respondent was having

sexual intercourse with her while she was residing in her husband''s house. Accordingly she was impregnated by the respondent and she gave birth

to the minor child on 3-11-95 from her husband''s house. Since the respondent refused to maintain the minor child and refused to acknowledge the

paternity of the child, she filed M.C. for maintenance against the respondent. At the stage of trial the petitioner filed the above C.M.P. to conduct

DNA test of the minor petitioner and the respondent to prove paternity of the child. The respondent resisted the petition by filing a detailed

counter. He contended that he had absolutely no sexual intercourse with the mother of the petitioner and the petitioner is not his child. He has also

contended that he is married and living happily with wife and a child aged about 2 1/2 years. He also contended that there is absolutely no need to

conduct the DNA test. He has further contended that if the petitioner is very particular to conduct the DNA test, he has no objection in conducting

the test at the expense of the petitioner.

3. The lower Court by the impugned order dismissed the petition. Hence the petitioner has filed this M.C. before this Court to quash the order in

the C.M.P. passed by the lower Court.

4. In this case the very allegation of the mother of the minor child is that while her husband Majeed was away in Gulf country, she had sexual

intercourse with the respondent whereby she became pregnant and gave birth to the minor child. The case of the respondent is complete denial of

any sexual relationship with the mother of the minor and the paternity of the minor child.

5. The counsel for the respondent has read over to me in Court the entire averments made by the respondent in the counter filed by him in C.M.P.

1410/98 before the lower Court. In that counter though he has denied any sexual relationship with the mother and the paternity of the minor child,

he has nowhere stated that Majeed, his brother and husband of the mother of the minor child is the father of the child nor he has Imputed paternity

of the child on any other person. But it appears that the lower Court on the basis of the assumption that being a legal point, the presumption with

regard to the legitimacy of the child born during the continuance of a valid marriage available u/s 112 of the Evidence Act can be raised at any

stage accepted the contention of the respondent, drew the presumption of legitimacy of the child u/s 112 of the Evidence Act and dismissed the

petition landing that the mother of the child has failed to prove that she had no access at the time when the child would have been begotten with her

husband.

6. In order to arrive at his conclusion the learned Family Court Judge has relied upon the decisions of this Court in Janamma Vs. Kuttappa

Panicker, and of the Supreme Court in Goutam Kundu Vs. State of West Bengal and another, .

7. The counsel for the petitioner submitted that all those decisions relied upon by the lower Court have arisen in cases where the father of the child

denied paternity of the child born during the subsistence of valid marriage with the mother of the child and failed to prove that there was no access

with the mother of the child at about the time the child would have been begotten. According to him, those decisions have no application to the

facts of this case wherein the mother of the child has categorically stated that there was no access with her husband during the relevant time as he

was abroad and she was having sexual intercourse with the respondent whereby the child was conceived and delivered by her.

8. Section 112 of the Evidence Act reads as follows :

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.

9. It is well settled that the burden to prove that the parties to the marriage had no access to each other at the time the child would have been

begotten is on the person who is challenging the legitimacy of the child and access means the opportunity of sexual intercourse between them. It

has been held so in the decision in AIR 1934 49 (Privy Council) .

10. In the decision in Janamma Vs. Kuttappa Panicker, this Court has held that there is a presumption of legitimacy in favour of the child born in

lawful wedlock and this presumption is conclusive unless it can be shown that the husband and wife had no access to each other at any time when

the child would have been begotten and in the absence of such evidence the child must be deemed to be legitimate even though the wife was living

apart and leading an unchaste life.

11. In the decision in Ammathayee Ammal and Another Vs. Kumaresan and Others, the Supreme Court has observed as follows :

It raises inter alia a conclusive presumption that a child born during the continuance of a valid marriage between his mother and any man is the

legitimate son of that man, and this conclusive presumption can only be rebutted if it is shown that the parties to the marriage had no access to each

other at any time when he could have been begotten.

12. Even though formerly in England this presumption under law could be displaced only by a strong preponderance of evidence and not by a

mere balance of probabilities, subsequently the position of law has been changed and it was indicated that the presumption can be rebutted on

balance of probabilities. Now, Section 26 of the Family Laws Reforms Act, 1969 provides that the presumption is rebuttable on the balance of

probabilities in civil proceedings. It has been held by this Court as well as various other High Courts and the Supreme Court that the standard of

proof to rebut the presumption of legitimacy of the child born during the continuance of a valid marriage available u/s 112 of the Evidence Act is

similar to the standard of proof required to establish the guilt of an accused in a Criminal case and the burden of proving non-access is entirely

upon the person who sets up such a contention. But non-access can be established by positive direct evidence or even by circumstantial evidence

provided it is cogent and conclusive in nature. The question of non-access has to be considered with reference to the time the child would have

been conceived.

13. In the decision in Parmeswaran Nair Vs. Janaki Amma and Another, this Court has held that the evidence of the mother with regard to the

paternity of her illegitimate child must be corroborated by independent evidence. In that judgment it is also observed as follows :

12. The rule that the evidence of a mother in regard to paternity of her child requires to be corroborated by independent evidence is, unlike in

England, not a statutory requirement. It is only a rule of prudence and caution. It is intended to save persons from being faced with irresponsible

charges of paternity of children.

14. In this case as already noted, the respondent has not contended that the mother of the child has been living in adultery or having sexual

intercourse with any or several other persons, and he has denied any sexual relationship with her. Therefore the evidence of the mother of the child

that the respondent is the father of the child has to be corroborated by acceptable direct or circumstantial evidence to dislodge the presumption of

legitimacy of the child born during the existence of valid marriage which has to be fastened upon Majeed, the brother of the respondent in this case.

15. It has been held in several cases that blood test is an important piece of evidence to determine the paternity of the child. Though by a blood

test it cannot positively establish the paternity of the child, it can certainly exclude certain individual as the father of the child. Therefore, while the

negative finding in a blood test is definite, the positive finding only indicates a possibility. Now the DNA finger-printing test has been much

advanced and resorted to by the Courts of law to resolve the dispute regarding paternity of the child. It is true that without the consent of the

person blood test cannot be conducted and there is no law in India enabling the Court to compel any person to undergo blood test as available in

England.

16. After considering the various aspects regarding the presumption of legitimacy of the child born during the subsistence of the lawful wedlock

available u/s 112 of the Evidence Act and the permissibility of the blood test to prove the paternity of the child in detail, the Supreme Court has laid

down the following guidelines in the decision in Goutam Kundu Vs. State of West Bengal and another, :

26. From the above discussion it emerges :-

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

(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 u/s 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.

17. Though the lower Court applied the above principles to the facts of this case to hold that DNA test is not permissible in this case, I find that the

facts and circumstances of this case and the evidence on record when tested on the principles laid down by the Supreme Court in the above ruling,

establish that this is an appropriate case wherein DNA test as prayed for should have been allowed.

18. While considering the question of law involved in this case, it is not only profitable but appropriate to bear in mind the principles laid down by a

11 Judges Bench of the Supreme Court in the decision in The State of Bombay Vs. Kathi Kalu Oghad and Others, . In that case the 11 Judges

Bench of the Supreme Court has considered the following issues: (1) Whether the production of the specimen handwritings of the accused could

be said to have been a witness against himself within the meaning of Article 23 of the Constitution. (2) Whether the mere fact that when those

specimen handwritings had been given, the accused person was in police custody could by itself amount to compulsion apart from other

circumstances which could be urged against vitiating the consent of the accused in giving those specimen handwritings, (3) Whether Section 27 of

the Evidence Act is violative of Article 14 of the Constitution. (4) Whether the impressions of the accused''s palms and fingers taken from him after

his arrest, which were compared with the impressions on the glass panes and phials, were not admissible in evidence in view of the provisions of

Article 20(3) of the Constitution. (5) Whether the direction given by a Court to an accused person present in Court to give his specimen writing

and signature for the purpose of comparison under the provisions of Section 73 of the Indian Evidence Act. infringes the fundamental right

enshrined in Article 20(3) of the Constitution. After elaborate consideration, the Supreme Court by the majority of 8 Judges came to the following

conclusions :

(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police

custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made

would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in

conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the

acused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be

incriminatory, is not ''compulsion''.

(3) To be a witness'' is not equivalent to ''furnishing evidence'' in its widest significance; that is to say, as including not merely making of oral or

written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the

accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification

are not included in the expression ''to be a witness''.

(5) ''To be a witness'' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court

or otherwise.

(6) To be a witness'' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal

interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused in

an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused

person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.

The ratio in the above judgment rendered by the Supreme Court should be borne in mind while considering the contentions raised by the petitioner

and the respondent in this case with regard to the DNA test.

19. In this case, the mother of the child has definitely alleged that the respondent is the father of the child. Apart from relying upon the presumption

available u/s 112 of the Evidence Act against the allegation of paternity made against him and his denial of sexual relationship with the mother of the

child, no other contention is put forward by the respondent in the above petition seeking for DNA test in this case. The very definite case of the

mother of the petitioner is that during the relevant period her husband Majeed was in Gulf country and she had no access to him at about the time

the child would have been conceived. It is true that even according to the mother of the child, her husband Majeed divorced her only on 26-6-96,

long after the child was born on 3-11-95. The question whether the husband divorced the mother of the child before or after the delivery of the

child is not a matter of importance while considering the petition for a DNA test to ascertain the paternity of the child. Likewise, the fact that

Majeed, the brother of the respondent is shown as the father of the child in the hospital when she delivered as well as in the Municipal records, is

also not of much significance at this stage since it is the definite case of the mother of the petitioner that she delivered the child while she was

residing in the house of her husband wherein the respondent was also residing. It is also clear from the contentions raised by the respondent in his

counter filed in the above petition that he has not expressed his unwillingness to undergo the DNA test. He has only stated that if at all, the test can

be done at the expense of the petitioner. Therefore, in this case there is no denial of consent to undergo DNA test but in fact, he has expressed his

willingness to undergo the test by stating that the expense of the test should be met by the petitioner. Under the circumstances it is clear that the

request made by the petitioner for a DNA test in this case has to be construed as a corroborative piece of evidence available to the mother of the

petitioner to substantiate her contention that she had no access to her hausband at about the time the child would have been conceived.

20. The impugned order shows that in view of the fact that the copy of the passport of Majeed, the former husband of the mother of the child was

incomplete, the document was not marked and considered in evidence. If the document produced was incomplete, lacking in particulars or

required further information, the lower Court should have directed the petitioner to produce the proper document or further particulars before the

Court instead of rejecting it outright while considering the above petition.

21. Likewise, in spite of the definite case of the mother of the petitioner as PW 1 that she was married to Majeed on 14-3-91 and he was in the

Gulf country at the time when the child was begotten, the lower Court disbelieved her evidence on the ground that PW 1 was not in a position to

give the date on which Majeed had returned to the Gulf country in the year 1993. Since the child was conceived long after 1993 and delivered on

3-11-95, the failure of PW 1 to mention the date of return of Majeed to Gulf country in the year 1993 is not at all of any significance in this case,

since the question to be considered is whether PW 1 had access to Majeed at about the time the child would have been conceived.

22. As it is clear from the contention of the petitioner that PW1 conceived the child due to the sexual intercourse with the respondent and at the

time the child would have been conceived her husband Majeed was away in the Gulf country and the respondent has not alleged that the child was

conceived by PW1 due to her sexual intercourse with somebody else, it cannot be said that the petitioner has filed the above application for DNA

test to make any roving enquiry or fish out evidence against the respondent. Likewise, it also cannot be contended that the consequence of

ordering DNA test in this case will have the effect of branding the child as bastard and his mother as an unchaste woman, since the very case of the

mother of the petitioner is that she conceived the child due to her illicit sexual intercourse with the respondent, who is the brother of her husband,

while living in the same house. The DNA test will certainly be a corroborative evidence in support of the contention of PW1 that she had no access

to her husband at about the time the child would have been conceived. There is no compulsion of the respondent to give sample of blood for the

DNA test in this case since he has nowhere stated in the counter filed by him in the petition that he is not willing to give his blood for analysis and in

fact, he has offered to undergo the DNA test provided the expense is met by the petitioner. Under the circumstances direction to the respondent to

undergo DNA test in this case will be in conformity with the guidelines laid down by the Supreme Court in the decision reported in Goutam Kundu

Vs. State of West Bengal and another, referred to above and none of the decisions relied upon by the lower Court in the impugned order or cited

by the counsel for the respondent before me lays down any rule of law or prudence against directing the respondent and the child to undergo DNA

test under the facts and circumstances involved in this case.

From what is stated above, it is clear that the impugned order passed by the lower Court rejecting the prayer of the petitioner to conduct DNA

test of the petitioner and the respondent in this case, is absolutely illegal and unsustainable, which is liable to be quashed. Hence this Crl. M.C. is

allowed, the impugned order is set aside and the petition in C.M.P. 1410/98 praying to conduct DNA test of the petitioner and the respondent is

allowed. The lower Court is directed to take necessary steps to conduct the DNA test at the expense of the petitioner expeditiously, since the

counsel for the petitioner has submitted that the petitioner is prepared to meet the expenses for the DNA test in this case.