SUPREME COURT OF INDIA

Shyam Lal @ Kuldeep

Vs.

Sanjeev Kumar

C.A.No.2888 of 2001

(Dalveer Bhandari and H.L. Dattu JJ)

15.04.2009

JUDGEMENT

DALVEER BHANDARI, J.

1. This appeal is directed against the judgment dated 21.09.2000 of the High Court of Himachal Pradesh at Shimla in Regular Second Appeal No.10 of 1998 whereby the High Court allowed the appeal of the respondents and set aside the judgment and decree passed by the learned District Judge, Solan.

2. The appellant herein, who was the plaintiff before the Trial Court, filed a suit for declaration to the effect that mutation number 1313 dated 20.2.1988 in favour of defendant nos.1 and 2 was illegal, null and void. The plaintiff and defendant nos.3 and 4 are the sons and defendant nos.5 and 6 are the daughters of late Shri Balak Ram. They were joint owners and in possession of the estate of the deceased Balak Ram in equal shares. Balak Ram died on 31.10.1987.

After his death, his estate came to be mutated in favour of his grandsons, defendant nos.1 and 2, on the basis of a Will executed on 4.12.1978, vide mutation number 1313 dated 20.02.1988.

3. According to the plaintiff, the estate was inherited by the deceased Balak Ram from his father Mohar Singh and as such the same was ancestral in his hands. It is further alleged by the plaintiff that the deceased Balak Ram's Hindu Undivided Family (HUF) consisted of himself, the plaintiff and the defendants. Late Balak Ram was governed by the Hindu Law and Customs in the matter of alienation and succession whereby he could not bequeath the ancestral property. It was further pleaded that no Will was executed by the deceased Balak Ram during his lifetime. The Will, if any, was forged and fabricated and ultimately the mutation of inheritance sanctioned on 20.2.1988 was illegal, null and void.

4. The respondents herein, who were defendants in the Trial Court, while resisting the suit admitted that the deceased Balak Ram had inherited the property from his father Mohar Singh. They, however, denied that such property was ancestral in the hands of the deceased. They also denied that the deceased was governed by the customs in the matter of alienation and succession. They pleaded that the deceased Balak Ram on 4.12.1978 was in a sound disposing mind when he had executed a valid Will in favour of defendant nos.1 and 2. The Will was registered on 23.12.1987 in the office of Sub-Registrar.

5. It was also submitted that Smt. Durgi, wife of deceased Balak Ram, had deserted her husband during her lifetime while he was in service at Chandigarh. She developed illicit relations with one Mehar Singh. The plaintiff and Phanki Ram, defendant no.4 were born to Smt. Durgi from the loins of the said Mehar Singh. The Trial Court framed the following issues:- "1. Whether the mutation no.1313 dated 20.2.88 is illegal, null and void and not operative against the plaintiff as alleged? OPP

2. Whether the plaintiff and defendant nos.3 and 6 are joint owners in possession of the suit land as alleged? OPP

3. Whether there is a validly executed will in favour of defendant nos.1 and 2 as alleged? OPD

4. Whether the plaintiff has no cause of action to file the present suit? OPD

5. Whether the suit is not maintainable as alleged? OPD

6. Whether the suit is not properly valued for purpose of court fee and jurisdiction.

OPD

7. Whether the plaintiff is estopped from filing the present suit as alleged.

OPD

8. Whether the suit is within time? OPD

9. Whether the suit is bad for want of better particulars, as alleged? OPD

10. Whether the alleged will in favour of defendants 1 and 2 is the result of fraud etc.

as alleged?"

OPP

6. The Trial Court decided issues nos.1, 2 and 10 against the plaintiff and issues no.3, 7 and 9 against the defendants.

Consequent upon such findings, the suit of the plaintiff was dismissed by the Trial Court on 27.8.1996.

7. The plaintiff, aggrieved by the said judgment filed an appeal before the learned District Judge, Solan who partly allowed the said appeal on 11.9.1997. The plaintiff and defendant no.4 were held to be the sons of deceased Balak Ram. The property in the hands of deceased Balak Ram was held to be ancestral to the extent of his share in the coparcenary property.

8. Defendant nos.1 to 3 and 6, aggrieved by the said judgment of the District Judge, Solan filed a second appeal before the High Court on the following substantial questions of law :

1. Whether the relationship, particularly regarding parentage, is required to be proved strictly in consonance with the provisions of Section 50 and 60 of the Indian Evidence Act? Can the evidence of persons who having no special means of knowledge of such relationship be held to be admissible

and are not the findings of the lower appellate court unsustainable which are based on such inadmissible evidence?

2. When it was duly established that Smt. Durgi had illicit relationship with Mehar Singh in whose company she had begotten the plaintiff and defendant no.4, could the learned lower appellate court raise the presumption as envisaged under Section 112 of Indian Evidence Act relating parentage to Shri Balak Ram deceased from whom she severed all the relationship, merely on the ground that there was no legal divorce between Smt. Durga Devi and Shri Balak Ram?

3. Whether Ext. P-2 was inadmissible in evidence having not been proved in accordance with law and findings based on the same are illegal and unsustainable?

4. When the learned lower Appellate Court has held the custom to have been abrogated on account of the provisions of Sections 4 and 30 of the Hindu Succession Act, was not the will executed by Shri Balak Ram in favour of defendant nos.1 and 2 valid for the entire property when its due execution and validity has been upheld?

5. Whether the findings of the learned lower Appellate Court are incorrect to hold the property firstly to be Joint Hindu Family property, secondly ancestral property and thereby restricting the validity of the will executed by Shri Balak Ram qua his coparcenary interest in the property without holding that there existed a coparcenary amongst the parties to the suit and ascertaining the interest of Shri Balak Ram therein?

9. The High Court after hearing learned counsel for the parties answered questions nos.1 and 2 as follows:- "The learned District Judge in coming to the conclusion that the plaintiff and defendant No.4 are the sons of the deceased Balak Ram, has relied upon the presumption under Section 112, Evidence Act, 1872, which reads:- "112. Birth during marriage, conclusive proof of legitimacy. - The fact that any person who 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."

The rule, contained in the above Section, that continuance of a valid marriage will prevent an inference being drawn to the effect that the children born to a woman during the continuance of the valid marriage were born to another person as a result of adulterous intercourse is only a rule of evidence. The presumption which Section 112, Evidence Act, 1872, contemplates, is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the Section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature, the husband could have been the father of the child."

10. Section 112 of the Indian Evidence Act is based on English law. Section 112 reproduces rule of English law that it is undesirable to inquire into paternity of child when mother is married woman and husband had access to her.

Adultery on her part will not justify finding of illegitimacy if husband has had access. [See: Nga Tun E v. Mi Chon A.I.R.

1914 Upper Burma 36].

11. More than a century ago in Bhima v. Dhulappa (1904) 7 Bombay Law Reports 95, the Court aptly observed that section 112 of the Evidence Act is based on the principle that when a particular relationship, such as marriage, is shown to exist, then its continuance must prima facie be preserved.

12. The fact that a woman is living in notorious adultery, though of course it amounts to very strong evidence, is not, in itself quite sufficient to repel this presumption [See: R v.

Mansfield, 1941, 1 QB 444, 450].

13. In 1947 All LJ 569 at page 572 Hardan Singh v.

Mukhtar Singh & Anr. , the Allahabad High Court observed:

"The mere fact that a woman is immoral or is living in a house separate from that of her husband is having relations with other men is not sufficient to rebut the conclusive presumption of legitimacy which is raised by section 112 of the Evidence Act, unless it is proved that the husband and wife had no access to each other during the period indicated in the section."

14. In Lal Haribansha v. Nikunja Behari, ILR 1960 Cuttack 230, relying on Ma Wun Di and Another v. Ma Kin and Others XXXV IA 41, the Court stated that:

"It is the principle of law that "Odiosa et inkonesta non sunt in lege prae sumenda" (Nothing odious or dishonourable will be presumed by the law). So the law presumes against vice and immorality. One of the strongest illustrations of the principle, is the presumption in favour of legitimacy of children in a civilized society. But, where illegitimacy seems as common as marriage and legitimacy, a presumption of legitimacy cannot be drawn and legitimacy or illegitimacy will have to be proved like any other fact in issue."

15. The High Court placed reliance on a judgment of this court in Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana AIR 1954 SC 1761 as under:- "It may be stated at the outset that the presumption which section 112 of the Indian Evidence Act contemplates is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child. Access and non-access again connote, as has been held by the Privy Council (Vide Karapaya v. Mayandy, AIR 1934 PC 49(A), existence and non- existence of opportunities for material intercourse.

It is conceded by Mr. Somayya, who appeared on behalf of the plaintiff appellant, that non-access could be established not merely by positive or direct evidence; it can be proved undoubtedly like any other physical fact by evidence, either direct or circumstantial, which is relevant to the issue under the provisions of the Indian Evidence Act, though as the presumption of legitimacy is high favored by law it is necessary that proof of non-access must be clear and satisfactory....."

16. Reliance has also been placed in Perumal Nadar (dead) by Legal Representative v. Ponnuswami Nadar (minor) AIR 1971 SC 2352 where the parties, i.e., the husband and wife were living separately long before the birth of the child. It was held that unless the husband is able to establish absence of access, presumption raised under section 112 of the Indian Evidence Act will not be displaced. The proof of non-access must be clear and satisfactory.

17. In Badri Prasad v. Deputy Director of ConsolidatioN & Others AIR 1978 SC 1557 : (1978) 3

SCC 537, it has been laid down that a strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. If man and woman who live as husband and wife in society are compelled to prove, half a century later, by eye-witness evidence that they were validly married, few will succeed.

18. In Goutam Kundu v. State of W.B. & Another, AIR 1993 SC 2295, this Court summarized the law as under:

"(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 under Section 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."

19. In Raghunath Parmeshwar Panditrao Mali and Another v. Eknath Gajanan Kulkarni and Another, (1996) 7 SCC 681 it was observed that if a man and woman have lived together for long years as husband and wife and a son having been born to them, legal presumption would arise regarding valid marriage, though such a presumption is rebuttable similarly in S.P.S. Balasubramaniyam v.

Suruttayan alias Andalipadayachi & Others, 1994 (1) SCC 460 it was observed by this court that if a man and woman live together for long years as husband and wife then a legal presumption arises as to the legality of marriage existing between the two, but such a presumption is rebuttable.

20. In Smt. Kanta Devi and Another v. Poshi Ram AIR 2001 SC 2226, this Court held as under:

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

21. In the impugned judgment, the High Court observed that in the present case admittedly the plaintiff and defendant no.4 were born to Smt. Durgi during the continuance of her marriage with the deceased Balak Ram. Therefore, in the absence of cogent and reliable evidence as to non-access on the part of the deceased Balak Ram, presumption under Section 112 of the Indian Evidence Act would be available and it will have to be held that plaintiff and defendants are sons of deceased Balak Ram.

22. On ground of public policy, it is undesirable to enquire into the paternity of a child whose parents "have access" to each other. The presumption of legitimacy arises from birth in wedlock and not from conception.

23. The High Court also observed that since the onus to rebut the presumption was on the defendants, it was for them to prove that the plaintiff and defendant no.4 are not the sons of the deceased. Sections 50 and 60 of the Indian Evidence Act cannot be pressed into service by the defendants to contend that the plaintiff has failed to prove his relationship with the deceased Balak Ram.

Question No.3

24. One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ex.P.2, the School Leaving Certificate. The learned District Judge, while dealing with this documents has observed:

"on the other hand, there is a public document in the shape of school leaving certificate Ex.P.2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded son of Shri Balak Ram."

25. The findings of the learned District Judge holding Ex.P.2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence. It has been held in Dasondha Singh and Others v. Zalam Singh and Others [1997(1) P.L.R. 735] that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit. Even otherwise such a document falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof.

26. Even if such document is excluded from consideration, the defendants, as held under questions no.1 and 2 above, have not been able to rebut the presumption available under Section 112, Evidence Act.

Question No.5

27. The High Court, regarding question no.5, in the impugned judgment observed as under:- "The learned District Judge has held the property in the hands of the deceased Balak Ram to be coparcenary property.

Be it stated that such findings cannot be sustained. The plaintiff has nowhere pleaded that the property in the hands of his father the deceased Balak Ram was a coparcenary property. His pure and simple case, as set out in the plaint, is that the property in the hands of the deceased was ancestral and under the custom governing the parties such ancestral property could not be bequeathed by way of a will. By holding the property in the hands of the deceased Balak Ram to be coparcenary property, the learned District Judge has in fact made out a new case for the plaintiff. On this short ground alone, the findings of the learned District Judge deserve to be set aside."

Question No.4 28. The two courts below have concurrently held the Will Ex.

DW 1/A to have been validly executed by the deceased Balak Ram in favour of defendant nos.1 and 2. Such concurrent findings being purely on a question of fact, that is, with regard to execution of the Will, cannot be interfered within the present Second Appeal.

29. There is no denying that the property in the hands of the deceased Balak Ram was ancestral

since admittedly he had inherited the same form his father.

30. In so far as the question whether under the custom governing the parties, a Will could be executed in respect of ancestral property is concerned, the same is no more res integra. A learned Single Judge of this court in Kartari Devi and Ors. v. Tota Ram [1992 (1) Sim. L.C. 4021] has held that in view of section 30 read with section 4 of the Hindu Succession Act, 1956 a male Hindu governed by Mitakshara system is not debarred from making a Will in respect of coparcenary/ancestral property.

31. The above view of the learned Single Judge was upheld and approved by a Division Bench of this court in Tek Chand and Another v. Mool Raj and Others [1997 (2) Hindu L.R. 306].

32. In view of the above ratio, the learned District Judge has erred in upholding the validity of the Will Ex. DW 1/A only to the extent of the interest of the deceased in the property.

Such findings are wrong and liable to be set aside.

33. There is yet another significant aspect of the case. The present suit was filed by the plaintiff for a declaration that the mutation of inheritance bearing No.1313 sanctioned on 20.2.1988 was wrong, illegal, null and void and not binding on his rights and that the land property in dispute was jointly owned and possessed by him and defendant nos.3 to 6 in equal shares. Further that the Will dated 4.12.1978 was null and void and inoperative beyond the competency of the deceased and also being the result of fraud, misrepresentation etc. Such suit was filed on 21.5.1991.

34. Regarding question no.4 pertaining to the Will, the High Court has observed that the concurrent findings being purely on the question of fact, i.e. with regard to the execution of the Will cannot be interfered with in the Second Appeal. The High Court also observed that the property in the hands of the deceased Balak Ram was ancestral in character. The High Court also observed that a Will could not be executed as far as ancestral property was concerned and in view of the clear legal position this matter was no longer res integra.

Limitation (Issue No.8)

35. Regarding the limitation, the High Court observed as under:- "Undisputedly, the period of limitation prescribed under the law for such a suit is three years from the date the cause of action accrued to the plaintiff. It has been averred by the plaintiff in para 9 of his plaint, as to cause of action, as under:- "that the cause of action has arisen on 31.10.87 from death on 20.2.88 from mutation and on various other dates from the knowledge of the illegalities and wrongful actions of Village Jabal Jamrot Pargana Haripur Teh. and Distt. Solan within the jurisdiction of this Court, hence this matter has jurisdiction in the matter."

36. The learned Trial Court, while recording the findings under issue no.8 has held the suit to be not within time. No findings have been recorded by the learned District Judge on the question of limitation. Considering the pleadings as a whole as set out in the plaint, the suit of the plaintiff as laid, on the face of it, was not within time. There were neither pleadings nor evidence as to the date on which the plaintiff had derived the knowledge about the mutation and/or the Will.

37. In the impugned judgment the High Court set aside the decree dated 11.9.1997 of the District Judge and that of the learned Trial Court dismissing the suit of the plaintiff restored. In the impugned judgment, the High Court also dealt with the question of limitation. The High Court

observed that learned Trial Court while recording the findings under issue no.8 has held the suit to be not within time. No findings have been recorded by the learned District Judge on the question of limitation. Considering the pleadings as a whole as set out in the plaint, the suit of the plaintiff as laid, on the face of it, was not within time. There were neither pleadings nor evidence as to the date on which the plaintiff had derived the knowledge about the mutation and/or the Will.

38. Both the Trial Court and the District Court did not deal with this aspect of limitation in a proper perspective. The High Court, in our considered view has given correct findings regarding limitation. We have carefully and critically examined the findings of the High Court on the issues of Will and consequent mutation. The findings of the High Court are based on correct evaluation of evidence and record of the case.

39. The findings of the High Court on the interpretation of Section 112 of the Evidence Act are based on correct analysis of Indian and English cases for the last more than a century.

According to the legislative intention and spirit behind Section 112 of Evidence Act it is abundantly clear that once the validity of marriage is proved then there is strong presumption about the legitimacy of children born out of that wedlock. The presumption can only be rebutted by a strong, clear satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt.

40. In the instant case, admittedly the plaintiff and defendant no.4 were born to Smt. Durgi during the continuance of her valid marriage with the deceased Balak Ram. Their marriage was infact never dissolved. There is no evidence on record that the deceased Balak Ram at any point of time did not have access to Smt. Durgi. According to the clear interpretation of section 112 of the Evidence Act, there is strong presumption about the legitimacy of children born out of continuation of the valid marriage.

41. It is well settled principle of law that Odiosa et inkonesta non sunt in lege prae sumenda (nothing odious or dishonourable will be presumed by the law). The law presumes against vice and immorality. In a civilized society it is imperative to presume legitimacy of a child born during continuation of a valid marriage and whose parents had "access" to each other.

42. It is undesirable to enquire into paternity of a child whose parents "have access" to each other. Section 112 of the Evidence Act is based on presumption of public morality and public policy.

43. It our considered view, no interference is called for.

This appeal being devoid of any merit is accordingly dismissed leaving the parties to bear their own costs.