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HIGH COURT OF CHHATTISGARH, BILASPUR

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02/11/2008

Criminal Misc. Petition No.592 of 2007

PETITIONER/:

(Applicant)

Kanakram Patel, aged about 52 years, S/o Shri Chamruram Patel, Caste Marar, Agriculturist and Labour, R/o Village Chaknar, Police Station Gandai, Tahsil Chhuikhadan, Distt. Rajnandgaon (C.G.)

Versus

RESPONDENT/:

(Non-applicant)

Daulatram, aged about 8 years, S/o Not known, R/o Village Chaknar, Police Station Gandai, Minor, through his natural guardian Mother Smt. Dashribai, Widow of Late Shri Tijuram Sahu, aged about 45 years, Agriculturist and Labour, R/o Village Chaknar, Police Station Gandai, Tahsil Chhuikhadan, Distt. Rajnandgaon (C.G.)

(Petition under Section 482 of the Code of Criminal Procedure, 1973)

Present:

Mr. P.K.C. Tiwary, Senior Advocate with Mr. Rakesh Thakur, Advocate for the petitioner.

Mr. Rakesh Pandey, counsel for the respondent.

Single Bench: Hon'ble Mr. T.P. Sharma, J

ORAL ORDER
(28-11-2008)

1. This petition is directed against the order dated 12-11-2007 passed by the Additional Sessions Judge, Khairagarh in Criminal Revision No.52/2007 affirming the order dated 10-5-2007 passed by the Judicial Magistrate, First Class, Khairagarh in Misc. Criminal Case No.64/2006 whereby the trial Court has awarded maintenance to the respondent as illegitimate child.
2. The award is challenged on the ground that without any sufficient evidence the Court below has arrived at a finding that the respondent is illegitimate child of the petitioner and committed illegality.
3. I have heard learned counsel for the parties and perused the order impugned as also the record of the Courts below.

4. Learned counsel for the petitioner submits that according to the case of the respondent, the petitioner has committed rape with the mother of the respondent and as a result of the said rape/sexual intercourse, she conceived and delivered the respondent. The respondent is the illegitimate child of the petitioner. This is not the case of second marriage, irregular marriage, unlawful marriage or long cohabitation between the petitioner and mother of the respondent, this is a case of casual cohabitation which mother of the respondent has not hoped. Learned counsel further submits that in the case of illegitimate child, mother of the said child is required to prove the fact that relation between the petitioner and mother of illegitimate child is virtually one of monogamous.
5. On the other hand, learned counsel for the respondent submits that the Court below after appreciating the evidence available on record, arrived at a finding that the respondent is illegitimate child of the petitioner. He further submits that the Court below has not committed any illegality. Mother of the respondent has quoted the case of the respondent, the petitioner has not cross-examined the mother of the respondent to show that the petitioner was not having any relation with the mother of the respondent, she has not conceived and as a result of such relation gave birth to the respondent.
6. On careful examination of record, it appears that mother of the respondent has lodged report against the petitioner for offence punishable under Section 376 of the I.P.C. The petitioner was tried for the said offence and acquitted finally. According to the mother of the respondent, the petitioner committed forceful sexual intercourse with her for 3-4 times as a result of which she conceived and delivered the respondent. The petitioner has filed suit for declaration against the respondent relating to birth certificate that he is not the father of the respondent and wrongly the name of the petitioner has been mentioned. The said suit was dismissed. The Court below has considered the birth certificate and arrived at a finding that legality & propriety of the birth certificate has not been challenged by the petitioner which is evident, although the author of the birth certificate Kotwar Sitaram (NAW-2) has stated that he has corrected the entry and strike off the name of the petitioner from the birth entry register. This is not the case of irregular marriage, second married, illegal marriage or long cohabitation between the petitioner & mother of the respondent. Paternity of the respondent is based on the cohabitation of the petitioner with mother of the respondent by committing rape.

7. As has been held by the Madras High Court in the matter of *Durairaju v. Neela* and another reported in 1976 CRI. L.J. 1507 in para 6

"To decide the paternity of the child is *prima-facie* improper to accept the mere statement of the mother, upon whom lies the burden to establish the paternity of the child. It is true that corroborative evidence is not usually forthcoming and therefore the Magistrate has to rely upon other corroborating circumstances if they are available. But at that same time it is not correct to say that unless the child is admitted by the putative father to be his illegitimate child, the Magistrate has no power to make an order for payment of maintenance. The basis of an application for maintenance of a child is the paternity of the child irrespective of its legitimacy or illegitimacy. Therefore, it is the duty of the Court, before making the order, to find definitely though in a summary manner, the paternity of the child. In the instant case, the medical officer who made the entries in Ex. P-1 has not been examined. PW 1 is the witness who had made the entries in the original of Ex. P-2 on the basis of the entries made in Ex. P-1. The author of the information is not mentioned in Ex. P-1. It may also be noted here that PW-2 herself has not stated that she mentioned to the doctor that the child was born to her through the petitioner. In the absence of such evidence the question is whether this document could by itself prove the relevant entries made thereon Section 35 of the Evidence Act states as follows:-

"An entry in any public or other official book, register or record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact".

To prove the document under Section 35 it must be shown that the document was prepared by a public servant in discharge of his official duty or by any person in performance of a duty specially enjoined by the law. But in this case there is absolutely no evidence on the side of the respondents as to whose signature is found in Ex. P-1 as the informant. PW-1 does not speak about the signature found on Ex. P-1 of course, it is not possible for him. Either the author of Ex. P-1 or anybody from the hospital has not been examined to prove the intimation under Ex. P-1. In the absence of such evidence, it cannot be held that the entries were made by a public servant in discharge of his official duty so as to prove the evidence of paternity. Therefore, no presumption of paternity can arise out of these two documents. It is well stated that unless it is established beyond doubt that a woman was the exclusively kept mistress of the man and the relationship was virtually one of monogamy, it cannot be legitimately presumed that the child was born to the woman through that man (vide *Mahadeva Rao V. Yasoda Devi* 1961 Mad WN (Crl) 164=(1962 (1) Cri LJ

437 (2). For the reasons mentioned above, the record, Exs. P.1 and P.2 in this case, are not adequate to sustain any such finding and the evidence of PW 2 is also not sufficient to hold that she was kept exclusively as a concubine of the petitioner and during such period only she conceived."

It was also observed in para 8 as under:-

"The burden of proof is not upon the father of the child in such cases. It is for the mother claiming maintenance to show that the child was born to the alleged father and the circumstances of the exclusive relationship. Consequently, since it cannot be said that the paternity of the second respondent in the instant case has been proved either by documentary or oral evidence or by both, this revision will have to be allowed and the order of maintenance passed by the learned Magistrate has to be vacated. Hence, I set aside the order passed by the learned Magistrate and allow this revision petition."

8. Mother of the child is required to prove the fact that relation between her and the present petitioner against whom maintenance has been claimed was virtually one of monogamous. In this case, mother of the respondent has not adduced any conclusive evidence to the effect that relation between her & the petitioner was virtually one of monogamous and in absence of such evidence, any finding relating to the paternity of the illegitimate child is not sustainable.
9. This is a summary proceeding and in order to decide the rights of the parties, parties are required to avail their remedy before the competent Court. Court below has not considered this aspect and committed illegality which resulted in miscarriage of justice.
10. Consequently, the order impugned is not sustainable and liable to be set aside, it is hereby set aside. The petition is allowed. Maintenance awarded to the respondent against the petitioner is waived. Henceforth the petitioner is not required to pay any maintenance to the respondent.
11. In view of this order, I.A.No.1/2007 stands disposed of.

Soma

Sd/-
T.P. Sharma
Judge