2022:APHC:19170

HIGH COURT OF ANDHRA PRADESH

WEDNESDAY ,THE THIRTEENTH DAY OF JULY

TWO THOUSAND AND TWENTY TWO

PRSENT

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

WRIT PETITION NO: 27520 OF 2016

Between:

1. Paka Padmavathi (Geddam) W/o Geddam Subbaraju
   aged about 41 Yrs. House wife
   R/o H.No.5-1-15, 14th Ward,
   Maddalavaripeta,
   Amalapuram-533201.

...PETITIONER(S)

AND:

1. State of Andhra Pradesh, Rep.by its Secretary, School Education, Secretariat, Hyderabad
2. The District Education Officer, East Godavari District Kakinada-533001.
3. The District Collector East Godavari District Kakinada-533001.
4. The Chief Executive Officer, Zilla Parishad, East Godavari District Kakinada-533001.
5. The Head Master Zilla Parishad HIgh School, Allavaram-533217.
6. Mortha Swarna Kumari D/o Mortha Ramanujachari
   aged about 45 Yrs. Employee,
   R/o Thanelanka (v) Mummidivaram Mandal.
   East Godavari District.

...RESPONDENTS

Counsel for the Petitioner(s): SRINIVASA RAO PAPPU

Counsel for the Respondents: GP FOR SCHOOL EDUCATION (AP)

The Court made the following: ORDER

HIGH COURT OF ANDHRA PRADESH

* * * *

WRIT PETITION No. 27520 of 2016

Between:

Paka Padmavathi (Geddam)

.....PETITIONER

AND

The State of Andhra Pradesh,
Rep.by its Secretary,
School of Education,
Secretariat, Hyderabad & 5 others

.....RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: **13.07.2022**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No

3. Whether Your Lordships wish to see the fair copy of the Judgment? Yes/No

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RAVI NATH TILHARI, J

*** THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**

\+ <u>WRIT PETITION No. 27520 of 2016</u>

% 13.07.2022

Paka Padmavathi (Geddam)

....Petitioner

<u>Versus</u>

$ The State of Andhra Pradesh,
Rep.by its Secretary,
School of Education,
Secretariat, Hyderabad & 5 others

.....Respondents

! Counsel for the Petitioner: Sri PAPPU SRINIVASA RAO

^ Counsel for the respondents: GP FOR EDUCATION, for R1 to R3 & R5
Sri G. SRINIVASULU REDDY, for R4
Sri G. SIMHADRI, for R6 & R7

< Gist :

> Head Note:

? Cases Referred:

1. (2020) 9 SCC 356
2. (2004) 3 SCC 553
3. (2015) 9 SCC 433
4. (2020) 19 SCC 241
5. 1989 Supp (2) SCC 627
6. AIR 1966 AP 210
7. 1986 SCC Online All 84
8. (2005) 4 SCC 449
9. (2022) 1 SCC 20
10. (2001) 5 SCC 311

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

WRIT PETITION No. 27520 of 2016

JUDGMENT:

Heard Sri Pappu Srinivasa Rao, learned counsel for the petitioner, the learned Government Pleader, appearing for respondent Nos.1 to 3 and 5, Sri G. Srinivasulu Reddy, learned standing counsel for the 4th respondent and Sri G. Simhadri, learned counsel for 6th respondent and newly impleaded 7th respondent, and perused the material on record.

2. This writ petition under Article 226 of the Constitution of India has been filed for the following reliefs:-

> "...to issue a Writ of Mandamus or any other appropriate Writ order or direction declaring the impugned action of the Respondents 2 to 5 in withholding the death benefits and family pension payable to the petitioner on account of the death of her husband Geddam Subbaraju on Dt. 16.6.2016 as illegal arbitrary and violative of principles of natural justice etc and consequently direct the respondents 2 to 5 to pay the death-cum-retirement benefits payable on account of the death of Geddam Subbaraju to the petitioner and also consider her application for compassionate appointment at an earliest point of time and pass such other order or orders…."

3. The petitioner – Paka Padmavathi (Geddam) is the second legally wedded wife of deceased Geddam Subba Raju. Their marriage was solemnized on 03.06.2013 as per the traditions of Christian Community. The petitioner was blessed with two children out of said wedlock.

4. Geddam Subba Raju initially filed O.P.No.63 of 1994 under Section 13 (1)(i) r/w.Sec.12 of the Hindu Marriage Act seeking divorce and dissolution of marriage with 6th respondent, the first legally wedded wife. The same was dismissed by the learned Senior Civil Judge, Amalapuram vide judgment dated 11.03.1998 against which he filed CMA

No.3524 of 1999, which was dismissed by judgment and decree dated 05.06.2009.

5. During the pendency of CMA.No.3524 of 1999, late Geddam Subba Raju filed another O.P.No.96 of 2007 seeking divorce from 6th respondent, the first wife, which was decreed *ex parte* against the 6th respondent on 24.03.2008.

6. After dissolution of marriage with 6th respondent, late Geddam Subba Raju married the writ petitioner.

7. Learned counsel for the petitioner submits that late Geddam Subba Raju during his lifetime duly reported the 4th respondent-the Chief Executive Officer, Zilla Parishad, East Godavari District, Kakinad about the divorce decree; about his marriage with the petitioner vide documents annexed to the reply affidavit, viz., divorce decree, marriage certificate respectively, as also the bnirth certificates of the children from the petitioner, which were duly recorded and endorsed in the Service Register of Geddam Subba Raju. His submission is that in view of the above, the petitioner is entitled for release of the death benefits and the family pension as also for appointment on compassionate grounds, but her case has not been considered and the death benefits are also not released by the official respondents.

8. Sri Pappu Srinivasa Rao, learned counsel for the petitioner, next submits that the respondent No.7 is not the son of the deceased Geddam Subba Raju and has no right in the death benefits and the family pension being claimed by the petitioner.

9. Sri G. Simhadri, learned counsel for respondent Nos.6 and 7 submits that the first OP.No.63 of 1994 filed by the deceased Geddam Subba Raju was dismissed and the CMA No.3524 of 1999 filed there against was also dismissed. The O.P.No.96/2007 was filed during

pendency of CMA No.3524 of 1999, without disclosing the same. Further, the OP No.96 of 2007 was decided *ex parte* against the 6th respondent and consequently, it cannot be said that the divorce took place between late Geddam Subba Raju and the 6th respondent. Their marriage subsisted and as such the marriage of late Geddam Subba Raju with the petitioner is during continuance of his first marriage with the 6th respondent, and is not valid. Consequently, the petitioner is not the legally wedded wife of late Geddam Subba Raju and is not entitled for the reliefs claimed.

10. Sri G. Simhadri, next submitted that the respondent No.7 is the son of the deceased Geddam Subba Raju out of his wedlock with respondent No.6 and is legally entitled to the death benefits and family pension with respondent No.6, and not the petitioner.

11. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

12. The point which arises for consideration is whether the petitioner is entitled for the relief claimed and if Yes, to what extent?

13. The status of the petitioner and the 6th respondent as wife of the late Geddam Subba Raju on his death as also the status of the 7th respondent as son of late Geddam Subba Raju is highly contested.

14. Ordinarily, this Court in the exercise of writ jurisdiction under Article 226 of the Constitution of India would not enter into such controversies and determine the same but would leave the parties to get it settled through appropriate forum.

15. But, in the present writ petition on the facts admitted to both the contesting parties, applying the legal provisions the controversy can be set at rest. Determination of such questions does not involve, leading of any evidence in support of their respective cases, in view of the admitted facts and settled legal principles.

16. In ***Hari Krishna Mandir Trust v. State of Maharashtra***[1] the Hon'ble Apex Court held that the High Court is not deprived of its jurisdiction to entertain a petition under Article 226 of the Constitution of India merely because in considering the petitioner's right to relief, questions of fact may fall to be determined. In a petition under Article 226 of the Constitution of India, the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is discretionary, but the discretion must be exercised on sound judicial principles.

17. In ***Hari Krishna Mandir Trust*** (supra), the judgment in ***ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.***[2] was referred in which it was held that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the Court entertaining such petition under Article 226 of the Constitution of India is not always bound to relegate the parties to a suit. Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

18. Judgment in the case of ***State of Kerala v. M. K. Jose***[3] was also referred in ***Hari Krishna Mandir Trust*** (supra), in which it was held that when the petition raises questions of fact of complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition.

19. It is apt to reproduce paragraphs – 104 and 105 of ***Hari Krishna Mandir Trust*** (supra) as under:

[1] (2020) 9 SCC 356
[2] (2004) 3 SCC 553
[3] (2015) 9 SCC 433

"**104.** The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief, questions of fact may fall to be determined. In a petition under Article 226, the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. Reference may be made inter alia to the judgments of this Court in *Gunwant Kaur* v. *Municipal Committee, Bhatinda* [*Gunwant Kaur* v. *Municipal Committee, Bhatinda*, (1969) 3 SCC 769] and *State of Kerala* v. *M.K. Jose* [*State of Kerala* v. *M.K. Jose*, (2015) 9 SCC 433] . In *M.K. Jose* [*State of Kerala* v. *M.K. Jose*, (2015) 9 SCC 433] , this Court held: (SCC pp. 442-43, para 16)

"*16.* Having referred to the aforesaid decisions, it is obligatory on our part to refer to two other authorities of this Court where it has been opined that under what circumstances a disputed question of fact can be gone into. In *Gunwant Kaur* v. *Municipal Committee, Bhatinda* [*Gunwant Kaur* v. *Municipal Committee, Bhatinda*, (1969) 3 SCC 769] , it has been held thus: (SCC p. 774, paras 14-16)

'*14.* The High Court observed that they will not determine disputed question of fact in a writ petition. *But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State*. The High Court, however, proceeded to dismiss the petition in limine. *The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles*. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised

thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.'"

(emphasis in original and supplied)

105. In *ABL International Ltd.* v. *Export Credit Guarantee Corpn. of India Ltd.* [*ABL International Ltd.* v. *Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553] , this Court referring to previous judgments of this Court including *Gunwant Kaur* [*Gunwant Kaur* v. *Municipal Committee, Bhatinda*, (1969) 3 SCC 769] held: (*ABL International Ltd. case* [*ABL International Ltd.* v. *Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553] , SCC pp. 568-69 & 572, paras 19 & 27)

"*19*. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* [*Gunwant Kaur* v. *Municipal Committee, Bhatinda*, (1969) 3 SCC 769] this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

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27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(*a*) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(*b*) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule;

(*c*) A writ petition involving a consequential relief of monetary claim is also maintainable."

20. In ***Popatrao Vyankatrao Patil v. State of Maharashtra***[4] the Hon'ble Apex Court held that even if there are disputed questions of fact which fall for consideration but if they do not require elaborate evidence to be adduced, the High Court is not precluded from entertaining a petition under Article 226 of the Constitution of India. However, such a plenary power has to be exercised by High Court in exceptional circumstances.

21. In view of settled proposition of law as in the aforesaid cases and as the petition can be decided on the admitted facts applying the legal provisions without there being any necessity of leading any evidence, the Court proceeds to consider the issue involved.

22. The admitted/undisputed facts are that the marriage of late Geddam Subba Raju was solemnized with the 6th respondent; OP.No.63 of 1994 for divorce was dismissed on 11.03.1998 against which CMA No.3524 of 1999 was dismissed on 05.06.2009; 2nd OP.No.96 of 2007 for divorce filed by late Geddam Subba Raju against 6th respondent was decreed *ex parte* on 24.03.2008. Sri G. Simhadri, learned counsel for respondent Nos.6 and 7, submits that neither any appeal nor any application for setting aside was filed against the decree dated

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[4] (2020) 19 SCC 241

24.03.2008. He admits that in view thereof, the decree dated 24.03.2008 attained finality. The marriage of the petitioner with late Geddam Subba Raju on 03.06.2013 is also admitted to both the parties.

23. According to the submission advanced by Sri G. Simhadri, for respondent Nos.6 and 7, the marriage between late Geddam Subba Raju with the petitioner is not valid as his marriage with 6th respondent was subsisting because the decree dated 24.03.2008 in OP No.96 of 2007 was *ex parte* and not binding.

24. Such a submission of Sri G. Simhadri, deserves outright rejection.

25. The judgment dated 24.03.2008 records that the notice was served personally on the respondent therein (6th respondent herein) and she was set *ex parte* on 18.01.2008. Thereafter, the *ex parte* decree dated 24.03.2008 was passed against the 6th respondent dissolving her marriage with Geddam Subba Raju. This decree attained finality in the absence of any challenge made by the 6th respondent.

26. It is settled in law that an *ex parte* decree is also binding between the parties in the same way as a decree passed on contest.

27. In ***Pandurang R.Mandlik v. Shantibai R.Ghatge***[5] the Hon'ble Apex Court held that it is true that *ex parte* decrees operate to render the matter decided *res judicata*, and the defendants' failure to appear will not deprive the plaintiff of the benefit of his decree.

28. In ***Sree Madana Gopalaswami Varu of Ballipadu v. Vanga Padmaraju***[6], this Court, held that an *ex parte* decree is as much a decree on merits as a decision *in invitum*. Paragraph-4 is reproduced as under:

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[5] 1989 Supp (2) SCC 627
[6] AIR 1966 AP 210

"**4.** The next contention that falls to be noticed is that the rule of *res judicata* is not available to the plaintiff who has obtained only an exparte decree. I do not think this contention can succceed. **An ex parte decree is as much a decree on merits as a decree obtained after contest.** The definition of "decree" in section (2) C.P.C. equally comprehends both these classes of decrees. There is nothing in Section 11 C.P.C. which renders it inapplicable to exparte decrees. Reliance has been placed by the learned counsel for the respondents on the words "heard and finally decided" occurring in section 11 C.P.C. But these words do not seem to be of assistance to him. Where summons in the suit duly issued to the defendant, but he did not take opportunity of appearing and contesting the suit and the suit was decided against him in his absence, it can not be said that it is not a case a "heard and decided" within the meaning of section 11 C.P.C., vide, *Radhamohan* v. *Eliza and Hilt* [A.I.R. 1947 All. 147.] . A decision of a Division Bench of Bombay High Court in *Baldevdas* v. *Mahantal* [A.I.R. 1946 Bom. 232.] points even more strongly in the same direction. It states the law as follows.

"It is perfectly clear and by now well established that an ex parte decree can operate as *res judicata* because an exparte decree is a decree on merits. The Court passing the decree hears the case on merits, finally decides it and passes the decree. The only difference between an ex parte decree and a decree in invitum is that when an ex parte decree is passed, the defendant is absent; but an ex parte decree is as much on merits as a decision in invitum."

29. In ***Bramhanand Rai v. Dy.Director of Consolidation, Ghazipur***[7] the High Court of Judicature at Allahabad held that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceedings. It is apt to refer paragraph-11 held as under:

"**11.** The claim of the opposite party that the ex parte decree was obtained in collusive proceedings can also not be sustained inasmuch as neither there is any material on record to prove that the ex parte decree was obtained in collusive proceedings nor this ground can be permitted to be Urged in these proceedings. It is now well settled that the original decree or judgment must be taken to be subsisting and valid until it has

[7] 1986 SCC Online All 84

been reversed or superseded by some ulterior proceedings. In *State of West Bengal* v. *Hemant Kumar Bhattacharjee*, AIR 1966 SC 1061 the Supreme Court observed thus,—

> "……This argument proceeds on a fundamental misconception, as it seeks to equate an incorrect decision with a decision rendered without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. The learned Judges of the High Court who rendered the decision on 4-4-1952 had ample jurisdiction to decide the case and the fact that their decision was on the merits erroneous as seen from the later judgment of this Court, does not render it any the less final and binding between the parties before the Court. There is, thus, no substance in this contention. The decision of the High Court dt. 4-4-1982 bound the parties and its legal effect remained the same whether the reasons for the decision be sound or not."

30. A perusal of the judgment of the appellate Court dated 05.06.2009 in CMA No.3524 of 1999 as also the judgment passed in OP No.96 of 2007 dated 24.03.2008 on record shows that O.P.No.63 of 1998 and O.P.No.96 of 2007 seeking divorce from 6th respondent were filed on different grounds.

31. It is therefore now not open for the 6th respondent's counsel to advance the submission contrary to the divorce decree dated 24.03.2008 granting divorce to late Geddam Subba Raju against 6th respondent which decree attained finality.

32. The divorce decree against the 6th respondent was passed on 24.03.2008. The marriage of the petitioner with late Geddam Subba Raju was solemnized thereafter on 03.06.2013. At that time even the CMA No.3524 of 1999 was not pending which was dismissed on 05.06.2009.

33. Consequently, it is held that the writ petitioner is the second legally wedded wife of late Geddam Subba Raju after his divorce from 6th

respondent, and not during continuance of marriage of 6th respondent with late Geddam Subba Raju.

34. The petitioner as also 6th respondent have applied for compassionate appointment and for grant of death benefits on the death of Geddam Subba Raju as also for family pension before the 4th respondent. The 7th respondent has not applied for any compassionate appointment, as submitted by his learned counsel.

35. Consequently, the writ petitioner's case for giving her the compassionate appointment deserves to be considered in accordance with law and not of the 6th respondent.

36. With respect to grant of death benefits and family pension on the death of Geddam Subba Raju, the submission of the petitioner's counsel is that only the petitioner is entitled and not the respondent Nos.6 and 7, as the respondent No.6 is the divorcee and the respondent No.7 is not the son of late Geddam Subba Raju.

37. As regards the respondent No.6, she being the divorcee would not be entitled for the grant of death benefits and the family pension.

38. Sri G. Simhadri, learned counsel for respondent Nos.6 & 7, submits that the respondent No.6 was granted maintenance against late Geddam Subba Raju in M.C.No.22 of 1995 on the file of Judicial Magistrate of First Class, Mummidivaram in proceedings under Section 125/127 of Code of Criminal Procedure. So, notwithstanding divorce, 6th respondent is also entitled for death benefits and family pension.

39. The aforesaid submission deserves rejection. The maintenance under Section 125/127 Cr.P.C is granted to a divorcee as well because the expression 'wife' therein includes a divorcee. Ordinarily, 'wife' does not mean a 'divorcee'. Any rule or any judicial pronouncement that a divorcee

would be entitled to family pension or/and the death benefits on the death of her ex-husband has not been placed before the Court.

40. So far the submission with respect to the 7th respokndent that he is not the son of late Geddam Subba Raju and as such not entitled to the death benefits and family pension requires consideration on the admitted facts.

41. It is undisputed that the 7th respondent was born during the continuance of the marriage of late Geddam Subba Raju with 6th respondent. The undisputed date of marriage of late Geddam Subba Raju with 6th respondent is 30.05.1993. The date of dissolution of their marriage is 24.03.2008, and the date of birth of respondent No.7 is 12.03.1994.

42. Section 112 of the Evidence Act provides as under:

> "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."

43. In view of Section 112 of the Indian Evidence Act there is a legal presumption that any person born during the continuance of a valid marriage between his mother and any man 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.

44. In ***Banarsi Dass v. Teeku Dutta***[8] the Hon'ble Apex Court has held that Section 112 of the Indian Evidence Act, 1872 requires the party disputing the parentage to prove non-access in order to dispel the presumption of the fact under Section 112 of the Evidence Act. There is a

[8] (2005) 4 SCC 449

presumption and a very strong one, though a rebuttable one. The Hon'ble Apex Court further observed and held that in the matters of disputing the parentage, the Court must have regard to Section 112 of the Evidence Act, which is based on the well-known maxim *pater is est quem nuptiae demonstrant,* which means he is the father whom the marriage indicates. The presumption of legitimacy is that the child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality. The presumption of law under Section 112 of the Evidence Act is that a child born during lawful wedlock is legitimate, and that access occurred between the parents. This presumption though rebuttable but can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

45. It is apt to refer to paragraphs 9 to 12 of ***Banarsi Dass*** (supra) as under:

> "**9.** It was noted that Section 112 of the Indian Evidence Act, 1872 (in short "the Evidence Act") requires the party disputing the parentage to prove non-access in order to dispel the presumption of the fact under Section 112 of the Evidence Act. There is a presumption and a very strong one, though a rebuttable one. Conclusive proof means proof as laid down under Section 4 of the Evidence Act.
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> **10.** In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim *pater is est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.

11. It is rebuttable presumption of law that a child born during lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

12. In *Dukhtar Jahan* v. *Mohd. Farooq* [(1987) 1 SCC 624 : 1987 SCC (Cri) 237] this Court held: (SCC p. 629, para 12)

> "Section 112 lays down that if a 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 and the mother remains unmarried, it shall be taken as 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. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman."

The view has been reiterated by this Court in many later cases e.g. *Amarjit Kaur* v. *Harbhajan Singh* [(2003) 10 SCC 228]."

46. Recently, in ***Ashok Kumar v. Raj Gupta***[9] the Hon'ble Apex Court reiterated that the presumption of legitimacy of a child can only be displaced by a strong preponderance of evidence, and not merely by balance of probabilities. Referring to the case of ***Kamti Devi v. Poshi Ram***[10] in paragraphs – 12 and 13 the Hon'ble Apex Court held as under:

"**12.** This Court in *Kamti Devi* v. *Poshi Ram* [*Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311 : 2001 SCC (Cri) 892] , while determining the question of standard of proof required to displace the presumption in favour of paternity of child born during subsistence of valid marriage held : (SCC p. 316, para 10)

> "*10.* We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with

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[9] (2022) 1 SCC 20
[10] (2001) 5 SCC 311

deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

13. The presumption of legitimacy of a child can only be displaced by strong preponderance of evidence, and not merely by balance of probabilities. The material portion of the Court's opinion is produced hereinbelow : (*Kamti Devi case* [*Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311 : 2001 SCC (Cri) 892] , SCC p. 316, para 11)

"*11*. … But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatised. If a court declares that the husband is not the father of his wife's child, without tracing out its real father the fallout on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband."

47. At this stage, the Court takes note of the undisputed fact that the deceased Geddam Subba Raju filed O.P.No.63 of 1994 under Section 13(1)(i) r/w.Section 12 of the Hindu Marriage Act, 1955, on the alleged ground that 6th respondent at the time of her marriage with Geddam

Subba Raju was already pregnant and suffering from venereal deceases. The O.P. No.63 of 1994 was dismissed by order dated 11.03.1998 passed by the learned Senior Civil Judge, Amalapuram, holding that the petitioner could not lead evidence to prove the alleged ground of dissolution of marriage. CMA No.3524 of 1999 filed by late Geddam Subba Raju challenging the order of dismissal dated 11.03.1998 was also dismissed by this Court by judgment dated 05.06.2009.

48. It is apt to refer the paragraphs-7 and 8 of the judgment dated 05.06.2009 of this Court in CMA No.3524 of 1999 which reads as under:

> "7. There is no dispute in regard to the marriage between the parties. However, the only main ground urged by the learned counsel for the appellant-husband is that the respondent was already pregnant by the date of marriage and she was also suffered from venereal diseases in a communicable form. In support of which, the appellant-husband was examined himself as PW.1 apart from supported by the evidence of PWs.2 to 4 and the recitals in Exs.A1 to A10. However, there is no direct or positive evidence in support of the contentions raised by appellant-husband. No attempt has been made on the part of the appellant-husband to prove his allegation as to whether the respondent-wife was really pregnant and she is suffering from venereal diseases in a communicable form. In the absence of any such evidence, it cannot be said that the respondent-wife was pregnant and suffering from venereal diseases before the date of marriage. We do not find any reason in the order under impugned warranting interference by this Court. There are no merits in the appeal.
>
> 8. Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs."

49. In view of the findings recorded in O.P.No.63 of 1994 as affirmed by this Court in CMA No.3524 of 1999, vide appellate judgment dated 05.06.2009 which attained finality, now it is not open to the writ petitioner, the second wife, to raise any such ground denying the status of the 7th respondent as son of late Geddam Subba Raju.

50. The conclusive presumption under Section 112 of the Evidence Act is also fortified by the finding recorded in O.P. No. 63 of 1994.

51. For the discussion made herein above, 6th respondent is not entitled for grant of death benefits and the family pension due to death of Geddam Subba Raju. However, such benefit cannot be denied to 7th respondent on the ground that he is not the son of late Geddam Subba Raju, but subject to fulfillment of other requirements of such grant.

52. In view of the aforesaid, the writ petition is partly allowed, with the following directions, issued to the respondent Nos.1 to 5;

a) to consider the case of the writ petitioner for compassionate appointment, in accordance with law;

b) to consider the case of the writ petitioner for grant of death benefits of late Geddam Subba Raju, as also the family pension, in accordance with law, along with 7th respondent, if he is otherwise eligible for such grant;

c) The entire exercise shall be completed, within a period of 8 (eight) weeks from the date of production of copy of this judgment before the respondents. Each of the respondent Nos.1 to 5 is hereby directed to timely perform his part of requisite exercise, in completion of the entire exercise.

53. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

RAVI NATH TILHARI, J

Date: 13.07.2022
Dsr

Note:
LR copy to be marked.
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Dsr