

WEERASINGHE
v
JAYASINGHE

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J.
SOMAWANSA, J.
SC 21/2006
SC Spl LA 286/2004
HC RATNAPURA 8/2001
MC BALANGODA 39587/M
OCTOBER 25, 2006
JANUARY 10, 2007

*Maintenance Ordinance, Section 6 – Corroboration – When? – D.N.A. Test?
Paternity – Cogent evidence – Necessity to corroborate evidence of mother.*

The Magistrate's Court found that the appellant is the father of the child and was directed to pay maintenance to the child. The High Court affirmed the said order. It was contended in appeal that, there is a DNA report indicating that he is not the father of the child.

On a suggestion made by the Supreme Court the DNA report was sent to the GENETECH for a medical opinion – which confirmed the DNA report.

It was contended by the appellant that in the Magistrate's Court the respondent's evidence had not been corroborated by other evidence in terms of section 6 of the Maintenance Ordinance.

Held:

Per Dr. Shirani A. Bandaranayake, J.

"In the instant case, it is apparent that the respondent's evidence had convinced the Magistrate. In such circumstances, in terms of section 6 it was necessary for the respondent's evidence to have been corroborated by other independent evidence, where the question of paternity looms large, the mother's evidence would have to be corroborated by independent evidence".

Held further:

- (1) In cases where parentage (paternity) is in issue the most cogent evidence is likely to be obtained by blood tests in general and DNA tests in particular. Such tests may be used either to rebut the presumption or allegation of paternity or to establish marriage".
- (2) DNA profiling can establish parentage with a virtual certainty; DNA tests are also known as genetic finger printing could by matching the alleged father's DNA bands with that of the child's bands after excluding such bands that match the mother's would make positive finding of paternity with virtual certainty.
- (3) The DNA test could be used by the appellant to rebut the allegation of paternity.

APPEAL from the judgment of the High Court of Ratnapura.

Cases referred to:

- (1) *Angohamy v Babasinno* 1910 4 Weerakantha's reports 60.
- (2) *Karuppiah Kangany v Ramaswamy Kangany* 52 NLR 262.
- (3) *Wimalaratne v Milina* 77 NLR 332.
- (4) *Turin v Liyanora* 53 NLR 310.
- (5) *Le Roux v Neethling* – Juta (1891-1892) 247.
- (6) *Stocker v Stocker* 1966 1 WLR 190.

W. Dayaratne with P. Jayawardane for respondent-appellant-appellant, Ananda Panagoda with Kumari Thirimanne for appellant-respondent-respondent.

May 24, 2007

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of Ratnapura dated 14.09.2004. By that judgment the learned Judge of the High Court affirmed the order of the learned Additional Magistrate of Balangoda dated 26.04.2001 by which the defendant-appellant-appellant (hereinafter referred to as the appellant) was found to be the father of the child and the appellant was directed to pay a sum of Rs. 4000/- per month as maintenance of the child.

The appellant appealed to the Court on which Special Leave to Appeal was granted on the following questions :

- (4) *Is the entire approach of the learned Magistrate in regard to the question of paternity of the child wrong and has the learned High Court Judge failed to consider it in his order?*
- (5) *Has the learned Magistrate failed to consider that in terms of section 6 of the Maintenance Ordinance, which speaks of corroboration of the evidence of the mother, it must be taken to include any kind of corroboration which is recognized by law and has the learned Magistrate as well as learned High Court Judge failed to consider the said question of law?*
- (6) *Has the learned Magistrate erroneously considered the mere contradictions of the respondent/petitioner's evidence as corroborations of the applicant/respondent's case?*

When this matter was taken up for hearing, learned Counsel for the appellant brought to the notice of this Court that there is a report of the DNA test, setting out the results that the appellant

is not the father of the child of the applicant-respondent-respondent (hereinafter referred to as the respondent). This Court had thereafter directed the appellant to obtain a special medical opinion on the DNA report, which was obtained from the GENETECH Institution.

Accordingly, both learned Counsel agreed that the only question that has to be considered was as follows:

'In view of the DNA test report, whether the respondent's evidence has been corroborated, in terms of section 6 of the Maintenance Ordinance?'

The facts of this appeal, as set out by the appellant, *albeit* brief, are as follows:

The respondent instituted action in the Magistrate's Court, Balangoda against the appellant seeking for orders that the appellant be declared as the father of the child, namely, Rasandanie Sachinika (hereinafter referred to as the child) and for the appellant to pay a sum of Rupees Five Thousand (Rs. 5000/-) per month as maintenance. The appellant denied paternity and therefore was enlarged on a personal bail in a sum of Rupees Five Thousand (Rs. 5000/-) and the case was fixed for inquiry.

When the said inquiry commenced in April 1998, the respondent, her mother, namely, Kasturi Arachchige Leelawathie, her grandmother, namely, Matarabha Parana Withanalage Alisnona and a midwife of the Base Hospital Balangoda, namely Widane Pathirannahelage Nandawathie gave evidence and filed the documents, which contained the birth certificate of the child (e₁1), complaint made by the respondent to the Balangoda Police (e₁2) and the Medico Legal Report of the respondent dated 21.01.1998 (e₁ 3).

The appellant denied allegations including paternity against him and stated that the respondent is his divorced wife's eldest sister and he came to know about the birth of the child only at the inquiry held at Balangoda Police Station into a complaint made against him by the respondent. He has produced two documents, namely his statement made to Balangoda Police

Station on 14.10.1997 (X) and the plaint of the Divorce Case No. 248/97 of District Court, Balangoda (XI).

Learned Magistrate of Balangoda held that the appellant was the father of the child and ordered a sum of Rupees Four Thousand/(Rs. 4000/-) per month as maintenance to the child, which order was affirmed by the learned Judge of the High Court.

Having stated the facts of this appeal, let me now turn to consider the question of corroboration by other evidence vis-a-vis the applicability of the DNA test report.

Section 6 of the Maintenance Ordinance deals with the rule requiring corroboration of the mother's evidence in proceedings for maintenance and is in the following terms:

"No order shall be made on any such application as aforesaid on the evidence of the mother of such child unless corroborated in some material particular by other evidence to the satisfaction of the Magistrate."

The said provision is quite clear and what it stipulates is the necessity for the mother's evidence to be corroborated by other evidence. Such corroboration of the mother's evidence has been vital in establishing paternity and this was the approach of our Courts that considered matters even under section 7 of the Maintenance Ordinance, No. 19 of 1889, which section was an identical provision to that of section 6 of the Maintenance Ordinance. For instance, in the early decision of *Angohamy v Babasinno*⁽¹⁾, it was held by Wood Renton, J. that corroboration should consist of some evidence, oral or real, entirely independent of that of the applicant which renders it probable that her story as to the paternity of the children in respect of whom she is applying for maintenance is true.

In fact our Courts have been specific of the need for corroborating the mother's evidence in establishing paternity as even on instances where the mother's evidence had appeared to be quite impressive. This position was clearly laid down in *Karuppiyah Kangany v Ramaswamy Kangany*⁽²⁾ where it

was stated that upon the uncorroborated testimony of the mother, a Magistrate cannot make an order against the putative father.

It is thus apparent that in a matter, where the question of paternity is looming large, the mother's evidence would have to be corroborated by independent evidence. Such type of corroboration was defined in *Wimalaratne v Milina*⁽³⁾, where it was stated that, in an application for maintenance of an illegitimate child, evidence of any number of witnesses, who had heard from the applicant's mouth that the defendant was the father of the child would not constitute independent corroboration of the story of the applicant as to paternity.

The necessity for corroborated evidence was considered at length in *Turin v Liyanora*⁽⁴⁾, in terms of section 6 of the Maintenance Ordinance, where it was stated that,

"What the statute provides is that no order for maintenance of an illegitimate child should be made unless a mother who has given convincing evidence is corroborated in some material particular. If the mother's evidence does not convince the Judge the question of corroboration does not arise".

In *Turin's case* reference was also made to the observations of De Villiers, CJ, in *Le Roux v Neethling*⁽⁵⁾ regarding corroboration, where it was stated that,

"I think it may be laid down as a general rule that the plaintiff who seeks to fix the paternity of an illegitimate child on a man must clearly prove it, and must be corroborated by some independent testimony, and in case of doubt, judgment must be given in favour of the defendant."

In the instant matter, it is apparent that the respondent's evidence had convinced the learned Magistrate. In such circumstances, in terms of section 6 of the Maintenance Ordinance, it was necessary for the respondent's evidence to have been corroborated by other independent evidence.

The only independent witness was the midwife, namely Widane Pathirannahelage Nandawathie. She had been a Family Health Officer attached to the Base Hospital, Balangoda. Admittedly her duty had been to enter the necessary details for the issuance of the child's Birth Certificate. Except for the details relevant for that purpose, the witness had not given any evidence to corroborate the respondent's evidence. Infact, it is interesting to note that the proceedings of the Magistrate's Court Balangoda of 06.05.1999, disclose that, the Magistrate herself had been of the view that the witness Nandawathie's evidence had been detrimental to the respondent. In such circumstances, it is apparent that the respondent's evidence had not been corroborated by other evidence in terms of section 6 of the Maintenance Ordinance.

In the light of the aforementioned, it would be of paramount importance to consider the applicability of the evidence based on the DNA Report in deciding the paternity of the child.

As stated earlier, both parties, on a suggestion made by this Court had agreed to subject themselves to a DNA test. The said DNA test was carried out by the Molecular Medicine Unit of the University of Kelaniya and had stated that the appellant, namely Upul Kumara Weerasinghe is not the father of the child, namely, Rasandanie Sachinika.

Thereafter, both parties had also obtained a further report from Molecular Diagnostics and School of Gene Technology (GENETECH), which had clearly stated in its conclusion that the respondent is not the biological father of the child in question and that this could be stated with 100% certainty. Although there are no statutory guidelines as to when blood and/or DNA tests should be ordered by Court, in different instances the Court has directed the use of such tests. In *Stocker v Stocker*⁽⁶⁾, Karminski, J. referred to the importance of using serological evidence as it could successfully exclude a proportion of men, wrongly supposed to be father of a given child.

Referring to the use of DNA tests, Cretney and Masson (Principles of Family Law, 15th Edition, 1990, pg. 497) state that DNA profiling can establish parentage with virtual certainty. Bromley and Lowe (Bromley's Family Law, 8th Edition, 1992, pg. 274), considering the use of blood and DNA tests to establish parentage state that the DNA tests, which are also known as genetic fingerprinting, could by matching the alleged father's DNA bands with that of the child's in question, after excluding such bands that match the mother's, would make positive findings of paternity with virtual certainty (P.M. Bromley and N.V. Lowe, pg. 274). Bromley and Lowe on the same issue further had commented that,

"In cases where parentage (usually paternity) is in issue the most cogent evidence is likely to be obtained by blood tests in general and DNA tests in particular. Such tests may be used either to **rebut the presumption or allegation of paternity or to establish parentage**" (emphasis added).

It is thus apparent that a DNA test could be used by the appellant to rebut the allegation of paternity. Accordingly considering the circumstances of this appeal and based on reasons aforementioned, I answer the question at issue, in the negative.

For the reasons aforementioned this appeal is allowed and the judgment of the High Court of Ratnapura dated 14.09.2004 and the order of the Magistrate's Court, Balangoda dated 26.04.2001 are set aside.

I make no order as to costs.

AMARATUNGA, J. – I agree.

SOMAWANSA. J. – I agree.

Appeal allowed.