UBEYRATNE
v.
KARUNAWATHIE AND OTHERS

COURT OF APPEAL.
WIGNESWARAN, J.,
JAYAWICKRAMA, J.
C.A. NO. 238/92 (F).
D.C. GAMPAHA NO. 28632/L.
DECEMBER 19, 1997.
MARCH 30, 1998.
SEPTEMBER 23, 1998.

S. 112, Evidence Ordinance – Legitimacy and paternity should be decided between the parties – Can a third party attack the validity of contract of marriage – Access – Who can raise or canvass same.

The 1st plaintiff-respondent's husband was the owner of the subject-matter, who died intestate leaving behind the 1st plaintiff, his legal wife and three children, all of whom became entitled to his property.

The defendant-appellant contended that after the death of the 1st plaintiff-repondent's husband, she became entitled only to a half-share as his widow and that the three children were illegitimate, and were not entitled to the balance half-share. It was further contended that Gunaratne left the 1st plaintiff-respondent on 31.8.1965 and the three children were born in 1967, 1970 and 1975 and that they could not have been born legitimately during the continuance of their marriage.

Held:

1. The question of legitimacy and paternity should be decided between the parties who are directly affected by such a question. The question of validity of marriage, paternity and legitimacy of the children are personal matters to be decided by a Court of competent jurisdiction amidst the parties affected by the marital contract.

2. A third party should not have any legal right to attack the validity of such a contract of marriage nor its consequences.

3. There is no proof that the marriage between the 1st plaintiff-respondent and her husband was annulled according to law. Therefore, the children born during the continuance of that valid marriage are presumed to be legitimate.

4. The question of no access in s. 112 Evidence Ordinance should be raised and canvassed only by a disputing father not by a third party; only a party to the marriage should be called upon to prove or disprove the question of no access, as it is something personal to them.

5. The birth certificates of the children are *prima facie* evidence of the fact that they were born during the continuance of a valid marriage

"Presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability, the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive."

APPEAL from the judgment of the District Court of Gampaha.

Cases referred to:

1. *Banbury Purage Case* – 1811 – 1 SIM and St 153.
2. *Kalikuttty Kanapathipillai v. Velupillai Parapathy* – 57 NLR 553.
3. *Wilkinson v. Est H. J. Steyn* – 1947 (2) SALR 740 (CPC).
4. *Gaskil v. Gaskil* – 1921 – Pr. p. 425.

N. R. M. Daluwatte, PC for defendant-appellant.

Vidura Guneratne for plaintiff-respondent.

Cur. adv. vult.

November 26, 1998.

JAYAWICKRAMA, J.

This is an appeal from the judgment of the Additional District Judge of Gampaha in favour of the plaintiff. The plaintiff-respondent instituted this action seeking a declaration of title to the land described in the schedule to the plaint.

It was admitted that the 1st plaintiff's husband, A. M. Gunaratne was the owner of the subject-matter of this case who died intestate leaving the 1st plaintiff, his legal wife, and three children all of whom became entitled to his property. The 1st plaintiff averred that the defendant-appellant had entered this property unlawfully on 27.1.92 and he continued to be there as a trespasser.

The defendant-appellant averred in his answer that although the owner of the subject-matter was A. M. Gunaratne who was the husband of the 1st plaintiff-respondent, after his death she became entitled only to a half-share of the subject-matter as his widow and that the 1st plaintiff-respondent's three children being illegitimate, were not entitled to the balance half-share of the subject-matter. He further averred that the balance half-share of the property should devolve on deceased Gunaratne's brothers and sisters.

It is common ground that the 1st plaintiff-respondent was legally married to A. M. Gunaratne and that marriage subsisted until the death of the said Gunaratne. Hence, the 2nd, 3rd and 4th plaintiff-respondents who were minors at the time of the institution of the action were in law legitimate children of the 1st plaintiff-respondent and her husband. According to the birth certificates marked as V1, V5 and V6, the 2nd, 3rd and 4th plaintiff-respondents were the legitimate children of the 1st plaintiff-respondent and Gunaratne. Hence, in normal circumstances, the intestate property of A. M. Gunaratne should devolve on his legal wife and his three children.

In view of the above facts the sole question for decision in this case is whether the 2nd, 3rd and 4th plaintiff-respondents were the legitimate children of Gunaratne.

The learned President's Counsel for the defendant-appellant submitted that as the 1st plaintiff-respondent had admitted that her husband left her on 31.8.1965, and the three children were born in 1967, 1970 and 1975, they could not have been born legitimately during the continuance of their marriage. He further submitted that Gunaratne

had filed a divorce case No. 18666/D (D3) against the 1st plaintiff-respondent and in the amended plaint in that case Gunaratne had made the allegation that she was living in adultery with unknown persons from whom she had had children and denied their paternity. Further, Gunaratne had also made an application to the Conciliation Board to obtain a divorce from his wife (D4).

The learned President's Counsel for the defendant-appellant further submitted that the 1st plaintiff-respondent had filed a maintenance case on 6.9.74 (D6) against Gunaratne for the maintenance of herself and her children and that Gunaratne had denied paternity of the two children (D6A). The Court made no order in regard to the maintenance as the applicant was absent on the last date of the case.

The learned President's Counsel contended that the said Gunaratne died on 27.2.1982 and for 7 years the 1st plaintiff-respondent had not taken any steps to get a judicial order on the basis of the legitimacy of the children. In view of the fact that the alleged father, ie her married husband had denied paternity, the counsel argued, that this was a relevant fact which had escaped the attention of the learned trial Judge.

The learned President's Counsel further contended that although Gunaratne married the 1st plaintiff-respondent on 5.6.1965 (D2), the marriage was short-lived, as Gunaratne, the husband on 31.8.1965 had made a complaint to the Grama Sevaka (D8) to the effect that he had taken his wife and left her with her mother because his wife's character was bad. After the wife was left at her mother's place, both mother and daughter came to the husband's home and took back the wife's belongings and her husband Gunaratne made another complaint to the Grama Sevaka dated 2.9.1965 (D7) stating that his wife had taken all her belongings from the matrimonial home. The learned President's Counsel submitted that there is no evidence whatsoever that the wife ever came back to the matrimonial house, nor even that she attended the funeral of her husband.

The 1st plaintiff-respondent denied all these allegations and stated in her evidence that her husband visited her in her own house and

the children were born to him. She further denied that she ever received summons in DC Gampaha case No. 18666/D.

The learned President's Counsel for the defendant-appellant further submitted that the rejection of all these documents (D2, D3, D6, D7 and D8) by the learned Additional District Judge is erroneous, as he had not stated under what provisions of the Evidence Ordinance, they were rejected. With regard to these complaints the learned Additional District Judge held that the complaints had been marked without the complainant being called and that the plaintiff-respondent had no opportunity to question the complainant about the complaints. The learned President's Counsel submitted that as the complainant was dead, he could not be questioned and that the best answer to this is that Gunaratne had denied paternity before a Court of law and the wife did not proceed with the maintenance case, where Gunaratne could have been questioned, when he was alive.

The learned President's Counsel for the defendant-appellant further contended that had the learned Additional District Judge approached this question on the basis of all the available material, his conclusion would have been different.

According to the evidence of the 1st plaintiff-respondent (at page 141) she has stated that she came back home to her mother after she got angry with the husband, but she became friendly again after two or three weeks later and that her husband came to her house in the day time and went back to his own house in the evening.

The learned President's Counsel submitted that the 1st plaintiff-respondent's position regarding the maintenance case was that she never instituted such a case, but since a certified copy of the maintenance case had been filed, there was no necessity for further proof. He submitted that if it was the Judge's view that somebody else had filed a maintenance case on behalf of two of these children, which is a far-fetched view, then he should have called upon the defence to prove that the very same 1st plaintiff-respondent filed this application.

Learned President's Counsel further argued that once the 1st plaintiff-respondent denied that she had filed a case, the Court of necessity should have evaluated the denial on a balance of probabilities and come to a conclusion on her credibility as a witness which the trial Judge in this instance had not even attempted to do. Therefore, he contended that the rejection of the aforesaid documents was erroneous in law and vitiated the entire judgment of the learned trial Judge.

The learned President's Counsel contended that the 4th plaintiff-respondent Sujith Rohitha was born on 10.7.1975 (D6) and as the maintenance case was instituted on 6.9.1974, taking 280 days referred to in section 112 of the Evidence Ordinance as the period for gestation, this child would have been conceived a few days after 6.9.74.

The learned President's Counsel for the defendant-appellant further contended that it is improbable that the 1st plaintiff-respondent and Gunaratne would have had sexual relationship whilst the maintenance case was pending. He further argued that on 7.2.75 the applicant would not have appeared in Court because her pregnancy would have been clearly visible.

The learned President's Counsel for the defendant-appellant further argued that had the learned trial Judge evaluated the material available rationally, having regard to the probabilities, he would certainly have come to the conclusion, that the 4th plaintiff-respondent was conceived after the maintenance case was instituted.

When one considers the above submissions made by the learned President's Counsel on questions of fact and law to be decided by the learned trial Judge, it must be remembered that questions of paternity and legitimacy are matters to be generally decided among the parties affected. In the instant case a third party is attempting to deny paternity of the children and question the legitimacy of children born during the continuance of a valid marriage.

In my view the question of legitimacy and paternity should be decided between the parties who are directly affected by such a question. A third party may only lead evidence of such facts elicited in a contest between the parties in a Court of law regarding such matter. A third party who is not a party to a contract of marriage when he files an action in a Court of law to canvass the validity of a marriage or the legitimacy or paternity of the children born during that valid marriage is trying to import his opinions on what had taken place. The question of validity of marriage, paternity and legitimacy of the children are personal matters to be decided by a Court of competent jurisdiction amidst the parties affected by the marital contract. A third party should not have any legal right to attack the validity of such a contract of marriage nor its consequences. Of course, a third party may make use of facts proving the relationship that existed between the contracting parties, provided they are relevant to the matters in issue.

In the instant case the evidence led by the defendant-appellant regarding the validity of the marriage and the legitimacy of the children seems to be hearsay. The documents marked do not prove the dissolution of a valid marriage nor the illegitimacy of the children born during the course of that marriage. A Court of competent jurisdiction has not made any decision regarding divorce nor maintenance. The only inference one could draw from the documents marked is that there had been some marital problems between the 1st plaintiff-respondent and her husband, but even here the only surviving party had denied that there was a divorce case filed against her or that she herself filed a maintenance case against her husband. A legally married person could obtain a divorce only according to law. There is absolutely no proof that the marriage between the 1st plaintiff-respondent and her husband was annulled according to law. Although the defendant-appellant had made certain allegations, they remain only as allegations without any proof. Thus, in law the marriage between the plaintiff-respondent and her husband continued to be a valid marriage until her husband's death. Therefore, the children born during the continuance of that valid marriage are presumed to be legitimate

children. In deciding such facts a Court will always consider what is best in the interest and welfare of the children.

In such a situation the mere denial of paternity by the husband will not make the children illegitimate. In the instant case there is no proof of the dissolution of the marriage between the 1st plaintiff-respondent and her husband. Hence, the presumption under section 112 of the Evidence Ordinance is applicable to the children born to such marriage and therefore the 2nd, 3rd and 4th plaintiff-respondents are to be deemed as the legitimate children of the 1st plaintiff-respondent and her husband. As the 2nd, 3rd and 4th plaintiff-respondents were born during the continuance of a valid marriage between the parents mentioned in their respective birth certificates that fact is to be deemed as conclusive proof that they are the legitimate children of their putative father. This is a statutory recognition of the principle underlying the maxim, *'Pater est quem nuptiae demonstrant'*, which is recognized in both Roman-Dutch and English Law. *Banbury Peerage case*[1], Voet, 1.6.6.

The question of no access in section 112 of the Evidence Ordinance should be raised and canvassed only by a disputing father not by a third party. Only a party to the marriage should be called upon to prove or disprove the question of no access, as it is something personal to them. Access is something factual and not dependant on opinions. If a party to a marriage alleges no access and gives evidence to that effect the position would be different and he may be allowed to call other evidence as corroboration of his allegation. In the instant case the 1st plaintiff-respondent's husband never gave evidence to that effect nor was he cross-examined. An outsider cannot vouch for such a personal matter as "no access". The only acceptable evidence in the instant case regarding access is the 1st plaintiff's-respondent's evidence where she has categorically stated that although she left the house of her husband, he used to visit her during the day and go back to his home in the evening. This being the only evidence regarding access, the principle laid down in *Kalikutty Kanapathipillai v. Velupillai Parpathy*[2] is applicable. The Privy Council in that case,

held that where there was personal access under such circumstances that there might have been sexual intercourse, the law raised the presumption that there had actually been intercourse, and that presumption must stand, till it is rebutted satisfactorily by evidence that there was no such sexual intercourse. In the instant case the evidence of the 1st plaintiff-respondent clearly establishes the fact that although she lived with her mother, her husband used to visit her and that their houses were situated in close proximity.

If one is to accept the submissions made by the learned President's Counsel for the defendant-appellant regarding the question of legitimacy and access, then any third party other than the husband or the wife could lead evidence to prove facts which could dissolve a marriage and thereby make the children illegitimate. The presumption of legitimacy could only be displaced by clear and unimpeachable evidence and in particular by evidence of incapacity to generate or of an absence inconsistent with the period of gestation. Either spouse may give evidence of non-access in any proceedings civil or criminal. (Grotius 1.12.3) *Wilkinson v. Est. H. J. Steyn*[3].

In the instant case the defendant-appellant has made an attempt to deprive the three children born to the 1st plaintiff-respondent during the continuance of her valid marriage to Gunaratne, of their lawful rights to succeed to the property of their putative father. The defendant-appellant's sole intention seems to be to acquire a share of the property which these children had become legally entitled to. The acceptance of the arguments put forward by the learned President's Counsel for the defendant-appellant would be against public policy. Scheming persons can otherwise deprive legitimate children of their due rights and cause injustice to such children.

Mere filing of certified copies of a plaint and answer in a divorce case or an application in a maintenance case by itself would not prove anything unless a valid judgment or decree of a Court of competent jurisdiction is also produced. It is prudent to view what has taken place according to law rather than impair the value of a marriage or affect the legitimacy of children. It would be unjust to stamp a child

with illegitimacy or it's mother with want of chastity without proof of such facts.

The documents marked by the defendant-appellant to show that there had been marital problems between the 1st plaintiff-respondent and her husband are not legal proof of the fact of the dissolution of their marriage or the illegitimacy of the children. A Court cannot accept these documents as evidence as they are only allegations and not proved facts. In the instant case the only surviving party to the marriage between the 1st plaintiff-respondent and her husband has given evidence denying these allegations and there has been no other evidence to prove otherwise and the Court had no alternative other than to accept her evidence. The birth certificates of the childtren are *prima facie* evidence of the fact that they were born to the 1st plaintiff-respondent and her husband during the continuance of a valid marriage. No cogent evidence had been led in the instant case by the defendant-appellant to disprove such facts. All what the defendant-appellant had done was to give evidence based on gossip and hearsay. Lord Chancellor in *Gaskill v. Gaskill*[4] points out that "presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive".

When one considers the above facts it is clear that the learned additional District Judge had very correctly evaluated the evidence before him in this case and arrived at a correct conclusion. Hence, I affirm the judgment of the learned Additional District Judge and dismiss the appeal with incurred costs payable by the defendant-appellant to the plaintiff-respondents.

WIGNESWARAN, J. – I agree.

Appeal dismissed.