Delhi High Court
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Ms. X vs Mr. Z And Anr. on 20 December, 2001
Equivalent citations: 96 (2002) DLT 354, I (2002) DMC 448
Author: V Aggarwal
Bench: V Aggarwal
JUDGMENT

V.S. Aggarwal, J.

1. The main question which craves for an answer is as to whether the petitioner can resist the request of respondent No. 1 for directing the Pathology Department of the All India Institute of Medical Science, New Delhi to prepare a slide containing the blood cells of respondent No. 1 and calling for the slides and blocks of the case relating to the petitioner and order a DNA test with a view to ascertain if respondent No. 1 is the father of the foetus.

The petitioner's claim is that such an order would infringer has constitutional right of her privacy.

2. The present application under consideration arises as a result of the following facts. The petitioner has filed a petition for dissolution of marriage on the ground of cruelty and adultery against respondent No. 1 under Section 10 of the Indian Divorce Act. The said petition is being contested on the ground of counter-allegations of similar nature.

3. Respondent No. 1, by virtue of I.A. 3804/99 contends that case of the petitioner is that respondent No. 1 had adulterous affair with respondent No. 2 and the respondent No. 1 on the contrary assest that petitioner had adulterous affairs with one Jose Thomas, which resulted in petitioner being on family way. It is now not much in issue between the parties whether the pregnancy of the petitioner, which was admitted a tubular pregnancy was terminated on 30.12.1994 at All India Institute of Medical Sciences. Respondent No. 1 asserts that he has come to know that records and slides of tubular gestation of the petitioner have been reserved in All India Institute of Medical Science. The slides are kept under Hospital Registration No. 415330. It contains cells of aborted foetus and therefore, while respondent No. 1 asserts that he is not the father of the same, he seeks that a DNA test would also be beneficial and it would establish as to who is the father of the aborted foetus. With these assertions, it has been claimed that the pathology department of the All India Institute of Medical Science be directed to prepare the slides containing the blood cells of respondent No. 1 and Court should call for slides and blocks of the case relating to operation of the petitioner and send it for test (DNA test).

4. Needless to state that in the reply filed, the application as such, has been contested. It has been asserted that the petition has been filed only to delay the disposal of divorce petition and the respondent No. 1 is trying to create smoke screen for his own affairs. It is denied that DNA examination of the slides would conclusively prove the paternity of the foetus. It is alleged that the Courts in India do not have the authority to order DNA test in civil and quasi-civil matters in particular, where it is to establish the paternity even of living child where husband had the access. Such an order, it is alleged, would be in violation of the constitutional and legal rights of the petitioner.

5. It is in this back-drop of these facts that the main question referred to above, comes up for consideration. But before converging into the same, it would be appropriate to deal with the other submissions that were made at the Bar. Learned Counsel for the petitioner urged that there is no provision permitting the collection of the evidence at the behest of the Court and, therefore, such an order, as such, would not be passed.

6. It is true that the Code of Civil Procedure or the Indian Evidence Act does not specifically deal with any such situation that Court can direct or be instrumental in collecting the evidence for or on the either party. When the parties litigate it is for them to produce the necessary evidence relevant for disposal of the matters

but just exceptions would always creep in. When certain evidence cannot be allowed or collected, without the order of the Court in that event either of the party can seek the intervention of the Court. Reverting back to the controversy in the present case, it is obvious that when DNA test with respect to the slides pertaining to the foetus of the petitioner is to be conducted and the said foetus is stated to be in All India Institute of Medical Science, necessarily, it would require an order of the Court before slides would be prepared. In that view of the matter in peculiar facts, such an order, as permissible in law, would be necessary and it cannot be termed that evidence would be collected at the behest of the Court.

7. Yet another limb of the argument was that since the foetus is a part of the body of the petitioner, without her consent such a test cannot be conducted and stress is laid on the fact that she can be compelled to agree for such a test. In support of her claim, learned Counsel relied upon one of the earliest decisions on the subject in the case of Polavarapu Venkataswarlu v. Polavarapu Subbayya, . In the cited case, an application was filed about legitimacy of the plaintiff in the suit. The defendant was alleged to be the father and he was disputing the same. The Madras High Court held that if parties are unwilling to offer their blood for test of this kind, the Court will not force them to do so. In paragraph 4, the findings recorded were:

That may be. But I am not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind this Ct. can be forced to do so. Mr. Krishnamurthi says that his clients are not prepared to offer their blood for such a test.

8. In another case, reported as Sabayya Gounder v. Bhoopala Subramanian, , when a similar question cropped up under Section 488 of the Code of Criminal Procedure 1908 corresponding to Section 125 of the Code of Criminal Procedure, 1973. The same Court referred to Article 20(3) of the Constitution to conclude that no person accused of any evidence shall be compelled to be a witness against himself and once again the finding was that if the party concerned is unwilling to such a test, the Court cannot direct them to submit accordingly. It was held:

In India there is no special Statute and there is no provision either in the Criminal Procedure Code or in the Indian Evidence Act empowering Courts to direct such a test to be made. Similarly, as pointed out by Raghava Rao, J. in Venkateswarulu v. Subbayya, , there is no procedure either in the Civil

Procedure Code or the Evidence Act which provides for a blood test being made of a minor and his mother when the father is disputing the legitimacy of the minor and held that if the parties are unwilling to submit to such a test the Court has no power to direct them to submit themselves to such a test.

9. Bombay High Court in the case of Sadashiv Malikarjun Kheradkar v. Smt. Nandini Sadashiv Kheradkar and Another, 1995 Crl. L.J. 4090, the Court relied upon the decision of the Supreme Court in the case of Goutam Kundu v. State of West Bengal, , and held that the Court has power to direct blood examination but it should not be done as a matter of course or to have a roving inquiry. The Bombay High Court even felth that there should be a suitable amendment by the Legislature and after noting that no body can be compelled to give blood sample, it was held that the Court can give a direction but cannot compel giving of blood sample. The findings in this regard are:

".....There was be some strong prima facie case to be established by the husband to show non-access in order to get over the legal presumption under Section 112 of the Evidence Act and Supreme Court has also observed that nobody can be compelled to give blood sample. Therefore, the position is that the Court has power to give a direction to a party to give blood sample for the purpose of examination of the same but the party cannot be compelled to give blood for testing purpose. In other words, the Court can direct a party and if the party fails to obey the direction, the Court cannot compel the party to give blood sample. In such circumstances, when there is a direction and non- compliance by a party, the only thing is that the Court may draw an adverse inference against the party who fails to give blood samples in spite of the direction of the Court."

10. Madras High Court once again, in the case of D. Rajeswari v. State of Tamil Nadu, III (1996) CCR 774=1996 Crl. L.J. 3795, was concerned with a matter where there was a major girl of 18 years, who had been impregnated due to rape by several persons. Bearing and rearing of child in her womb would have agonised her entire life. The Madras High Court held that the pregnancy should be terminated. The foetus should be preserved so that the investigating agency could seek DNA test.

The findings in this regard in paragraph 35 read:

35. In view of the above discussion, I deem it fit to direct the Chairman and Superintendent, Government Kasturba Gandhi Hospital for Women and Children, Madras-5, to conduct medical termination of pregnancy of the petitioner and preserve foetus to enable the investigating agency to ask for DNA test, which would be helpful in order to prove the case of rape alleged by the petitioner, against the persons during the course of trial.

11. The conclusions are obvious that nobody can be compelled without his consent to submit to DNA test. A direction can be issued. Such direction should not be done in the ordinary course, in routine or as a roving inquiry. A strong prima-facie case should be made out.

12. In the facts of the present case, at this stage, the foetus is not a part of the body of the petitioner. It had already been discharged. It is true that the carrying of the foetus would depend upon the mother but the bond between them came to an end when it was discharged. It cannot thereafter be treated as a part of the mother, but was a unique organism. When the foetus has already been discharged from the body of the petitioner there is no question of compelling her to submit to any test. It is an organism, which has been preserved and, therefore, once the organism is preserved, the petitioner cannot claim that it should not be put to any test. The question of compelling her to do any particular act does not arise. This argument, therefore, so much thought of by the learned Counsel for the petitioner, must fail.

13. The main argument, as already referred to above, however, was that it affects the rights of life of the petitioner, which includes the right of privacy. It would affect the confidentiality that the petitioner has in this regard.

14. It is not in controversy that right of privacy is part of right to life enshrined under Article 21 of the Constitution. This came up for consideration before the Supreme Court in the case of Kharak Singh v. State of U.P. and Others, . The Supreme Court detailed the said right in the following words:

"We shall now proceed with the examination of the width, scope and content of the expression" personal liberty" in Article 21. Having regard to the terms of Article 19(1)(d), we must take it that that expression is used as not to include the right to move about rather of locomotion. The right to move above being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the residue. We have already extracted a passage from the judgment of Field, J. in Munn v. Illinois, (1876) 94 US 113, at p. 142, where the learned Judge pointed out that "life" in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs-- his arms and legs etc. We do not entertain any doubt that the word "life" in Article 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human

existence even as an animal? It might not be inappropriate to refer here to the word of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those chershed human values as the means of ensuring his full development and evolution.

We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrine constitutional theories. Frankfurter, J. observed in Wolf v. Coloroado, (1948) 338 US 25.

The security of one's privacy arbitrary intrustion by the police.....is basic to a free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.....We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment'."

15. From that time onwards the said right has made deep in roots into the right on life.

16. It also came up for consideration with respect to freedom of Press in the case of Rajagopal @ R.R. Gopal v. State of T.N. And Ors., , but the basic principles about right of privacy to be a fundamental right, came up for consideration. Certain guidelines were provided and the Supreme Court held that once the matter becomes a matter of public record, the right of the privacy no longer subsists. The two paragraphs in this regard read:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of the country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything covering the above matters without his consent -- whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including Court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by Press and media among others. We are, however, of the opinion that in the interests of decency (Article 19(2) an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in Press/media."

17. In the case of telephone tapping, People's Union for Civil Liberties v. Union of India, , once again the said right had been recognized.

18. Reference with advantage further can be made to the Supreme Court in the case of MR 'X' v. Hospital 'Z', (1998) 8 SCC 296, it was concluded by the Supreme Court that right of privacy cannot be treated be an absolute right and in paragraph 26, the Supreme Court provided the following important guidelines.

"26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

27. Right of privacy may, apart from contract, also arise out a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed.

28. Disclosure of even true private facts has the tendency to distrub a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others."

19. From the aforesaid, the conclusion can conveniently be drawn, viz., that right of privacy though a fundamental right, forming part of right to (sic) her constitutional right of her life enshrined under Article 21 cannot be taken to be an absolute right. The right of privacy may arise from contract and also may arise from a particular specific relationship including matrimonial but when the right to privacy has become a part of public document, in that event a person concerned, indeed cannot insist that any such test would infringe his/her right of privacy.

20. The position herein can again be taken note of. As already referred to above, the foetus is no more a part of the body of the petitioner. The petitioner indeed has a right of privacy but is being not an absolute right, therefore, when a foetus has been preserved in All India Institute of Medical Science, the petitioner, who has already discharged the same cannot claim that it affects her right of privacy. Adultery has been alleged to be one of the grounds of divorce. At this stage, the Court is not expressing any opinion on merits of the matter, but the petitioner indeed cannot resist the request of respondent No. 1. However, if the petitioner was being compelled to subject herself to blood test or otherwise, she indeed could raise a defense that she cannot be compelled to be a witness against herself in a criminal case or compelled to give evidence against her own even in a civil case but the position herein is different. The petitioner is not being compelled to do any such act. Something that she herself has discharged, probably with her consent, is claimed to be subjected to DNA test. In that view of the matter, in the peculiar facts, it cannot be termed that the petitioner has any right of privacy.

21. For these reasons, the application is allowed. It is directed that at the cost of respondent No. 1, the Pathology Department of All India Institute of Medical Sciences shall prepare a slide of blood cells of respondent No. 1. It shall also call for slides and blocks of the case relating to operation of the petitioner (Registration No. 415330-Gynea III, Ward/OPD-AB3/15, admitted on 29.12.1994 and discharged on 4.1.1995. It is directed that DNA test would be conducted to ascertain if respondent No. 1 is the father of the foetus. It be sent to Central Forensic Science Laboratory, 30, Gorachand Road, Calcutta (West Bengal).

22. I.A. stands disposed of.

Mat. 1/96

List it for further proceedings on 12.2.2002.