Boramma Vs. Dharmappa

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Court : Karnataka

Decided On : Feb-08-1968

Reported in : AIR1969Kant17; AIR1969Mys17; (1968)2MysLJ39

Judge : A.R. Somnath Iyer, J.

Acts : Evidence Act - Sections 12 and 112;

Appeal No. : Second Appeal No. 530 of 1964

Appellant : Boramma

Respondent : Dharmappa

Judgement :

1. The suit out of which this second appeal arises commenced with an application for permission to sue in forma pauperis which was presented on July 14, 1958. The plaintiff was the wife who sought a decree for maintenance against her husband. There was an ex parte decree on April 8, 1959, and, in execution of that decree, the property of the husband was sold. It was at that stage that the husband made an application for getting the ex parte decree set aside, and it was set aside on payment of costs. The written statement was then produced on January 15, 1962 in which the husband contended that the wife had forfeited her right to maintenance by her unchastity.

2. The allegation of unchastity was made on the foundation of the birth of a female child to the plaintiff on November 8, 1960 during the pendency of the suit. The husband denied that the child was born to him while the wife asserted that he was her parent.

3. The Courts below pronounced against legitimacy and this was responsible for their conclusion that the wife was unchaste and so was not entitled to maintenance.

4. The judgment of the Civil Judge who heard the appeal which he dismissed, is open to the criticism that he completely misunderstood the provisions of Section 112 of the Evidence Act which raises a presumption of legitimacy if the child was born during the continuance of a valid marriage and it was not shown that the parties to the marriage had no access to each other at any time when the child could have been begotten.

5. Since there was no dispute that the marriage between the two spouses was a valid marriage, the burden of establishing that the spouses had no access to each other at the time when the child could have been begotten was on the husband. Not unnaturally, an appeal to this section was made on behalf of the wife, and, while it was negatived by the Court of first instance, it was negatived by the Civil Judge on the ground that the presumption could not be claimed by a Hindu wife. It is obvious that in taking this view, he was plainly mistaken. The provisions of section 112 of the Evidence Act are as much applicable to the offspring of a marriage between Hindus as it is to children of spouses professing other faiths.

6. The Civil Judge, therefore, proceeded without reference to the presumption claimable under section 112 of the Evidence Act and in derogation of the well known rule which emerges from the decision of the Privy Council in Karapaya Servai v. Mayandi that the burden of proving that parties to a valid marriage had no access to each other at any time when the child could have been begotten is on the person challenging legitimacy.

7. Now, the Civil Judge depended in support of his conclusion that the child was illegitimate on the evidence given by the husband and that given by D. W 2 as he

did upon a certain chronology of events.

8. Defendant 1 stated in his examination-in-chief that he had no access to his wife and that the child was not born to him. In his cross-examination, he stated that some other person was the father of the child and that the wife was of an immoral character. But what appears from another part of his cross-examinations that his justification for the accusation of infidelity against his wife was the fact that she was 'seen' by him with a certain Annayya of Ibbani.

9. D. W 2 who is a resident of the village in which the husband lives, stated that there were strained relations between the spouses during the period of five years and that the husband had gone to the village in which the wife was living and that the plaintiff did not visit her husband in his village. But, when the plaintiff gave evidence, she asserted that the child was born to her husband, and, she repudiated the suggestion in cross-examination that the offspring was the result of adultery.

10. It is clear that the evidence of D.W. 2 was no evidence of non-access. He is a resident of the husband's village and he could not be sure that at no time when the child could have been begotten the husband had not gone to the wife's village or that the wife did not go to the husband's village. The mere assertion of the husband that he had no access to his wife, is, not, normally speaking, evidence of non-access, the burden of establishing which is thrown by S. 112 of the Evidence Act on him. That burden is a heavy burden, and, since any pronouncement on legitimacy is a serious pronouncement having grave consequences, evidence of non-access should be clear and convincing. It is not enough for the husband to merely assert that he did not have access to his wife but it must be proved that the circumstances were such that there was no opportunity for access. In the absence of such evidence, the presumption is that the child was legitimate.

11. The Civil Judge overlooked this principle by reason of his imperfect understanding of the provisions of Section 12 of the Evidence Act.

12. Now, there is nothing in the chronology of events which supports the conclusions of the Civil Judge. On the contrary, the chronology is such as to raise

a doubt as to the truth of the allegation of the husband that he had no access.

13. The institution of the present suit was preceded by the prosecution of an application for restitution of conjugal rights by the wife. On January 24, 1958, that application was disposed of on a report made by the wife that the matter had been settled between the spouses.

14. The extremely slender foundation on which the courts below depended in support of their finding on legitimacy was the fact that the child was born during the pendency of the suit for maintenance. It is seen from the manner in which the proceedings for restitution of conjugal rights terminated, that the mere fact that the two parties were arrayed on opposite sides to a legal proceeding, did not constitute an impediment to their coming together as it did happen as reported by the wife in those proceedings.

15. The suit for maintenance was pending during a long period of more than two years before the child was born, and the husband produced no evidence as to what were the relations between the parties at the time when the child could have been begotten which was somewhere by the end of January 1960. There is a presumption that the child so born is a legitimate child and the presumption could be displaced only on production of proof that at the time the child could have been begotten there were no opportunities for access. The husband said nothing beyond making a bald statement that the child was not his and that he had no access to her, and, no evidence was produced as to what were the relations between the spouses at the most crucial point of time. What had to be proved by the husband was that there was no opportunity for sexual intercourse at the most material point of time, and, of that, no evidence was produced.

16. So, I set aside the decrees of the courts below, and in substitution of the finding recorded by them that the wife was unchaste, I make a finding that she was not, and that she had not forfeited her right to maintenance. So, the wife was clearly entitled to maintenance.

17. But, unfortunately, on the measure of maintenance the Courts below recorded no finding. This was a very regrettable thing for them to do. It was their duty to

record findings on all the issues even if on the finding on any one of the issues it was possible to decide the suit one way or the other.

18. So, it becomes my duty to fix the rate of maintenance. I have looked into the evidence in the case, and, while the wife claims that the annual income of the husband is as high as Rs. 5,000/- the husband has made an extremely gross under-estimate. Taking all the circumstances into consideration, it seems to me that I should award maintenance at the rate of Rs. 25/- a month.

19. In regard to arrears, it is clear that if the husband is directed to pay arrears at the rate fixed by me during the whole of the period during which this litigation was pending, it becomes extremely oppressive. So, I award a sum of Rs. 600/- towards arrears of arrears of maintenance payable for the period till now. Future maintenance from this date will be paid at the rate fixed by me.

20. Each party will bear his or her own costs in all the three courts. But the court-fee payable in all the three courts on the plaint and on the appeals shall be paid by defendant 1.

21. CWM/D.V.C.

22. Appeal allowed.