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Prem Singh Vs. Smt. Dilla Devi

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Court : Allahabad

Decided On : Aug-03-1983

Reported in : AIR1984All129

Judge : Deoki Nandan, J.

Acts : Evidence Act, 1872 - Sections 4 and 112

Appeal No. : First Appeal No. 186 of 1983

Appellant : Prem Singh

Respondent : Smt. Dilla Devi

Advocate for Def. : T.P. Asthana, Adv.

Advocate for Pet/Ap. : K.C. Dhuliya, Adv.

Disposition : Appeal dismissed

Judgement :

Deoki Nandan, J.

1. This to appeal arises from a decree dismissing the appellant's petition for divorce under Section 13 of the Hindu Marriage Act The ground, on which dissolution of the marriage by a decree of divorce was sought, was that a daughter bora to the respondent on the 2nd Aug., 1980 was not begotten upon her by the

appellant and the respondent was thus guilty of having had, after marriage, voluntary sexual intercourse with a person other than her husband. That person was not implead-ed as a co-respondent nor was he named in the petition tor divorce or at any stage of the proceedings. Instead it was stated in the petition that the respondent had visited tihe appellant on the 28th Dec., 1979 and stayed with him over night at his house at Mathura where he was posted at that time, though under orders of transfer to Dehra-dun. According to the appellant, he didnot have any sexual intercourse with the respondent during the course of her stay from the 28th to the 29th Dec., 1979.

2. The parties were married on the 13th Dec., 1964. They lived together for some years and had a son born of the marriage in or about the year 1972. The respondent was admittedly staying with the son at the appellant's village home on the hills in district Tehri Garhwal and the appellant was employed as a Junior Engineer under the State Electricity Board. He was posted at Mathura in Dec., 1979, and was posted at Debradun when the divorce petition was filed in the year 1981.

3. The respondent asserted that the daughter born to her on the 2nd Aug., 1980, was conceived when she had sexual intercourse with the appellant on the night between the 28th and the 29th Dec., 1979 and was born somewhat premature because she had a fall while carrying a load of tihe grass on her head.

4. On the facts, u child born on tihe 2nd Aug., 1980, could have been conceived on the 28th Dec., 1979. Adding the standard fourteen days usually added before the date of conception in a case where the exact date of the commencement of the menstrual cycle before the intercourse is not known, the child born on the 2nd Aug., 1980, could be said to have been born after 233 days. I do not have to refer to any medical text book for this inasmuch as the formula of computation is to be found in the case of Mahendra v. Sushila : [1964]7SCR267 , decided by the Supreme Court (see para 160 at page 392). According to the very same case, a child is viable and the delivery is called premature if the birth takes place after 28 weeks. 233 days could be said to be equal to seven months and 23 days if the month is taken to be of 30 days. This was well above 7 mouths and even if the

menstrual cycle began shortly before the 28th Dec., 1979, the child born on the 2nd Aug., 1980, had completed more than seven months period of gestation and could have been conceived on the 28th Dec., 1979, according to the common course of natural events. Therefore, the fact that the child was born during the continuance of a valid marriage between the appellant and the re-spondent, who was the child's mother, is conclusive proof of fact that the child is the legitimate child of the appellant, 'unless it can be shown that the parties to the mar-riage had no access to each other at any time when' the child could have been begotten. That is the law declared by Section 112 of the Evidence Act. The effect of such declaration by that Act is, as defined by the third paragraph of Section 4, that 'the Court shall, on proof of the one fact, regard the other as proved and shall not allow evidence to the given for the purpose of disproving it.'

5. The effect of these provisions of the Evidence Act is that the Court could not have allowed evidence to be given for purpose ot disproving that the child born to the respondent on the 2nd Aug., 1980, was not the legitimate child of the appellant by his showing that he did not, in fact, have sexual intercourse with the respondent on the night between the 28th and the 29th Dec., 1979. That evidence was barred. I have, therefore, refrained from referring to it although having looked into it I believe the wife who said that she did have sexual intercourse with the appellant on the night between the 28th and the 29th Dec., 1979 in the kitchen where she was sleeping alone on a bed and the appellant came over from the adjoining room to her bed during the night. The only evidence, which could have been led, was of non-access, which means non-existence of opportunity for sexual intercourse. The very fact that the appellant and the respondent stayed together in the appellant's house and they have been husband and wife for about 15 years although still young the there was nothing between them to prevent sexual intercourse rather they would have been prone to it on a wintry night having met after many months, is enough to prove access or existence of an opportunity for marital intercourse. See Venkateswarlu v. Venkatauarayana : [1954]1SCR424 and Karapaya v. Mayandi .

6. I might add that the case in hand was not of a petition for annulment of the marriage by a decree of nullity on the ground that the respondent was at the time

of marriage pregnant by some person other than the appellant. The case was of a petition for divorce on the ground that the wife had voluntary sexual intercourse with a person other than her husband. That required proof of fact of voluntary sexual intercourse and since it amounted to saying that the wife was guilty of adultery, it was necessary for the appellant to have either named the adulterer and impleaded him as a co-respondent or to have applied to the Court forbeing excused from doing so on either of the grounds on which that could be done under Rule 6 of the Hindu Marriage and Divorce Rules, 1956. Adultery has to be proved as a positive fact. It would not be inferred merely because a child was born to the wife on the 2nd Aug., 1980 and the husband said and tried to prove that he did not have sexual intercourse with the wife on the night between the 28th and the 29th Dec., 1979 when they had stayed under the same roof particularly when it was admitted that the wife was throughout living at the appellant's village home on the hills with their son born in lawful wedlock and looking after his cultivation and there was no suggestion of any looseness of character or immorality on her part.

7. Having looked into the pleadings of the parties and the evidence, I am satisfied that the husband was only trying to break away from the marriage tie as he had an affair with the sister of his brother's wife who was admittedly staying with him even when the respondent reached Mathura on the 28th Dec., 1979, his explanation for her stay with him being wholly unconvincing. It is unfortunate that this is so and the wife is willing to suffer and to look after the appellant's ancestral land on the hills. The matrimonial guilt in this case cannot be fastened on the wife. On the case pleaded and proved by her, the husband is most probably the guilty party, but she has chosen not to ask for any relief. Howsoever modern our laws may be, I can only commend her patience and wish that she may be rewarded by her husband mending his ways.

8. The appeal fails and is dismissed. The respondent-wife has already had her expenses by an order under Section 24 of the Hindu Marriage Act. Therefore, no order for costs in this Court need be passed.

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