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Court : Madhya Pradesh

Decided On : Aug-19-1985

Reported in : AIR1986MP57; 1986MPLJ105

Judge : Rampal Singh, J.

Acts : Hindu Marriage Act, 1955 - Sections 13, 25 and 28; Evidence Act, 1872 - Sections 112; Code of Civil Procedure (CPC) , 1908 - Order 41, Rules 2 and 33 - Order 6, Rule 17

Appeal No. : First Appeal No. 18 of 1979

Appellant : Hargovind Soni

Respondent : Ramdulari

Advocate for Def. : R.K. Patni, Adv.

Advocate for Pet/Ap. : R.C. Lahoti, Adv.

Judgement :

Rampal Singh, J.

1. The husband, aggrieved by the rejection of his prayer for divorce by the District Judge, Guna, by his judgment dated 31-1-1979, has preferred this appeal under Section 28 of the Hindu Marriage Act, (for short, hereinafter referred to as 'the

Act').

2. Respondent is his first wife who was barren for 12 years while living with the appellant-husband. According to the husband, on the advice and instigation, the appellant acquired a second wife, by marriage. But, after this second marriage, the differences between the appellant and respondent widened. At last, the caste Panchayat assembled on 24-6-1966, which decided that the appellant should pay a monthly maintenance to the respondent and should also provide shelter in his own home. But, on 28-4-1968, the respondent left her husband's home with bag and baggage and on 19-5-1978, started proceedings in a Court of law for maintenance. Ultimately, there was a compromise and the appellant was required to pay the respondent a maintenance amount :of Rs. 50/- p.m. According to the husband/appellant, he never cohabited with the respondent after 28-4-1968, but she delivered a boy on 12-3-1969 and a girl on 27-5-1975, and as she had voluntary sexual intercourse with other person or persons, he is entitled to get a decree for divorce on the sole ground of adultery.

3. The respondent in the trial Court accepted the factum of marriage, but repudiated the fact that she encouraged or persuaded the appellant to have a go at a second marriage with' one Saraswati, She strongly denied that she was guilty of adultery or she conceived and delivered children by some other man than the appellant. She vehemently and strongly asserted that the appellant, after the separation, visited her always and the two children are born from him. She also denied her alleged adulterous relationship with one Sheelchand.

4. The trial Court decided the important issues against the appellant and held in paras 6 and 7 of the impugned judgment that the two children born to the respondent are from the appellant himself. The witnesses of the appellant have been disbelieved and that of respondent have been relied upon. The respondent, according to the impugned judgment, is a woman of virtue and has never led an adulterous life.

5. The textual Hindu Law did not permit dissolution of manage. The Hindu Marriage Act created appropos marriage, a relation and status, not defined by contract, but by law. It has provided for the legal dissolution of marriage. So long

as such a divorce has not been obtained by one of the spouses, the marriage subsists. The law in the Act lays down as a ground for divorce, the respondent's sexual intercourse with another, after the solemnization of the marriage. In other words, it must have been a willing and knowing act consented to by the respondent in violation of the matrimonial obligation not to have sexual intercourse with any other person than the spouse. Sex loyalty to the spouse is a single loyalty and cannot admit of division or duality. Ground of relief under this clause is known as adultery in matrimonial law, though the clause does not use the term 'adultery'.

6. Adultery is generally proved by presumptive proof based upon (a) circumstantial evidence; (b) evidence of non-access and birth of children; (c) contracting venereal disease, and (d) confessions and admissions. In fact, adultery is seldom susceptible of proof except by circumstances which would lead to that conclusion. The birth of a child to the wife, when there was no access to her by husband during possible period of conception shows, no doubt, the adultery by the wife. But, it must be satisfactorily established that birth of the child was clearly as a result of adulterous intercourse. There must be a clear proof of adultery. Standard of proof to establish a matrimonial pffence like adultery is the satisfaction of Court beyond reasonable doubt. Adultery has also to be inferred from the circumstances which exclude any presumption of innocence in favour of a person against whom it is alleged. Proof of adultery must be of such character as would lead a reasonable man to conclude no other inference than the misconduct. Mere probability is not enough. No implicit reliance can be placed on the bald statement of the husband for recording a finding of adultery against wife.

7. During the pendency of this appeal, the appellant-husband, by an amendment application prayed for incorporation of the fact in the pleading that during the pendency of this appeal the respondent has again given birth to a child and this child is illegitimate. The said amendment was allowed. A similar application was filed by the appellant (LA. No. 1065 of 1979) on 1-5-1979, just after the birth of the third child to the respondent, alleging the same fact. The appellant, during the pendency of the proceedings in the trial Court filed several applications for blood grouping test to be carried out, but the respondent persistently refused and took the stand that she cannot be compelled and her children too to this test. No person

can be compelled to give a sample of blood for analysis against her will, and no adverse inference can be drawn against her for this refusal. But on 19-7-1985 the respondent agreed to this test by an application filed by her counsel. Consequently, this Court on 19-7-1985 directed the Professor of Pathology, G.R. Medical College, Gwalior, to take the blood samples of the husband and the wife and the three children and conduct the blood grouping test.

Dr. (Mrs.) Satya Monga carried out the said tests and attended this Court with the results. On 22-7-1985 her statement was recorded and parties were permitted to question her through the Court. She filed the results of different Blood Grouping Test Reports and gave the following opinion : --

'2. According to these reports, a child has to inherit the blood group of either the mother, or the father or both. In this case, the mother's (Smt. Ramdulari) blood group is 'O' and the father's blood group is 'B'. They are both 'Rh' positive. Rajkumar, aged 15 years, is of 'O' group and of 'Rh' positive. So it can be said that he could be the offspring of these two, i.e., Hargovind Soni and Smt. Ramdulari. He inherits the blood group of his mother and not of his father Hargovind Soni. He could be the son born from Hargovind or from any other person, the reason being that he has inherited the blood group of his mother.

3. Seema, aged about 10 years, also has 'O' group and 'Rh' positive like her mother. She has also inherited her mother's blood group and not the father's blood group. Therefore, Hargovind Soni could be the father of Seema, or any other person could also be the father.

4. Rajni, aged about 5 years, has 'A' group and is 'Rh' positive. Since the mother's blood group is 'O' and father's blood group is 'B', she could be born of this mother and not of this father, i.e., Hargovind. There is no possibility of Hargovind Soni being the father of this child. *** *** ***

6. Rajni has 'A' blood group and is 'Rh' positive. She does not seem to have inherited her mother's 'O' blood group like the other two children, nor she has inherited her father Hargovind Soni's 'B' blood group. The 'A' blood group, which Rajni has inherited, is of a person other than Hargovind Soni.

Question. Is this sign of blood grouping based upon the science of genesis or genetic basis?

Answer : --No further investigation is possible at Gwalior or in Madhya Pradesh about estimation of blood group examination. It is settled that a child has to have the blood group of either the father or of the mother or of both. Suppose the father is of A group and mother is of B group, then the child may have either A group or B group or AB group. AB group is a rare phenomenon. Only about 6% of the population may have AB group.

Though the blood group test is conclusive in nature, yet extended genotypic test should also be done to be 100% sure. But that facility is -not available in this Medical College or anywhere in Madhya Pradesh.

*** *** ***'

She is, thus, of opinion that first two children, i.e., Rajkumar and Seema, may be said to have been born from the appellant. It is, therefore, concluded that the blood grouping test is a perfect test to determine the questions of disputed paternity and can be relied upon by the Courts as a circumstantial evidence, which ultimately excludes a certain individual as a possible father of a child. But the youngest child Rajni aged 5 years has 'A' group and 'Rh' positive. So she could be bom of this mother but not from the husband-appellant, Hargovind. Hence, according to her (the Doctor), Rajni is born of a person other than appellant. When questioned on the subject, Dr.(Mrs.) Monga admitted that further scientific pathological investigations are not possible in Madhya Pradesh. On being questioned further, she admitted that though blood group test is conclusive in nature, yet extended genotypic test should also be done to be 100% sure. After her testimony was recorded, both the parties, though given an opportunity, refused to adduce any evidence on the point.

8. If this evidence is accepted then Rajkumar and Seema must be taken to be children born from the appellant but not Rajni. Hence, as held in the impugned judgment, the appellant cannot get any decree for divorce as the grounds with regard to Rajkumar and Seema have been found to be false. The impugned

judgment as has been handed over, that the allegation of adultery against the respondent has not been proved, has to be maintained, so far as paternity of Rajkumar and Seema is concerned.

9. Let us now examine whether on the strength of the evidence of Dr.(Mrs.) Monga, Rajni can be held to be born from a person other than the appellant? If so, the respondent can be said to have had sexual intercourse with a person other than her spouse. But whether the science of blood grouping test is so perfect on evidence that upon which it can be held that Rajni is a bastard and an illegitimate child born from a person other than the appellant? It has been observed in Ramchandra v. Shanker AIR 1968 Bom 388 :

'Blood grouping tests have their limitations. They may exclude a certain individual as the possible father of a child, but they cannot possibly establish paternity. They can only indicate its possibilities.'

In the case of Rajni, the appellant has been excluded as a possible father according to this judgment.

10. Dr. Israel Davidsohn and Dr. John Bernard Henry in their book 'Clinical Diagnosis by Laboratory Methods' 15th edition, while dealing with this subject in the chapter 'Blood groups and their application' are of following opinion :

'Factors A and B cannot appear in a child unless present in one or both parents.'

They have further expressed the general principles of exclusion of parentage in the following words : --

'Exclusion of Parentage. This application is based on the Mendelian inheritance of blood factors referred to previously. The following general principles must be understood in order to interpret properly blood grouping for possible exclusion of parentage.

1. Each person inherits one paternal and one maternal allele for each blood factor.

2. In logical consequence of this mode of inheritance.a person can be either homozygous or heterozygous for each blood factor.

3. In the case of blood factors it is possible to distinguish between homozygous and heterozygous whereas for other blood factors this is not possible.

4. A person cannot possess a blood factor that is absent from the blood of each father and mother. .

5. A blood factor cannot be absent in aperson if one of his parents is homozygous forthis factor.

6. If a parent is heterozygous for a factor of which both alleles can be demonstrated by suitable tests, his child must possess a blood factor corresponding to one of these two alleles.

By applying theseprinciples to ABO system persons with certain ABO groups can be excluded from parentage *****,'

11. This distinguished medical opinion of eminent authors on the subject fully supports the evidence tendered by Dr.(Mrs.) Monga. Furthermore, Taylor's 'Principles and Practice of Medical Jurisprudence' 12th edition, in Chapter 6 at page 46 is of the opinion that 'Acceptance by the Courts of the hereditary transmission of the blood groups on Mendelian principles has opened up a new vista in the field of paternity issues at law. The three allelomorphic genes A, and its sub-groups, B (which are dominants) and O (which is recessive), form the AA, AO, BB, BO, AB and OO combinations which are normally termed A, B, AB and O. These allelomorphic genes are inherited on strict Mendelian laws, and furnish the basis of what are sometimes known as the 'Bernstein Laws.' Dr. Taylor concludes the chapter by observing the importance of the necessity for expert knowledge and laboratory experience in disputed paternity work, and also for the need for sera of absolute reliablility. Though Dr. Modi has also probed the subject, but not as deeply and thoroughly as the above-noted.

12. But keeping in view the provisions of Section 112 of the Indian Evidence Act, it can be said that the fact of non-access could be established not merely by positive or direct evidence, it can be proved undoubtedly like any other physical fact by evidence either direct or circumstantial, which is relevant to the issue under the

provisions of Evidence Act, though, as the presumptipn of legitimacy is highly favoured by law, it is necessary that proof of non-access must be clear and satisfactory. That was the view of Hon'ble the Supreme Court in Chilukuri's case AIR 1954 SC 176. Yet with the development of science, the Supreme Court in Dastane v. Dastane AIR 1975 SC 1534 elaborated the subject further on the point of the standard of proof of adultery. This Court's Full Bench judgment in Lalit Lazarus v. Lavina Lazarus 1979 Jab LJ 299 : (AIR 1979 Madh Pra 70) is as under :

'Previously the view was that the matrimonial offences have to be proved by the petitioner beyond doubt but recently the view has been modified and it has been held that petitioner is only required to prove his case by preponderance of probabilities and the degree of probability depends on the gravity of the offence.

It is wrong, therefore, to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery, like any other fact on which irretrievable breakdown of marriage is concerned, may be proved by a preponderance of probability; and although it has been said that in proportion as the offence is grave, so ought the proof to be clear, and that even in these days there is a stigma in adultery, nevertheless views on adultery have changed and it no longer generally entails the serious social consequences that in some former times resulted from its discovery.'

13. The amendment in the pleading of the appellant is based upon the subsequent event; yet this Court must take cautious cognizance of events and developments subsequent to the events of the proceedings. AIR 1975 SC 1409. The rule of fairness in this case has been scrupulously observed while taking the cognizance of the subsequent event. Appeal is the continuation of a proceeding and a proceeding culminates in ultimate end only in an apex Court of the country. Hence, subsequent event during the pendency of an appeal, if properly pleaded and proved, cannot be ignored.

14. Shri R.C. Lahoti, learned counsel or the appellant, has cited a judgment of this Court in Kewal Ram v. Jiji Bai (1984) 1 DMC 336; AIR 1969 Mad 235 and other

cases in support of the fact of non-accessibility. This argument of Shri Lahoti was repelled by Shri R.K. Patni, learned counsel for the respondent, that the presumption under Section 112 of the Evidence Act is in favour of the wife. Be that as it may, Section 112 of the Evidence Act has to be interpreted and applied with reference to the facts arid circumstances of each case in order to find out whether really there was an opportunity of sexual intercourse or not. If the husband has established that he had no sexual intercourse with-his wife, he need not prove further that he had no opportunity.

15. The trial Court has held in this case that the first two children were born from the appellant. This fact has further been corroborated by Dr.(Mrs.) Monga. But the last child Rajni, as shown hereinabove, was not born from the appellant. This fact was based upon subsequent event and the parties were afforded an opportunity to adduce their evidence. Appellant and the respondent both have deposed before the trial Court on remand after the incorporation of the amendment based upon subsequent event. Appellant deposed specifically that the third child was not born from him, while the respondent has repelled this fact. But the blood Grouping Test, which is in the nature of circumstantial evidence, does not favour of the respondent. Hence, the appellant's contention has to be upheld and the evidence of respondent in this respect has to be rejected. The net result is that the third child Rajni aged 5 years was not born from the appellant but from some unknown other person. Hence, the respondent had voluntary sexual intercourse with a person other than her spouse, as a result of which Rajni was born to her. The appellant is, thus, on this ground alone, entitled to get a decree of divorce from the respondent. But his hands are dirty with matrimonial offence. He is already having a second wife, and on this ground alone he can be refused any relief. But this situation needs to be viewed from three dimensional aspects. Appellant has fathered two elder children with the respondent and called them to be bastards. He has been found telling a lie in this regard. Respondent too has been found to be unreliable as far as the birth of Rajni is concerned. This jumbled stalemate and contaminated situation has to be solved by this Court in the interest of justice. Appellant does not want to be with the respondent, but she clings to him. The appellant fathered two children with the respondent while keeping in his bed another wife. The respondent out of physiological urge cannot refrain from keeping

away with having sex with other person. No doubt, sex is a strong natural euphoric urge, yet it has to be regulated within the four corners of social norms and the law. Appellant had taken another wife under the false pretext of having the tacit consent of the respondent. Travesty of fate is that till the parties were living together for long 12 years, they, for this long time, could not get the fruits of conception. But the moment the appellant took another wife, the respondent became fertile and appellant became seedy.

16. This Court is in a dilemma as to whether to grant the relief of divorce to the appellant, while his hands are dirty with matrimonial offence. But the unfortunate respondent, who has suddenly became fertile and cannot resist another man, should not be allowed to be tied down with the appellant for life. No doubt, status quo is not the demand of justice. It is also not the demand of social norm. Status quo will further stagnate the life of these parties. Both need release from the religious and legal bondage, and to prevent further bigotry, falsehood and fornication, it is just and proper to separate them now, before further damage is done. The real damage is done to Rajni, aged 5 years, innocent who does not even know as to who her father is. My heart bleeds for her. The legendary sexual urge of a female has burdened this society with Rajni. May God bless, this innocent child and grant her with fortune, intelligence and divine and, thus, to become a legendary woman of this country. My heart goes out to her predicament.

17. The ultimate culmination of the abovenoted thoughts of mine results in finality and I, accordingly, allow this appeal partially. The impugned judgment and decree to the extent that appellant is father of Rajkumar and Seema is maintained. But it is held that he is not the father of Rajni. It is further held that Rajni was conceived by the respondent from someone unknown other than the appellant: hence, a decree of divorce is granted in favour of the appellant and against the respondent.

18. This decree of divorce is going to cost the appellant heavily. Keeping in view the appalling condition of inflation, under the provisions of Section 25 of the Act, I direct that the appellant shall pay a, permanent alimony to his wife-respondent, Rs. 150/- per month from the date of this judgment. He shall further pay a sum of Rs. 100/- p.m. to Rajkumar and Rs. 100/- p.m. to Seema for their maintenance,

health and education till they become major, married or employed. This total amount of Rs. 350/- p.m. shall, positively, be deposited by the appellant in the Court of the District Judge on the 11th day of each month. In the event of failure, this condition shall be rigorously enforced by the District Judge. Appellant shall bear all the cost of this litigation throughout. While granting this decree of divorce, I direct that the respondent shall have exclusive custody of Rajkumar, Seema and Rajni under Section 26 of the Act and the respondent shall collect her alimony as well as the maintenance amount on behalf of her two children from the Court of the District Judge.

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