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Chiruthakutty Vs. Subramanian

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Court : Kerala

Decided On : Jul-03-1986

Reported in : AIR1987Ker5

Judge : V. Sivaraman Nair and; K. John Mathew, JJ.

Acts : Hindu Marriage Act, 1955 - Sections 13(1); Evidence Act, 1872 - Sections 112

Appeal No. : M.F.A. No. 65 of 1981

Appellant : Chiruthakutty

Respondent : Subramanian

Advocate for Def. : P.K. Musa, Adv.

Advocate for Pet/Ap. : K.K. Ravindranath and; Mathew Cheriyan, Advs.

Disposition : Appeal allowed

Judgement :

John Mathew, J.

1. The respondent (wife) in an application for divorce under Section 13 of the Hindu Marriage Act, 1955(hereinafter referred to as the Act) is the appellant. The lower court has allowed divorce under Section 13(1)(i) of the Act after entering a

finding that after the solemnization of the marriage the appellant herein had voluntary sexual intercourse with some person other than the respondent herein.

2. The respondent married the appellant in March, 1969. As per the averment in the petition, three children were born to them out of this wedlook. The respondent underwent vasectomy operation on 8-1-1976. Thereafter the appellant and respondent lived together. On 30-8-1978 the appellant gave birth to another child. The allegation is that the appellant was having illicit connection with others and she became pregnant out of it and therefore she had committed adultery. Divorce was prayed for on that ground.

3. In the counter filed by the appellant she denied the allegation of adultery. Hercontention was that the child born on 30-8-1978 was begotten through the respondent and none else.

4. So, the question to be decided is, whether the finding of the court below that the appellant is guilty of adultery is correct.

5. The evidence consists of the oral evidence of P. Ws. 1 to 5 and R. W. 1 and Exts. A-1 to A-8. P. W. 1 is the petitioner himself. He has given evidence to the effect that in 1976, January, he underwent vasectomy operation. On 20-8-1978 he took his wife to her house for delivery. He swears about the tests he underwent and also proves the documents produced by him in support of his contention that he is sterile after the vasectomy operation. In cross-examination he has spoken that doubts about the chastity of his wife started only in 1977. He also speaks about the maintenance case filed by the appellant against him before the Magistrate's Court. In the last portion of his cross-examination he has stated that he is willing to maintain the 4th child of the appellant and also to live with her as husband and wife, provided she admits that she has committed adultery.

P. W. 2 is the Doctor who issued Ext. A-3 certificate on the basis of the result of the examination of the semen of the husband on 29-1-1970. He gave the requisition for theexamination to the Public Health Laboratory, Calicut. After examination the husband brought the result of the analysis to P. W. 2, which is marked as Ext. A-2. He has given evidence to the effect that as per Ext. A-2 his

semen contains no sperm and so he is incapable of procreation. On that basis he issued Ext. A-3 certificate. In cross-examination he has stated that he found a scar at the place where vasectomy operation was said to have been done on the husband. He has stated that similar scar can be seen for other reasons also. He has further stated that he cannot say as to when exactly the sterility started in this case. Sperms will be present even after the vasectomy operation, if the operation is not successful. He had no occasion to examine the husband before this examination. Believing his words that he has got children before the operations, P. W. 2 has given evidence that he became sterile after the operation. The petitioner had shown Ext. A-1 certificate to P. W. 2 when he met him. Ext A-1 certificate is the duplicate certificate issued to the petitioner by the Assistant Medical Officer of Health, Kozhikode, after the vasectomy operation.

P. W. 3 is the Doctor who was the Convenor of the Santhosh Trophy Mini Camp, Calicut, which was a camp for male sterilisation. P. W. 3 has issued Ext. A-1 duplicate certificate. As per the evidence of P. W. 3 he has performed Vasectomy operation on one I. Subramoniam, 26 years, Bangalath P. O., Moreyoor, via. Kondotty, Malappuram District on 8-1-1976, as per acquittance No. 962. He proves Ext. A-1. In cross-examination he has stated that he was not shown any identification mark of the person operated upon. He has also stated that there is a chance of 1% failure in Vasectomy operations. P. W. 4 is the Medical Officer in the Regional Public Health Laboratory, Calicut. The husband met, him with the requisition of P. W. 2 on 29-1-1979. He proves the report of the Analyst, namely Ext. A-2. He also speaks about another examination of the husband's semen on 22-9-1979. The report of that analysis is Ext. A-5. The analysis was done by the Scientific Officer in the Laboratory. In Ext. A-2 the identification marks of the husband and his address are not given. The semen was not taken in the presence of P. W. 4. He has not signed Exts.A. 2 and A-5. P. W. 5 is the Technician in Manjeri Clinical Laboratory, where the husband's semen was examined on 20-5-1978. He proves Ext. A-8 which is the result of the examination.

6. The wife was examined as R. W. 1. From her evidence it is seen that the husband and wife were living together for 11 years and thereafter the wife is residing in her father's house. She was taken to her father's house for her 4th

delivery, when she was 7 months pregnant. After her 4th delivery she was not taken back to the husband's house. She denies the allegation that the 4th child is not the child of her husband. She also denies the allegation that she has sexual intimacy with any man other than her husband. She has also spoken that after she became pregnant for the 4th time, she consulted a Doctor. She was residing in her husband's house till her 7th month of pregnancy and only thereafter she was taken to her house.

7. Section 112 of the Evidence Act is as follows :

'The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when ,he could have been begotten.'

8. The word 'access' was interpreted by this Court in Chandramathi v. Pazhetti Balan, AIR 1982 Kerala 68 : 1981 Ker LT (Short Notes) 104 as follows :

'Section 112 provides for conclusive proof of legitimacy of a child born during the continuance of a valid marriage. The only exception contemplated by the section is proof that the parties to the marriage had no access to each other at any time when the child could have been begotten. That the husband had undergone a successful vasectomy operation is a circumstance which will negative the. presumption of the paternity of the child that could have been begotten only after such operation was evidently not envisaged at the time the Section was enacted. The answer, perhaps is that the term 'access'has to be understood as opportunity to procreate and not merely opportunity for sexual intercourse.'

No doubt if the wife gives birth to a child and it is proved that the husband could not be the father, that will be sufficient proof of adultery. However, in order to rebut the conclusive presumption under Section 112 of the Evidence Act, there should be conclusive evidence that the husband could not be the father of the child. In this case the conception of the 4th child of the appellant herein was in or about

November, 1977. There is absolutely no evidence about the sterility of the respondent at that time. What the respondent has sought to prove is only that he underwent a vasectomy operation on 8-1-1976. But there is no evidence to prove that it was a successful operation. The earliest of the tests was only on 20-5-1978 and the result of the examination is Ext. A-8. Ext. A-2 and Ext. A-5 tests were conducted only in January and September, 1979 respectively. In Ext. A-8 it is mentioned that the semen was received at 1.30 P.M. and it was examined at 4 P.M. That the delay has not affected the result of the examination is not attempted to be proved by the respondent. P.W. 5 who is the Technician who proves Ext. A-8 has admitted that the semen was not taken in his presence. So it cannot be conclusively held that the semen was taken from the respondent. P.W. 2 issued Ext. A-3 certificate only on the basis of Ext. A-2 which is the result of the analysis. There is no evidence that the analysis was properly done. The analyst who prepared Ext. A-2 is not examined. The Scientific Officer who prepared Ext. A-5 report is also not examined.

9. The presence of Spermatozoa will depend also upon several circumstances like whether the person is suffering from any disease like Mumps, Venereal disease or Tuberculosis. There is a possibility of mistake and also a possibility that the respondent gave the semen of another person for examination. It may be observed that the certificate was obtained to advance the respondent's case and not as per any direction from court. That is all the more reason why the certificate should not be accepted without conclusive evidence regarding the above stated facts.

10. The book 'The Infertile Couple' which is a clinical account of male and female infertility, written by an international team of 19 experts and edited by R. J. Pepperell, Bryan Hudson and Carl Wood deals with semen analysis in the following manner, at page 83 :

'The limitations of semen analysis must be recognized; The first point that should be made is that the laboratory which performs the analysis must have the expertise to do this. Although this may seem self-evident, semen analyses are performed in many laboratories that lack this expertise because they are not

requested to undertake such analysis on a regular basis. Even in a laboratory with experience and expertise, the errors of measurement are often quite large. Thus sperm density is most usually estimated by counting sperm in a haemocytometer and the final figure depends upon the number of sperm counted: variations as high as +-20 per cent are not uncommon between different technicians. Sperm motility and morphology are usually assessed subjectively. The limitations require that results be interpreted with caution. Abnormal semen samples require repeated assessment and we recommend that at least three samples be examined. The prognosis for fertility of an individual patient is certain only when there is persistent azoospermia or complete absence of motility, for if there are any motile sperm present the man might produce a conception.'

At page 85 it is also stated thus :

'General appearance.-- Although many laboratories make comments on the general appearance of the semen sample the significance of reported abnormalities is not always known. When ejaculated, semen is liquid, but coagulates to a gel immediately. The semen liquefies again as a result of enzymatic action within 10 to 20 minutes and thereafter remains in a viscous state. If the semen sample does not liquefy, which is not a common problem, sperm are not able to achieve normal motility.

After liquefaction the semen sample remains quite viscous. Samples with abnormal viscosity cannot be easily poured into a graduated cylinder and may be seen as a thick semi-solid mass on which it may beimpossible to do sperm counts and in which sperm become egglutinated and are unable to achieve normal motility. The causes of abnormalities in viscosity are not known but may indicate disorders, of accessory gland function.'

In Williams Obstetrics (Sixteenth Edition, by Jack A. Pritchard and Paul C. Macdonald) Page, 1037 it is observed as follows ;

'A major disadvantage of vasectomy is that sterility is not immediate. Complete expulsion of sperm stored in the reproductive tract beyond the interrupted vas deferens may take a week to several months. The time appears to depend in part

on the frequency of ejaculation. Semen should be checked until two consecutive sperm counts are negative. During this period, another form of contraception must be used. The failure rate for vasectomy is estimated to be about 1 to 100 (Population Reports, Jan., 1975).'

11. Therefore it is very important to keep in mind that error is likely to result if the analysis is performed in laboratories which lack expertise to do the test and do not observe the conditions under which the semen is collected and preserved till its analysis. So also tests have to be repeated to eliminate errors. In this case there is no evidence that the tests were done properly. P.W. 3 also has stated that there is a chance of 1% failure in vasectomy operations. In none of these certificates the identification marks of the respondent are given in none of these cases semen was taken in the presence of the person who examined it. Considering the entire evidence in this case we hold that the respondent has not proved that in or about November, 1977 when the 4th child of the appellant was conceived, he was unable to procreate.

12. There is another circumstance in this case namely that the appellant and respondent were living together till the 7th month of pregnancy which is the usual month when the wife is taken to her house for delivery. In case the husband had any doubts about the chastity of the wife, normally the husband would not have allowed the wife to reside with him till this advanced stage of pregnancy. Moreover, as P.W. 1 the respondent has stated that he is willing to maintain the 4th child ofthe appellant and also live with her as husband and wife, provided she admits that she has committed adultery.

13. Under the above circumstances we hold that the respondent has not established that the appellant is guilty of adultery. The finding of the lower court to the contrary is not sustainable and is hereby set aside. The result is that this appeal is allowed and O.P. (H.M. A.) 70 of 1970 before the District Judge, Manjeri, is dismissed. There will be no order as to costs.

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