

Sivadasan Vs. Govindan

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Court : Kerala

Decided On : Mar-12-1985

Reported in : 1985CriLJ1553

Judge : S. Padmanabhan, J.

Appellant : Sivadasan

Respondent : Govindan

Judgement :

ORDER

S. Padmanabhan, J.

1. The illegitimate child of the respondent & the revision petitioner. The short question for consideration is whether the presumption under Section 112 of the Evidence Act is irrebuttable and whether that presumption will always stand in the way of an illegitimate child claiming maintenance from the putative father.

2. The revision petitioner, a minor child, by name Sivadasan, was born to Sreemathi, who had a former husband by name Sankaranarayanan. Sankaranarayanan married Sreemathi in 1974. The allegation is that after a few months of the marriage, Sankaranarayanan left Sreemathi and thereafter he was not heard of and he had no access to her. The further allegation is that subsequently the respondent Govindan alias Unnikurup developed intimacy with

Sreemathi and they were living like husband and wife at the residence of the respondent. In that alliance, Sreemathi became pregnant and the revision petitioner was born. Sreemathi for herself and on behalf of her minor son filed M.C. 106 of 1978 on the file of the Judicial Magistrate of the First Class, Tirur, under Section 125 of the Cr. P.C., for maintenance. ,

3. On the side of the petitioners, four witnesses were examined and 13 documents were produced. The respondent examined two witnesses and proved three documents. The learned Magistrate considered the entire evidence and rejected the claim of Sreemathi for maintenance on the ground that she is not having marital status as wife of the respondent. On the further finding that Sankaranarayanan had no access to Sreemathi during the relevant period and the only person having access to her was the respondent he was fixed with paternity and ordered to pay monthly maintenance of Rs. 60/- to the child. Sreemathi did not challenge the order against her and it became final. The matter was taken up in revision by the respondent before the Sessions Judge, Manjeri. The Sessions Judge allowed the revision and dismissed the petition on the basis of the presumption under Section 112 of the Evidence Act.

4. Admittedly, Sreemathi was married by Sankaranarayanan in 1974 and the marital relationship was not terminated. That means the valid marriage between Sreemathi and Sankaranarayanan was subsisting even when the child was conceived and born, but the definite case of Sreemathi was that in spite of the continuance of the marriage Sankaranarayanan had no access to her after less than six months of the marriage since he left her and was not heard of thereafter. On that ground and on the further ground that the only person who had access to her at the time when the child could have been begotten was the respondent, she claimed maintenance for the child from him. Sreemathi admits that she was not married by the respondent.

5. PW. 1 is Sreemathi herself and PWs. 2 and 3 are two independent neighbours. It is proved beyond doubt by them that after a few months of the marriage between Sreemathi and Sankaranarayanan, the former was deserted by the latter and the latter was not thereafter heard of. That means in spite of valid marriage non-

access to each other at any time when the child could have been begotten is established. Coupled with this it is clear from their evidence that some sort of intimacy developed between Sreemathi and the respondent and Sreemathi was residing in the house of the respondent practically as his wife. That they were having free sexual connection at the residence of the respondent has also been amply proved by the evidence of PW. 1, supported by the facts deposed by PWs. 2 and 3 and the attendant circumstances brought out by their evidence. There are certain documents also probalising the evidence of PWs. 1 to 3. Further we have got the evidence of PW. 4 and the admissions of the respondent as RW. 2. The learned Sessions Judge did not care to consider the above-said evidence at all. He simply brushed aside the documentary evidence as love letters which need not be considered.

6. In my opinion, the learned Sessions Judge has rather refused to exercise the jurisdiction vested in him. Sreemathi, who was examined as PW. 1, is undoubtedly competent to swear regarding non-access of Sankaranarayanan and the access the respondent had to her. She has spoken to those facts. The question then is whether she could be believed. My answer, especially in the light of the depositions of PWs. 2 to 4 and the documentary evidence and circumstances, is on the affirmative and in agreement with the Magistrate. PW. 4 is a police constable deputed to serve summons on Sankaranarayanan. His evidence and Ext.: P12 (a) endorsement on the summons recorded by him show that Sankaranarayanan was not heard of for more than five years prior to the date when summons was taken. Coupled with this there is the admission of the respondent as RW. 2 that Sankaranarayanan was not available in the locality and information about him had to be collected from his mother. Added to this there is the further statement of the respondent as RW. 2 that he cannot deny the evidence of PWs. 1 to 3 that Sankaranarayanan was not heard of as spoken to by them. Nothing more is required to probalise the version of PWs. 1 to 3.

7. The learned Sessions Judge was attempting to rely on Exts. R1(a) and R2 which refer to the relationship of Sreemathi and Sankaranarayan as husband and wife. At the same time Ext. P1 birth certificate of the minor child wherein the respondent was described as the father was ignored.

8. Exts. P4 to P11 are the other documents relied on by the learned Magistrate along with the depositions of PWs. 1 to 3 in order to find that the respondent is the father of the minor child. These documents were simply ignored by the Sessions Judge with the sweeping remark that they are love letters.

9. Ext. P4 is a family photograph of the respondent: In that photograph, along with the members of his family, Sreemathi is also there. The respondent admitted that his mother is very much fond of Sreemathi and it may appear from Ext. P4 that she is being treated as his wife. He said 'Ext. P4 (Matter in vernacular omitted - Ed.). There is a case for Sreemathi that after the birth of the minor child the respondent attempted to desert her and there was a mediation as a result of which the respondent paid Rs. 500/- and thereafter maintenance to the child at the rate of Rs. 50/- per month for some time. This fact has been spoken to by PWs. 1, 2 and 3. Even though the respondent denied these facts, while examined as RW. 2, he had to admit at atleast to some extent that the above evidence is correct. Ext. P5 is a letter written to him by one Jayakrishnan in which reference is made to PW. 1, treating her as a member of the family of the respondent. Likewise, Ext. P6 is a letter written by the respondent's brother. That letter was written stating that it was intended to be read by Sreemathi and the respondent's mother. Ext. P7 is a letter written by the respondent to Sreemathi and Ext. P8 is another letter written to her by him. In these letters, he had expressed his desire to bite the lips of Sreemathi. He admitted that he was addressing Sreemathi as 'Sree'. In Ext.P8, he has written that he was always dreaming about Sreemathi and the child. In some of the letters written by him, there are references to the amounts sent by him to Sreemathi and the child for their maintenance. A reading of the entire deposition of the respondent as RW. 2 shows that the letters were not merely love letters and that they eloquently speak regarding the relationship which the respondent was having towards Sreemathi. He had also to admit that in Ext. P8 he has stated that he had occasion to pledge the ornaments of Sreemathi. It was in the background of such evidence that the learned Magistrate found that during the relevant period Sankaranarayanan had no access to Sreemathi and that the only person who was having access to her was the respondent. On that basis the learned Magistrate awarded maintenance to the child. The finding is unassailable.

9A. In revision, these aspects were not at all considered by the learned Sessions Judge.

10. The learned Sessions Judge went under the 'impression that the presumption under Section 112 of the Evidence Act is not rebuttable and that when there is the subsistence of a valid marriage it is impossible to attribute paternity to anybody else. I am of opinion that the approach made by the Sessions Judge is wrong.

11. It is true that the presumption under Section 112 of the Evidence Act is very strong. Section 112 of the Evidence Act reads:

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 parties to the marriage had no access to each other at any time when he could have been begotten.

12. Even though the presumption is stated to be conclusive, the Section itself says that conclusiveness is subject to proof of non-access at any time when the child could have been begotten. Here the proof of non-access is from the close of 1974 and the child was born only in 1976. The evidence is that at any time when the child could have been begotten, the only person having access to PW. 1 was the respondent and Sankaranarayanan did not have access.

13. What Section 112 of the Evidence Act lays down is a rule of prudence which is in accordance with the-rule of natural justice. Subsistence of a valid marriage involves mutual rights and obligations. Husband is entitled to the company of the wife and the wife is entitled to keep aloof only when she is justified in doing so. Husband is having conjugal rights against the wife and he can legally enforce the same. In a cultured society, chastity is the rule and lapses from virtue is the exception. Presumption of law could always be only in favour of the rule and not the exception. Exception is something to be proved in each case depending upon the facts and circumstances. Morality and innocence are legal presumptions which could be accepted as a matter of course and the converse are matters to be proved by positive evidence. This is the basis of the presumption of paternity

which is available only to an offspring of a legally wedded couple. Lapses from virtue and non-access are matters for proof and not for presumption. The presumption which is the basis of the section is that he is the father whom the marriage indicates. That presumption arises from the conception in favour of marriage and against concubine in a civilised society. The presumption is in favour of legitimacy and against bastardy. Public policy demands such a presumption. Law in general presumes against vice and immorality. The legal presumption that he is the father whom the nuptials show to be so is the foundation of every one's birth and status. These are the basic features on which the presumption embodied in Section 112 of the Evidence Act rests.

14. But that presumption could definitely to be rebutted by adducing evidence. When either by admission or evidence non-access during the relevant period is proved and access of the paramour is established, the presumption is rebutted. It is not necessary in every case that the marriage should be dissolved before a paramour could be held to be father of the child. When a married woman has admitted or proved to have lived for years with a man other than her husband and when it is further admitted or proved that he was the father of the child or children born during that time, the presumption of legitimacy must be taken as rebutted. Lapses from virtue and non-access of the husband, though they are exceptions to the normal rule, are matters capable of proof in individual cases. Incarceration in jail, physical ouster by a paramour or non-access by distant residence are possible instances.

15. In *Dr. Chathukutty v. Janaki Amma* 1972 Ker LT 1020 : 1972 Cri LJ 696 an identical case was considered. It was held:

The presumption is a rebuttable one. It is open in a particular case to show that despite the subsistence of a valid marriage the husband had no access to the woman at the concerned period and the child was born to the paramour. It is not impossible for a child to be born to the woman by her paramour when her marriage is subsisting. The mother of the woman has deposed that the husband is not heard of for more than 20 years and there is no evidence to the contra. If, in fact, the husband is alive and employed at Tarur as deposed by C.P.W. 4, there

was absolutely no difficulty to get at him and clear the mystery surrounding him. There is no legal bar to the child claiming maintenance against its mother's paramour even though the mother's marriage has not been dissolved.

It follows that in spite of the subsistence of a valid marriage, it is open to the parties to prove that the husband had no access to the woman at the concerned period and the child was born to a paramour. It is not impossible for a child to be born to a woman by her paramour when her marriage is subsisting.

16. So also, a similar case came up for consideration in *Sreenivasan v. Kirubai* : AIR1957 Mad160 , wherein it was observed (At pp. 380-81 of Cri LJ):

it is not quite impossible for children born to a married woman to be legally held to be the progeny of a paramour. The presumption under Section 112, Evidence Act, though no doubt a strong one, is not conclusive and can be rebutted, by proving that, at the time when the children or any of them could have been conceived, the husband could not have had access to his wife, either by reason of being imprisoned in some distant place, or, by reason of having never visited the house owing to his disgust at his wife's immorality and having therefore permanently severed all sexual relations with her or for such other reasons. It is not necessary in every case that the marriage should be dissolved before a paramour can be held to be the father of the children, if the paramour is keeping his wife as his concubine, and the husband is driven out of the house and rigidly kept away from approaching the wife, so that he may not interfere with the immoral activities of the paramour, the paramour may well be held to be the father of the children born thereafter though the marriage is not dissolved.

It follows that even though the presumption under Section 112 of the Evidence Act is a strong one, it is not conclusive. That presumption could be rebutted by proving that at the time when the child was born or at the time when the child was conceived, the husband could not have had access to the wife for any reason.

17. In *Kalla Maistry v. Kanniammal* : AIR1963 Mad210 , the same principle has been laid down:

The rule that continuance of a valid marriage will prevent an inference being drawn to the effect that the children born of the woman during the continuance of the valid marriage were born to another man as a result of adulterous intercourse is only a rule of evidence and not a conclusive presumption. It is open in a particular case to show that despite the subsistence of a valid marriage, the husband had no access to the woman at the concerned period and the children were born to the paramour.

18. So far as this case is concerned, there is ample evidence to show that even though the marriage between Sankaranarayanan and PW. 1 Sreemathi was subsisting, Sankaranarayanan was not having any access to Sreemathi. The respondent was the only person having access to her and even in the absence of a valid marriage they were residing as husband and wife. By his conduct, the respondent was treating himself as the husband of Sreemathi and he was also considering himself as the father of the child. Nothing more is required to show that the child was born to him. Even an illegitimate child is entitled to get maintenance from the putative father is a proposition, which cannot be disputed. Therefore, the learned Sessions Judge was wrong in refusing maintenance to the child and the Magistrate was correct in his finding in this respect. The finding of the Magistrate has to be restored.

19. The Magistrate has only awarded maintenance at the rate of Rs. 60/-. There is evidence even from the admissions of the respondent while examined as RW. 2, that he is having sufficient means to maintain the child at that rate. This has been spoken to by PW. 1 and other witnesses also. The amount awarded cannot be said to be excessive when considering the means of the respondent and the needs of the child. Therefore, I am inclined to restore the order of the Magistrate.

Hence, the revision is allowed and the order of the Magistrate is restored. There will be an order for maintenance to the child at the rate of Rs. 60/- per month from the date of the order. Sreemathi will be entitled to realise the amounts on behalf of the minor child.