Mathew Vs. Annamma Mathew

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Court : Kerala

Decided On : Nov-17-1993

Reported in : I(1994)DMC525

Judge : Jagannadha Rao, C.J. and; K. Sreedharan, J.

Acts : Indian Divorce Act, 1869 - Sections 10, 18 and 19; Evidence Act, 1872 - Sections 4 and 112

Appeal No. : C.M.P. No. 20290 of 1992 in O.P. 13049 of 1991

Appellant : Mathew

Respondent : Annamma Mathew

Advocate for Def. : O.V. Radhakrishnan, Adv.

Advocate for Pet/Ap. : K. Jagadisachandran Nair, Adv.

Disposition : Petition dismissed

Judgement :

Jagannadha Rao, C.J.

1. The Miscellaneous Petition has been referred to a Division Bench by the learned Single Judge by order dated 15.3.93. The main petition, OP 13049 of 1991 is a petition filed on 13.12.1991 in the High Court by the petitioner Mr. A.T.

Mathew against his wife Mrs. Annamma Methew for declaring their marriage dated 28-10-1979 as null and void, under Sections 18 and 19 of the Indian Divorce Act, 1869. Earlier, the same petitioner had filed OP 153 of 1986 in the District Court, Kottayam under Section 10 of the Indian Divorce Act, 1869 for divorce. The said OP has since been transferred to the High Court and has been re-numbered as OP 14997 of 1992.

2. CMP 20290 of 1992 is a petition filed by the petitioner-husband in the newly filed (in the High Court) OP 13049 of 1991 for declaration of the marriage as nullity under Sections 18 and 19. The petitioner and the respondent were married on 28-10-1979. The substantive allegation now made in 1991 is that on the same night, the respondent-wife told the petitioner-husband that she was pregnant and it was through one James. So, it is said, the petitioner refrained from sex with her and, therefore, there was no occasion for the respondent becoming pregnant though the petitioner. It is then stated that recent discoveries have made it possible to find out whether a particular child is the son of its putative father. It is called DNA finger-printing. The Centre for Cellular and Molecular Biology at Hyderabad, it is stated, has developed a test which, according to one scientist Mr. Lalji Singh, is absolutely fool-proof. For the purpose of the said test 10 ml each of the blood of the putative father, the mother and the child are to be taken and preservative added and identified and then handed over for analysis under orders of Court. The cost of analysis is said to be Rs. 1,200/- for every 10 ml of blood. Petitioner states that he is prepared to bear the expenditure for the tests and also for travel, transportation, evidence etc. He states that the test will reveal that the petitioner is not the father of the child (now 13 years old) delivered by the respondent. Hence the respondent should be directed to produce the child born on 11-7-1980 before Court and that, under directions of the Court, the blood sample of the child and the respondent must be taken and then the same, along-with petitioner's blood sample must be sent to the above said institution at Hyderabad.

3. This Petition is opposed by the respondent for various reasons. It is pointed out that the petitioner and respondent were married solemnly on 28.10.1979 and that a male child was born to this wedlock on 11.7.1980 and the petitioner is the father of the child. The petitioner filed OP 153 of 1986 in District Court, Kottayam,

admitting the factum of a valid marriage and after stating that the respondent confessed on the very first night of having contact with her cousin, one James, the petitioner admitted that 'to save faces, the first respondent was allowed to stay at the house of the petitioner for some time. It was stated in OP 153 of 1986 by the petitioner that after 19.7.1980, the respondent was having intimacy with several persons and that from 1984, she was living as mistress of Thankachan (second respondent in that OP) and was guilty of adultery and, therefore, the marriage should be dissolved. It is pointed out in the counter affidavit that James was out of India from 13.5.1979 to 23.7.1980 as is clear from his Passport, that the petitioner and respondent lived together, and later she became pregnant. The child was delivered 274 days after the last menstruation and 259 days after marriage. The petitioner deserted the respondent and the child on 19.7.1980 and has contracted a marriage with another. The respondent filed M.C. No. 6 of 1992 CMC 39/84) before the Judicial First Class Magistrate, Kottayam for maintenance. In that case, the Magistrate held that the child was born to the petitioner and the respondent after their marriage. Crl. R.P. 45 of 1985 filed by the petitioner was dismissed by the District Court, Kottayam. The respondent filed OS 292 of 1983 before the Sub Court, Kottayam for return of Streedhanam and past maintenance. In the written statement there, petitioner bad no case that the respondent had made any confession (nor was such a case set up in the M.C. case. There the case was that he come to know of the pregnancy after four months). There the petitioner raised this very question. The suit was decreed and the decree was affirmed by the High Court in A.S. 216 of 1986 dated 23 6,1986 and it was categorically found that the child was legitimate. Section 112 of the Evidence Act was applied. The District Court and the High Court also accepted that the petitioner was keeping a mistress by name Moly through whom he begot two children. The petitioner was made liable for maintenance. In divorce OP 153 of 1986 for divorce, the petitioner had no case that his consent for the marriage was obtained by fraud ' or force.

4. Earlier, the petitioner filed IA 1232 of 1990 in OP 153 of 1986 before the District Court for directing this very respondent to produce her child for obtaining blood sample for DNA finger-printing and for sending the same to Hyderabad. The IA was dismissed on 10.8.1990 and CRP 1631 of 1990 was filed and withdrawn for filing separate petition.

5. The point for consideration is whether, in the light of the above facts and Section 112 of the Evidence Act, the petitioner can seek a direction from this Court for compelling the respondent and her child to give their blood for DNA finger-print testing ?

6. It will be noticed that, admittedly, the marriage between the petitioner and the respondent took place on 28.10.1979 and the male child was born on 11.7.1980, 259 days after the date of marriage. Before going into the question whether the respondent and the child can be compelled to give their blood for the test purposes, we have to consider whether the provisions of Section 112 of the Evidence Act permit such a course to be adopted.

7. In Vasu v. Santha, (1975 KLT 533), it has been held that the Court cannot compel a party to undergo medical examination. The learned Single Judge doubted the correctness of the above decision in view of the present-day scientific developments and the position in USA as disclosed in Armado Shamarban v. State of California, (384 US 737) and the provisions of the Family Reforms Act, 1969. Reference was also made to Venkates-warlu v. Venkatanarayana, (AIR 1954 SC 176) and to Kunhiraman v. Manoj (1991 (2) KLT 190).

8. Learned Counsel for the respondent relied upon the latest judgment of the Supreme Court in Gautam Kundu v. State of West Bengal, (1993 (3) SCC 418) under Section 112 of the Evidence Act.

9. It is true that there have been great scientific advancements in the matter of blood tests and DNA finger-printing in recent times. But the question is whether:--

(1) Section 112 of the Evidence Act permits resort to such evidence on the facts of the case, and

(2) Whether a party can be compelled to submit to such medical tests.

10. Adverting to the second question, the learned Counsel for the petitioner submitted that the recent decision of the Supreme Court in Gautam Kundu v. State of West Bengal, (1993 (3) SCC 418) is not to be followed as it is,--so the submission goes,--contrary to the decision of a larger Bench in State of Bombay v.

Kathi Kalu, (AIR 1961 SC 1808).

11. We shall first consider whether in view of Section 112 of the Evidence Act, there is at all any scope., on the facts of this case, for resorting to the second question referred to above.

''Section 112, Birth daring marriage conclusive proof of legitimacy.

The fact that any person was born during the continuance of a vaild 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.'

12. The Indian Evidence Act, 1872 maintains the distinction between the words 'may presume', ''shall presume' and 'conclusive proof' in Section 4. The words 'may presume' merely enable the Court to raise or not to raise a presumption while the words 'shall presume' requires the Court to necessarily raise the presumption. While in the first, the Court may or may not raise the presumption, in the second, the Court must necessarily raise the presumption. But in both situation, that is to say, where the presumption is raised in the first as well as the second types of situations, the presumption is rebuttable. The definition of 'may presume' as well as 'shall presume' in Section 4 clearly provides that the presumption holds until it is disproved'. That is why the presumption raised in both these situations is rebuttable.

13. Rut the position is not so if the Legislature uses the words 'conclusive proof'. Section 4 defines 'conclusive proof' as follows :--

'Conclusive proof:--When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.'

In other words, if the Legislature uses the words 'conclusive proof, there is no question of rebuttal because the definition in Section 4 uses the words 'coo-elusive

proof and states that the Court 'shall not allow evidence to be given for the purpose of disproving it'.

14. If that be the true meaning of the words 'conclusive proof used in Section 11.2, there is no question of adducing rebuttal evidence. If the birth of the child has taken place during the continuance of a valid marriage between the mother and any man (or within 280 days after its dissolution the mother remaining unmarried), the legitimacy of the child vis-a-vis the man is to be deemed as 'conclusively proved' and no question of permitting rebuttal evidence to disprove legitimacy vis-a-vis the father arises. The Section provides a single exception wherein rebuttal evidence can be adduced and the exception so provided is, in our view, exhaustive and cannot be widened. The said sole exception is, therefore, confined to the situation :--

'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 begot ten.'

That the words 'conclusive proof' in Section 112 preclude any evidence in rebuttal except in the solitary situation provided in the very Section is clear from the decision of the Supreme Court in Venkateswarlu v. Venkatanarayana, AIR 1954 SC 176. There, a suit was filed by a Hindu son against his father for partition and it was contended for the father that the plaintiff was not his legitimate son. The defendant relied upon certain documents by which he had agreed to pay maintenance to the plaintiff's mother and upon a deed gifting a house to her and also relied on assertions made in a previous suit that he had no intercourse with her after he married a second wife. The said contention was rejected. It was held that though the plaintiff's mother lived in the house gifted to her there was no 'impossiblity' of cohabitation. In that case, B.K. Mukherjee, J. (as he then was) observed :

'It may be stated at the outset that the presumption, which Section 112 of the Indian Evidence Act contemplates, is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage, at any time when according to the ordinary course of nature, the husband could have been the father of the child.

Access and non-access again connote, as has been held by the Privy Council : vide Karpaya v. Mayandi, AIR 1934 PC 49, existence and non-existence of opportunities for marital intercourse .....proof of non-accesss must be clear and satis factory.'

Therefore, the presumption raised in Section 112 is conclusive and rebuttal evidence can be permitted to prove that the child is not legitimate, in the only one situation provided in Section 112 and not in any other situation.

15. In Ammathayee v. Kumaresan Balakrishnan, AIR 1976 SC 569, the Supreme Court held that the conclusive presumption can only be displaced, if it is shown that the parties had no access at any time when the child could have been begotten. In that case, the boy's mother who initially did not beget a child allowed her husband to marry three other wives and she was staying in her father's house in the same village, a furlong away from where her husband was staying. Even so, the Court upheld the legitimacy of the child born to her on the ground that non-access was not proved.

16. Again, in Perumal v. Ponnuswaml, AIR 1971 SC 2352, the husband and wife were living apart in the same village long before the birth of the child and the wife had lodged a complaint in a Magistrate's Court that her husband and contracted another marriage. The complaint was no doubt dismissed, but this led to estrangement. Even so, it was held by the Supreme Court that non-access was not proved.

17. Though it was evident that the husband had undergone vasectomy operation, in the absence of any reliable material to show that the operation was successful, this Court held that the child born to his wife could not be treated as not born to him : Chandramathi v. Pazhetti Balan, AIR 1982 Ker 68; and Chirutha Kutty v. Subrahmaniam, AIR 1987 Ker 5 (DB)=1986 KLT 1068=1986 KLJ 744.

18. On the facts of the present case, the fact that the child was born during the continuance of a valid marriage, i.e., (a marriage not yet established to be invalid) is conclusive proof that the child is born to the petitioner unless the petitioner is able to prove that he had no access to the respondent at any time, when the child

could have been begotten. Therefore, the appellant has to establish non-access to the respondent after marriage. Admittedly, they had spent, at least one night together, even according to the petitioner. Even thereafter there is no proof of non-access. The word 'access' has been explained by the Supreme Court in Venkateswarlu v. Venkatanarayana, AIR 1954 SC 176 :--

"Access and non-access again connote, as has been held by the Privy Council: vide Karapaya v. Mayandi (AIR 1934 PC 49) existence or (non-existence) of opportunities for marital intercourse.'

Admittedly, there was in existence opportunity for marital intercourse on the first night. Once such an opportunity is found to be in existence, the petitioner falls outside the exception mentioned in Section 112 inasmuch as what is required under Section 112 is non-access, i.e. non existence of opportunity for marital intercourse, at any time when the child could have been begotten. The words again are 'could' have been begotten and not 'actually begotten'. In the present case, the parties having met on at least one night for purposes of marital intercourse, the petitioner has no chance to prove non-access or non-existence of opportunity for marital intercourse. Even thereafter, there must be proof of total non-access. There is no such proof. Further, as stated in Venkateswarlu v. Venkatanarayana. AIR 1954 SC 176, the 'conclusive' presumption in favour of legitimacy being so strong under Section 112 of the Indian Evidence Act, the proof of non-access must be quite clear and strong.

19. If the case of the petitioner thus does not come within the exception provided in Section 112, the legitimacy of the child is conclusively established by the fact that the child is born during the continuance of a valid marriage (i.e., a marriage not yet established to be invalid).

20. A submission was made by the petitioner's Counsel that Section 112 applies only if the marriage is 'valid'. If there is fraud or suppression of facts by the spouse regarding her pregnancy by the date of marriage, the marriage, it is said, is a nullity. In our view, the mere allegation of fraud or suppression does not convert the marriage into an invalid marriage. Fraud or such suppression can be established only at the trial and after the Court accepts the plea. A mere plea or

fraud or suppression does not render Section 112 inapplicable.

21. If the conclusive proof afforded by Section 112 protects the child and the mother too, the case not falling under the exception, the second question of permitting rebuttal evidence by DNA finger-printing does not arise at all Such a situation could arise if the Legislature had used the words 'may presume' or 'shall presume' instead of the words 'conclusive proof; or where the case falls within the sole exception mentioned in the Section itself. Hence, unless Parliament amends Section 112 by substituting the words 'may presume' or 'shall presume' for the words 'conclusive proof' in Section 112 of the Evidence Act, it is not possible to permit DNA finger-printing in cases which do not fall within the exception mentioned in the Section. The said exception is the sole exception, as the Section stands today.

22. We are, therefore, not going into the second question, namely, whether the respondent and her child can be compelled to give their blood samples for DNA finger-printing. The Supreme Court has, in fact, said that there is no power in the Court to compel parties to undergo blood tests: Gautam Kundu v. State of West Bengal, 1993 (3) SCC 418. Therefore, the subsidiary issue raised by the petitioner's Counsel that the above said decision is contrary to the decision of a larger Bench in State of Bombay v. Kathi Kalu, AIR 1961 SC 1808 need not be gone into.

23. In this context, we may point out that in England, the words 'conclusive proof are no longer in the Statute: see Section 26 of the Family Law Reforms Act, 1969 and S. v. MCC & W. v. W., 1972 AC 24. In fact, even under common law, blood test results were admissible only where parties submitted to the tests voluntarily: Liff v. Liff (Orse Rigby) 1948 WN 128). The Courts had no inherent power to compel a witness or party to submit to blood test: W. v. W, (No, 4), 1964 P 67; and S. v. MCC, W. v. W., 1972 A.C. 24. Realising this difficulty, provision is made in the Family Law Reforms Act, 1979, Part III (Section 20-25) for obtaining blood test evidence in any case where paternity is in issue. Section 20(1) provides as follows

'In any civil proceedings in which the paternity of any person falls to be determined by the Court hearing the proceedings, the Court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for the taking, within a period specified in the direction, of blood samples from the person, the mother of that person and any person alleged to be the father of that person or from any, or any two, of those person.' (Phipson on Evidence', 14th Edn. 1990) (Paras. 4-27, 15-21).

No such amendments either removing the words 'conclusive proof in Section 112 or permitting blood tests to be ordered, have been brought forward by our Parliament.

24. Be that as it may, we hold that the case on hand is clearly covered by the main part of Section 112 and does not fall within the sole exception provided therein and therefore, the petitioner is concluded by the conclusive inference of legitimacy drawn by the Legislature in Section 112 and no question of permitting disproof of the said fact arises in view of Section 4 of the Evidence Act, which positively prohibits evidence to disprove such a fact.

In the result, the Miscellaneous Petition is dismissed. The Writ Petition will now go back before the learned Single Judge for disposal in accordance with law.