Sajitha Vs. State of Kerala

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Court : Kerala

Decided On : Oct-23-2002

Reported in : 2003(1)ALT(Cri)188; I(2003)DMC222

Judge : T.M. Hassan Pillai, J.

Acts : Evidence Act, 1872 - Sections 112; Code of Criminal Procedure (CrPC) , 1973 - Sections 125

Appeal No. : R.P. (F.C.) Nos. 55 and 69 of 2002

Appellant : Sajitha

Respondent : State of Kerala

Advocate for Def. : K.P. Mujeeb, Adv. and; Sujith Mathew Jose, Public Prosecutor

Advocate for Pet/Ap. : Babu S. Nair, Adv.

Judgement :

T.M. Hassan Pillai, J.

1. Wife and her child alleged to be born in the lawful wedlock have come up in revision against the order passed by the learned Family Court Judge, Manjeri in M.C. 95/2000 whereby the learned Judge refused to award maintenance to the

child, who is the second petitioner in the M.C., holding that the child was conceived at least one month prior to the marriage ie., child was conceived as a result of pre-marital sexual intercourse by mother with another and she is not the child born in the lawful wedlock. First petitioner in the M.C. dissatisfied with the quantum of maintenance awarded to her by the Family Court at the rate of Rs. 300 per month preferred R.P. (F.C.) No. 69/2002. Aggrieved by the order awarding separate maintenance to the wife, the husband preferred R.P. (F.C.) No. 55 of 2000. Both the revisions are heard together and are being disposed of by a common order.

2. It is the admitted case of both the parties that the marriage of 1st petitioner in the M.C. with the respondent in the M.C. was solemnized on 1st November, 1998 in accordance with the customary rites prevalent in the Muslim community and it is also the common case of the parties that 2nd petitioner in the M.C. was born on 30.6.99 ie., child was born within 243 days of contracting the marriage. The assertion made in the application filed under Section 125 Cr.P.C. by the petitioners in the M.C., shorn of unnecessary details is that in the first two months of marriage behaviour of the husband-respondent towards the first petitioner wife was very cordial and thereafter he demanded for bringing from her mother Rs. 1 lakh for the purpose of continuing his business (that amount was demanded in addition to the amount and ornaments already given by her mother at the time of marriage). Wife expressed her helplessness in bringing more money from her mother due to the strained condition of her mother and she was subjected to mental and physical cruelty by the husband insisting for bringing Rs. 1 lakh. She became pregnant and in the seventh month of pregnancy she was taken to her natal home for delivery. At the time of taking her by her relatives for delivery, they were told by the husband that she need to return to the matrimonial home only if she brings Rs. one lakh. She had given birth to a child on 30th June, 1999 at B.M. Hospital, Pulikkal and on getting information regarding the birth of the child the husband visited the hospital. It is also asserted in the application filed under Section 125 Cr.P.C. that the husband had not met the delivery expenses nor provided any maintenance to the petitioners. The wife was not taken to the nuptial home after three months of delivery (that is the custom) and, on enquiry made by the relatives of the wife, they were told that she would be taken to the nuptial home only if the

amount demanded by the husband was paid. Thus, the petitioners in the M.C. pleaded a case of non-providing of maintenance to the wife after she was taken to the nuptial home and also non-providing of any maintenance to the child after the child was born. Wife's further case is that monthly income of the husband is Rs. 10,000.

3. Husband refuted the allegations made against him by the wife and 2nd petitionerin the application and in the counter statement he denied the paternity of the child. Headmitted the fact of solemnisation of marriage in accordance with the customary ritesprevalent in the Muslim community in the counter statement filed by him and alsoadmitted the fact of living together as husband and wife in the nuptial home. Hedenied the asserted fact of giving any ornaments or money at the time of marriage andhis case was that the mother of the wife was not in position to give ornaments andmoney to him at the time of marriage. He asserted in the counter statement that hemarried the first petitioner in the M.C. knowing fully well the poor economic conditionof her mother. His assertion in the counter statement was that he had met the entirehospital expenses in connection with the delivery of the wife from the hospital andalso asserted in the counter statement that after delivery also he had providedmaintenance to the wife. Denying paternity of the 2nd petitioner, the husband set upa case in his counter statement, that wife confessed before him that before the marriageshe had sexual intercourse with another. She had indulged in sexual intercourses withanother and she refused to have sexual intercourse with him. Thus, he denied theliability to provide maintenance to the child. According to him, the child was conceived.even before contracting of marriage with him. He disclaimed his liability or obligationto provide maintenance to the wife on the ground that she had sexual intercourseswith others. Regarding his income the case set up is that he is a coolie and earningdaily Rs. 40 as wages.

4. Learned Family Court Judge, on an evaluation of the evidence, came to the conclusion that the husband's case that the child was not born in the lawful wedlock is acceptable mainly on the assumption that the child given birth to by the wife was a full grown child ie., at the time of marriage wife was pregnant. Even after recording a finding that the wife became pregnant as a result of pre-marital

intimacy with another at the time of marriage, the learned Family Court Judge awarded maintenance to the wife at the rate of Rs. 300 per month from the date of the order.

5. The first question that is to be considered is whether the learned Family CourtJudge is justified in refusing to award maintenance to the child (2nd petitioner in theM.C.) holding that she was not born out of the lawful wedlock, ie., wife conceivedeven prior to the contracting of marriage between PW1 and RW1. The other questionthat is to be considered is whether the Family Court was justified in awardingmaintenance to the wife. It is also to be considered whether the wife is entitled toenhanced maintenance in case of this Court holding that the Family Court rightlyawarded maintenance to the wife.

6. As pointed out by me earlier, there is no dispute between the parties regarding the factum of solemnisation of marriage and the husband in his counter statement admitted the fact of contracting a legal marriage with the wife in accordance with the customary rites prevalent in the Muslim community on 1.11.1998, He had also admitted in his counter statement that after the marriage both of them lived together as man and wife In his counter statement the husband has not set up a definite and specific case that the marriage was not consummated and he had no sexual intercourse with her wife after marriage. It is an undisputed fact that the wife had given birth to a child on 30.6.99 ie., 243 days after the marriage and that child was born during the subsistence of marriage. The case of the petitioners in the M.C. is not that 1st petitioner had given birth to a full grown child. The assertion made by PW1 both in the application filed by her and also in her evidence is that in the seventh month of pregnancy she was taken to her natal home for delivery and that assertion made in the application is not specifically denied in the counter statement filed by the husband. Husband denied only the assertion made in the application that for taking back the wife after delivery to nuptial home he demanded Rs. one lakh and he also denied the asserted fact that after two months of marriage he demanded for bringing Rs. one lakh. He has also disputed the asserted fact that he had not met the delivery expenses of the wife. I am not prepared to accept the contention of the learned counsel for the husband that in the counter statement there is a specific denial of the fact that wife lived in

the nuptial home till she was taken for delivery in the 7th month of her pregnancy to her natal home.

7 Learned Family Court judge accepted the ipse dixit of the husband to the effect that on the night of sixth day of marriage wife made a confession that she was pregnant (conceived as a result of illicit connection with another). Though the husband asserted in his evidence that on the next day of disclosing that fact or making such a confession by the wife she was sent out of nuptial home ie., she was taken to her house, no such case was set up by him in his counter statement. The assertion of husband that after marriage they lived under the same roof only for a very short period of six days and his further assertion that there was no conjugal union and marriage was not consummated are not to be accepted nor believed on the ground that it was not contended in the counter statement that marriage was not consummated. The assertion made in the counter statement is that No case non-access or no opportunity for having sexual intercourse with the wife is pleaded in the counter statement. It may be pointed out that it is not disclosed in the counter statement when such a confession was made by wife (date and time) and the occasion for making such a confession. His assertion as RW1 that first five days wife avoided to have sex with him pretending that she was menstruating is not to be accepted on the ground that no such case is set up in the counter statement. So, the Family Court erred grossly in accepting the assertions made by the husband in his evidence that on the 7th day of marriage wife was sent out of the nuptial home for the reason that confession was made by her on the previous night to the effect that she had illicit intercourse with another. Wife has testified the fact that after marriage she had sexual intercourse with the husband and the child was begotten (2nd respondent in the M.C.) as a result of the sexual intercourse between husband and wife and was born in the lawful wedlock. I do not find any ground to disbelieve or brush aside the evidence given by the wife on that aspect, particularly, taking into consideration the fact that she lived with the husband in the nuptial home till she was taken to her natal home for delivery in the 7th month of her pregnancy and also on the basis of the fact that husband admitted in his counter statement that he met the entire expenses incurred in connection with the delivery of the child and subsequently also he paid maintenance to the wife. If a newly married wife made a confession to the

husband that she had sexual intercourse with another before marriage and she was pregnant at the time of marriage no husband in the ordinary course would meet the hospital expenses in connection with the delivery of the child who is illegitimate. It is to be remembered that it is the assertion of husband as RW1 that on the next day of disclosing the fact that she had illicit intimacy with another she was taken to her natal home by him and was left there and it is, therefore, very unlikely for such a man to meet the delivery expenses if his assertion of disclosing by wife that she was pregnant at the time of marriage is true. His conduct rendered unacceptable his story of making such a confession by the wife and it is to be inferred from his conduct that no such disclosure was made by her to him. Wife's evidence denying making of any such confession is believable. The assertion of the husband is that as he was informed by one of his friends about the difficulty of the mother of the wife to pay the hospital bill in connection with the delivery he gave to he? (mother of wife) through his friend Rs. 2000/-. It is very difficult to gulp such a story of paying Rs. 2000 out of sympathy and the meeting of at least half of the delivery expenses by the husband strengthened my conclusion that denial of paternity of the child by him is not bona fide and he falsely denied paternity.

8. Counsel for husband vehemently contended on behalf of the husband that wife has admitted that hospital records would not show that a premature child was given birth to by her and he argued that from her evidence it is to be inferred that there is a tacit admission on her part that a full grown child was born to her. It is clear from the pleadings and evidence of the wife that child was born 243 days after the marriage ie., not a full grown child was given birth to by her. I may also point out that in his counter statement no case is set up by husband that wife gave birth to a full grown child and in his evidence also he has not stated that child born was full grown. A mere statement by a rustic Muslim woman that hospital records would not show that She had given birth to a premature child could not be treated as an admission made by her that she had given birth to a full grown child, particularly when the hospital records are not available before the court. Wife's opinion could suffer from error of judgment.

9. Female child was born during the subsistence of a valid marriage and the question that is to be considered is whether the husband had access ie.,

opportunity to have sexual intercourse with the wife when the child (2nd petitioner in the M.C.) could have been begotten. The Privy Council in Karapaya v. Mayandi (AIR 1934 Privy Council 49) held that the word 'access' connotes only existence of opportunity for marital intercourse. The legal position is that the party who wants to displace the presumption of conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents (See Kamti Devi v. Poshi Ram (2001 SCC (Crl) 892). It is to be pointed out at the risk of repetition that in the counter statement filed by the husband he had also not contended that there was no access ie., opportunity for marital intercourse for him and he had not specifically contended in the counter statement that after the wife made the alleged confession he had not sexual intercourse with her. In short, non-access is not pleaded by the husband specifically in the counter statement filed by him and no credence can be given to the evidence given by the husband that marriage was not consummated ie., he had no sexual intercourse with PW1. Only on proving non-access between the parties to the marriage at the time when, according to the ordinary course of nature, the husband could have been the father of the child the conclusive presumption of law under Section 112 of the Indian Evidence Act can be said to be displaced. The presumption of legitimacy is highly favoured by law and proof of non-access must be clear and satisfactory. Section 112 lays down that if a 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 and the mother remains unmarried, it shall be taken as conclusive proof that he/she is the legitimate son/daughter 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/she could have been begotten. Courts are inclined towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as

such a legitimation of the child would result in rank injustice to the father, Section 112 of the Indian Evidence Act is based on the dictates of justice. A verdict on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman is desisted by the courts and courts would not render such verdict lightly or hastily (See Dukhtar Jahan v. Mohammed Farooq, AIR 1987 SC 1049).

10. Section 112 is based on the well known maxim pater est quem nuptiae demonstrant (he is the father whom the marriage indicates). A child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid and that every person is legitimate. Marriage or affiliation (parentage) may be presumed, the law in general presuming against vice and immorality. To dispel the presumption arising under Section 112 of the Evidence Act requires that a party disputing the paternity to prove non-access. Access and non-assess means the existence or nonexistence of opportunity for sexual intercourse. It does not mean actual cohabitation.

11. The Supreme Court has occasion to consider in Kamti Devi v. Poshi Ram (2001 SCC (Cri) 892) the question whether the burden on the husband to prove non-access is as hard as the prosecution to prove the guilt of the accused in a trial and made the following observation:

'11. Whether the burden on the husband is as hard as the prosecution to prove the guilt of the accused in a trial deserves consideration in the above background. The standard of proof of prosecution to prove the guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of preponderance of probabilities belongs to civil cases. The reason for insisting on proof beyond reasonable doubt in criminal cases is to guard against the innocent being convicted and sent to jail if not to extreme penalty of death. It would be too hard if that standard is imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. But at the same the test of preponderance of probabilities too light as that might expose many children to the peril of being illegitimatized. If a court declares that that husband is not the father

of his wife's child, without tracing out its real father the fallout on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere titling of probability. Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be a decree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband.'

The burden on the husband is higher than the standard of preponderance of probabilities and I can say without any compunction that the husband has not discharged the burden on him.

12. The Supreme Court held in the above cited decision that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucieic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the Legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act eg. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the collusiveness in law would remain irrebuttable. From the point of view of the husband it may look hard and husband would be compelled to bear the Fatherhood of a child, of which he may be innocent. In such cases also the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access. So, the result of DNA test conducted in this case ie., husband is excluded from possible paternity of the 2nd petitioner in the M.C. is of no consequence in view of conclusive presumption available under Section 112 of the Evidence Act which is not displaced by husband by proving non-access.

13. The Supreme Court in Chilukuri Venkateswarlu v. Chilukuri Venkatanarayanan (AIR 1954 SC 176) made the following observation:

"(4) 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 the 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 'Karapaya v. Mayandi'. AIR 1934 PC 49 (A), existence and non-existence of opportunities for marital intercourse. It is conceded by Mr. Somayya, who appeared on behalf of the plaintiff appellant, that 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 the Indian Evidence Act, though as the presumption of legitimacy is highly favoured by law it is necessary that proof of non-access must be clear and satisfactory. Mr. Somayya has also not contended seriously before us that the principle of English Common Law: Vide - 'Russel v. Russel', 1924 AC 687 (B), according to which neither a husband nor a wife is permitted to give evidence of non-access, after marriage to bastardise a child born in lawful wedlock, applied to legitimacy proceeding in India. No such rule is to be found anywhere in the Indian Evidence Act and it may be noted that the old Common Law doctrine has itself been abrogated in England by Cause Act, 1950: Vide 'In re Jenion ' 1952-1 All. ER 1228(c)'.

14. I find no substance in the contention based on the fact that the child was born after 243 days of the marriage and the husband's contention is that from that fact itself it is to be inferred that 2nd petitioner in the M.C. is an illegitimate child. The Supreme Court in Dukhtar Jahan v. Mohammed Farooq, (1987 SC (Crl.) 237) referred to some of the reported cases where the courts have applied the rule of evidence contained in Section 112 of the Evidence Act and declared the legitimacy of a child born during wedlock even though the child had been born prematurely.

' 13. To drive home the point, we may refer to some of the reported cases where the course have applied rule of evidence contained in Section 112 of the Indian Evidence Act and declared the legitimacy of a child born during wedlock, even though the child had been born prematurely. In Mahbub Ali v. Taj Khan, AIR 1915 Lah. 77(2), it was held that a boy born about 7 month's after his father and mother were lawfully married and who had opportunity of access to each other at the lime he could have been begotten, must be held to be the legitimate son of his parents. In Kahan Singh v. Natha Singh (AIR 1925 Lah. 414), the defendant's father was married to the defendant's mother on August 2, 1889 and the defendant was born on January 23, 1890. Even so it was held that the defendant being born during the continuance of the marriage between his parents, he is his father's legitimate son unless it is shown that his parents had no access to each other at any time when he could have been begotten and that it is immaterial how soon after the marriage the defendant was born. In Sibt Mohammed v. Md. Hameed (AIR 1926 AH. 589), it was held that a Muhammedan child born during the continuance of a valid marriage between its parents but within 6 months of the date of its parents' marriage must be held to be a legitimate child by reason of Section 112 of the Evidence Act. In Ponnammal v. Andi Aiyan (MR 1953 Tra-Co. 434) the paternity of a child born to a married woman after 8 months' from the date of marriage was disputed as the husband alleged that he was incapacitated from having sexual intercourse for one month from date of marriage due to some operation he had to undergo and hence the child was not his. The court held that even assuming that the husband was so incapacitated, the time available, viz., over seven months, was sufficient to raise the presumption that he was the father of the child'.

15. In the above cited decision the Supreme Court relying on a 'Combined Textbook of Obstetrics and Gynaecology' by Sir Gugald Baird 7th Edn. at page 162 held that it cannot be concluded that that the child born in about 7 months' time after the marriage of the parents should have necessarily been conceived even before the husband had consummated the marriage. Giving birth to a viable child after 28 weeks duration of pregnancy is not biologically an improbable or impossible event. So, it is to be held that giving birth to a child 243 days after the marriage is not biologically an improbable or impossible event and it cannot also be held that the wife was enceinte at the time of marriage.

16. So, on the basis of the evidence available on record, it is to be held that the child (2nd petitioner in the M.C.) was born during the subsistence of the valid marriage between PW1 and RW1 and merely because the child was born 243 days after marriage it is not possible to hold that child was illegitimate and was not born in the lawful wedlock. Therefore, the Family Court was not justified in holding that PW1 was pregnant even before contracting of the marriage and the learned Family Court Judge was also not justified in denying maintenance to the child.

17. The husband's own admission is that he has been getting daily Rs. 40 as wages. Taking into consideration the income of the husband, awarding of maintenance at the rate of Rs. 300 per month from the date of filing petition to the child is justified and, hence, maintenance is awarded to the child at the rate of Rs. 300 per month from the date of filing petition.

18. Wife has not taken a ground in the revision petition filed by her that the Family Court Judge was not justified in refusing to grant maintenance allowance to her from the date of filing the petition. There is no case for the husband that wife has her own source of income and, therefore, I do not find any ground to interfere with the awarding of maintenance to the wife at the rate of Rs. 300 per month from the date of passing the impugned order. I am not prepared to accept the contention of the husband that since there is evidence to show that wife was pregnant even before the marriage there is no legal marriage between the parties (PW1 and RW1) and, the wife is not entitled to any maintenance from him (husband). Reason for rejecting such a contention is that no such case was adumbrated in the counter statement filed by him. He has not raised any contention in the counter statement that the marriage between him and the wife was not a legal marriage on the ground that wife was pregnant at the time of marriage.

19. Learned counsel for the wife has not contended before me that there is any ground to enhance the maintenance allowance awarded to the wife. Hence, the revision filed by the husband challenging the order passed by the learned Family Court Judge awarding maintenance to the wife is dismissed. Revision filed by the petitioners in the M.C. is allowed in part awarding maintenance to the child (2nd petitioner in the M.C.) at the rate of Rs. 300 per month from the date of filing the

petition.

20. Proceedings under Section 125 Cr.P.C. are of a summary nature and are intended to enable destitute wives and children, the latter whether legitimate or illegitimate to get maintenance in a speedy manner. The order passed under Section 125 Cr.P.C. is a summary order which does not finally determine the rights and obligations of the parties thereto. The decision of the criminal court in a criminal proceedings will not operate as decisive in any civil proceedings between the parties regarding the paternity of the child.

In the result, the revision filed by the husband (R.P. (F.C.) 55/2002) is dismissedconfirming the order passed awarding maintenance to the wife at the rate of Rs. 300per month from the date of the order and the revision filed by the petitioners in theM.C. (R.P. (FC) 69/2002) is allowed in part awarding maintenance at the rate ofRs. 300 per month to the child from the date of filing the petition.